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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 603781/2009

LOPEZ, WILFREDO

VS.

FENN, RICHARD A.

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

tion to/for _____

No(s). 1, 2

No(s). 3, 4

No(s). 5, 6

7

Upon the foregoing papers, it is ordered that this motion is

FILED
DEC 12 2011
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/12/11

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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WILFREDO LOPEZ,

Plaintiff,

- against -

RICHARD A. FENN, J.P. MORGAN CHASE & CO., MERRILL LYNCH, PIERCE, FENNER & SMITH INC., and REDDEN'S FUNERAL HOME,

Defendants.

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Index No.
603781/09

DECISION and ORDER

Mot. Seq.
004

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Wilfredo Lopez ("Lopez") claims to be the surviving domestic partner of the Reverend Charles E. Whipple ("Whipple") from 1987 until Whipple's death on February 20, 2009. Lopez claims that the two cohabitated with one another throughout their 22-year relationship. On February 20, 2009, Whipple died at the age of 95 and left behind an estate worth over $10 million. Lopez alleges in his complaint that, since Lopez was of lesser means, Whipple sought to provide for Lopez in the event that Whipple predeceased him. For example, Lopez states that Whipple established bank accounts with Lopez in which the two were joint tenants with rights of survivorship.

Subsequent to the signing of the 2005 Will, Whipple executed a power of attorney to Defendant Richard Fenn ("Fenn"). The complaint states that Fenn became acquainted with Whipple approximately ten years earlier, and was aware of the domestic partnership between Lopez and Whipple. Lopez claims that Fenn "resented" Lopez, "and consistently sought to denigrate, disparage and intimidate" him. The complaint alleges that because Fenn felt that Lopez was not "deserving" of the benefits of Whipple's estate plan, Fenn took, and continues to take deliberate measures to harm Lopez's personal and economic interests.

Lopez alleges that Fenn acted to deprive Lopez of the benefit of a bank account

maintained by Whipple at J.P. Morgan Chase in which Whipple and Lopez were joint tenants with a right of survivorship ("the Chase Account"). Lopez claims that, in February 2007, Fenn, "through his authority under the power of attorney and/or confidential relationship" with Whipple, withdrew $565,907.86, leaving Lopez with a balance of $3.48. Lopez maintains that Fenn transferred the funds "to an account which was not in whole or part in Plaintiff's name." Lopez states that in June 2008, Fenn caused approximately $300,000 to be withdrawn from it from the Chase Account.

Lopez's complaint alleged that Fenn took numerous other measures to thwart Whipple's intention of providing for Lopez upon his death. These included wrongfully withdrawing funds from a joint Merrill Lynch account with right of survivorship between Whipple and Lopez; falsely asserting the right to possess and determine the interment of Whipple's remains; wrongfully locking Lopez out of his home at 8 Perry Street in Manhattan on June 3, 2009; wrongfully locking Lopez out of the Cherry Grove house; and seeking to have Whipple's remains interred in a Philadelphia crypt, contrary to Lopez's wishes. Lopez's complaint asserted a total of twenty causes of action. By order dated July 7, 2010, the court granted Fenn's motion to dismiss the complaint with respect to nineteen causes of action, but denied Fenn's motion to dismiss with respect the Chase Account (Lopez's fifth cause of action).

Fenn now moves for summary judgment on Lopez's remaining cause of action. Fenn provides his own affidavit; an affidavit from Alexander N. Constantine, a Senior Financial Advisor at Chase; and a memorandum of law in support of his motion. Fenn refers the court to Chase Account (account number EBH-156868) records for the month of February 2007. These records indicate the account had a portfolio value of $566,013.02 in cash and cash equivalents. Fenn states that, on February 12, 2007, Whipple bought more than 566,000 shares, at $1.00 per share, of a Chase money market fund. This purchase is documented in the February 2007 records for the Chase Account. Fenn also provides the Chase Account records for the month of March 2007. These records indicate that the Chase Account had a total portfolio value of $563,914.68, which constituted $541,193.37 in securities, and $22,721.31 in cash and cash equivalents. Fenn states that "[t]he slight decrease in total portfolio value resulted from unrealized losses on the mutual funds purchased by Mr. Whipple."

With respect to the allegation that Fenn wrongfully converted $300,000 from the Chase Account in June 2008, Fenn states that "$322,000 was transferred out of

the Chase Account to another account, account no. EBH-147559, held at Chase by Mr. Whipple, individually (the 'Individual Account')." This is evidenced by Chase Account records and Individual Account records for the month of June 2008.

Fenn states that all of the transactions at issue herein were "made at the direction and authorization of Mr. Whipple." Moreover, he argues that he is entitled to judgment as a matter of law because (1) his actions were taken pursuant to a valid power of attorney ("POA") to act on Whipple's behalf; and (2) because Fenn never exercised control over the subject funds.

Lopez opposes the motion and cross-moves for summary judgment. Lopez submits his own affidavit; an attorney's affirmation; and a memorandum of law in support. In his affidavit, Lopez states that he and Whipple maintained joint checking accounts with rights of survivorship with Chase since 1990. "For years prior to Whipple's passing, 2005-07, the balance at Chase in the joint account was approximately $550,000." Lopez states that neither he nor Whipple made any substantial withdrawals from these joint accounts, and that they drew on other accounts for their sustenance. He alleges that all of the withdrawals and transfers from the subject Chase Account "were made solely and exclusively by Defendant Fenn," and were made "against the will and wishes of ... Whipple through his abuse of the power of attorney that Whipple had given him." Lopez claims that, contrary to Fenn's assertions, the subject transfers and withdrawals were not made at Whipple's direction. In fact, "Whipple repeatedly directed Fenn not to remove money from joint accounts of which [Lopez] was the beneficiary."

Lopez argues that Fenn's motion must be denied, and Lopez's cross-motion granted, because the undisputed facts establish that Fenn deprived Lopez of both his moiety interest and his survivorship interest in the Chase Account.

Fenn submits a memorandum of law in further support of his motion for summary judgment and in opposition to Lopez's cross-motion. Chase also submits an affirmation in opposition to the cross-motion for summary judgment.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party

opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Banking Law §675(a) provides that

> When a deposit of cash ... has been made ... with any banking organization ... in the name of such depositor ... and another person and in form to be paid or delivered to either, or the survivor of them, such deposit ... and any additions ... by either of such persons, after the making thereof, shall become the property of such persons as joint tenants and the same, together with all additions and accruals thereon, shall be held for the exclusive use of the persons so named, and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them....

It is well settled that a joint tenant has the right to withdraw and use his or her one-half interest, or "moiety," in the account; however, "[w]ithdrawal of more than that amount subjects the excess to suit for its recovery by the other joint tenant...." (*Mullen v. Linnane*, 218 A.D.2d 50, 55 [1st Dept. 1996]).

"A conversion occurs when one 'intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession'" (*Demry v. Wind*, 2011 NY Slip Op 2535, *1 [1st Dept. 2011], *quoting Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 [2007]). "Conversion causes of action have been unhesitatingly recognized in cases involving the unauthorized withdrawal of more than his share of the funds from a joint account by a cotenant (*Payne v. White*, 101 A.D.2d 975, 976 [3rd Dept. 1984]).

Here, the court finds that issues of fact preclude the awarding of summary judgment to either Lopez or Fenn. Even if Fenn's account of the facts is credited, and he acted pursuant to Whipple's direction, "[a] party acting as an agent on behalf of

a principal may not escape liability simply because the agent was acting at the time at the behest of the principal" (N.Y. Jur. 2d Agency §351, *citing Zampatori v. United Parcel Service*, 125 Misc.2d 405 [Sup. Ct., Monroe Co. 1984]). It is undisputed that the Chase Account was a joint account between Whipple and Lopez to which the presumption of joint tenancy with rights of survivorship attached. Fenn does not dispute that the Chase Account was a joint account with right of survivorship, nor does the record contain any evidence, much less clear and convincing proof, rebutting the presumption (*see Pinasco v. Ara*, 219 AD2d 540[1st Dept. 1995]). Lopez alleges in his affidavit that Fenn was the individual who withdrew the $322,000 from the subject Chase Account and placed it in Whipple's Individual Account. Moreover, records from the Individual Account document the transfer of the $322,000, and contain a handwritten note:

Whipple individual	322,000 came from EBH - 156868 at the request of Fenn

However, there is no proof in the record in admissible form that demonstrates who authorized the transfer.

Contrary to Lopez's allegations that Fenn withdrew $565,907.86 from the Chase Account in February 2007, the record reveals that no funds were withdrawn by Fenn at that time. Rather, the proceeds therein were used to purchase securities, which remained in the Chase Account. However, it is undisputed that in June 2008, a sum of $322,000 was transferred out of the Chase Account and placed into the Individual Account, out of Lopez's reach. The June 2008 statement for the subject Chase Account indicates a total portfolio of $245,487.66 after the transfer of $322,000. Without the transfer, the Chase Account would have had a total portfolio value of $567,487.66. Accordingly, Lopez's moiety (i.e., one-half of the account) was $283,743.83. Accordingly, the withdrawal of the $322,000 and transferring of said amount into Whipple's Individual Account deprived Lopez of $38,256.17 of his moiety.

In addition, an issue of fact remains as to whether Fenn was authorized to make the disputed withdrawal from the Chase Account at all. Fenn states in his affidavit that he acted at all times "with the direction and authorization of Mr. Whipple," and pursuant to the Chase POA. Lopez, on the other hand, states in his affidavit that "Whipple repeatedly directed Fenn not to remove money from joint accounts of which

[he] was the beneficiary."

> A power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal .... Because the relationship of an attorney-in-fact to his principal is that of agent and principal . . . , the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing (*Matter of Ferrara*, 2006 NY Slip Op 5156, *8 [2006]) (citations and internal quotes omitted).

An attorney-in-fact thus has "a duty to comply with all lawful instructions received from the principal ... concerning the agent's actions on behalf of the principal" (Restatement, Agency 3d, §8.09(2)). Based upon the record before the court, a jury could find that Fenn was specifically instructed not to transfer the $322,000 from the Chase Account to the Individual Account, and thus lacked the authority to do so; or that Chase was without authority to release the funds.

Wherefore it is hereby

ORDERED that Fenn's motion for summary judgment is denied; and it is further

ORDERED that Lopez's cross-motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 8, 2011

EILEEN A. RAKOWER, J.S.C.