

Wald v Wald
2022 NY Slip Op 33325(U)
October 2, 2022
Supreme Court, New York County
Docket Number: Index No. 154892/2022
Judge: Lisa S. Headley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY **PART** **28M**

Justice

-----X

KENNETH WALD

Plaintiff,

- v -

ABIGAIL MIRIAM WALD,

Defendant.

-----X

INDEX NO. 154892/2022

MOTION DATE 08/05/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISS.

Before the Court is the defendant’s motion to dismiss the First Cause of Action for Breach of Fiduciary Duty, in part, and to dismiss the Second Cause of Action for Conversion and recovery of the sum of \$2,350,000 used to purchase the subject property, as well, as to dismiss the Third Cause of Action to impose a Constructive Trust upon the proceeds of the sale of the subject property located at 52 Morton Street, Apartment 2, New York, New York 10014 (“subject property), and for such other and further relief as the court may deem just and proper. Plaintiff filed opposition to the motion, and defendant filed a reply.

Plaintiff Kenneth Wald (“plaintiff”) commenced this action to: a) restrain the defendant Abigail Miriam Wald (“defendant”) from selling the subject property located at 52 Morton Street, New York, N.Y. 10014 (“subject property”); b) to quiet the title in the name of plaintiff; c) to restrain the defendant from using her Power of Attorney; d) to create a constructive trust over the defendant’s assets; e) to award plaintiff damages for defendant’s breach of fiduciary duty and conversion; and f) to award plaintiff court costs, attorney’s fees and prejudgment interest against defendant.

In the complaint, the plaintiff asserts, *inter alia*, Breach of Fiduciary Duty in the First Cause of Action; Conversion in the Second Cause of Action; and Constructive Trust in the Third Cause of Action. Plaintiff contends, *inter alia*, that the defendant used a Power of Attorney to withdraw from plaintiff’s bank accounts to purchase personal property. Plaintiff also contends that in the end of 2016, the defendant asked plaintiff to invest and purchase her an apartment (the subject property), and that said property would be used as an investment for plaintiff. Plaintiff claims that he provided defendant with the sum of \$2,350,000 to purchase the subject property, and that he allowed defendant to put the title in her name, but for the sole benefit of plaintiff. Plaintiff alleges that defendant is now attempting the sell the subject property, and the he would be entitled to the proceeds of the sale.

It should be noted that the defendant does not seek to dismiss the allegations regarding the alleged withdrawal of money from plaintiff’s account for the purchase of personal property, however, the motion to dismiss pertains to the causes of actions related to the subject property. In

support of the motion to dismiss, first, the movant-defendant argues that the subject property co-op claims are barred by the statute of frauds and must be dismissed. The complaint alleges that in 2016, the defendant and plaintiff agreed that the subject property would belong solely to the plaintiff but would be used by the defendant. Plaintiff submits bank records from UBS which indicate that plaintiff directed \$235,000.00 to Abigail Wald. Plaintiff alleges that said funds were used by defendant to purchase the subject property co-op on or about February 24, 2017. Defendant argues that this purported agreement is not documented in writing, and is void as a matter of law under the Statute of Frauds.

Second, the defendant argues that the Breach of Fiduciary Duty claims is governed by the three-year statute of limitations, and therefore, the claims related to the purchase of the subject property are barred because the purchase of the property took place on February 24, 2017, and this case was filed well after the three years, on June 9, 2022. Altogether, defendant submits that the First Cause of Action that seeks monetary damages for Breach of Fiduciary Duty as it relates to the claims to the subject property must be dismissed as time-barred.

Thirdly, defendant argues that the Second Cause of Action for Conversion is also subject to the three-year statute of limitations, and should also be dismissed. Lastly, defendant argues that the Third Cause of Action to impose a Constructive Trust upon the proceeds of the sale of the subject property should be dismissed because “one cannot claim an equitable remedy to import a constructive trust in order to enforce time-barred rights.”

In opposition, the plaintiff submit, *inter alia*, his attorney’s affirmation, his own affidavit, a bank letter from UBS dated August 10, 2017 addressed to the plaintiff and defendant, an American Express account statement dated July 28, 2017 for Harriet Gail Wald, and text message conversations with the defendant. Here, the plaintiff argues that the cause of action for Conversion does not need to be supported by writing, and must be determined at a hearing, therefore the defendant’s defense of Statue of Fraud is not applicable. Second, the plaintiff argues the action was filed timely and within the statute of limitations because the time for commencing this action must be computed from the time plaintiff had actual knowledge of the facts, and here, plaintiff alleges that he “discovered the facts upon which the right to maintain this action depended on after April 21, 2022. This action was commenced on June 6, 2022.”

DISCUSSION

On a *CPLR §3211* motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory [internal quotations and citation omitted].” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007).

In New York, the law is clear that “a contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent.” *General Obligations Law § 5-703*. Here, the complaint is devoid of a written contract for the agreement regarding the plaintiff’s interest in the purchase of the subject property, which is required under the law. *NY Gen Oblig §5-701* also states in part, that “every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by lawful agent, if such agreement, promise or undertaking is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the **purchase**, sale, exchange, renting or

leasing of **any real estate** or interest therein[.]” *NY Gen Oblig §5-701(a)(10)*. (*Emphasis added*). Defendant argues that this purported agreement is not documented in writing, and is void as a matter of law under the Statute of Frauds. Defendant's motion to dismiss is based on her contention that both of the alleged oral promises she made to plaintiff are barred by the Statute of Frauds. Thus, even assuming all of plaintiff's allegations in the complaint to be true that defendant made these oral promises to plaintiff, plaintiff's claims are unavailing as a matter of law. Therefore, the court finds that the plaintiff failed to submit any evidence or written instrument to support that there was an agreement with his daughter to use the purported funds from the plaintiff's UBS account for the purchase of the subject property for the plaintiff's interests.

As to the First Cause of Action, plaintiff's breach of fiduciary duty claim seeking monetary damages is based on his allegation that the defendant was appointed by plaintiff as his power of attorney in 2016 to sell his property located at 248 W 71st Street, New York, NY 10023, and to generally help him with financial affairs while plaintiff was attending to his wife, who is sick with Parkinson disease.

In breach of fiduciary claims, where the remedy sought is purely monetary in nature, courts construe the suit as alleging “injury to property” within the meaning of *CPLR §214(4)*, which has a three-year limitations period. *See e.g., Yatter v. Morris Agency*, 256 A.D.2d 260, 261 (1st Dep't 1998), *see also, Averick v. Glickenhau*, 2017 N.Y. Slip Op. 30862[U], 2 (N.Y. Sup Ct, New York County 2017). To establish a *prima facie* case for breach of fiduciary duty, a plaintiff must allege “(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct.” *Varveris v. Zacharakos*, 110 A.D.3d 1059, 973 N.Y.S.2d 774, quoting, *Rut v. Young Adult Inst., Inc.*, 74 A.D.3d 776, 777, 901 N.Y.S.2d 715; *see, Stortini v. Pollis*, 138 A.D.3d 977, 979, 31 N.Y.S.3d 90; *Deblinger v. Sani-Pine Prods. Co., Inc.*, 107 A.D.3d 659, 661, 967 N.Y.S.2d 394), *see also, Vil. of Kiryas Joel v. County of Orange*, 144 A.D.3d 895, 898 (2d Dep't 2016).

Here, there is no dispute that the plaintiff is seeking monetary damages. However, regardless of the relief sought, “where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under *CPLR §213(8)*.” *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d at 139, 879 N.Y.S.2d 355, 907 N.E.2d 268; *see McDonnell v. Bradley*, 109 A.D.3d 592, 594, 970 N.Y.S.2d 612). The issue before this Court is to determine when the alleged breach of fiduciary duty occurred- at the time of the transfer of funds used to purchase of the subject property in February 2017, or at the purported time the plaintiff alleges he discovered defendant was allegedly mismanaging his funds in April 2022. Here, the legal instrument appointing the plaintiff's power of attorney was signed on November 2, 2016.¹ The power of attorney document appoints plaintiff's wife, Harriet Wald, as his agent, and then designated his daughter, the defendant, Abigail Wald, and plaintiff's cousin, Shelly Wald as successor agents, who may act separately if the agent is unable or unwilling to serve. Based on the plaintiff's Complaint, there was a discussion between the parties to transfer funds from plaintiff to defendant in 2017, which is evidenced by the transfer of money to defendant from the UBS account, and the subsequent purchase of the subject property. There is no dispute that the purchase of the subject property took place on February 24, 2017, and the deed of same was issued only in the defendant's name. Therefore, the alleged act of breach of fiduciary duty occurred at the time of the purchase of the property, in February 2017 - at the time the defendant was designated as the sole owner on the deed. Plaintiff asserts that the interests in the subject property were for his financial benefit and investment, and this act of “mismanagement,” as alleged by the plaintiff,

¹ In this court electronic filing system, the power of attorney document is listed as NYSCEF Doc. No. 19.

occurred at the time of purchase of the subject property on 2017, and not at the time plaintiff discovered the breach in 2022, even though the plaintiff may not have known of the existence of wrongdoing back in 2017 when defendant purchased the subject property. *See, Sternberg v. Continuum Health Partners, Inc., supra.*

Here, this Court is applying the applicable statute of limitations for six years (*see, CPLR §213(2)*) because regardless of the relief sought, “where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under *CPLR §213(8)*. Here, the essence of the plaintiff’s claim is that the defendant allegedly induced him to transfer money to her account for the purchase of the subject property under the guise that plaintiff’s funds would be used for investment purposes and for plaintiff’s financial benefit. Here, plaintiff alleges that defendant told him that it would be “easier if the property was solely in her name,” and orally promised that the plaintiff would retain his interest and investment in the subject property.

Even *arguendo*, that the action is not time barred having applied the six-years from the date of the cause of action, that being six years from the purchase of the subject property with the purported funds by plaintiff to the defendant in February 2017, the cause of action regarding the purchase of the subject property and plaintiff’s financial interest in said property cannot withstand the legal defense of Statute of Frauds, as explained hereinabove. The plaintiff’s complaint, even accepting the facts as alleged in the complaint as true, and accord plaintiffs the benefit of every possible favorable inference, is devoid of a written instrument conveying his interest in real property. *See, General Obligations Law § 5-703*. Therefore, the defendant’s motion to dismiss the First Cause of Action for breach of Fiduciary Duty as it pertains to the subject property is granted.

As to the Second Cause of Action for Conversion, the court explains that a “conversion occurs when ‘someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession’.” *Colavito v. New York Organ Donor Network*, 8 N.Y.3d 43, 50, 827 N.Y.S.2d 96, 860 N.E.2d 713 (2006). A necessary element of conversion is “defendant’s dominion over the property or interference with it, in derogation of **plaintiffs rights**.” *Id.*, (*Emphasis added*). Here, the record indicates that plaintiff failed to demonstrate his rights in the property as there is no written instrument on record that states his interests in the subject property. Thus, the Cause of Action for Conversion in the interest of the subject property must be dismissed. *See, General Obligations Law § 5-703*.

The Third Cause of Action, the equitable claim for imposing a constructive trust is governed by a six-year statute of limitations, which begins to run upon the occurrence of the wrongful act from which a duty of restitution arises. *See, CPLR §213 (1)*. “A constructive trust is an equitable remedy, and may be imposed [w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest.” *Quadrozzi v. Estate of Quadrozzi*, 99 A.D.3d 688, 691 (2d Dep’t 2012), *quoting, Rowe v. Kingston*, 94 A.D.3d 852, 853 (2d Dep’t 2012). The elements of a constructive trust cause of action are: “(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment.” *Quadrozzi Id.* (internal citations omitted). “While a constructive trust is a flexible remedy, and a party does not need to plead all of the elements of a constructive trust to survive a motion to dismiss, unjust enrichment is a key factor and a claim for constructive trust will not lie in its absence.” *See, BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 949 F. Supp. 2d 486 (SDNY 2013), *quoting, In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 354 (2dCir 1992) [applying New York law]. “The salutary (*sic*) purpose of the constructive

trust remedy is unjust enrichment.[.]” *Sharp v. Kosmalski*, 40 N.Y.2d 119, 123 (1976). Here, this Court finds that the defendant’s motion to dismiss the Third Cause of Action for Conversion must be denied as plaintiff has alleged that defendant’s receipt of the title to the subject property with the plaintiff’s money would unjustly enrich the defendant.

Accordingly, for the reasons stated herein it is

ORDERED that defendant does not seek to dismiss the allegations regarding the alleged withdrawal of money from plaintiff’s account for the purchase of personal property, and such cause of action remains; and it is further

ORDERED that the defendant’s motion to dismiss the First Cause of Action for Breach of Fiduciary Duty is GRANTED, as it pertains to the subject real property, 52 Morton Street, New York, N.Y. 10014, only; and it is further

ORDERED that the defendant’s motion to dismiss the Second Cause of Action for Conversion is GRANTED as it pertains to the subject real property, 52 Morton Street, New York, N.Y. 10014, only; and it is further


ORDERED that the defendant’s motion to dismiss the Third Cause of Action for Constructive Trust is DENIED; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this Decision/Order upon the plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

10/2/2022
DATE


LISA S. HEADLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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APPLICATION:

CHECK IF APPROPRIATE: