

Tabakman v Cherney

2023 NY Slip Op 32279(U)

July 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 520562/2020

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____ X

ROMAN TABAKMAN,

Plaintiff,

-against-

**DECISION / ORDER
Index No. 520562/2020
Motion Seq. No. 3
Date Submitted: 6/22/23.**

**LEONORA CHERNEY a/k/a LEONORA
CHERNYAKHOVSKAYA and “XYZ TRUST” (“XYZ
TRUST” is set forth as a fictitious name representing a
trust managed by Defendant Leonora Cherney a/k/a
Leonora Chernyakhovskaya, as the true name of said
trust is unknown to Plaintiff),**

Defendants.

_____ X

***Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion
to dismiss the complaint.***

Papers	NYSCEF Doc.
Notice of Cross motion, Affirmation and Exhibits Annexed.....	<u>54-56</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>57</u>
Reply	<u>58</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In motion sequence #3, the defendants which remain, Leonora Cherney and her fictitiously named trust (“XYZ Trust”) move to dismiss the complaint pursuant to CPLR 3211 (a)(7), for failing to state a cause of action. For the reasons which follow, the motion is granted, and the complaint is dismissed. As defendants have not requested the severance of their counterclaims, they are dismissed as well.

Background

What can be gleaned from the papers in this matter is the following. Plaintiff is the son of Mark Toman and Dolya Toman, both of whom are deceased. Dolya Tolman passed away in 2015. Mark Tolman remarried in 2019. He married defendant Leonora Cherney. In 2005, before Dolya Toman died, plaintiff and his parents took title to the shares of a coop

apartment in Brooklyn, with all three owing their interest as joint tenants with rights of survivorship. Subsequently, Mark and Dolya Tolman created a trust in 2011, and the trust agreement states that they transferred the apartment to the trust, with plaintiff's written consent, and put other assets in the trust as well. There is nothing in the motion papers that confirms that the stock and lease for the apartment were in fact transferred to the trust. The trust is called the Toman 2011 Family Trust. The original trust agreement [Doc 4, which is an incomplete copy], states that plaintiff becomes the trustee when both grantors pass away. Although it is alleged that after this action was commenced, Mark Toman passed away, nothing is submitted to establish this fact. However, Doc 36 is a stipulation of discontinuance dated June 23, 2021, against the trust as a named defendant, so presumably, when Mark Toman passed away, plaintiff became the trustee and did not need or want to sue himself. But the court does not know who the Trustee is, as neither side provided a complete copy of the amendment to the trust agreement.

In October of 2019, the trust agreement was amended. Among other things, it states that [part of this document is at Doc 6] Mark Toman's spouse would have the equivalent of a life estate in the coop apartment, which is personal property and not real property, if he dies first. The amendment also states that if he predeceases his second wife Leonora, and she consents, the apartment may be sold and the proceeds used to purchase "a replacement property" to be used as her residence. It goes on to say that if she no longer occupies the property as her residence "by reason of being confined to a skilled nursing facility or other institution permanently without a reasonable prospect of . . . returning to said residence, then Trustee may sell or lease such property without their prior written consent as set forth above and shall not be required to purchase a replacement residence." It also provides that the sole grantor, Mark Toman, has the right to "withdraw all or any part

of the trust principal.”

The amendment to the trust agreement then states that when Mark Toman dies, which has apparently occurred, his second wife Leonora Cherney may continue to live in the coop apartment, but she is responsible for all maintenance charges and assessments related to her occupancy. This provision proceeds to state that when Leonora dies, the apartment is to be sold by the Trustee, and the proceeds divided equally among plaintiff’s three children, Mark Toman’s grandchildren. This provision is stated to be irrevocable. A specified investment account is to be distributed to plaintiff. The rest of this amendment to the trust is not provided in the exhibit.

The complaint in this action was filed and served before Mark Toman passed away. It is not verified. The first cause of action is for an injunction stopping defendants “from any further transfer of any property.” In the complaint, plaintiff claims that his father, on an unspecified date, withdrew some of the trust funds and gave them to his wife, defendant Leonora Cherney, and he believes she deposited the funds into the “XYZ trust”.

The second cause of action is for unjust enrichment, and states that Leonora Cherney “fraudulently induced Mark Toman to sign an amendment to the trust completely transferring ownership of the Subject Premises from Plaintiff to the [trust].” First, it is not established that the trust owns the apartment, and second, such a transfer could not have been accomplished without plaintiff’s signature, as he was a one-half owner (one third until his mother passed away) with his father. Plaintiff also claims that the transfer of funds to defendant and/or her trust unjustly enriched defendant at his expense, as he was the trust beneficiary. He seeks compensatory damages and punitive damages.

The third cause of action is for fraudulent inducement. It states that plaintiff was “fraudulently induced by defendants into assigning over his interest” to the cooperative

apartment “for no consideration and without the assistance of counsel.” This is a judicial admission that he did in fact execute documents to transfer the cooperative apartment to the trust. Whether the transfer was effectuated, which would have required the issuance of a new stock certificate and a new or assigned proprietary lease, the consent of the apartment corporation, and of the bank holding the security interest, is not known.

The fourth cause of action is for breach of fiduciary duty. It claims that, in essence, Leonora Cherney had a fiduciary duty to the plaintiff, as he was a beneficiary of the trust, and she breached that duty by “engaging in a scheme to divest the plaintiff of his interest in [the trust]”.

In defendants’ answer, which was interposed on behalf of all defendants before the Toman 2011 Family Trust was dismissed as a defendant, [Doc 13] provides some of the language missing from the incomplete copy of the trust agreement provided by plaintiff. In particular, it states that “The Trustees are authorized in their absolute discretion with respect to any property at any time held or acquired by them, including any accumulated income: 1. To sell or otherwise dispose of the same at such times, in such manner, for cash or on credit, and upon such terms and conditions, as they shall deem advisable” and “the right of any beneficiary to any payment or distribution of income or principal shall in every case be subject to any charge or deduction which the Trustees may make against the same under the authority granted to the Trustees by law or by any provision of this Agreement.”

Motion to Dismiss

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court’s role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable

inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2nd Dept 2005]. See also *Leon v Martinez*, 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2nd Dept 2000].

The standard of review on such a motion is not whether the party has artfully drafted the pleading, “but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562. The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” *Dee v Rakower*, 2013 NY Slip Op 07443 [2d Dept], citing *Leon v Martinez*, 84 NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

First Cause of Action - Injunction

The court finds that this cause of action fails to state a claim. As the Toman 2011 Family Trust is no longer a party defendant to this action, nor was the Trustee of the trust ever made a party defendant, there is no defendant sued herein who could be subjected to an injunction to “stop the further transfer of any trust property.”

Second Cause of Action – Unjust Enrichment

Unjust enrichment is essentially a quasi-contractual claim where the law creates a contract in the absence of any agreement (See, *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005]). Here, plaintiff has two claims. First, he states that Leonora Cherney “fraudulently induced” his father to put the coop apartment into the trust. As the papers indicate that the apartment was placed in the trust by his parents in 2011, this claim makes no sense. Further, plaintiff has no standing to complain about this, as he is not his father’s estate representative. If his claim is based on the fact that he was a beneficiary of the trust, his rights under the trust did not vest until his father passed away, and this suit was brought before then, at a time when he had no rights other than as a contingent remainderman. Finally, if the apartment is in fact owned by the trust, a fact which has not been established, in the trust agreement as amended, the plaintiff’s children are the named beneficiaries of the apartment’s sale proceeds. Plaintiff has not provided the pages of the first trust agreement which indicate who was to receive the trust proceeds upon the sale of the apartment. Thus, the plaintiff has not established that he has standing to make this claim, or that he has been damaged by the trust amendment.

Plaintiff’s second claim in this cause of action is that his father transferred some of the trust assets to his wife, the defendant. That is not an actionable claim. Plaintiff had no “quasi-contract” with Ms. Cherney that he has a right to enforce. Plaintiff had no rights in the trust assets until his father died, and then, only if there were provisions in the trust naming him a beneficiary and assets in the trust on his death to distribute to him in conformity with the provisions. While many a person feels that their parent’s second wife should have no rights to any of their parent’s assets, claiming that the surviving spouse was unjustly enriched is not a valid claim. Plaintiff had no enforceable agreement with Ms.

Cherney. Plaintiff does not allege that his father was not of sound mind when he re-arranged his estate to provide for his second wife. As such, the second cause of action must be dismissed.

Third Cause of Action – Fraudulent Inducement

Plaintiff's claim that he was "fraudulently induced by defendants into assigning his interest in the apartment" is not pled with the requisite specificity. "To make out a cause of action for fraud, . . . a party must allege representation of a material existing fact, falsity, scienter, deception and injury." *Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 209 [1st Dept 1991]. Moreover, "each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that the circumstances constituting the wrong shall be stated in detail." *Id.* at 209-10. Here, plaintiff fails to state when the allegations were made and by whom. It appears that his consent to the transfer to the trust took place in 2011, when the trust was set up. This was while his mother was still alive, and makes his claim against Ms. Cherney improbable at best. Furthermore, scienter is not specifically pled and there are no facts alleged to support a conclusion that there were misrepresentations made by defendant Cherney which were false when made. As there are insufficient facts alleged, and plaintiff has not sought leave to replead, this cause of action must be dismissed.

Fourth Cause of Action – Breach of Fiduciary Duty

In this claim, plaintiff avers that Leonora Cherney had a fiduciary duty to him, as he was a beneficiary of the trust, and she breached that duty by "engaging in a scheme to divest the plaintiff of his interest in [the trust]". Plaintiff does not explain how he has concluded that a fiduciary relationship arose between defendant Cherney and himself, as she was neither his attorney, nor is there any other relationship alleged which would result

in the creation of a fiduciary duty (see *Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 972 N.Y.S.2d 11 [1st Dept 2013] [breach of fiduciary claim dismissed absent attorney-client relationship between the parties or any other alleged fiduciary duty between them]). There is no fiduciary duty which arises from a stepmother to a stepson, and as such the fourth cause of action must be dismissed.

Accordingly, the defendants' motion is granted in its entirety, and the complaint is dismissed. As defendants do not seek to sever the counterclaims, they are dismissed as well.

This shall constitute the decision and order of the court.

Dated: July 5, 2023

ENTER:



Hon. Debra Silber, J.S.C.