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SHORT FORM ORDER

INDEX No. 10-1890

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

***PRESENT:***

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-25-12 (#003)
MOTION DATE 10-23-12 (#004)
ADJ. DATE 1-8-13
Mot. Seq. # 003 - MotD
# 004 - XMD

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JANET MENITE,

Plaintiff,

-against-

DONNA DOWD, JAMES MENITE, THE ESTATE OF JOSEPH MENITE and THE ESTATE OF HELEN MENITE,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated August 21, 2012, and supporting papers 1 - 11; (2) Notice of Cross Motion by the plaintiff, dated September 21, 2102, and supporting papers 17 - 23; (3) Affirmation in Opposition by the plaintiff, dated September 21, 2012, and supporting papers 12 - 16; (4) Affirmation in Opposition by the defendant, dated December 7, 2012, and supporting papers 24 - 25; (5) Reply Affirmation by the defendants, dated December 7, 2012, and supporting papers 26 - 27; (6) Reply Affirmation by the plaintiff, dated January 7, 2013, and supporting papers 28 - 29; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

***ORDERED*** that this motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the complaint against the defendants The Estate of Joseph Menite and The Estate of Helen Menite is dismissed, and is otherwise denied; and it is further

***ORDERED*** that this cross motion by the plaintiff for an order pursuant to CPLR 3124 and CPLR 3126 compelling the defendants to appear for examinations before trial and to provide her with responses to certain outstanding discovery requests is denied; and it is further

***ORDERED*** that the parties are directed to appear for a discovery conference on May 28, 2013 at the Supreme Court, Part 17, One Court Street, Riverhead, New York at 9:30 a.m.

This is an action for constructive trust, conversion and accounting related to bank accounts allegedly held jointly by decedents Joseph Menite and Helen Menite with their children, the individual defendants herein. It is undisputed that the parties are siblings, and the children of the decedents. In her complaint, the plaintiff alleges that neither of her parents estates have been probated, that her parents intended to distribute their assets equally to their three children, and that the decedents added the names of their children to certain bank accounts "to guard against costly probate and protect the assets in the event that [decedents] became sick and required costly end of life care." The plaintiff further alleges that, despite their parents' intentions, the defendants converted approximately $425,000 of those assets, violated the constructive trust created by her parents for the benefit of the three siblings, and decided to "unjustly retain enjoyment of the assets to the exclusion and detriment of [the plaintiff]."

The defendants now move for summary judgment on the grounds that the plaintiff does not have standing to bring this action, that the plaintiff has failed to plead a cause of action for constructive trust, conversion and accounting related to the accounts, and that this court is an improper forum to determine the issues raised herein. In support of their motion, the defendants submit, among other things, the pleadings, their affidavits, the affirmation of their attorney, a copy of letters testamentary issued to the defendant Donna Dowd (Dowd), and a copy of the preliminary conference order in this action. Initially, the Court notes that the affidavit of the defendant James Menite (Menite) is deficient on its face in that it was notarized in the State of Florida and was not accompanied by a certificate verifying that the manner in which it was taken conforms with Florida law (*see* CPLR 306 [d], 2309 [c]; Real Property Law § 299-a [1]). However, it has been held that the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be ignored in the absence of a showing of actual prejudice (*see* ***Betz v Daniel Conti, Inc.***, 69 AD3d 545, 892 NYS2d 477 [2d Dept 2010]; ***Matapos Tech. Ltd. v Compania Andina de Comercio Ltd.***, 68 AD3d 672, 891 NYS2d 394 [1st Dept 2009]; ***Smith v Allstate Ins. Co.***, 38 AD3d 522, 832 NYS2d 587 [2d Dept 2007]). Here, the Court finds that the plaintiff has not raised any objection to said affidavit, and that she has suffered no actual prejudice herein.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Standing is conferred when a party alleges an injury in fact within his or her zone of interest, and that he or she has a sufficiently cognizable stake in the outcome of the case so that the dispute is capable of judicial resolution (***Silver v Pataki***, 96 NY2d 532, 730 NYS2d 482 [2001]: ***Community Bd. 7 of Borough of Manhattan v Schaffer***, 84 NY2d 148, 615 NYS2d 644 [1994]; ***Society of Plastics Indus., Inc. v County of Suffolk***, *supra*). Here, the plaintiff has adequately established her standing to seek

recovery of that portion of the moneys that she alleges she is entitled to receive from her parents.

In addition, the Court finds that the defendants' contention that this is not the proper forum for the plaintiff's action is without merit. The defendants' attorney asserts that the plaintiff is required to bring this action in the Surrogate's Court. It appears from the record that said court issued letters testamentary to Dowd on June 19, 2008 regarding her father's estate. However, the defendants have not submitted any evidence to indicate that any further proceedings have taken place in the Surrogate's Court, or that the decedents' estates have been probated. It is well settled that the Supreme Court and the Surrogate's Court have concurrent jurisdiction to compel executors to account, and where complete relief can be obtained in the Surrogate's Court, the Supreme Court will refuse to exercise its equitable powers (***Matter of Smith***, 120 AD 199, 105 NYS 223 [1st Dept 1907]; ***Bushe v Wright***, 118 AD 320, 103 NYS 410 [1st Dept 1907]; ***Matter of Fogarty***, 117 AD 583, 102 NYS 776 [1st Dept 1907]). However, the Surrogate's Court lacks jurisdiction over matters involving allegations of wrongful conversion and disputes related to matters involving controversies between living persons (SCPA 201; ***Matter of O'Connell***, 98 AD3d 673, 951 NYS2d 28 [2d Dept 2012]). Here, the Court finds that the controversy does not directly involve the decedents' estates and is, in fact, a dispute between living persons which permits this court to exercise its discretion and resolve the instant action.

A review of the defendants' submission reveals that they have failed to establish their entitlement to summary judgment herein. In their affidavits, the defendants swear that they were added to the subject bank accounts as joint tenants, and that their attorney has advised them that the plaintiff's complaint should be dismissed because she never owned or possessed the bank accounts. However, the defendants have failed to submit any evidence establishing the details of those accounts. "[T]he credibility of persons possessed of exclusive knowledge of the facts should not be determined by affidavits ..., and where knowledge is a key fact at issue, and peculiarly within the possession of the movant himself, summary judgment will ordinarily be denied" (***Krupp v Aetna Life & Cas. Co.***, 103 AD2d 252, 479 NYS2d 992 [2d Dept 1984]; *see also* ***Kindzierski v Foster***, 217 AD2d 998, 630 NYS2d 823 [4th Dept 1995]; ***Vasquez v Gonzalez***, 143 AD2d 413, 532 NYS2d 435 [2d Dept 1988]). By way of example only, the defendants' affirmations do not establish whether the joint bank accounts were established for their parents' convenience, without the intention of conferring an interest which would create joint tenancy with right of survivorship (*see generally* ***Jacks v D'Ambrosio***, 69 AD3d 574, 892 NYS2d 503 [2d Dept 2010]; ***Storozynski v Storozynski***, 60 AD3d 754, 874 NYS2d 575 [2d Dept 2009]; ***Matter of Camarda***, 63 AD2d 837, 406 NYS2d 193 [4th Dept 1978]; ***Filippi v Filippi***, 53 AD2d 658, 384 NYS2d 1010 [2d Dept 1976]).

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]). Here, the defendants have failed to establish their entitlement to judgment as a matter of law. Failure to

make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; *see also* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***Bozza v O'Neill***, 43 AD3d 1094, 842 NYS2d 88 [2d Dept 2007]).

However, the record reveals that the causes of action against the defendants The Estate of Joseph Menite and The Estate of Helen Menite must be dismissed. An action against a decedent's estate must be commenced against the appointed representative of the estate (EPTL 11-3.1; *cf.* ***Skolnick v Goldberg***, 297 AD2d 18, 746 NYS2d 296 [1st Dept 2002]; ***Hughes v Hiscox***, 105 Misc 521, 174 NYS 564 [Sup Ct, Kings County1919]). Here, the action has not been commenced against Dowd in her capacity as the executor of the estate of her father, and it appears that a representative was never appointed for her mother's estate.

Accordingly, the defendant's motion for summary judgment is granted to the extent that the complaint against the defendants The Estate of Joseph Menite and The Estate of Helen Menite is dismissed, and is otherwise denied.

Regardless, the Court finds that this motion for summary judgment is essentially premature, and that the parties should complete discovery in an expeditious manner before they consider the wisdom of making a future motion for accelerated judgment. The plaintiff has not yet had an adequate opportunity to conduct any discovery into relevant matters that are exclusively within the knowledge of the defendants to enable her to oppose this motion (*see* CPLR 3212 [f]; ***Colombini v Westchester County Healthcare Corp.***, 24 AD3d 712, 808 NYS2d 705 [2d Dept 2005]; ***Mazzola v Kelly***, 291 AD2d 535, 738 NYS2d 246 [2d Dept 2002]).

The Court notes that the defendants contend that the complaint fails to state a cause of action for constructive trust and conversion. To obtain the equitable remedy of a constructive trust, a plaintiff must establish the following elements: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance of such promise, and (4) unjust enrichment (*see* ***Sharp v Kosmalski***, 40 NY2d 119, 386 NYS2d 72 [1976]; ***Rowe v Kingston***, 94 AD3d 852, 942 NYS2d 161 [2d Dept 2012]; ***Watson v Pascal***, 65 AD3d 1333, 886 NYS2d 440 [2d Dept 2009]). These elements, however, are not to be applied rigidly, as the purpose of a constructive trust is to prevent unjust enrichment (***Simonds v Simonds***, 45 NY2d 233, 241, 408 NYS2d 359 [1978]; *see* ***Rowe v Kingston***, *supra*; ***Nastasi v Nastasi***, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him to a trustee" (***Beatty v Guggenheim Exploration Co.***, 225 NY 380, 386, 122 NE 378 [1919]).

To recover damages for conversion, a plaintiff must establish "legal ownership or an immediate superior right of possession to a specific identifiable thing" and that the defendant "exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of plaintiff's rights" (***Independence Discount Corp. v Bressner***, 47 AD2d 756, 757, 365 NYS2d 44 [2d Dept 1975]; *see* ***Colavito v New York Organ Donor Network, Inc.***, 8 NY3d 43, 827 NYS2d 96 [2006]; ***Channel Marine Sales, Inc. v City of New York***, 75 AD3d 600, 903 NYS2d 922 [2d Dept 2010];

***Whitman Realty Group, Inc. v Galano***, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]).

Considering that discovery has not commenced in this action, and the Court's finding that the instant motion is premature, the Court finds that it is unable to determine whether the plaintiff has cognizable and viable causes of action herein.

The Court notes that the plaintiff submits opposition to the defendants request for summary judgment dismissing the complaint on the ground that it fails to state a cause of action. The plaintiff's attorney submits an affirmation containing a proposed amended complaint. However, the plaintiff has not cross-moved for leave to amend her complaint. The Court notes that plaintiff's affirmative request for relief, to wit, that the Court grant leave to amend her complaint is not properly before the Court and has not been considered (CPLR 2215, ***Anderson Props. v Sawhill Tubular Div., Cyclops Corp.***, 149 AD2d 950, 540 NYS2d 82 [4th Dept 1989]). The plaintiff may, however, renew her request for such relief in a properly made motion.

The plaintiff cross-moves for an order compelling the defendants to appear for depositions and to respond to her outstanding discovery demands. Summary denial of this cross motion is mandated as it was made without any affirmation of good faith as required by 22 NYCRR 202.7 [a] (***Matos v Mira Realty Management Corp.,*** 240 AD2d 214, 658 NYS2d 880 [1st Dept 1997]). 22 NYCRR §202.7 [c] of the Uniform Rules for the Trial Courts, states that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." In addition, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (*see* Uniform Rules for the Trial Courts [22 NYCRR] §202.7 [c]). Here, the plaintiff has not supported his motion with an affirmation of good faith. Therefore, summary denial of this branch of the plaintiff's motion is required (*see* ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]; ***Matos v Mira Realty Mgt. Corp.***, *supra*; ***Vasquez v G.A.P.L.W. Realty***, 236 AD2d 311, 654 NYS2d 16 [1st Dept 1997]).

Accordingly, the plaintiffs cross motion is denied.

However, the Court notes that the procedural posture of this action requires further comment. It is undisputed that there has been no exchange of disclosure in this action, although the parties hotly dispute the relative blame for that failure.[1] In addition, as noted above, the record reveals that the reasons for the delay in completing discovery in this action is at issue. The Court declines to do more than set this action upon its proper course regarding the exchange of discovery.

Accordingly, the parties are directed to appear for a discovery conference as set forth herein.

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[1] The Court notes that a preliminary conference was held, and an order signed by the attorneys for the parties, on October 20, 2011.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 5/7/13

PETER H. MAYER, J.S.C.