

**Courtian v Courtian**

2023 NY Slip Op 30326(U)

January 30, 2023

Supreme Court, New York County

Docket Number: Index No. 651183/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART 59

Justice

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JENNIFER B. COURTIAN and BARBARA COURTIAN,

Plaintiffs,

- v -

MELISSA COURTIAN,

Defendant.

-----X

INDEX NO. 651183/2020

MOTION DATE 09/09/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 86

were read on this motion to/for JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that the motion of defendant for summary judgment seeks dismissal of the first cause of action for breach of contract, third cause of action for specific performance, and fourth cause of action for conversion, such motion is granted, and the first, third, and fourth causes of action of the original complaint are dismissed; and it is further

ORDERED to the extent that the motion of defendant for summary judgment and the reply of defendant to plaintiffs' cross motion to amend the complaint seek dismissal of the second cause of action for imposition of a constructive trust of the original complaint and dismissal of the fifth cause of action for breach of the 2019

Agreement of the proposed amended complaint, respectively, and for judgment in favor of defendant on her counterclaim for conversion against plaintiff Jennifer B. Courtian, such motion is denied; and it is further

ORDERED that the cross motion of plaintiff for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the caption to name Melissa Courtian, individually and as nominated Executor of the Estate of Michael Courtian, and to add a cause of action for breach of the 2019 Agreement and to such extent the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed first, third, and fourth causes of action and those causes of action are stricken; and it is further

ORDERED that the defendant shall serve her amended answer or otherwise respond thereto within twenty (20) days from the date of such service; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary conference order or proposed competing preliminary conference order(s) at least two days before March 7, 2023, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

This court concurs with defendant that the first cause of action that alleges breach of contract and the third cause of action that seeks specific performance of such contract fail, as such claims are void pursuant to the Statute of Frauds, specifically, General Obligations Law §5-701(a)(1).

The alleged oral agreement made by non-party decedent Michael Courtian and his spouse, the defendant Melissa Courtian, wherein, as consideration for the transfer by the parents of Michael Courtian of such parent's assets to them (i.e., to non-party decedent Michael Courtian and his spouse, the defendant), defendant and non-party decedent would use such assets solely for the benefit of such parents during their parents' lifetimes violates such section of the statute of frauds because such oral promise could not be completed before the end of a lifetime.

See Bayreuther v Reinisch, 264 AD 138, 141 (1<sup>st</sup> Dept 1942)

("Under the decisions, nothing short of full performance by both parties will take such contract out of the operation of the statute.") The third cause of action that seeks specific performance of such oral agreement fails for the same reason.

Nor do plaintiffs raise an issue of fact with respect to the partial performance exception to the Statute of Frauds. The papers raise no issue of fact that the transfer of the parents' assets was "unequivocally referable" to the oral agreement, in

that there is no dispute that the transfer of assets was motivated by the parents' desire to qualify non-party, now deceased Martin Courtian, for long term care Medicaid benefits. See Lowinger v Lowinger, 287 AD2d 39, 45 (1<sup>st</sup> Dept 2001).

The second cause of action for an impressment of a constructive trust upon the subject assets, including real property in Connecticut, is adequately pled. Such allegations are that (1) there was a confidential relationship between plaintiff Barbara Courtian and her daughter in law defendant Melissa Courtian, as personal representative of the estate of non-party Michael Courtian, and as such, defendant Melissa Courtian is charged with an obligation not to abuse the trust and confidence placed in her by her mother-in-law plaintiff Barbara Courtian, to whom she owes a fiduciary duty as personal representative of the estate of non-party Michael Courtian; (2) defendant Melissa Courtian, individually, and as personal representative of the estate of her husband Michael Courtian, made a promise to use such assets solely for the benefit of plaintiff Barbara Courtian; (3) plaintiff Barbara Courtian transferred certain funds and the real property to defendant Melissa Courtian in reliance upon such promise; and (4) defendant Melissa Courtian was unjustly enriched. See Sharp v Kosmalski, 40 NY2d 119, 121 (1976).

Defendant does not come forward with prima facie evidence of “unclean hands” with respect to her assertions that plaintiffs committed fraud with respect to the long term care Medicaid application they submitted on behalf of non-party Martin Courtier, now deceased. She neither cites the applicable Social Services Law nor offers evidence as to how such transfers were violative of such statute. Cf In the Matter of Steele (Saratoga County Department of Social Services), 85 AD3d 1375 (3<sup>rd</sup> Dept 2011).

In addition, the court disagrees that there is a lack of standing, in that, as alleged in the complaint, plaintiff Barbara Courtian was the co-owner with her now deceased husband non-party Martin Courtian of the subject assets, including the real property. See Rossi v Morse, 153 AD3d 1637 (4<sup>th</sup> Dept 2017).

However, the fourth cause of action for conversion is unavailing, as such claim rests upon the oral agreement rendered unenforceable under the statute of frauds.

With respect to the proposed amended complaint, which is verified by plaintiff Jennifer Courtian, the added fifth cause of action for breach of the 2019 Agreement between plaintiff Jennifer Courtian and her sister-in-law defendant Melissa Courtian, individually and as executrix of the estate of her husband Michael Courtian, is sufficiently pled. See Hawkins v Genesee Place Corp, 139 AD2d 433 (1<sup>st</sup> Dept 1988) (“This function

of the reviewing court is predicated upon judicial economy and efficiency. It is not meant to supplant the motion to dismiss or for summary judgment".)

With respect to the first, third and fourth causes of action of the proposed amended complaint, plaintiffs' motion does not substantively alter the original causes of action, and therefore the court dismisses the proposed amended complaint to that extent. See Aetna Life Ins Co v Appalachian Asset Management Corp, 110 AD3d 32, 39 (1<sup>st</sup> Dept 2013). Moreover, as the 2019 Agreement, appended to plaintiffs' cross motion, was not prepared by non-party Michael Courtian, now deceased, the alleged oral agreement that he allegedly made, remains unenforceable as against his estate, as in violation of the Statute of Frauds. See Bent v St John's University, New York, 189 AD3d 973 ("Signed and unsigned writings can be read together to satisfy the statute, provided that . . . the unsigned writing was prepared by the party to be charged".)

Finally, with respect to defendant's claim of conversion against plaintiff Jennifer Courtian, there is an issue of fact as to whether such plaintiff illegally accessed the tenant-in-common accounts, as copies of the account agreements, i.e., the terms and conditions thereof, have not been submitted to the court. See Granite State Insurance Company v Transatlantic Reinsurance Company, 132 AD3d 479, 481 (1<sup>st</sup> Dept 2015).

*Debra A. James*

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1/30/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE