

Pensionsversicherungsanstalt v Lichter

2011 NY Slip Op 32724(U)

October 6, 2011

Supreme Court, New York County

Docket Number: 116393/2007

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 116393/2007
PENSIONSVERSICHERUNGSANSTALT
vs.
LICHTER, FERDINAND, THE ESTATE
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

OCT 12 2011

Upon the foregoing papers, it is ordered that this motion

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motion and cross-motion are decided in accordance
with accompanying memorandum decision.

Dated: 10/12/11

Saliann Scarpulla
SALIANN SCARPULLA s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
PENSIONSVERSICHERUNGSANSTALT,

Plaintiff,

Index No.: 116393/07
Submission Date: 5/25/11

- against-

THE ESTATE OF FERDINAND LICHTER, JONA
LICHTER, URI LICHTER, RACHEL LANDAU,
JON DOE, JANE DOE, and THE ESTATES OF
JOHN AND JANE DOE,

DECISION AND ORDER

FILED

OCT 12 2011

Defendants.

-----X

For Plaintiff:
Harnick & Finkelstein LLP
645 Fifth Avenue, 7th Floor
New York, NY 10022

For Defendants:
B. Kogan PLLC
236 Broadway, Suite 208
Brooklyn, NY 11211

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Papers considered in review of this motion for summary judgment and cross-motion for summary judgment:

Notice of Motion	1
Aff in Support	2
Memo of Law	3
Notice of Motion	4
Affs in Support	5
Memo of Law	6
Reply Memo of Law	7

HON. SALIANN SCARPULLA, J.:

In this action to recover overpayment of pension benefits, plaintiff Pensionsversicherungsanstalt (“plaintiff” or “PVA”) moves pursuant to CPLR 3212 for an order granting summary judgment in its favor, and for severance of defendant Jona Lichter (“Jona”) from the action against defendants Uri Lichter (“Uri”) and Rachel Landau (“Landau”). Defendants Jona, Uri and Landau cross-move for summary judgment pursuant to CPLR 3212(a) dismissing this action against them.

Plaintiff seeks to recover € 42,167.07 from overpayment of pension benefits paid to Ferdinand Lichter (the “decendent”) after his death. As alleged in the amended summons and complaint, decedent died on December 20, 2002, but plaintiff did not learn of his death until some time later. Plaintiff alleges that Jona, decedent’s son, continued to send plaintiff false certificates stating that his father was alive, as part of a fraudulent scheme to receive the pension money. Decedent continued to receive pension checks from January 2003 through April 2005.

Plaintiff deposed defendants Jona, Uri and Rachel Landau, the three children of decedent. At their depositions, the children confirmed that decedent had been a widower. Jona testified that he was living with his father before his death, continued to be present in the apartment after his death, and that he had access to his father’s mail. Jona was aware that his father received a pension check from plaintiff.

At his deposition, Jona was asked a series of questions pertaining to a “confirmation of being alive” form, and pension checks issued, endorsed, deposited and cashed after the date of his father’s death. In response to these questions Jona asserted his Fifth Amendment right against self incrimination.

In support of its motion for summary judgment, plaintiff argues that it may rely on Jona’s invocation of his Fifth Amendment privilege for an adverse inference, and that invocation of the Fifth Amendment privilege may be used to confirm matters supported by other independent evidence.

In opposition to plaintiff's motion, and in support of their cross-motion for summary judgment, defendants argue that plaintiff cannot meet its burden on its motion for summary judgment, because it is relying on unsigned deposition transcripts, which are inadmissible. Defendants also argue that plaintiff cannot rely on the affidavit of Frau Mag. Susanne Leopold-Koning, submitted by plaintiff in support of its motion, because the affidavit was sworn and notarized in Vienna, Austria, and is not accompanying by a Certificate of Conformity as required by CPLR 2309(c). Additionally, defendants assert that there do exist triable issues of fact, as plaintiff is relying on a series of checks which were issued to Ferdinand Lichter and cashed, yet which bear "illegible" endorsements. Defendants also argue that plaintiff's request for an adverse inference to be drawn from Jona's invocation of his Fifth Amendment rights be denied, as it is not supported by independent evidence.

Lastly, defendants argue that their cross motion for summary judgments should be granted. As against Uri and Landau, they assert that plaintiff has not made any arguments or presented any case against either defendant. As against Jona, defendants assert that plaintiff has failed to submit admissible evidence to connect him to the pension checks at issue.

In opposition to the cross motion, plaintiff argues that Jona's objection to the unsigned deposition testimony is without merit because he has not indicated any inaccuracies in the transcripts. Plaintiff further argues that the issue of the illegibility of the endorsement on the checks at issue are irrelevant to the motions.

At oral argument, plaintiff consented to the dismissal of this action against defendants Uri and Landau, leaving only the motion for summary judgment against Jona, and Jona's cross motion for summary judgment.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Plaintiff has made a *prima facie* showing that Jona fraudulently collected his deceased father's pension checks. In support of its motion, plaintiff submitted Jona's deposition testimony, in which Jona admits that (1) he was living with his father; (2) he had and still has access to the mailbox at the apartment he shared with his father; (3) he was aware that his father received pension checks; and (4) the pension checks were deposited in a joint account shared by Jona and his father. Jona does not contest these admissions, but rather challenges whether they are admissible.

Jona relies on CPLR 3116(a) which provides that before it may be used, the transcript of the deposition of a witness must be provided to the witness for his or her review and signature, and any changes in form or substance desired by the witness shall be recorded. This provision was not complied with, as plaintiff submits unsigned deposition

Plaintiff also argues that it has “presented more than sufficient circumstantial evidence to allow the court to conclude that the material facts supporting plaintiff’s complaint cannot be disputed.” Plaintiff relies on Jona’s deposition testimony and notes that there is no dispute that Jona is the decedent’s son, and that he resided at the decedent’s home and had access to his mail before and after his death. In addition, plaintiff submits copies of the pension checks which were mailed to decedent and cashed after the date of his death. Lastly, plaintiff argues it may be inferred from Jona’s invocation of his Fifth Amendment privilege that Jona did, in fact, fraudulently endorse and cash his late father’s pension checks. This inference may be made as, “the Fifth Amendment does not forbid adverse inferences . . . where the privilege is claimed by a *party to a civil cause*.” *Haiti*, 211 A.D.2d at 386 (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)) (emphasis in original). As such, it is proper to infer that Jona’s failure to answer the question at his deposition on Fifth Amendment grounds was because it would have incriminated him, but also because his answers would have been “unfavorable” to him in this action.” *See Haiti*, 211 A.D. 2d at 386.

As plaintiff has successfully established it *prima facie* case that Jona fraudulently received and retained his deceased father’s pension checks, and Jona has failed to establish any triable issues of fact, plaintiff’s motion for summary judgment is granted.

However, plaintiff has failed to establish the amount owed by Jona as a result. In support of its claim that it is owed € 42,167.07, to be converted into U.S. dollars at judgment, plaintiff submits the affidavit of Mag. Susanne Leopold-Konig (“Leopold-

Konig”), which was executed in Vienna, Austria. Pursuant to CPLR 2309(c), affidavits sworn and notarized outside of New York must be accompanied by a certificate of conformity. Plaintiff has failed to submit a certificate of conformity along with Leopold-Konig’s affidavit, and have therefore failed to meet their burden as to the amount of their recovery. *See Ford Motor Credit Co. v. Prestige Gown Cleaning Service, Inc.*, 193 Misc.2d 262 (Civ. Ct., Queens Co. 2002).

In accordance with the foregoing, it is

ORDERED that the motion for summary judgment by plaintiff Pensionsversicherungsanstalt on its complaint is against defendants Uri Lichter and Rachel Landau is dismissed on consent; and it is further

ORDERED that the motion for summary judgment by plaintiff Pensionsversicherungsanstalt on its complaint against defendant Jona Lichter is granted; and it is further

ORDERED that an inquest is to be held assessing damages against Pensionsversicherungsanstalt and entering judgment in accordance therewith; and it is further

ORDERED that Pensionsversicherungsanstalt shall file and serve a note of issue for the inquest within thirty (30) days of the date of this order; and it is further

ORDERED that the Clerk is directed to place this matter on the inquest calender for an assessment of damages; and it is further

ORDERED that the cross motion for summary judgment by defendants Jona
Lichter, Uri Lichter and Rachel Landau is denied as moot.

This constitutes the decision and order of the Court.

FILED

Dated: New York, New York
~~September~~, 2011
October 6

OCT 12 2011

ENTER:

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Salvatore Scarpulla
Salvatore Scarpulla, J.S.C.