

Ner Mordechai Inc. v Ohel Harav Yenoshua Boruch Found.

2023 NY Slip Op 34413(U)

November 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 520013/2020

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 28th day of Nov. 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X Index No: 520013/2020
NER MORDECHAI INC. and SEPHARDIC Motion Seq. 4
TORAH AND RETURN CENTER, INC.,
Plaintiff(s)

-against-

ORDER

OHEL HARAV YENOSHUA BORUCH
FOUNDATION and JOSEPH "BEN"
LANDA
Defendant(s)

-----X
The following e-filed papers read herein: NYSCEF Nos.:
Notice of Motion/Affirmation/Affidavits Annexed 60-68; 76
Exhibits Annexed/Reply..... 70-74
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

In this matter, Ohel Harav Yehoshua Boruch Foundation ("The Foundation") and Joseph "Ben" Landa ("Landa") (Collectively "Defendants") move (Motion Seq. 4) for summary judgment against Ner Mordechai Inc. ("Ner Mordechai") and Sephardic Torah and Return Center, Inc. ("Sephardic Torah Center") (collectively "Plaintiffs") pursuant to CPLR 3212.

Plaintiffs commenced this matter by the filing of a summons with notice and complaint on October 16, 2020, and November 3, 2020, respectively. In the Complaint, Plaintiffs assert that Goldie Hager ("Hager") and Helen Schvimmer ("Schvimmer") created Trusts in or about 2007. Plaintiff alleges that the purposes of both Trust was to hold Hager and Schvimmer's respective life insurance policies and, upon their death, provide the pay out from such policies as charitable contributions to Ner Mordechai. Plaintiffs allege that Hager and Schvimmer designated Ner Mordechai as the sole and irrevocable beneficiary of their individual Trusts. John Hancock issued both life insurance policies, and Plaintiffs allege that the Sephardic Torah Center made "a number of premium payments" under both policies. Specifically, plaintiff asserts that the Sephardic Torah Center made premium payments totaling

\$849,240.48 and \$518,495.26 on the Hager and Schvimmer policies, respectively. Plaintiffs claim that the payments were made with the understanding that both policies would continue to be owned by the Trusts and Ner Mordechai would continue to be the beneficiary. However, Plaintiffs claim that Defendant Landa submitted documents to John Hancock that transferred the ownership and beneficiary information on both policies from Ner Mordechai to the Foundation. Plaintiffs claim that defendant Landa was not authorized by either Trust to submit transfer documents to John Hancock, or to change the ownership or beneficiary of either life insurance policy.

The defendants filed a pre-Answer motion to dismiss plaintiffs' complaint pursuant to CPLR § 3211 (a)(1), (7) and (5), based upon documentary evidence, failure to state a cause of action, and on the ground that the issues raised by plaintiffs were previously submitted to arbitration before a Beth Din that resulted in an award. The defendants also requested costs and sanctions against plaintiffs, based upon their attorney's contention that he previously advised plaintiffs' counsel via email that the instant lawsuit was frivolous. This court rendered a decision on September 27, 2021, that denied the defendants' application to dismiss. In that decision, the court found that the defendants had the burden of establishing that the issues presented in the instant matter were identical to those previously litigated. Ultimately, it was determined that the defendants failed to establish that an arbitration before a Beth Din occurred and that such arbitration resulted in an arbitration award. The court, upon review of the Agreement annexed to the defendants' motion, found that the defendants failed to establish that it resolved all factual issues and conclusively disposed of the plaintiffs' claims herein.

The Defendants then moved by notice of motion for leave to reargue and renew their pre-Answer motion to dismiss the Complaint, and, upon re-argument and renewal, for an order granting their underlying motion to dismiss. Plaintiffs, cross moved to dismiss the defendants' counterclaims. The court, upon consideration, rendered a decision on July 7, 2022, that denied the Defendants motion to renew and granted Plaintiffs' cross-motion to the extent that Defendants First counterclaim for declaratory judgment and third counterclaim for costs, fees, and imposition of sanctions were dismissed. In the decision, the court found that the issue of whether Plaintiff's complaint is subject to dismissal on lack of standing or

statute of limitation grounds were either not presented in Defendants' original motion, improperly raised for the first time in their reply, or raised for the first time on re-argument. The court limited re-argument to the extent that Defendants' contention that the court over looked or misapprehended matters of fact or law when it determined that Defendants failed to demonstrate dismissal was warranted because of arbitration and an award or due to res judicata or collateral estoppel grounds. Additionally, the court found that New York does not recognize an independent cause of action for the imposition of sanctions relating to frivolous actions and that Defendants counterclaim for a declaratory judgment was "merely an iteration of the defendants' affirmative defenses and patently seeking a declaration of their sufficiency," warranting dismissal of both counterclaims.

NOW, in support of its motion, Defendants argue that they are entitled to summary judgment on the grounds that Plaintiffs have failed to commence this action within the requisite statute of limitations. Defendants state that Plaintiffs' claims began to accrue either on December 30, 2010, when the transfer happened or on December 9, 2011, when Chaim Muscat, the President of Sephardic Torah, emailed Defendants expressing his objections to the transfer, alleging fraud. Thus, Defendants state that Plaintiffs' claims lapsed six years later either on December 30, 2016, or December 9, 2017. Additionally, Defendants argue that Plaintiffs lack standing to bring this action because Plaintiffs do not allege any beneficiary interest in the policies themselves but rather in the Trusts that owned the policies that they were beneficiaries under. Defendants state that the only connection Plaintiffs have to the policies in question are as a Broker and Financial Representative in charge of making payments. Defendants claim that it would be inequitable to permit Plaintiffs to undo a transaction between the Trusts and the Defendants considering not only that the Trusts are not even parties to this action but also because Defendants have made over 12 years' worth of payments totaling over \$13 million. Defendants state that Plaintiffs stopped making payments on the policies after the transfer and have slept on their claims for over a decade.

In opposition, Plaintiffs argue that their claims are not time barred. Plaintiffs state that their claims are for conversion, not contract, and therefore the statute of limitations does not begin to run

until Plaintiffs suffer an injury which has not happened yet because Hager and Schvimmer are still alive and benefits of the policies have not been paid on their lives. Additionally, Plaintiffs argue that their unjust enrichment claim did not accrue until after Plaintiffs made a demand in 2018, for Defendants to return the policies, which was refused, making the claim timely. Moreover, Plaintiffs claim that they do have standing to bring this action because Ner Moredechai is the beneficiary of the Trusts and Sephardic Torah is their representative which is sufficient. Plaintiffs state that Defendants equitable justice argument is not supported by law and that any uncertainty as to whether Plaintiff's claims have accrued or if they have standing should warrant dismissal of Defendants motion.

It is well established that "the proponent of a summary judgment motion 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v Nassau County*, 111 AD2d 212, [2d Dept 1985]; *Steven v Parker*, 99 AD2d 649, [2d Dept 1984]; *Galeta v New York News, Inc.*, 95 AD2d 325, [1st Dept 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]; *Rebecchi v Whitmore*, 172 AD2d 600 [2d Dept 1991]). To be entitled to summary judgment on the issue of liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Higashi v M & R Scarsdale Restaurant, LLC*, 176 AD3d 788 [2d Dept 2019]; *Webb v Scharf*, 191 AD3d 1353 [4th Dept 2021]). When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such

negligence was a substantial factor in causing plaintiff's injuries -- if so, the comparative fault of each party is then apportioned by the jury (*Rodriguez* at 324).

Pursuant to CPLR 213(8), an action based upon fraud must be commenced within six years. The time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud or could with reasonable diligence have discovered it. Moreover, an action for a declaratory judgment is generally governed by a six-year statute of limitations and is time-barred if commenced more than six years after it accrues (*Trump Village Section 4, Inc. v Young*, 217 AD3d 711 [2d Dept. 2023]; *Kogut v Village of Chestnut Ridge*, 214 AD3d 777 [2d Dept. 2023]; quoting *Save the View Now v Brooklyn Bridge Park Corp.*, 156 AD3d 928 [2d Dept. 2017]). An action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties (see CPLR 3001; *Young* at 714). A dispute matures into a justiciable controversy, as necessary for an action for declaratory relief to accrue, when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights (*Id.*; see *Anson v Incorporated Vil. of Freeport*, 193 AD3d [2d Dept. 2021]).

Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request (*Caprer v Nussbaum*, 36 AD3d 176 2d Dept 2006]). Without both capacity and standing, a party lacks authority to sue (see *Graziano v County of Albany*, 3 NY3d 475 [2004]). A party does not have standing to bring suit regarding the disposition of an insurance policy when they are not an intended beneficiary of same (*Bronxville Properties, Inc. v Friedlander Group, Inc.*, 307 AD2D 245 [2d Dept. 2003]; *Campbell v Goldome Realty Credit Corp.*, 209 AD2d 991 [4th Dept. 1994]). A beneficiary of a trust, may have standing to bring an action once a demand has been made upon the trustee to proceed (*Schlegel v Schlegel Mfg. Corp.*, 23 AD2d 808 [4th Dept. 1965]).

Here, the court finds that Plaintiffs have failed to raise any material questions of fact to rebut Defendants showing of entitlement to judgment as a matter of law because Plaintiffs have only submitted the affirmation in opposition of their counsel, which is insufficient to rebut the instant motion (see

Zuckerman, holding that the bare affirmation of an attorney who demonstrated no personal knowledge of the manner in which the accident occurred, is without evidentiary value and is thus unavailing).

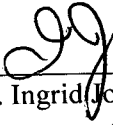
Furthermore, the complaint does not contain a cause of action for conversion. Reading the complaint as a whole and giving the Plaintiffs every favorable inference (see *Leon v. Martinez*, 84 NY2d 83 [1994]), it is clear that Plaintiffs have raised only three causes of action for a declaratory judgment, mandatory injunction, and for unjust enrichment. Therefore, an action for declaratory judgment began to accrue as of December 30, 2010, the date in which the Policies were transferred and lapsed on December 30, 2016. Assuming arguendo, that the transfers happened without Plaintiffs knowledge, the action would have accrued once a plaintiff received direct, definitive notice that the defendant is repudiating his or her rights. As evidenced by the email sent by Muscat on December 9, 2011, Plaintiffs raised their objections to the fraudulent transfer and thus were required to file their complaint by December 9, 2017. Even if Plaintiffs argue that the statute of limitations on Plaintiffs' claims here does not run from Landa's alleged improper transfer of ownership of the Policies but that it will begin to run once either Hager or Schwimmer dies, and one or both of the Policies is paid out to Defendants instead of the Trusts, the action would then warrant dismissal for being premature. With respect to Plaintiffs standing, the court finds that Plaintiffs are not the intended beneficiaries of the policies. As purported beneficiaries of the Trusts, Plaintiffs may only bring an action once a demand has been made upon the trustees, here Mordechai Schonbrun and Mark Kraft, which Plaintiffs do not allege to have done.

Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment against Plaintiffs pursuant to CPLR 3212 is granted.

Matters not discussed are either without merit or moot.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**