Reisner v Langenthal
2017 NY Slip Op 31157(U)
May 30, 2017
Supreme Court, New York County
Docket Number: 157195/16
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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RICKI REISNER and RICHARD REISNER, as Preliminary Executors of the Estate of LOUIS GOTTLIEB,

Plaintiffs,

-against-

STEVEN LANGENTHAL and JANET LANGENTHAL, as Individuals and as Trustees of the LANGENTHAL FAMILY CHARITABLE REMAINDER TRUST, and the LANGENTHAL FAMILY CHARITABLE REMAINDER TRUST,

Defendants.

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Index No. 157195/16
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Defendants Steven Langenthal, Janet Langenthal, and the Langenthal Family Charitable Remainder Trust (collectively "Defendants") move pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred. Plaintiffs Ricki Reisner and Richard Reisner ("Plaintiffs") oppose the motion, arguing among other things that Defendants' fraudulent activities preclude them from taking advantage of New York's statutes of limitation.

BACKGROUND

Plaintiffs' decedent Louis Gottlieb ("Decedent") passed away on January 31, 2015. The Decedent's daughter, plaintiff Ricki Reisner, and her husband, plaintiff Richard Reisner, were named as executors of the Decedent's estate under a will executed by him on October 12, 2012.[1] Defendant Steven Langenthal is an accountant who provided services to the Decedent from the early 1990's up to his death. Mr. Langenthal and defendant Janet Langenthal are married.

In March of 2011, the Decedent created the Louis Gottlieb Revocable Trust ("Gottlieb Trust"). Over the course of the next four years approximately $11,500,000 from the Gottlieb Trust

[1] A copy of the Decedent's will is annexed to the moving papers as exhibit A.

[1]

was transferred to a number of persons, including Ricki Reisner, Richard Reisner, and their son Jeffrey Reisner; Steven Langenthal and Janet Langenthal; Peter Max, a relative of the Decedent's wife; and the United Jewish Appeal.

On or about June 11, 2015, a few months after the Decedent died, Plaintiffs commenced a proceeding against the Langenthals and their three adult children in Nassau County Surrogate's Court, Index No. 2015-383313(A), seeking to recover all of the money received by them from the Gottlieb Trust and all of the money paid by the Decedent directly to Mr. Langenthal's accounting practice. Plaintiffs commenced a separate proceeding in Nassau County Surrogate's Court on August 13, 2015 against Peter Max, Index No. 2015-383313(B), to recover the monies that he received from the Gottlieb Trust. In those actions Plaintiffs claim that both the Langenthals and Mr. Max obtained the monies from the Gottlieb Trust by exerting undue influence over the Decedent.[2] It appears that during the course of discovery in the Nassau County proceedings the Langenthals produced documents which refer to nine apartments once owned by the Decedent in a building located at 56 West 82nd Street in Manhattan. Plaintiffs allege that their resultant research revealed the titles to those apartments were transferred to the Defendants in 2005 and 2006.

The complaint[3] in this action was filed on August 26, 2016. It alleges that one such apartment was transferred by the Decedent directly to Steven Langenthal on or about December 13, 2005. The other eight were allegedly transferred to a trust created by the Langenthals called the Langenthal Family Charitable Remainder Trust ("Langenthal Trust") on June 30, 2006. The Complaint alleges that on or about and between December 20, 2006 and June 9, 2010 Defendants sold all nine apartments for a total amount of $1,628,000. The proceeds of the sale of all nine apartments were deposited into the Langenthal Trust. Plaintiffs claim that these transfers were

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[2] Exhibits C, D, E, and F to the moving papers.

[3] Exhibit G to the moving papers ("Complaint").

accomplished without the Decedent's knowledge through a power of attorney[4] allegedly forged by Mr. Langenthal (Exhibit G, ¶¶ 52, 55, 57, 63):

> 52. Steve made at least the following material omissions of fact to the Decedent:
> (i) Upon information and belief, that Steve had forged the Power of Attorney and caused it to be falsely notarized;
> (ii) That Steve had caused shares of stock in the 56 West 82nd Street apartments to be issued to himself and the Langenthal Trust;
> (iii) Upon information and belief, that Steve had forged New York State and New York City tax documents concerning the 56 West 82nd Street apartments; and
> (iv) That the Langenthal Defendants had benefitted from sales of the 56 West 82nd Street apartments. [5]
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> * * * *
>
> 55. Steve actively concealed these material facts from the Decedent by causing all documents relating to the Power of Attorney and the transfers of the 56 West 82nd Street apartments to be delivered to himself, rather than to the Decedent.
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> * * * *
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> 57. Upon information and belief, Steve intended to defraud the Decedent of his ownership interests in the 56 West 82nd Street apartments.
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> * * * *
>
> 63. By taking the Decedent's ownership interests in the 56 West 82nd Street apartments, selling them for not less than $1,628,000, and putting the proceeds into the Langenthal Trust, Steve engaged in blatant self-dealing and did not act in the Decedent's best interests.

The Complaint asserts five causes of action sounding in fraud, conversion, unjust enrichment, and two counts of breach of fiduciary duty. Defendants contend that all five causes of action began to accrue no later than June 22, 2006, the date the group of eight apartments were transferred to the Langenthal Trust. Defendants thus argue that Plaintiffs' conversion claim, which is governed by a three-year limitation period, and Plaintiffs' fraud, breach of fiduciary duty, and unjust enrichment claims, which are governed by a six-year limitation period, are all time-barred. Defendants submit that Plaintiffs are not entitled to the benefit of an extension of either limitation period despite Plaintiffs' allegation that they did not discover the transfers until after the Decedent's

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[4] A copy of the power of attorney at issue is annexed to the Complaint as exhibit A.

[5] While the power of attorney granted Mr. Langenthal the power to handle transactions with respect to the 56 West 82nd Street apartments, it also expressly forbade Mr. Langenthal from personally gaining from any such transactions.

death. Defendants also provide excerpts from Plaintiffs' deposition transcripts in the Nassau County proceedings to demonstrate that they knew "well before Louis Gottlieb's death (and not afterward, as they claim in their complaint) that he had divested himself of ownership interest in the apartment units in the West 82nd Street building."[6] In their opposition to the motion Plaintiffs do not submit affidavits challenging Defendants' allegations, relying instead solely upon the allegations of their Verified Complaint. Distilled to its essence, Plaintiffs argue that Defendants are equitably estopped from invoking New York's statutes of limitation because of their allegedly manifest fraudulent conduct against both the Decedent and these Plaintiffs, namely the forgery that led to this action and the commission of perjuries in the Nassau County proceedings.

DISCUSSION

On a CPLR 3211 motion to dismiss the court must afford the pleadings a liberal construction, must accept the facts as alleged in the complaint as true, and must accord the plaintiff the benefit of every favorable inference. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011); *see also Leon v Martinez*, 84 NY2d 83, 88 (1994) ("We . . . determine only whether the facts as alleged fit within any cognizable legal theory"). A motion to dismiss will fail if "from [the Complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976).[7]

Pursuant to CPLR 3211(a)(5), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be

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[6] Moving Affirmation of Robert Zausmer Esq. dated September 29, 2016, p. 13 (emphasis in original).

[7] But see *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999) aff'd 94 NY2d 659 (2000) ("Where extrinsic evidence is used, the standard of review under a CPLR 3211 motion is 'whether the proponent of the pleading has a cause of action, not whether he has stated one' . . . . In cases where the court has considered extrinsic evidence on a CPLR 3211 motion, 'the allegations are not deemed true .... The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.'. . ." (internal citations omitted)

maintained because of . . . [the] statute of limitations." On a CPLR 3211(a)(5) motion to dismiss "defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." *Benn v Benn*, 82 AD3d 548, 548 (1st Dept 2011) (quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [1st Dept 2008]). "[P]laintiff's submissions in response to the motion 'must be given their most favorable intendment.'" *Benn*, 82AD3d at 548 (quoting *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

Pursuant to CPLR 213(8), the statute of limitations for actions based upon fraud is "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." *See Gerschel v Christensen*, 143 AD3d 555, 557 (1st Dept 2016) (internal citations omitted) (Where "an allegation of fraud is essential to a breach of fiduciary duty claim" . . . "[t]he discovery accrual rule . . . applies").

As this is a pre-answer motion to dismiss, without more the court must presume the veracity of the Complaint's allegations that Mr. Langenthal forged the Decedent's power of attorney and fraudulently transferred the apartments to himself and to the Langenthal Trust without the Decedent's knowledge. *Roni LLC,* 18 NY3d at 848. Relying on *Faison v Lewis,* 25 NY3d 220 (2015), Plaintiffs argue the court must deem such transfers *void ab initio* even though they occurred more than ten years ago and find that Defendants' statute of limitation defense does not apply.

At issue in *Faison* was a home jointly owned by the plaintiff's father and aunt. The aunt conveyed her half-interest in the home to her daughter, the defendant. The daughter then allegedly recorded a deed conveying plaintiff's father's half-interest to her as well. Eight years later the daughter obtained a loan from Bank of America secured with the mortgage on the home. Thereafter

plaintiff was appointed the executor of her father's estate and filed an action seeking a declaration that the deed recorded by the aunt's daughter was void as a forgery. The trial court granted the motion to dismiss the complaint in its entirety as time-barred. The Second Department modified the order, but held that plaintiff's claim was still subject to a six-year statute of limitations. The Court of Appeals reversed, holding that because the claim alleged a forged deed defendants were precluded from moving for dismissal on statute of limitation grounds. In reiterating the long-standing principle that a forgery "holds a unique position in the law; a legal nullity at its creation is never entitled to legal effect because '[v]oid things are as no things'" (*id.* quoting *Marden v Dorthy*, 160 NY 39, 56 [1899]), the Court explained (*Faison*, 25 NY3d at 227):

> Defendant [Bank of America] contends that plaintiff's claim is time-barred because forgery is a category of fraud, and, like any other claim based on fraud, an action challenging a forged deed is subject to the limitations period of CPLR 213(8). That conclusion cannot be squared with . . . general principles of real property law. Nor is it supported by compelling policy reasons. On the contrary, our long-standing commitment to the protection of ownership interests and the integrity of our real property system favors the continued treatment of challenges to forged deeds as distinct from other claims, and exempt from a statute of limitations defense.

In this case, Plaintiffs argue that Defendants' activities fall squarely within the scope of activities condemned by the court in *Faison*, precluding Defendants from invoking any statute of limitations defense. Defendants respond that Plaintiffs' analysis of *Faison* overlooks the distinction the Court drew between documents that are void *ab initio* and those that are merely voidable (*id.* at 224):

> A forged deed that contains a fraudulent signature is distinguished from a deed where the signature and authority for conveyance are acquired by fraudulent means. In such latter cases, the deed is voidable. The difference in the nature of the two justifies this different legal status. A deed containing the title holder's actual signature reflects "the assent of the will to the use of the paper or the transfer," although it is assent "induced by fraud, mistake or misplaced confidence" . . . . Unlike a forged deed, which is void initially, a voidable deed, "until set aside . . . has the effect of transferring the title to the fraudulent grantee, and ... being thus clothed with all the evidences of good title, may incumber the property to a party who becomes a purchaser in good faith" . . . .

Whether or not this case involves transfers that are voidable or transfers that are void *ab initio*, Defendants' statute of limitations defense does not change the outcome of this motion. The discovery accrual rules permit the tolling of a fraud claim for two years from the time the plaintiff discovered or should have discovered the fraud. As set forth above, Plaintiffs' attorney posits that Plaintiffs only first became aware of the transfers in or about October of 2015 when discovery commenced in the Nassau County proceedings and only obtained a copy of the alleged forged power of attorney from third-parties after the Langenthals had already been deposed in the Nassau County proceedings.

Defendants' statute of limitations defense may also be precluded on equitable estoppel grounds. Under this doctrine, a defendant is estopped from pleading a statute of limitations defense if the "plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Simcuski v Saeli*, 44 NY2d 442, 448-449 (1978). "For the doctrine to apply, a plaintiff may not rely on the same act that forms the basis for the claim--the later fraudulent misrepresentation must be for the purpose of concealing the former tort." *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 (2007). The Complaint in this case alleges an ongoing fraud by Mr. Langenthal by way of his longtime fiduciary relationship with the Decedent, particularly his duty to manage the Decedent's assets. *See Gleason v Spota*, 194 AD2d 764, 765 (2d Dept 1993). Plaintiffs specifically allege that Mr. Langenthal intercepted documentation in order to prevent the Decedent from learning about the transfer of his interests in the 56 West 82nd Street apartments (Complaint ¶¶ 3, 11-13); *see also General Stencils, Inc. v Chiappa,* 18 NY2d 125, 128 (1966). Such allegations are sufficient to allow Plaintiffs to proceed with their equitable estoppel claim. *See Nick v Greenfield*, 299 AD2d 172, 173 (1st Dept 2002); *Giannetto v Knee*, 82 AD3d 1043, 1045 (2d Dept 2011); *Dematteo v Ratzan*, 300 AD2d 344, 344 (2d Dept 2002).

Notwithstanding the foregoing, Defendants argue that testimony from the Nassau County proceedings establishes that Plaintiffs were aware of the property transfers long before Decedent's death, thereby rendering the Complaint untimely even under the two-year discovery accrual rule. In this regard Defendants recite portions of the testimony of estate attorney David Jacobsen, Esq. concerning his discussions with the Decedent about his estate planning needs (Zausmer Affirmation, Exhibit I):

> Q. What assets did Mr. Gottlieb tell you he had when you met with him to do his estate planning?
>
> A. Marketable securities and real property.
>
> Q. And what real property did he have?
>
> A. His home. . . .
>
> Q. The Links in Roslyn?
>
> A. Right. And a home in Arizona.

Defendants also cite testimony by Ms. Reisner that she knew about the power of attorney prior to her father's death (*id.*, Exhibit L):

> Q. Who told you that?
>
> A. It was my father who said he gave him the limited power of attorney to – on one of the papers I remember seeing, because he was able to. My father gave him the one apartment as financial compensation for handling the building. My father owned the building.
>
> Q. When your father told you he gave Mr. Langenthal limited power of attorney, that was for Mr. Langenthal to have authority to manage the apartments that your father owned in that building?
>
> A. To my understanding, it was for him to do what was necessary to keep the building I guess working and in good order.
>
> Q. When did your father tell you he had given Mr. Langenthal the power of attorney?
>
> A. The paper I saw was dated. When did my father give?
>
> Q. Tell you.
>
> Q. I remember that was December of 2006.

The court cannot consider such testimony since the record contains only selected pages from the deposition transcripts. But even at face value, several impermissible leaps would have to be

drawn from Mr. Jacobsen's testimony for the court to accept Defendants' contention that the Decedent knew all nine 56 West 82nd Street apartments had been transferred to the Langenthals. Nor can Ms. Reisner's testimony be deemed a clear admission that she knew prior to the Decedent's death that he had given up his interest in all nine 56 West 82nd Street apartments either.[8] On the other hand, Ms. Reisner has not submitted an affidavit denying Defendants' allegations or otherwise clarifying her testimony. But neither has Mr. Langenthal submitted an affidavit denying having forged the power of attorney. It is evident to this court that these issues must first be fleshed out through discovery and a more complete record established before the court can evaluate Defendants' claim that Plaintiffs and the Decedent knew of the property transfers long before the Decedent's death. I therefore find that the limited testimony from the Nassau County proceedings is not sufficient to show that the Complaint has "been negated beyond substantial question." *See Biondi*, 257 AD2d at 81; *see also Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 (1st Dept 1995) (To prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim"; *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 (2002) ("Such a motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.").

Finally, there is no dispute that Plaintiffs' conversion claim is time-barred. *See Harlem Capital Ctr., LLC v Rosen & Gordon, LLC*, 145 AD3d 579, 580 (1st Dept 2016) (cause of action for conversion is three years from the date the taking occurred).

[8] As Plaintiff's counsel argues, an equally plausible reading is that Ms. Reisner believed one apartment was transferred to Mr. Langenthal in exchange for his services managing the remaining eight apartments on the Decedent's behalf.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss is granted in part and denied in part; and it is further

ORDERED that Plaintiffs' fourth cause of action for conversion is hereby severed and dismissed; and it is further

ORDERED that Defendants' motion to dismiss is otherwise denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, New York, NY 10007, Room 412 (Part 30), on June 26, 2017 at 9:30AM.

The Clerk of the court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 5-30-17

SHERRY KLEIN HEITLER, J.S.C.