| **Kaplan v DeBlase** |
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| 2017 NY Slip Op 31321(U) |
| June 12, 2017 |
| Supreme Court, New York County |
| Docket Number: 157805/2016 |
| Judge: Kathryn E. Freed |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. KATHRYN E. FREED, J.S.C. **PART** 2
*Justice*

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ROBERT KAPLAN

Plaintiff,

- v -

LINDA DEBLASE,

Defendant.

**INDEX NO.** 157805/2016

**MOTION DATE**

**MOTION SEQ. NO.** 001

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27

were read on this application to/for Dismiss Complaint

**Upon the foregoing documents, it is**

ordered that the motion is granted in part.

Defendant Linda DeBlase moves, pursuant to CPLR 3211 (a) (1), (2) and (7), to dismiss the complaint for lack of subject matter jurisdiction, failure to state a cause of action, and based on documentary evidence.

## FACTUAL ALLEGATIONS

Plaintiff and defendant are brother and sister, and the son and daughter of the late Abraham Kaplan ("Abraham"), who died on March 17, 2014. The complaint alleges that

Abraham executed a Last Will and Testament on September 11, 2007. The 2007 will bequeathed his condominium located in Deerfield Beach, Florida to defendant, to be held in trust by plaintiff. The 2007 will named plaintiff and defendant as co-equal beneficiaries of Abraham's residual estate. However, defendant's share was to be held in trust, for her benefit, by plaintiff. Plaintiff, a resident of New York, was named the executor and the trustee of the testamentary trust. Defendant's inheritance was allegedly placed in trust, because Abraham was concerned that defendant would dissipate her inheritance, in the short term, due to a history of poor management over her own finances.

In early February 2013, Abraham, then 98 years old, came to live with defendant in her apartment in New York City. Plaintiff alleges that, upon his father's arrival in New York City, defendant began to exercise dominion and control over Abraham's bank accounts, as well as bank accounts held jointly in the name of plaintiff and his father. The complaint identifies an account at Capital One ending in x6935, and four accounts at Bank United ending in x1546, x2169, x2165 and x199 (Cmplt., ¶¶ 19-21). Defendant was allegedly added to the Capital One account on June 11, 2013 without plaintiff's permission and, on June 27, 2013, she withdrew $50,000 from that account and deposited the money in her Santander account ending in x4194. Plaintiff alleges that defendant routinely depleted both the Capital One account and the Santander account through October 2014, and that, through the Fall of 2014, defendant wrongfully depleted the assets of Abraham's other bank accounts without plaintiff's or Abraham's knowledge.

In early July 2013, defendant and Abraham went to stay at the Deerfield Beach condominium and remained there through September 2013. During this period of time, defendant allegedly learned about the terms of the 2007 will and on or about July 20, 2013, coerced Abraham into changing his will. The 2013 will bequeathed the Deerfield Beach house outright to defendant, and defendant was named the executor. Abraham's residuary estate was bequeathed to plaintiff and defendant in equal shares. The provisions for a testamentary trust for the benefit of defendant were removed.

Plaintiff commenced this action on September 19, 2016. The complaint's first cause of action alleges that plaintiff is entitled to, and has a possessory right to, his equal share in the Capital One account and the Bank United accounts, based on his joint ownership of the Capital One account and his 50% interest in Abraham's residuary estate. The second cause of action seeks an accounting. Plaintiff alleges that a relationship of care and trust existed between he and his sister by virtue of their familial relationship, and because they were equal beneficiaries of Abraham's residual estate. Defendant allegedly breached her duty of trust by converting the assets of the Capital One and Bank United accounts. The third cause of action seeks to impose a constructive trust on the bank accounts' assets from the time said assets entered defendant's possession. Plaintiff claims monetary damages of at least $250,000.

Defendant submits an affidavit in support of her motion to dismiss the complaint, by which she offers her explanation for the actions that she took with respect to her father's bank accounts. She avers that, while they were in Florida, Abraham, Abraham's girlfriend, his girlfriend's daughter and defendant went to Bank United (DeBlase aff, ¶

44). Defendant avers that, Abraham requested that Bank United remove plaintiff from one of the Bank United accounts and asked the bank representative for a new signature card so that defendant could be placed on the account (*id.*, ¶ 45). As evidence of this transaction, she submits a signature card, dated March 6, 2014, for the Bank United checking account ending in x2165 (*id.*, Ex. D). The first page of this card refers to defendant as Abraham's "AIF," presumably meaning attorney-in-fact. It is not signed by Abraham, but by defendant as "POA," presumably referring to a power of attorney. Defendant further avers that, when she and Abraham returned to New York in October 2013, Abraham needed constant care day and night, and that Abraham insisted that defendant stop working and use his money to live on (*id.*, ¶¶ 46-48). With respect to the Capital One account ending in x6935, defendant avers that Abraham added defendant as a signatory to his Capital One account so that defendant could pay his bills (*id.*, ¶ 49). This occurred sometime prior to June 2013. She then claims that she moved $50,000 to her account at Santander, fearing that the money was not safe at Capital One due to robberies in midtown Manhattan, and that her father was added to her Santander account (*id.*, ¶¶ 49-52). However, the documentary evidence that she submits shows that Abraham was not added as a joint owner of the Santander account, only as a beneficiary of the account upon defendant's death (*id.*, Ex. E).

Defendant avers that, at the time of his death, Abraham's domicile was the State of Florida and, as such, the 2013 will was admitted to probate by the Judicial Circuit Court in Broward County, Florida on October 30, 2014. In August 2015, plaintiff filed a petition to remove defendant as the executor of Abraham's estate, and sought an

accounting and other relief. Plaintiff accused defendant of exercising undue influence over Abraham in connection with his execution of the 2013 will, and of improperly withdrawing, or causing Abraham to withdraw, monies from the bank accounts that constitute his residuary estate. The petition also sought to assert tort claims against defendant for breach of fiduciary duty, "intentional interference with expectancy of inheritance," and conversion. Defendant moved to dismiss the petition, contending, inter alia, that it lacked any basis for plaintiff's contention that the Florida Circuit Court had jurisdiction over the alleged tort claims against defendant, individually, since the alleged wrongdoing occurred prior to her appointment as the estate's personal representative, both parties were residents of New York, and there was no showing that the alleged acts occurred in Florida. However, before defendant's motion to dismiss could be decided, plaintiff voluntarily dismissed the petition and commenced this action in New York.

Defendant now files this pre-answer motion to dismiss the complaint, contending that, because Abraham was domiciled in Florida at the time of his death, plaintiff's claims need to be litigated in Florida and this court lacks subject matter jurisdiction. In the alternative, defendant argues that the complaint fails to state a cause of action, because none of the monies in any of Abraham's bank accounts would have passed through Abraham's residuary estate or otherwise would have been part of the residue. Defendant contends that this action is nothing more than an attempt to recover monies that Abraham decided, during his lifetime, not to give to plaintiff.

## DISCUSSION

Subject matter jurisdiction "concerns the court's competence to entertain a given kind of case" (Siegel, NY Practice, § 8 at10 [5th ed 2011]; *see also Wells Fargo Bank Minnesota, N.A. v Mastropaolo*, 42 AD3d 239, 243 [2d Dept 2007]). "The Supreme Court is a court of general jurisdiction, and it is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed" (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]). The claims asserted in this action are claims between two New York residents for conversion, an accounting and the imposition of a constructive trust, legal and equitable claims that this Court has the power to adjudicate.

Defendant's reliance on *Matter of MacKean* (259 App Div 728 [2d Dept 1940]), is misplaced. In that case, the Appellate Division merely ruled that it was an improvident exercise of the Surrogate's Court's discretion to probate the will of a New Jersey resident, since there was no substantial personal property of the decedent within the State of New York. To the extent that plaintiff seeks to challenge the terms of the 2013 will or to enlarge Abraham's residuary estate, those claims must be litigated within the confines of the Florida probate proceeding. To the extent that plaintiff is suing his sister in tort seeking monetary damages and equitable relief based on the conversion of his or his father's personal property, this Court has subject matter jurisdiction.

"'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'" (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012], quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [citations

omitted]). While Abraham was alive, plaintiff was, at one point in time, a joint owner of the Capital One account ending in x6935, and, according to defendant's own testimony, plaintiff's name was on the Bank United checking account ending in x2165 (DeBlase aff, ¶ 45). "A cotenant of a joint bank account has an ownership interest in one half of the moneys deposited therein and a concomitant right to recover any amount withdrawn by another tenant in excess of this sum" (*Sperrazza v Kail*, 267 AD2d 692, 693 [3d Dept 1999]; *see also Matter of Mullen v Linnane*, 218 AD2d 50, 55 [1st Dept 1996]). Banking Law section 675(b) creates a rebuttable presumption that, when a joint account is created, the funds therein belong to those in whose names the account was made. The creation of a joint account, in the absence of proof of contrary intent, is presumptive evidence of an intention to effect a present transfer of both an alienable interest in one half of the deposit in both depositors, and a right to the whole fund in the survivor after the death of one of them (*Matter of Kleinberg v Heller*, 38 NY2d 836, 840-841 [1976] [Fuchsberg, J., concurring]). The presumption is, however, rebuttable by establishing that no true joint tenancy was intended, and that the donor (Abraham) added plaintiff's name to the account solely as a convenience and not with the intention of conferring a present beneficial interest on the plaintiff (*Jacks v D'Ambrosio*, 69 AD3d 574, 575 [2d Dept 2010]). This type of determination is, of course, unsuitable for resolution on a motion to dismiss the complaint for facial insufficiency. However, the fact that plaintiff was, at one time, a joint account holder on the Capital One account and possibly on another account at Bank United is sufficient to state a claim for conversion with respect to these two accounts.

The complaint, however, refers to three other accounts at Bank United that apparently were owned solely by Abraham. "A cause of action alleging conversion should be dismissed when the plaintiff does not allege 'legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights'" (*Barker v Amorini*, 121 AD3d 823, 825 [2d Dept 2014], quoting *Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 592 [2d Dept 2007]). If Abraham added defendant to these bank accounts as a joint bank account holder, the transactions can be challenged on the ground that the donor (Abraham) did not understand the transaction, or that fraud, mistake or undue influence infected the transaction. If defendant absconded with the funds by misuse of a power of attorney prior to Abraham's death, plaintiff, as a 50% beneficiary of Abraham's residuary estate, would have standing to challenge those transactions. However, neither of these scenarios state a cause of action for conversion of plaintiff's property by defendant. And indeed, these challenges would have to be made within the confines of the Florida probate proceeding, since, if plaintiff were successful in proving fraud, undue influence or misuse of a power of attorney, the transactions could only be voided and the money returned to Abraham's residuary estate (*see e.g. Matter of Giacalone*, 143 AD2d 749, 750 [2d Dept 1988]).

The second cause of action seeks an accounting. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Lawrence v Kennedy*, 95 AD3d 955, 958 [2d Dept 2012]

[internal quotation marks and citations omitted]). Although the plaintiff and defendant are siblings, "the existence of a familial relationship [brothers] is insufficient in itself to create a confidential relationship" (*McGregor v McGregor*, 55 Misc 3d 586, 592 [Sup Ct, Kings County 2017]). Although defendant may have acted as Abraham's fiduciary as his attorney-in-fact pursuant to a power of attorney, she had no such relationship with plaintiff, thus no basis for seeking an order directing defendant to account to plaintiff has been alleged (*Juliano v Juliano*, 42 Misc 3d 1226(A), 2014 NY Slip Op 50205(U) [Sup Ct, Kings County 2014], *affd* 145 AD3d 983 [2d Dept 2016]). For this same reason, the complaint fails to state a cause of action for a constructive trust, which also requires the existence of a confidential or fiduciary relationship between the parties (*Neos v Neos*, 262 AD2d 467, 468 [2d Dept 1999]).

**CONCLUSION and ORDER**

Therefore, in light of the foregoing, it is hereby:

**ORDERED** that defendant's motion (seq. no. 001) to dismiss the complaint is granted as to the second and third causes of action, which are dismissed, and is denied as to the first cause action; and it is further

**ORDERED** that defendant shall serve and file an answer to the remaining first cause of action of the complaint within thirty (30) days of service of a copy of this order with notice of entry; and it is further

**ORDERED** that the parties shall appear for a preliminary conference in Room 280, 80 Centre Street, on the 19th day of September, 2017 at 2:15 p.m. at 80 Centre Street, New York, New York, Room 280; and it is further

ORDERED that this constitutes the decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

6/12/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | | CASE DISPOSED | | | [X] | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | [X] | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
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