

Holy Church of the Virgin Mary Home for the Aged in Icaria, Greece v Pan- Icarian Foundation

2011 NY Slip Op 33578(U)

December 9, 2011

Supreme Court, Queens County

Docket Number: 6393/10

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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HOLY CHURCH OF THE VIRGIN MARY HOME FOR
THE AGED IN ICARIA, GREECE,

Plaintiff(s),

Index No.:6393/10

Motion Date:10/11/11

- against -

Motion Cal. No.: 14
Motion Seq. No: 1

PAN-ICARIAN FOUNDATION, ANTHONY KAYAFAS,
SOCRATES KOUTSOUTIS, GUS YIAKAS, MARIA
VASSILAROS, COLLEEN XENAKIS, PAN ICARIAN
BROTHERHOOD OF AMERICA, SONJA STEFANADIS,
E. TERRY PLATIS, MARGO PISAK, individually
and as an Executrix and Trustee of the
Souroumanis Estate and Souroumanis Family
Fund,

Defendant(s).

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The following papers numbered 1 - 12 read on this motion by the
defendants Pan-Icarian Foundation, Anthony Kayafas, Socrates
Koutsoutis, Gus Yiakas and Maria Vassilaros for an order granting
summary judgment and dismissing the complaint against them.

	<u>Papers Numbered</u>
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Upon the foregoing papers it is **ORDERED** that the motion is
decided as follows:

Plaintiff in this action seeks to recover damages for, *inter
alia*, breach of contract, conversion, fraud and conspiracy to
commit fraud. This action was commenced on March 15, 2010 by the
filing of a summons with notice. On or about September 29, 2010,

plaintiff served a verified complaint. According to the complaint, plaintiff seeks to recover money that was bequeathed to it through the Last Will and Testament ("Will") and Codicil to the Last Will and Testament ("Codicil") of non-party John P. Souroumanis. Pursuant to the terms of the will and codicil, defendant Pan-Icarian Foundation ("Foundation") was to receive the sum of \$1,005,000 from non-party John P. Souroumanis' estate and was directed to distribute these assets to the plaintiff. Mr. Souroumanis died on August 11, 2003. It is uncontested that, the \$1,005,000 was received by the Foundation in May, 2005.

Plaintiff further asserts that defendants Pan-Icararian Brotherhood of America ("Brotherhood") and Foundation acted together and wrongfully refused to disburse the subject funds. In its complaint, asserts that, in March, 2007, non-party John Howe, as Executor of the Estate, demanded the return of the \$1,005,000 due to the defendants' continued failure to distribute the funds to the plaintiff. It is uncontested that, in February, 2009, plaintiff received a payment of \$30,000 from the Foundation. To date, no further payments have been distributed.

Defendants Pan-Icarian Foundation, Anthony Kayafas, Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros now move, pursuant to CPLR §3211(a)(3), (5), (7), (8) and (11), for an order dismissing the complaint against them. The moving defendants assert that plaintiff lacks standing to commence and maintain this action, that plaintiff's first, fourth and fifth causes of action are barred by the applicable statutes of limitations, that plaintiff has failed to state a cause of action, that plaintiff has no jurisdiction over the defendants Pan-Icarian Foundation, Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros and that the individual defendants are immune from prosecution under the Not-for-Profit Corporation Law §720-a.

CPLR §3211(a)(3)

Defendants Pan-Icarian Foundation, Anthony Kayafas, Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros assert that the complaint must be dismissed because plaintiff lacks standing to commence or maintain this action. Business Corporation Law §1312 states that no foreign corporation doing business in the State of New York may maintain an action in the court of this state without being duly authorized to do so. In this action, it is uncontested that plaintiff is a not a New York corporation and that plaintiff has not been issued a certificate of authority to do business in the State of New York.

However, the movants have failed to submit any evidence that the plaintiff is doing business within the State of New York. New York courts have ruled that a solitary transaction or contract is not sufficient to reach the level of doing business. In a motion to

dismiss a complaint due to a plaintiff's alleged lack of authority to do business within the state, a movant must demonstrate that "plaintiff's activities in New York have been so systematic and regular as to manifest continuity of activity in the jurisdiction" (Construction Specialties, Inc. v. Hartford Insurance Co., 97 A.D.2d 808 [2d Dept. 1983]). In support of the instant motion, the moving defendants have offered no proof of systematic or regular activity by plaintiff within the State of New York. Accordingly, the movants have failed to prove that dismissal, pursuant to CPLR §3211(a)(3) is warranted.

CPLR §3211(a)(5)

Defendants Pan-Icarian Foundation, Anthony Kayafas, Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros also assert that plaintiff's first, fourth and fifth causes of action must be dismissed as this action was commenced after the expiration of the relevant statute of limitations. Plaintiff's first cause of action alleges that the defendants converted the assets of the Estate of John P. Souroumanis ("the Estate"). Plaintiff's fourth and fifth causes of action allege that the defendant Foundation and defendants Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros, as officers of the Foundation, breached their fiduciary duty to the plaintiff by failing to distribute the Estate's assets.

Conversion

A conversion occurs 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" (Colavito v. New York Organ Donor Network, 8 NY3d 43 [2d Dept. 2006]). CPLR §214 mandates that a cause of action for conversion be commenced within three years of the date that the cause of action accrues. New York courts have held that, where the original possession is unlawful, the cause of action accrues from the date of possession. However, where the possession was originally lawful, a plaintiff's cause of action for conversion accrues when the plaintiff makes a demand for return of the property and such demand is refused by the defendant (See, Estate of Rausman, 50 AD3d 909 [2d Dept. 2008]); Berman v. Goldsmith, 141 Ad2d 487 [2d Dept. 2006]; King v. Gaier, 305 Ad2d 683 [2d Dept. 2003]).

In the instant action, the moving defendants assert that plaintiff's cause of action for conversion accrued in May, 2005 when the will of John P. Souroumanis was probated. However, as it is uncontested that defendant Foundation was originally in lawful possession of the Estate's assets, it is clear that plaintiff's cause of action for conversion did not accrue until February, 2009, when plaintiff made a demand for payment. As this action was commenced in March, 2010, plaintiff's first cause of action

for conversion is timely.

Breach of Fiduciary Duty

New York State does not have a specific statute of limitations for claims of breach of fiduciary duty. In IDT Corp. v. Morgan Stanley Dean Witter and Co., et al.,¹² NY3d 132 (2009) the New York Court of Appeals ruled that, where the remedy sought for the alleged breach is for monetary damages only, the three-year statute of limitations set forth by CPLR §214 is the controlling statute.

In this action, it is clear that plaintiff seeks only monetary damages for its allegations of breach of fiduciary duty. Thus, plaintiff had three years after the alleged breach to commence the instant action. Although the moving defendants assert that any alleged breach of fiduciary duty must have occurred in May, 2005 when the movants came into possession of the Estate's assets, it is clear that plaintiff was paid the sum of \$30,000 by the defendants in February, 2009. It is only when the movants failed to pay the remainder of the amount allegedly due to the plaintiff that a cause of action for breach of fiduciary duty could have accrued. As this action was commenced in March, 2010, plaintiff's fourth and fifth causes of action for conversion are timely.

CPLR §3211(a) (7)

Defendants Pan-Icarian Foundation, Anthony Kayafas, Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros assert that the complaint must be dismissed because plaintiff's complaint fails to state a cause of action in its first, third, fourth, fifth, seventh, eighth, ninth and tenth causes of action. It is well-settled that a motion to dismiss made pursuant to CPLR §3211(a) (7), can only be granted if, from the pleadings' four corners, factual allegations are not discerned which manifest any cause of action cognizable at law. In furtherance of this task, the court liberally construes the complaint, accepts as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accords the plaintiff the benefit of every possible favorable inference (See, 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 [2002]).

Conversion

As previously stated, plaintiff's first cause of action alleges conversion. In order to establish a cause of action for conversion, plaintiff must establish that it had legal ownership and a right to immediate possession of a specific, tangible property and that the defendants exercised an unauthorized control over the property (See, Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453 [2d Dept. 2003]. Where a plaintiff

can establish that it has a right to possess, but has never had actual possession, control or title to a property, no claim for conversion exists (See, Orchid Construction Corp. v. Gonzalez, et al., 932 NYS2d 125 [2d Dept. 2011]; Fiorenti, supra).

In the instant action, plaintiff's complaint alleges that it has a right to possess the remaining \$975,000 bequeathed to it. However, as plaintiff does not state that it ever had actual possession, control or title of this sum, plaintiff has failed to state a cause of action for conversion.

Fraud

Plaintiff's third and ninth causes of action allege that defendant Foundation and defendants Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros, as officers of the Foundation, committed fraud. A complaint alleging fraud will be deemed sufficient where it states that there was a representation of a material fact, that the representation was false, that the party who made the representation knew that it was false when it was made, that plaintiff justifiably relied on the representation and that plaintiff was injured as a result of this reliance (See, Eurycleia Partners, LP v Seward and Kissel, LLP, 12 NY3d 553 [2009]).

A review of the instant complaint reveals that plaintiff alleges that the moving defendants knowingly made false representations to plaintiff, that plaintiff reasonable relied on these representations and that plaintiff was damaged as a result of this reliance. Thus, plaintiff's complaint sufficiently states a cause of action for fraud.

Breach of Fiduciary Duty

Plaintiff's fourth and fifth causes of action allege that defendant Foundation and defendants Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros, as officers of the Foundation, breached their fiduciary duty by failing to distribute the subject \$975,000 to plaintiff. In order to maintain a cause of action for breach of fiduciary duty, a plaintiff must plead (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. (See, Daly v Kochanowicz, 67 AD3d 78 [2d Dept. 2009]).

In its complaint, plaintiff asserts that, the Will and Codicil specified that the defendant Foundation was to receive \$1,005,000 from the Estate and to distribute same to the plaintiff. Consequently, plaintiff asserts that, by virtue of defendants' acceptance of this sum, a fiduciary relationship between the parties was created. New York courts have ruled that a fiduciary owes a duty of loyalty to those whose interest the fiduciary is to protect (See, Matter of Wallens, 9 NY3d 117

[2007]; Birnbaum v. Birnbuam, 73 NY2d 461 [1989]). In Wallens, the New York Court of Appeals stated that, in the context of a trustee's distribution of trust assets, a trustee owes a duty to the beneficiary to distribute trust assets solely in the best interests of the beneficiary (See, Wallens, supra at 122]).

The relationship between the plaintiff, defendant Foundation and defendants Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros, as officers of the Foundation, is analogous to that of a trustee and trust beneficiary. It is clear that the Will and Codicil entrusted certain assets to the moving defendants solely so that these assets could be transferred to the plaintiff. This court hereby rules that the existence of a fiduciary relationship between the parties has been sufficiently asserted in the complaint. The complaint also contains the requisite allegations of the defendants' misconduct and allegations of the damages that plaintiff sustained as a result of this misconduct. Thus, plaintiff has sufficiently pled its fourth and fifth causes of action for breach of fiduciary trust.

Breach of Contract

In its seventh and eighth causes of action, plaintiff alleges that defendant Foundation and defendants Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros, as officers of the Foundation, breached their contract with the Estate to distribute the funds received by them to the plaintiff. Plaintiff asserts that it is a third-party beneficiary to this contract. It is well-settled that non-parties to a contract generally lack the required privity to sue. A non-party may sue to enforce a contract only if it can be demonstrated that the non-party is an intended third-party beneficiary of the contract (See, Green v. Fox Island Park Autobody, 255 AD2d 417[2d Dept, 1998]).

In its complaint, plaintiff asserts that defendant Foundation and defendants Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros, as officers of the Foundation had a contract with the Estate and with the Trustee of the Souroumanis Family Trust in which they agreed to distribute the subject funds. However, plaintiff has not alleged that any separate agreement existed other than the Will and Codicil themselves. It is axiomatic that, a contract is not binding unless it is shown that there is an agreement, a promise and consideration between the parties. Consideration exists if there is a "benefit to the promisor or a detriment to the promisee" and "it is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him" (Weiner v McGraw-Hill, Inc., 57 N.Y.2d 458[1982]. See, also, Hollander v. Lipman, 65 Ad3d 1086 [2d Dept. 2009]).

In the instant action, plaintiff has failed to demonstrate that a promise was made and that there was a benefit to non-party

John Souroumanis or a detriment to the defendants as consideration for a contract. Thus, plaintiff has failed to demonstrate that the Will and Codicil are contracts to which it is a third-party beneficiary. Thus, plaintiff's seventh and eighth causes of action for breach of contract must be dismissed.

Conspiracy to Commit Fraud

Plaintiff's tenth cause of action is for conspiracy to defraud. However, New York does not recognize civil conspiracy to commit a tort, including conspiracy to defraud, as an independent cause of action (see, Alexander & Alexander, Inc. v. Fritzen, 68 NY2d 968 [1986]; Cash v. Titan Financial Services, Inc., 58 AD3d 785 [2d Dept. 2009]). Thus, plaintiff's tenth cause of action must be dismissed by this court.

CPLR §3211(a)(8), (11)

Defendants Pan-Icarian Foundation, Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros assert that the instant complaint must also be dismissed, pursuant to CPLR §3211(a)(8), due to plaintiff's failure to acquire jurisdiction over them and, pursuant to CPLR §3211(a)(11) because they are immune from liability pursuant to Not-for-Profit Corporation Law §720-a.

CPLR §3211(a)(8) gives this court the authority to dismiss an action where the court has no jurisdiction over the person of the defendant (See, CPLR §3211; Bramwell v. Tucker, 107 AD2d 731 [2d Dept. 1995]). It is uncontested that defendant Foundation is a Pennsylvania corporation. The moving defendants also allege that defendant Koutsoutis is a resident of the State of Maryland and that defendants Yiakas and Vassilaros are residents of the State of California. Thus, the movants assert this court has no jurisdiction over them.

Additionally, the movants assert that they are immune from liability in this action because, pursuant to Not-for-Profit Corporation Law §720-a, they cannot be held liable for their actions as officers of the defendant Foundation unless plaintiff proves that they were grossly negligent or caused intentional harm.

In support of the above-mentioned assertions, the movants submit the affidavits of Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros. However, none of these affidavits were executed within the State of New York. It is also noted that the affidavit submitted on behalf of defendant Gus Yiakas was not notarized. Pursuant to CPLR §2309[c], an affidavit executed outside of the State of New York may be admissible if it is accompanied by a certificate authenticating the authority of the notary who administered the oath. No such certificate is annexed to the submitted affidavits. Thus, the affidavits were not

considered by this court.

It is well-settled that the failure to submit such an affidavit is not fatal to the submission and that, pursuant to CPLR §2001, a movant may be given the opportunity to correct a mistake, omission, defect or irregularity (See, CPLR §2001; Betz v. Conti, 892 NYS2d 477 [2d Dept. 2010]; Smith v. Allstate Insurance Company, 38 AD3d 522 [2d Dept. 2007]). Thus, this court will allow the movants an opportunity to cure the defect of their submissions.

Accordingly, it is,

ORDERED, that those portions of the instant motion which seek dismissal of the complaint, pursuant to CPLR §3211(a)(3), (5) are denied in their entirety. It is further,

ORDERED, that the portions of the instant motion which seeks dismissal of plaintiff's third, fourth, fifth and ninth causes of action are also denied. Plaintiff has sufficiently pled its causes of action for fraud and breach of fiduciary duty. It is further,

ORDERED, that those portions of the instant motion which seek dismissal of plaintiff's first, seventh, eighth and tenth causes of action are granted. Plaintiff's causes of action for conversion, breach of contract and conspiracy to defraud are hereby dismissed. Finally, it is,

ORDERED, that those portions of the instant motion which seek dismissal of the complaint, pursuant to CPLR §3211(a)(8), (11) are denied with leave to renew upon submission of a properly notarized affidavit of defendant Gus Yiakas and submission of the required certificates authenticating the authority of the notary who administered the oath to affiants Socrates Koutsoutis, Gus Yiakas and Maria Vassilaros.

Dated: December 9, 2011

JANICE A. TAYLOR, J.S.C.