

Labusov v Bachner

2023 NY Slip Op 31152(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 650524/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

-----X

PAVEL LABUSOV, ALINA LABUSOVA,
Plaintiff,

- v -

MICHAEL BACHNER,
Defendant.

-----X

MICHAEL BACHNER
Plaintiff,

-against-

WILLIAM REDFERN, EQUITY TRUST COMPANY
Defendant.

-----X

MICHAEL BACHNER
Plaintiff,

-against-

SEIDEN LAW GROUP LLP, MICHAEL CILENTO, DANIEL
ESTRIN

Defendant.

-----X

INDEX NO. 650524/2020
MOTION DATE 03/31/2023
MOTION SEQ. NO. 012

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595535/2020

Second Third-Party
Index No. 595577/2022

The following e-filed documents, listed by NYSCEF document number (Motion 012) 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 222, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 248

were read on this motion to/for RENEWAL.

Plaintiff's motion to renew, or in the alternative, for summary judgment is denied.

Background

Plaintiffs Pavel and Alina Labusovs (the “Labusovs”) allege that defendant Michael Bachner breached his fiduciary duty to them as an escrow agent in an underlying action. Bachner represented William Redfern in the underlying action which ultimately ended in a settlement. A condition of the settlement was that Bachner would hold the contents of Redfern’s IRA account in escrow; Redfern represented that the value of that account was, at that time, \$444,027.26. Plaintiffs were to receive the funds in the IRA account if Redfern breached the settlement agreement, which he later did.

After Redfern defaulted, the Labusovs demanded the entirety of the IRA account. Bachner claims that when he attempted to liquidate the IRA account, he learned that the value of the account was never \$444,027.26 and alleges that both Redfern and Equity Trust Company made false representations to him regarding the value of the account.

This Court previously rejected plaintiffs’ motion for summary judgment against Bachner on the ground that it was premature and that discovery was necessary (NYSCEF Doc. No. 56). Plaintiffs now bring another motion, after much discovery has occurred, for summary judgment. They insist that Bachner never took any steps to confirm that the account actually had \$444,027.26 in it and question why he did not have any suspicions regarding why the account amount never changed given that it was supposed to be comprised of stocks, bonds, and equities. Plaintiffs insist that Bachner has violated his fiduciary duties to them.

In opposition, Bachner claims that plaintiffs have not established their entitlement to summary judgment on their claims of breach of fiduciary duty or gross negligence. He insists that the moving papers are improper because plaintiffs’ attorney did not include a separate memorandum of law. Bachner insists he did everything he was supposed to do as an escrow

agent and that plaintiffs are attempting to hold him liable as, essentially, a guarantor. He observes that it was Redfern who agreed to place the contents of his IRA account (at a certain stated value) into the escrow account. Bachner stresses that there was no provision in the escrow agreement that required him to independently verify the actual value of the assets or the accuracy of the representations made by Redfern.

In reply, plaintiffs maintain that they made their prima facie showing and that Bachner showed extreme carelessness by not verifying the amount in the subject IRA account.

Discussion

As discovery has occurred, the Court will consider the instant motion on the merits.

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably

conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Plaintiffs assert two causes of action against Bachner: for gross negligence and breach of fiduciary duty. “Gross negligence differs in kind, not only degree, from claims of ordinary negligence. To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others. Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence. Ordinarily, the question of gross negligence is a matter to be determined by the trier of fact” (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902, 998 NYS2d 107 [2d Dept 2014] [internal quotations and citations omitted]).

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct” (*Bd. of Managers of Brightwater Towers Condominium v FirstService Residential New York, Inc.*, 193 AD3d 672, 147 NYS3d 78 [2d Dept 2021]).

The Court denies plaintiffs' motion as there are, on this record, multiple issues of fact regarding Bachner's conduct as escrow agent. Bachner testified that after he found out that Redfern had defaulted under the terms of the settlement agreement, he “contacted Equity Trust via e-mail saying that pursuant to the terms of the power of attorney, I was directing that the contents of the IRA account be liquidated and that they cut me a check in the amount of four hundred and something thousand dollars. They, then, told me – they called me at home and they told me that it appears to them that the value of the account was in privately held securities, and

they did not know—they did not believe that the account was anywhere near the amount of four hundred and something thousand dollars” (NYSCEF Doc. No. 215 at 48).

He added that “ I then received a phone call back from Equity Trust—a woman by the name of Erin Callahan—who told me that the statement that they had valued at 444 was based upon the market value of the securities that Redfern *had told them* was valued at four hundred something, and that was in 2015 or so, and that money had come in and money had gone out, and that they should have been demanding yearly re-evaluations, but failed to do that” (*id.* at 49).

This creates a clear and material issue of fact at this point in the litigation. According to Bachner, he simply relied on the fact that Equity Trust sent a statement verifying the value of the account. Without more, and solely on this record, a fact finder must consider whether or not Bachner should have done more to verify the value of the account and to question the statements from Equity Trust. That is particularly true here, where plaintiffs bring a cause of action for gross negligence which, as noted above, is usually a matter to be determined by a trier of fact.


Similarly, the Court is unable to grant summary judgment on plaintiffs’ breach of fiduciary duty claim. There is no dispute that securities were deposited into an escrow account and that Bachner liquidated this account when Redfern breached the settlement agreement. At the very least, on these facts, there is a question about whether Bachner committed any misconduct, a necessary element for this cause of action. Moreover, this is not a situation, such as a case upon which plaintiffs rely, where the escrow agent represented that certain funds were deposited in an escrow account when he knew he had not received the funds (*c.f. In re Dwyer*, 292 AD2d 146, 149, 741 NYS2d 120 [2d Dept 2002]). Here, the sole issue is that the IRA account turned out to hold much less value than both Redfern and Equity Trust claimed. Whether Bachner is liable for that cannot be determined as a matter of law on these papers.

The Court also denies plaintiffs’ curious request for legal fees on the ground that Bachner’s defense is frivolous. Bachner is entitled to mount a defense and he has raised legitimate issues of fact that compel the Court to deny the instant motion.

The Court notes that, while plaintiffs’ motion is denied because they have not met their burden, nothing herein prevents any other party from moving for summary judgment.

Accordingly, it is ORDERED that plaintiffs’ motion for summary judgment is denied.

See NYSCEF Doc. No. 217 for information about the next conference.

<p><u>4/10/2023</u> DATE</p>		 <hr/> ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:		<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE