

Castellotti v Free

2023 NY Slip Op 31547(U)

May 8, 2023

Supreme Court, New York County

Docket Number: Index No. 158162/2012

Judge: James d'Auguste

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. James d'Auguste

PART 55

Justice

-----X

INDEX NO. 158162/2012

PETER CASTELLOTTI,

MOTION DATE _____

Plaintiff,

016 017 018

- v -

MOTION SEQ. NO. 019 020

LISA FREE, JOHN R. BLASI, LINDABURY MCCORMICK
ESTABROOK & COOPER, P.C., GOTHAM BUSINESS
CONSULTANTS, LTD., A.S.K. BUSINESS SOLUTIONS,
LLC., DENIS L. ABRAMOWITZ, CPA, PLLC, DENIS L.
ABRAMOWITZ, JOSEPH CASTORO, AMERICAN
PORTFOLIOS HOLDINGS, INC., BERNARDO L. LIRA,
ROBERT KELLY, KENNETH JONES,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 016) 407, 408, 409, 410, 411, 412, 413, 414, 421, 422, 423, 424, 425, 426, 438, 439, 440, 463, 464, 465

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 460, 461, 462, 483, 484, 485, 486, 487

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 018) 456, 457, 458, 459, 467, 470, 471, 472, 473, 474, 479, 480, 481, 482

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 019) 441, 442, 443, 444, 445, 446, 447, 448, 468, 475, 477, 497, 498

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 020) 449, 450, 451, 452, 453, 454, 455, 469, 476, 478

were read on this motion to/for PRECLUDE.

This combined decision and order resolves Motion Sequences 016, 017, 018, 019, and 020.

General Background:

This action arises from an alleged oral promise made by defendant Lisa Free to her brother, plaintiff Peter Castellotti Jr. Around February 2003, plaintiff began a lengthy and contentious divorce proceeding against his now ex-spouse. The parties' mother, Madeline Castellotti, was very ill at the time. Plaintiff claims that Madeline Castellotti strongly disliked plaintiff's ex-spouse and did not want her assets to benefit plaintiff's ex-spouse. Madeline Castellotti changed her Will, removing plaintiff as a 50% beneficiary and making defendant the sole beneficiary of her Will. On June 7, 2004, Madeline Castellotti passed away.

Plaintiff alleges that in 2004, both prior to and again subsequent to Madeline Castellotti's passing, the plaintiff and defendant entered into an oral agreement whereby plaintiff would use his share of Madeline Castellotti's life insurance proceeds to pay her estate taxes in exchange for: 50% of the assets transferred to defendant via Madeline Castellotti's will ("estate assets") after plaintiff finalized his divorce; 50% of all income and proceeds generated from the estate assets while plaintiff's divorce is pending; and plaintiff would be named as the sole beneficiary on defendant's life insurance policy whereby the coverage would not be less than \$5 million and would be in existence until the estate assets are transferred to plaintiff. The estate assets include Whole Pies, Inc., the corporate entity for John's Pizzeria of West 44th Street, Aim to Please, Inc., the management company for John's Pizzeria, and PMPL Inc., the general partner of a partnership that owns real estate assets in New York and Florida. Defendant disputes the existence of this oral agreement.

In 2005, plaintiff paid the estate taxes with the life insurance proceeds. Plaintiff's divorce was finalized in 2008, and defendant has not transferred any assets in furtherance of the alleged oral agreement. Between approximately 2005 and 2011, defendant maintained a bank

account to which plaintiff had access. Defendant made deposits into this account, although plaintiff believes that the amount deposited was not the full 50% of income and proceeds as contemplated in the alleged oral agreement. In 2005, defendant procured a \$5 million life insurance policy (at plaintiff's expense), although defendant let the policy lapse in 2012.

Plaintiff commenced this action by filing a summons and complaint on October 22, 2012, alleging, *inter alia*, breach of contract, accounting of Whole Pies, Inc. and Aim to Please, Inc., breach of fiduciary duty, and unjust enrichment. Following motions to dismiss and subsequent appeals, the First Department upheld the causes of action for unjust enrichment, promissory estoppel, and constructive trust.^{1 2} Castellotti v Free, 138 AD3d 198 [1st Dept 2016], *modified in Castellotti v Free*, 168 AD3d 535 [1st Dept 2018]. Several non-family defendants, including prior CPAs, were dismissed from the action; the remaining parties are Peter Castellotti and Lisa Castellotti Free. The parties conducted discovery, and the plaintiff filed a Note of Issue with demand for a trial by jury on January 31, 2019. The parties filed the instant motions *in limine*.

Motion Sequence 016:

In Motion Sequence 016, defendant moves *in limine* for a protective order regarding the trial subpoenas served on Tristate CPA, Joseph Castoro, Denis L. Abramowitz, CPA PLLC, Denis L. Abramowitz, John Blasi and American Portfolios Financial Services – seeking defendant's financial records and tax returns. Plaintiff opposes and cross-moves for an order precluding defendant from calling Kenneth Jones as a witness at trial and Vincent Travagliato as an expert witness at trial. Defendant opposes the cross-motion.

¹ As stated in Footnote 5 of the First Department's Decision and Order, promissory estoppel was not explicitly asserted in the complaint, however, the factual allegations fit within the complaint and thus, this cause of action survives the motion to dismiss.

² The Court notes that "constructive trust" is essentially a remedy in which plaintiff will have to prove the elements of the unjust enrichment and promissory estoppel claims.

Defendant highlights three categories of documents that plaintiff is seeking in advance of trial: documents that plaintiff could have pursued in discovery, but did not; documents that plaintiff sought, but were previously quashed during discovery; and documents which plaintiff received during discovery and seeks to authenticate for trial. The Court grants the branch of the motion seeking to preclude documents previously quashed during discovery. Even if the decision of this Court during the pre-trial phase does not constitute “law of the case” because plaintiff is now seeking to admit the documents at trial to aid in witness recollection (as plaintiff argues), the Court accepts the previous rulings by this Court (Crane, J.) as highly persuasive – and thus adopts the arguments presented in the previous decision of this Court in quashing this motion. The Court also conditionally grants the motion to quash a subpoena seeking to authenticate documents for trial conditioned on defendant fulfilling her offer to stipulate to the authenticity of these documents.

Next, the branch of the motion seeking to quash production of documents that were not requested during discovery is also granted. Within this category, plaintiff is seeking account records for various financial accounts held by defendant at Wachovia, American Portfolio, and Chase. Plaintiff claims that his purpose for requesting the account information is to refresh defendant’s recollection at trial, because she maintained during her deposition that she did not remember the details of many transactions in these accounts. However, plaintiff has not provided a reasonable reason for failing to request the documents following defendant’s deposition before discovery was completed; defendant was deposed in February 2018 and plaintiff filed the Note of Issue in January 2019. Nor has plaintiff provided case law demonstrating his entitlement to such documents post-Note of Issue and leading up to trial. Accordingly, the Court finds that plaintiff has waived his ability to belatedly seek these

documents, and this branch of the motion to quash is granted. *See* Spectrum Sys. Int'l Corp. v Chem. Bank, 78 NY2d 371, 376 [1991], *see* Mestel & Co., Inc. v Smythe Masterson & Judd, Inc., 215 AD2d 329 [1st Dept 1995].

The branch of plaintiff's cross motion to quash the trial subpoena of Kenneth Jones is granted. In Motion Sequence 011, defendants successfully moved to quash the subpoena *ad testificandum* of Kenneth Jones, stating that Jones had no relevant knowledge regarding alleged oral agreements. Therefore, defendants cannot subsequently seek to call Jones to testify at trial, stating that his testimony would now be relevant. *See* Envtl. Concern, Inc v Larchwood Const. Corp., 101 AD2d 591 [2nd Dept 1984] [discussing "doctrine of estoppel against inconsistent positions"]. Assuming, as defendants claim, that Jones's anticipated testimony is not inconsistent with his prior affidavit (NYSCEF Doc. No. 293) and related to other relevant facts related to the relationship between plaintiff and defendant (rather than merely collateral issues unrelated to the remaining causes of action), plaintiff would have to have been able to take Jones's deposition during the discovery phase to allow him to testify at trial. Accordingly, that branch of the motion is granted.

The branch of plaintiff's cross motion regarding the expert opinion of Vincent Travagliato is granted to the extent of compelling defendants to supplement their CPLR 3101(d) disclosure to clarify the scope of the catch-all phrase "other topics relevant to the claims in this case" or to limit testimony to the specified topics of "common estate planning strategies that high net worth individuals use to preserve and/or direct the distribution of assets; ... [and] the use of life insurance proceeds to pay for estate taxes." A court may compel a further expert disclosure when the original disclosure is "so general and nonspecific that [opposing party has] not been enlightened to any appreciable degree about the content of the expert's anticipated testimony."

Richards v Herrick, 292 AD2d 874 [4th Dept 2002] [citing Chapman v State of New York, 189 AD2d 1075 [3rd Dept 1993]]. The statement “other topics relevant to the claims in this case” is “general and nonspecific” to not give plaintiff reasonable notice of what testimony is being sought. Accordingly, defendants must supplement their CPLR 3101(d) disclosure to specify the “other topics relevant to the claims in this case” or the expert testimony of Travagliato shall be limited to the specified categories in their disclosure.

Motion Sequence 017:

In Motion Sequence 017, non-party John R. Blasi, Esq. and Lindabury McCormick Estabrook & Cooper, P.C. move *in limine* by Order to Show Cause for a protective order quashing the trial subpoena of non-party John R. Blasi, Esq. and non-party Lindabury McCormick Estabrook & Cooper, P.C. (“Lindabury”), as well as testimony demanded in connection with the subpoena. Plaintiff opposes the motion. The Court grants the motion to quash the subpoena.

In Motion Sequence 014, the Court granted non-party John R. Blasi, Esq.’s motion to quash a subpoena for Blasi to appear for a deposition. In a ruling on the record on March 27, 2019, the Court (Crane, J) quashed the subpoena because the “danger of getting into legal advice is really too great and the possibility of new noncumulative relative information is too small.” (NYSCEF Doc. No. 432). Plaintiff states that while the Court found the likelihood of being able to learn non-cumulative information in Blasi’s anticipated deposition was outweighed by the risk of exposing attorney/client privileged information, this calculus has changed leading up to trial because the parties do not know what will arise at trial yet. This speculative argument is insufficient to essentially revisit the Court’s ruling in Motion Sequence 014. Accordingly, Motion Sequence 017 is granted.

Motion Sequence 018:

In Motion Sequence 018, plaintiff moves *in limine* by Order to Show Cause for an order of protection to exclude evidence of the 2016 Petition for and Family Court Order of Protection (“2016 Order of Protection”) against plaintiff, exclude any testimony about the Family Court Petition or Order of Protection, and reserve the determination for the Court whether plaintiff suffered an unconscionable injury and established entitlement to a constructive trust. Defendant opposes the motion.

The Court grants the motion, except the Court is severing off the branch of the motion regarding whether the issue of “unconscionable injury” should be presented to the jury or reserved for the Court for further argument. Per the First Department, the remaining causes of action are unjust enrichment, promissory estoppel, and constructive trust. Since the shares of the family companies (and thus future earnings) were barred by the Statute of Frauds, the factual issues present in the case are primarily limited to the conduct of the parties prior to 2008. Defendant seeks to introduce evidence related to the 2016 Order of Protection to show that the relationship between the plaintiff and defendant deteriorated over the years, and, thus, plaintiff fabricated the oral agreement.

The Court finds the reliability of the evidence of the 2016 Family Court Order of Protection to be problematic, and, even if the Court were to find such evidence to be reliable, this evidence is highly prejudicial with limited relevance – at best. The judgment in the 2016 Family Court Order of Protection was entered when plaintiff defaulted, and plaintiff sought to vacate the default. Matter of Castellotti v Castellotti, 86 NYS3d 120 (2d Dept 2018). During the appeal, plaintiff’s counsel represented that he had inadvertently given plaintiff the incorrect time of the proceeding, and, for this reason, the Family Court Attorney Referee defaulted plaintiff. *Id.* The

Second Department declined to vacate the default. *Id.* Since this Order of Protection was obtained on default, it is inherently less reliable than a judgment obtained after a fully litigated court proceeding. Further, the Court declines to permit what will undoubtedly become a “trial within a trial” to evaluate the reliability of the 2016 Family Court Order of Protection.

Additionally, evidence of the 2016 Family Court Order of Protection is highly prejudicial with limited, if any, probative value. A party cannot seek to introduce evidence of unrelated bad acts to induce the jury to decide the case based on the defendant’s character. Mazella v Beals, 27 NY3d 694, 710 (2016). On its face, evidence of conduct between the parties that primarily occurred well after plaintiff paid Madeline Castellotti’s estate taxes and finalized his divorce does not appear to be relevant to the underlying promissory estoppel and unjust enrichment claims. However, this determination does not address whether defendant can testify to the underlying incidents without introducing or referring to the 2016 Family Court Order of Protection itself.³

Plaintiff asserts, and defendant concedes, that equitable defenses and equitable counterclaims must be tried by the Court. (NYSCEF Doc, No. 470, at p.13) [citing CPLR 4101]. However, the Court is reserving the issue of whether “unconscionable injury” should be tried by the Court or submitted to the jury for further argument. In Matter of Hennel, the Court of Appeals clarified that a party seeking to enforce an agreement under promissory estoppel can overcome the requirements of the statute of frauds by demonstrating that non-enforcement would result in unconscionable injury. In re Estate of Hennel, 28 NY3d 487, 494 [2017]. Although “unconscionable injury” is a principle derived from equity, the Court of Appeals did not clarify

³ Motion Sequence 018 only seeks to exclude information relating to the 2016 Family Court Order of Protection and does not explicitly request to exclude information about the underlying interactions that led to defendant filing the petition in Family Court.

whether proving “unconscionable injury” should be a matter reserved for the Court (like other equitable doctrines) or should be presented to the jury as an issue of fact – as defendant argues. *See Id.* Accordingly, the Court is severing this issue and reserving decision on it pending further briefing and argument.

Motion Sequence 019:

In Motion Sequence 019, defendant moves *in limine* by Order to Show Cause for an order to exclude defendant’s “estate plan evidence” in its entirety and to exclude evidence regarding communications with Madeline Castellotti (the testator) or her intentions about her estate plan and alleged side arrangements that vary or contradict her will. Defendant specifies this “estate plan evidence” to include evidence concerning communications with Madeline Castellotti about her intentions regarding her estate plan/alleged side arrangements that vary or contradict her will; testimony concerning the dismissed claims for breach of the alleged oral agreements; plaintiff’s testimony about communications or transactions with Madeline Castellotti concerning her estate plan; all direct or indirect hearsay conversations with Madeline Castellotti; and the testimony of witnesses anticipated to offer inadmissible evidence, including Christopher McGee, Geoffrey Argent, John McGee, and Linda O’Mara. Plaintiff opposes the motion.

In this motion, defendant reasons that any alleged side arrangements that vary or contradict Madeline Castellotti’s last will and testament must be excluded pursuant to CPLR 4519 (known as the “Dead Man’s Statute”), as well as extensive case law that shows a party cannot use extrinsic evidence to challenge the meaning of a clear and definite will. *In re Watson’s Will*, 262 NY 284, 293 [1933]; *Matter of Jones’ Estate*, 38 NY2d 189, 193 [1975]. Plaintiff argues that such testimony does not seek to challenge Madeline Castellotti’s estate plan, as the contemplated transfer of assets would occur after the final disposition of Madeline

Castellotti's assets through probate. The Court agrees, understanding the mechanics of the alleged interaction to be two related transactions or communications: Madeline Castellotti disliked plaintiff's ex-wife, so she removed plaintiff from her will, and Madeline Castellotti expressed her wish for defendant to share the estate assets with plaintiff once the divorce was finalized. After Madeline Castellotti's death, defendant allegedly had plaintiff pay the estate taxes, a legal obligation that belonged solely to the defendant. Thus, the case law prohibiting testimony that challenges the terms of a will is distinguishable from the facts at hand because the excluded testimony is being used as a challenge to the terms of the will itself, typically during Surrogate's Court proceedings. For these reasons, plaintiff's testimony regarding his conversations with Madeline Castellotti would not be barred under CPLR 4519, nor is plaintiff barred from calling third-party witnesses who may testify about Madeline Castellotti.

Although the prohibitions under CPLR 4519 are not exclusive to Surrogate's Court matters, the Court recognizes that the assets were fully within defendant's possession when the unjust enrichment and promissory estoppel causes of action accrued. Madeline Castellotti passed away in 2005, and plaintiff's divorce did not finalize until 2008. During those intervening three years, defendant was materially participating in the family business. The essence of defendant's contention is that these assets remained as "estate assets" to which defendant had received title through probate. However, the Court recognizes that these assets did not simply remain stagnant or even passively managed (such as a stock portfolio directed by an investment manager); defendant had spent the intervening years continuing to grow the family business. The Court believes that the significant period of time, combined with defendant's material participation in growing the assets, disconnects these assets from the "interest or title"

requirement under CPLR 4519, and, for this reason, plaintiff is solely challenging defendant's title to her own assets.

Moreover, even if the Court were to have found that such conversations fall within the scope of CPLR 4519, the remaining causes of action in this case are equitable in nature and, thus, afford the Court greater discretion to admit evidence of conversations with Madeline Castellotti. *See generally* 55 N.Y. Jur. 2d Equity § 6; *see also* Mental Hygiene Legal Serv. on Behalf of Oliviah CC. v Delaney, 176 AD3d 24, 31 [3d Dept 2019] *rev'd on other grounds* 38 NY3d 1076 [2022] [discussing the general principles of Supreme Court's equitable authority]; *see also* State v Barone, 74 NY2d 332, 336 [1989] [also discussing the general principle of Supreme Court's equitable authority]. Although New York does not have a formal "residual hearsay" exception, New York courts have demonstrated that certain circumstances exist in which the Courts are willing to expand the admissibility of hearsay. *See* People v Arnold, 34 NY2d 548, 549 [1974] ["it is observed that this court has in recent years emphasized that the hearsay doctrine has been too restrictively applied to exclude otherwise reliable evidence from the jury"] [internal citations omitted]. In cases where a New York court has expanded hearsay exceptions in a manner like a "residual hearsay" exception, the court focuses on the reliability of the testimony. In this case, there were other witnesses present during these alleged conversations who can help establish the reliability of plaintiff's assertion that Madeline Castellotti wanted defendant to share the family assets with him following his divorce. In addition, as this case is seeking equitable relief, plaintiff would be substantially prejudiced if he cannot introduce key information about the background of his agreement with defendant. Otherwise, plaintiff will have difficulty establishing evidence related to material (and potentially highly prejudicial) issues of the case,

such as why he was removed from Madeline Castellotti's will and why he chose to pay Madeline Castellotti's estate taxes for defendant's benefit. Accordingly, the motion is denied.

Motion Sequence 020:

In Motion Sequence 020, defendant moves *in limine* by Order to Show Cause for an order to exclude evidence of the alleged improperly withheld audio recordings and text messages and any evidence surrounding these recordings. Plaintiff opposes the motion.

The Court denies the motion. Two categories of discovery are at issue: text messages between plaintiff and defendant, and a conversation recording between plaintiff and Denis Abramowitz, the family accountant, regarding the alleged side agreements. Neither side produced the text messages during discovery, and plaintiff failed to provide the conversation recordings until January 29, 2020. In opposition to this motion, plaintiff's counsel represented to the Court that his failure to produce these elements of discovery was accidental; as soon as he discovered the recordings and text messages during trial preparation, he sent them to defendant's counsel. Defendant's primary argument is that production of these text messages and recordings on the eve of trial would be highly prejudicial. Considering the position of both sides, the Court agrees with defendant to the extent that defendant is entitled to a round of discovery limited to these text messages and documents. Accordingly, the motion is denied, and the parties are ordered to complete any limited discovery (including depositions of plaintiff, defendant, and Abramowitz if they so choose) within 60 days of this order.

Accordingly, it is hereby,

ORDERED that Motion Sequence 016 to quash is granted in its entirety, except that the branch of the motion seeking documents to be authenticated for trial is conditionally granted if the defendant stipulates to the authenticity of existing documents, and it is further,

ORDERED that the branch of the cross-motion in Motion Sequence 016 seeking to quash the trial subpoena of Kenneth Jones is granted, and it is further,

ORDERED that the branch of the cross-motion in Motion Sequence 016 seeking to preclude defendant’s expert Vincent Travagliato is granted to the extent of compelling defendant to supplement their CPLR 3101(d) disclosure to clarify the scope of the catch-all phrase “other topics relevant to the claims in this case” or to limit testimony to the specified topics of “common estate planning strategies that high net worth individuals use to preserve and/or direct the distribution of assets; ... [and] the use of life insurance proceeds to pay for estate taxes,” and it is further,

ORDERED that Motion Sequence 017 is granted, and it is further,


ORDERED that Motion Sequence 018 is granted, except the Court is severing for further consideration the branch of the motion regarding whether the issue of “unconscionable injury” should be presented to the jury or reserved for the Court, and it is further,

ORDERED that Motion Sequence 019 is denied, and it is further,

ORDERED that Motion Sequence 020 is denied, except the parties may conduct limited discovery regarding the text messages and audio recordings within 60 days of this order. The parties shall submit a stipulation to the Court with discovery deadlines for this limited round of discovery within 14 days of this order.

This constitutes the decision and order of the Court.

5/8/2023
DATE


James d'Auguste, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	