Gaston v Barnes
2024 NY Slip Op 35369(U)
October 22, 2024
Supreme Court, Queens County
Docket Number: Index No. 719786/2023
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

IAS PART 20

SHANTEL C. GASTON,

Plaintiff,

-against-

KEVIN BARNES and JP MORGAN CHASE BANK, N.A.,

Defendants.

Index No.: 719786/2023

Motion Seq. No.: 1

Motion Date: 3.13.2024

Motion Cal. No.: 15

The papers bearing NYSCEF Doc. Nos. 5-36 were read on the motion filed by the defendant Kevin Barnes (the "Defendant") for an Order dismissing the complaint insofar as asserted against him.

The plaintiff, Shantel C. Gaston (the "Plaintiff"), and the Defendant are children of Louise Henry-Barnes, who passed away on July 2, 2023 ("Louise" or the "Decedent"). The Plaintiff filed this cause seeking to recover the sum of $160,000.00 that she alleges was improperly transferred by the Defendant from Louise's checking account.

Presently before the Court is the Defendant's motion to dismiss the complaint, which is predicated upon various CPLR § 3211 provisions. For the following reasons, the motion is denied.

I. Factual Background and Procedural History

Preliminarily, this cause has been discontinued with prejudice as to the defendant JPMorgan Chase Bank, N.A., ("Chase") pursuant to a stipulation filed on February 1, 2024 (*see* NYSCEF Doc. No. 37).

Louise was the owner of a checking account at Chase, ending in number 5224 (the "Account"). The Account was opened and maintained in New York. The Plaintiff was the beneficiary on the Account.

The parties dispute where Louise resided at the time of her death. The Plaintiff contends that Louise was a resident of New York. The Defendant contends that Louise moved from New York to Virginia shortly before she died.

On June 23, 2023, Louise purportedly executed a power of attorney (the "POA") in favor of the Defendant, which provides, *inter alia*, as follows: "Banking. The Agent is empowered to conduct any and all bank, savings and loan, or credit union business on my behalf, including endorsing checks, depositing and withdrawing money, signing agreements, approving merges, consolidating assets or accounts, liquidating assets, transferring interests, investing, and exercising stock options …"

The POA indicates that Louise resided at 618 Nottingham Dr., Hampton Virginia 23669. The POA does not conform to New York law and purports to be effective "even in the event of my [Louise's] death …"

There is no dispute that Louise had been stricken with cancer for a significant amount of time prior to the events giving rise to this cause.

According to Chase's records, the authenticity of which is not disputed, the Defendant transferred the sum of $160,000.00 from the Account to an account owned by him and his brother Darrin Barnes, ending in number 5121 (the "Defendant's Account"). As explained below, the circumstances relative to this transfer deeply concern the Court.

The Defendant's Account was opened on July 1, 2023. By the subject date, Louise's health had deteriorated significantly and she was near death.

The next day, on July 2, 2023 at 3:32:12 a.m., the Defendant transferred the sum of $160,000.00 from the Account to the Defendant's Account (the "Transfer").

Louise passed away on July 2, 2023. The Defendant indicates in his affidavit that Louise died at 6:03 a.m. that morning, less than three hours after the Transfer. The Death Certificate issued by the Commonwealth of Virginia indicates that Louise died on July 2, 2023; that she died at the Defendant's house located at 618 Nottingham Drive, Hampton, Virginia; and that the "informant," *i.e.*, the person that reported Louise's death is the Defendant. The Death Certificate indicates that Louise's death occurred at 6:03 a.m. on July 2, 2023. However, because the Defendant is the "informant" and Louise died at the Defendant's house, the time of death is based on the information provided by the Defendant and nothing else.

Furthermore, the Death Certificate, contrary to the Defendant's affidavit, indicates that Louise resided in New York, at 114-03 201 Street 2, Saint Albans, Queens 11412.

In sum, the Defendant avers in his affidavit that he effectuated the Transfer while Louise, his mother, was on her death bed and just hours before she passed away.

II. Discussion

The Defendant moves to dismiss the complaint pursuant to various provisions of CPLR § 3211, which are considered separately below.

A. CPLR § 3211 [a] [1]

"A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211 [a] [1] may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law"

(*Qureshi v Vital Transp., Inc.*, 173 AD3d 1076, 1077 [2d Dept 2019] [internal quotation marks, brackets and citations omitted]).

"To constitute documentary evidence, the evidence must be unambiguous, authentic, and undeniable such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. Conversely, letters, emails, and ... affidavits, do not meet the requirements for documentary evidence. An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit" (*Xu v Van Zwienen*, 212 AD3d 872, 874 [2d Dept 2023] [internal quotation marks, brackets and citations omitted]).

The Defendant's contention that documentary evidence warrants dismissal of this cause fails for a number of different reasons. First, his affidavit in support does not constitute documentary evidence (*see id.*). Second, the POA purportedly executed by Louise in favor of the Defendant does not constitute documentary evidence (*see id.*).

Furthermore, there is an issue as to whether the POA is valid because where Louise resided when she died is unclear and disputed. Here, although the POA indicates that she resided in Virginia, her death certificate indicates that she resided in New York. The POA does not comport with New York law because, among other things, it purports to be effective even after Louise's death.

The death certificate does not help the Defendant either. A central contention advanced by the Defendant in his affidavit is that the Transfer took place on July 2, 2023 at 3:32:12 a.m., hours before Louise died. However, the death certificate reflects the time of death, 6:03 a.m., which was given by the Defendant "to the best" of his knowledge as the "informant." On this record, there is no objective evidence to establish the time of Louise's death. Thus, the death certificate does not establish whether the Transfer took place before or after Louise's death.

In sum, because the Defendant does not submit documentary evidence that utterly refutes the Plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law, the branch of the motion to dismiss the complaint pursuant to CPLR § 3211 [a] [1] is denied.

B. CPLR 3211 [a] [7]

The Defendant's motion predicated upon CPLR § 3211 [a] [7] seeks to dismiss the two causes of action asserted against him: conversion and unjust enrichment.

"On a motion to dismiss a complaint pursuant to CPLR § 3211 [a] [7] for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Where a party offers evidentiary proof on a motion pursuant to CPLR § 3211[a] [7], and such proof is considered but the motion has not been converted to one for summary judgment, the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (*Marinelli v Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 AD3d 714, 715 [2d Dept 2022] [internal quotation marks, brackets and citations omitted]).

(i) The Conversion Cause of Action

"To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Halvatzis v Perrone*, 199 AD3d 785, 786-787 [2d Dept 2021] [internal quotation marks and citations omitted]).

Here, the Plaintiff contends, in effect, that because she is the beneficiary on the Account, she is entitled to recover the sum of $160,000.00 that was transferred. The Defendant contends that because the Transfer took place *before* Louise died, he was entitled to transfer these funds pursuant to the POA and that the Plaintiff is not entitled to the funds. However, since "the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory," the Defendant is not entitled to dismissal pursuant to CPLR § 3211 [a] [7] with respect to the conversion cause of action (*Marinelli v Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 AD3d 714, 715).

(ii) Unjust Enrichment

"To prove unjust enrichment, a party must show that the other party was enriched at his or her expense, and that it is against equity and good conscience to permit that person to retain what is sought to be recovered" (*Daniels v Ruggiero*, 230 AD3d 563, 565 [2d Dept 2024] [internal quotation marks, brackets and citations omitted]). Here, the complaint, coupled with the Plaintiff's affidavit, allege sufficient facts to support an unjust enrichment cause of action (*see id.*).

(iii) Standing

On a motion to dismiss the complaint for lack of standing pursuant to CPLR § 3211[a] [3], "the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied. To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*Phoenix Grantor Trust v. Exclusive Hospitality, LLC*, 172 AD3d 923, 925-26 [2nd Dept 2019] [internal quotation marks, brackets and citations omitted]).

Here, the Defendant fails to establish the Plaintiff's lack of standing. The Defendant's argument on this issue is that because the Transfer took place while Louise was alive, any claim with respect to the Transfer would be for Louise's estate to assert. As explained, there are issues of fact as to whether the Transfer took place before or after Louise died. If the Transfer took place after Louise's death, the funds would belong to the Plaintiff because she was the beneficiary on the account. Since the Defendant fails to demonstrate the Plaintiff's lack of standing, the branch of the motion pursuant to CPLR § 3211 [a] [3] is denied.

(iv) Jurisdiction

Lastly, the Defendant moves to dismiss pursuant to CPLR § 3211 [a] [8], contending that there is "no basis to confer personal jurisdiction" upon him. Among other things, the Defendant asserts that he is a resident of Virginia.

"The ultimate burden of proving a basis for personal jurisdiction rests with the party asserting jurisdiction. When opposing a motion to dismiss the complaint pursuant to CPLR 3211 [a] [8] on the ground of lack of jurisdiction, a plaintiff need only make a *prima facie* showing that personal jurisdiction over the moving defendant exists. The facts alleged in the complaint and affidavits in opposition to such a motion to dismiss are deemed true and construed in the light most favorable to the plaintiff, and all doubts are to be resolved in favor of the plaintiff" (*Fanelli v Latman*, 202 AD3d 758, 759 [2d Dept 2022] [internal quotation marks and citations omitted]).

CPLR § 302 [a] [2] provides, in relevant part, that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... commits a tortious act within the state." Long-arm jurisdiction under said statutory provision "requires that a defendant's act or omission occur within the State" (*Kramer v Vogl*, 17 NY2d 27, 31 [1966]; *WCVAWCK-Doe v Boys & Girls Club of Greenwich, Inc.*, 216 AD3d 1 [2d Dept 2023]).

"[A] court may exercise personal jurisdiction over any nondomiciliary who in person or through an agent transacts any business within the state. The statute requires purposeful activities, *i.e.*, those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. The statute does not require that the business in question be commercial in nature, and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*PC-16 Doe v Hill Regional Career High School*, 223 AD3d 518, 518-519 [1st Dept 2024] [internal quotation marks, brackets and citations omitted]).

Once it is determined a plaintiff has established "a *prima facie* basis for long-arm jurisdiction under CPLR 302 [a] [2], … [it must be] determine[d] whether the … [defendant] has minimum contacts with New York such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (*WCVAWCK-Doe v Boys & Girls Club of Greenwich, Inc.*, 216 AD3d 1, 8 [internal quotation marks and citations omitted]).

"Moreover, with regard to the exercise of jurisdiction over nondomiciliaries who commit torts within a state's geographical boundaries, the United States Supreme Court wrote, a state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his [or her] tort" (*see id.*, 216 AD 3d 1, 10 [internal quotation marks, brackets and citations omitted]).

Here, deeming the facts alleged in the complaint and the Plaintiff's affidavit in opposition true, construing same in the light most favorable to the Plaintiff and resolving all doubts in favor of the Plaintiff (*see Fanelli v Latman*, 202 AD3d 758), the Court concludes that jurisdiction should be exercised over the Defendant. Specifically, the Plaintiff has asserted that the Defendant, a nondomiciliary, allegedly committed a tortious act in New York in that: Louise was a resident of New York; Louise's bank account was with Chase in New York; and that the claim arises out of the Transfer from Louise's New York bank account (*see generally PC-16 Doe v Hill Regional Career High School*, 223 AD3d 518, 518-519; *WCVAWCK-Doe v Boys & Girls Club of Greenwich, Inc.*, 216 AD3d 1).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendant's motion is denied; and it is further,

ORDERED, that the Defendant shall serve a copy of this Order with Notice of Entry via NYSCEF upon the Plaintiff by November 22, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
October 22, 2024

MOJGAN C. LANCMAN, J.S.C.

FILED
10/23/2024
COUNTY CLERK
QUEENS COUNTY