CMS Life Ins. Opportunity Fund, L.P. v Progressive Capital Solutions, LLC
2012 NY Slip Op 33370(U)
July 23, 2012
Supreme Court, New York County
Docket Number: 653646/11
Judge: Bernard J. Fried
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED E-FILE PART 60
Justice

Index Number : 653646/2011
CMS LIFE INSURANCE
vs.
PROGRESSIVE CAPITAL
SEQUENCE NUMBER : 012
DISMISS ACTION

INDEX NO. 653646/11
MOTION DATE _____
MOTION SEQ. NO. 012

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

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

Dated: 7/23/2012

_____, J.S.C.
HON. BERNARD J. FRIED

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 60

----------X

CMS LIFE INSURANCE OPPORTUNITY FUND, LP., and CNF II PARTNERS,

Plaintiffs,

-against-

Index No. 653646/11

PROGRESSIVE CAPITAL SOLUTIONS, LLC and JOHN PUGLISI,

DECISION AND ORDER

Defendants.

----------X

FRIED, J:

Motion sequence numbers 012 and 013 in the above-captioned action are consolidated for disposition.

In motion sequence number 012, defendants move, pursuant to CPLR 3211 (a) (3), (a) (7) and (a) (10) to dismiss the action. In motion sequence number 013, judgment creditor Global Secured Capital Fund, L.P. (Global) moves, pursuant to CPLR 1012 and 1013, to intervene as a plaintiff in the above-captioned action.

Plaintiffs bring this action to recover approximately $28 million that they allege was misappropriated by defendants Progressive Capital Solutions, LLC (Progressive) and John Puglisi (Puglisi). Plaintiffs CNF II Partners (CNF) and CMS Life Insurance Opportunity Fund, L.P. (CMS) are investors in the life settlement industry, which involves the sale of life insurance policies by insureds to investors. Investors in that market, known as life settlement providers, buy life insurance policies from policy owners, paying a lump sum to the owner, which is higher than the surrender value offered by the insurer, and are assigned the insured's

death benefits. The investor assumes the obligation to pay the remaining premiums to the insurance carrier until the insured dies. The risk involved in the investment is that, if the insured lives longer than projected, the cost of continued payment of the premiums may erode any anticipated profit.

Plaintiffs allege that in mid-to-late 2008, Philip Schatten (Schatten) and CMS formed CNF. CMS, through its investment as the sole limited partner in CNFII-Q, L.P., contributed approximately $28 million to CNF. CMS's contribution currently constitutes over a 95% ownership interest in CNF.

Using principally CMS's funds, CNF purchased approximately 90 life insurance policies. CNF's strategy was to use a portion of the policies as a long-term investment which could be funded by short-term trades on certain specific policies. Those short-term trades were expected to yield sufficient cash to pay premiums for the long-term policies without additional infusions of cash, as well as a return on capital invested.

CNF thereafter engaged defendants as brokers, who represented that they could sell certain policies in accordance with the strategy devised by CNF. Plaintiffs allege that they provided the policies and cash to defendants so that certain policies could be bought and sold on their behalf.

Plaintiffs allege that defendants promised to sell the policies and pay CNF defined prices in return, with defendants retaining any excess. In accordance with that understanding, which plaintiffs allege consisted of both written an oral agreements, defendants were not permitted to alienate CNF's rights unless and until a bona fide transaction was consummated, and the money was provided to CNF.

Thus, for example, on March 31, 2011, CNF and Progressive entered into a $20.5 million promissory note (the Note) relating to the transfer of 32 policies to Progressive (Goldberg Aff., Ex. D). Under the terms of the Note, Progressive took the policies in exchange for the $20.5 million obligation, which it was required to pay back with 180 days. That obligation was subsequently extended until the end of November 2011 (*id.*, Ex. F). During that time, Progressive was obligated to pay the premiums on those policies and was not permitted to transfer any of its interest in any of the policies without CNF's prior written consent (*id.*, Ex. D, Article I [A] [3], Article V [A] [2]). The Note also provided that, should any enumerated default events occur, CNF was entitled to re-purchase the policies for $1.00 (*id.*, Article IV [B] [2]).

Plaintiffs allege that, as to the 32 policies specified in the Note, defendants either sold the policies to a third party and kept the money, or allowed the policies to lapse for failure to pay premiums, despite Progressive's obligation in the Note to make those payments. During this time, Progressive falsely represented to plaintiff that the policies were owned by CNF, and remained in good standing. Plaintiffs allege that in two instances, death benefits were paid but Progressive absconded with those funds after falsely telling plaintiff that the money was "on its way" (Complaint, ¶ 24).

Plaintiffs further allege that, as to other policies, CNF gave cash to Progressive, which it was supposed to use to buy policies for CNF's benefit. Instead of buying the policies, in 20 of the 29 instances, Progressive simply kept the money, or used it for other unrelated purposes, and then falsely informed CNF that Progressive had purchased policies on CNF's behalf. In eight of the instances, defendants actually did purchase policies, but

then sold them to third parties and kept the proceeds, again falsely reporting that CNF owned the policies.

With regard to a third group of eight policies belonging to plaintiffs, plaintiffs allege that Progressive either sold the policies and kept the money or used the policies as collateral for its own obligations to third parties.

Plaintiffs allege that, in December 2011, defendant Puglisi confessed to plaintiffs that he had taken their money. Shortly thereafter, plaintiffs commenced the within action. In their amended verified complaint, plaintiffs allege causes of action for conversion (first cause of action) and imposition of a constructive trust (second cause of action).

Motion Sequence Number 012

Defendants move to dismiss on several grounds. First, defendants allege that CNF was not registered with the State of New Jersey until January 25, 2012, and was, therefore, not a legal entity during the time of the transactions at issue or at the time it brought suit. However, defendants themselves have presented a Business Registration Certificate for CNF II Partners which has an effective date of August 9, 2010 (Goldberg Aff., Ex H). Accordingly, during the relevant time period, CNF was a partnership registered in New Jersey, which is prior to the dates of the transactions herein. Further, under New Jersey law "[a] partnership may sue and be sued in the name of the partnership" (N.J. Stat. § 42:1A-19).

Defendants further contend that plaintiffs are precluded from bringing the instant lawsuit because they are unregistered entities "doing business" in New York. Under New York Partnership Law, § 121-907, "[a] foreign limited partnership doing business in this state without having received a certificate of authority to do business in this state may not

maintain any action . . . unless and until such partnership shall have received a certificate of authority in this state" (McKinney's Partnership Law § 121-907 [a]). However, New York courts hold that an entity is only "doing business" in New York if that entity is "engaged in a regular and continuous course of conduct in the State [quotation marks and citation omitted]" (*Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008]). Moreover, a defendant relying upon New York Partnership Law bears the burden of proving that the plaintiff's business activities were "'not just casual or occasional,' but 'so systematic and regular as to manifest continuity of activity in the jurisdiction'" (*id.* quoting *S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373, 373 [2d Dept 1998]). These statutes require a higher level of "doing business" than the general jurisdiction statute in CPLR 302 (*AirTran N.Y., LLC v Midwest Air Group, Inc.*, 46 AD3d 208 [1st Dept 2007]). Here, defendants have not alleged that plaintiffs conducted any activity in New York other than the business plaintiffs themselves allege they conducted with the defendants. Those transactions, in which plaintiffs allege they hired defendants as their brokers, are insufficient to constitute a systematic and regular course of business within this jurisdiction. Accordingly, the presumption that plaintiff CMS, which is a Pennsylvania partnership, and CNF, a New Jersey partnership, do business in their respective home states, has not been overcome (*see Great White Whale Adv. v First Festival Prods.*, 81 AD2d 704, 706 [3d Dept 1981]).

Defendants next allege that the plaintiffs have not adequately stated claims for conversion or a constructive trust. "'When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . the

benefit of every possible favorable inference'" (*People v Coventry First LLC*, 13 NY3d 108, 115 [2009], quoting *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]).

As to plaintiffs' claim for conversion "[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" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). There are two essential elements of conversion: '(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 [citations omitted]" (*id.* at 50; *Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 885 [1st Dept 2009], *lv dismissed* 14 NY3d 785 [2010]).

Defendants contend that CMS has no possessory interest or right to either the money loaned to Progressive, under the Note, or to the life settlement policies provided to Progressive under a Purchase Agreement and other assignment documents. Defendants allege that since CMS is not a party to those agreements it lacks privity with the defendants. Defendants further argue that the claim by CNF has no merit because CNF is not a legal entity.

As an initial matter, privity of contract is not an element of a claim for conversion. Plaintiffs have sufficiently alleged that they were the rightful owners of various assets consisting of cash and insurance policies, and that defendants interfered with those ownership rights by stealing the cash, selling the policies and absconding with the proceeds. Further, defendants have failed to demonstrate that plaintiffs' conversion claim is predicated

on a mere breach of contract and must therefore be dismissed (*c.f. Quinones v Schaap*, 91 AD3d 739 [2d Dept 2012]).

Defendants also argue that plaintiffs have not stated a claim for the imposition of a constructive trust. A constructive trust is "'[a]n equitable remedy that a court imposes against one who has obtained property by wrongdoing'" (*Beason v Kleine*, 96 AD3d 1611 [4th Dept 2012, 2012 N.Y. Slip Op. 04894 *2, quoting Black's Law Dictionary 1649 [9th ed 2009]). "The elements needed to establish a constructive trust are: [1] a confidential or fiduciary relationship, [2] a promise, [3] a transfer in reliance thereon, and [4] unjust enrichment" (*Enzien v Enzien*, 96 AD3d 1136, 2012 NY Slip Op 04449, *2 [3d Dept 2012]).

As to this argument, defendants assert that this was merely a conventional arm's length relationship and not a confidential or fiduciary relationship. "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005, quoting Restatement [Second] of Torts § 874, Comment *a*). "It exists only when a person reposes a high level of confidence and reliance in another, who thereby exercises control and dominance over him" (*People v Coventry First LLC*, 13 NY3d at 115). Thus, life settlement brokers, who held themselves out as working to obtain the highest price for their clients' policies were held to be fiduciaries for their clients (*id.*). Here, CNF has alleged that under the agreements between CNF and Progressive, defendants promised to sell the policies and pay CNF defined prices in return, with defendants retaining any excess (Complaint, ¶ 18). Were these the sole transactions at issue, no fiduciary relationship would have been created. However, as to other policies CNF provided cash to

Progressive, which Progressive was supposed to use to buy policies for CNF's benefit (*id.*, ¶ 23). This created a fiduciary relationship between the parties. Plaintiffs have, therefore, sufficiently alleged a cause of action for the imposition of a constructive trust.

Defendants next seek to dismiss the action pursuant to CPLR 3211 (a) (10), based upon plaintiffs' failure to join necessary parties. Defendants contend that there are a number of related entities and that they entered into an original Purchase Agreement, dated November 1, 2010 (the Purchase Agreement) with CNF II, LLC, not CNF II Partners, the plaintiff herein. CPLR 1001 (a) provides that "[p]ersons . . . who might be inequitably affected by a judgment in the action" are necessary parties whose joinder is required. Plaintiffs contend that the stolen cash and policies belong to CNF and CMS. At this point in the proceedings, defendants have, at best, suggested that there may be an issue as to ownership of some of the policies. If, during the course of the action, defendants present evidence to indicating that CNF and/or CMS were not the owners of policies in issue, or were not the source of the funds alleged to have been stolen, they may make whatever motion is deemed appropriate (*see City of New York v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979]).

Motion Sequence Number 013

In motion sequence number 013, proposed intervenor-petitioner Global moves, pursuant to CPLR 1012 and 1013, to intervene, as of right, or alternatively, by permission, in this action.

Global alleges that, in October 2011, it commenced an action against Progressive and one of its affiliates by filing a motion for summary judgment in lieu of complaint. Global's

action against Progressive involved a revolving line of credit that was to be used to purchase life insurance policies. On February 9, 2012, Global obtained a final judgment in the amount of $268,805.31 against the defendants in that action. That judgment has not been satisfied.

Global seeks to intervene in this action because I has entered an order attaching, in favor of CMS, all assets in which Progressive has an interest up to the amount of $28 million. Global asserts, upon information and belief, that this amount exceeds the value of the sum total of all of Progressive's assets. Plaintiffs oppose the motion because Global has no interest in the subject property, namely the life insurance policies, which are the subject of this action.

CPLR 1012 (a) (3) provides that a party may intervene in an action as of right when, inter alia, "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." In addition, a court, in its discretion, may permit a party to intervene, inter alia, "when the person's claim or defense and the main action have a common question of law or fact" (CPLR 1013).

Since there are no common issues of law or fact that Global's judgment against Progressive has with the present action, there is no basis to allow it to intervene in the present action as a matter of judicial discretion under CPLR 1013 (*see Gladstein v Martorella*, 75 AD3d 465 [1st Dept 2010]).

As to intervention as of right, Global has not shown that it has an interest in either the property (i.e. the insurance policies) or the funds which Progressive may hold. Where, as here, funds are not segregated, but rather are commingled, they cannot be identified as a

particular "fund" to which Global, as a judgment creditor would have a right (*see id.* at *467*). Finally, while a judgment in favor of plaintiffs may have a practical pecuniary effect on Global's enforcement of its judgment, its legal rights will not be adversely affected by a judgment in favor of plaintiffs (*id.*).

Accordingly, based upon the foregoing, it is

ORDERED that as to motion sequence number 012, the motion by defendants Progressive Capital solutions, LLC and John Puglisi to dismiss the action is denied; and it is further

ORDERED that as to motion sequence number 013, the motion by proposed intervenor-petitioner Global Secured Capital Fund, L.P. to intervene is denied.

July 23, 2012

ENTER:

J. S. C.

HON. BERNARD J. FRIED