

Cedeno v Velez

2014 NY Slip Op 30534(U)

January 24, 2014

Supreme Court, Bronx County

Docket Number: 302981/2009

Judge: Norma Ruiz

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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 302981/2009

ESPERANZA CEDENO

Plaintiff,

Decision and Order
HON. NORMA RUIZ

-against-

ANTHONY VELEZ

Defendant.

The following papers numbered to Read on this motion SUMMARY JUDGMENT
Noticed on 4/8/13 and duly submitted as No. 2 on the Motion Calendar of 6/3/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motions and Affidavits Annexed.....	1-2
Answering Affidavits.....	3
Replying Affidavits	4
Memorandum of Law	
Other:	

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendant Anthony Velez (“Velez”) moves to dismiss on the grounds that the action is barred by the statute of limitations. Alternatively, movant alleges that the action fails to state cause of action and that he is entitled to summary judgment on the merits. Upon a review of the moving papers and opposition submitted thereto, the motion is granted.

This is an action for fraud, conversion/wrongful taking and punitive damages. The plaintiff Esperanza Cedeno (“Cedeno”) is Velez’ aunt. According to the plaintiff’s complaint, her son passed away on October 7, 1999. Her son elected her as his beneficiary and she was to

collect \$225,000.00 from his life insurance policy. At that time, Velez was employed by non-party Citibank. Plaintiff contends that on January 1, 2000 the defendant, aware that she was about to collect \$225,000.00, contacted the plaintiff and told her to direct the insurance company to deposit the money in a Citibank money market account. Additionally, since he was a Citibank employee he informed her his name was required to be on the account so that he could manage it. On January 1, 2000, the insurance proceeds were deposited into the Citibank money market account. Plaintiff contends that the defendant continuously told the plaintiff that she did not have to inquire as to the status of the account because he would safeguard the money. Thereafter, the defendant allegedly withdrew and stole \$70,000.00 from the various accounts. Plaintiff alleges that she first became aware of the defendant's acts on/or about April 16, 2007.

Defendant now moves to dismiss the action as barred by the statute of limitations. Alternatively, movant seeks to dismiss the cause of action for fraud on the grounds it fails to state a cause of action. Movant also seeks summary judgment on the grounds that he did not commit any fraud or conversion.

Defendant disputes the plaintiff's version of events. He insists that the plaintiff opened the accounts after speaking with a Citibank investment specialist who spoke to the plaintiff in Spanish (her native language). She placed his name on only one account. All of the statements were mailed directly to the plaintiff's residence. Thereafter, in 2001 the plaintiff decided she no longer required the defendant's assistance. Instead, she chose to invest her money with her brother in the business of parking lots.

In support of the motion, defendant annexed the plaintiff's response to his demand for interrogatories which include various bank statements, Plaintiff annexed the bank statement

which purports to show the unauthorized withdrawals made by the defendant. The bank statements that include any type of withdrawals cover the periods: March 9, 2000 to April 10, 2000; April 11, 2000 to May 8, 2000, August 9, 2000 to September 11, 2000, September 12, 2000 to October 31, 2000, November 1, 2000 to November 30, 2000 and September 3, 2002 to September 30, 2002. In the statements there are handwritten notes which identify the unauthorized withdrawals allegedly made by the defendant.

The court finds that the plaintiff's first cause of action sounding in fraud is barred by the relevant statute of limitations. Pursuant to CPLR 213(8) the time to commence an action based upon fraud "shall be 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." Pursuant to the complaint, the alleged fraud occurred in the year 2000, thus the time to commence an action for fraud expired in 2006. The plaintiff asserts her fraud action is timely because she first learned of the defendants acts on or about April 16, 2007 and filed the complaint on April 14, 2009 which is within the two years after she discovered the fraud. However, the court notes that CPLR 213(8) states that 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* (CPLR 213[8][emphasis added]. Here, the plaintiff baldly asserts the first time she learned of the defendants fraud was on or about April 16, 2007. There was absolutely no evidence proffered regarding how she discovered such and why it took seven years to discover the alleged fraud. Plaintiff does not deny that the bank statements were mailed to her residence. Nor does she deny receiving the bank statements. The court finds that upon receipt of the bank

statements in 2002, with the use of reasonable diligence, the plaintiff should have discovered the alleged unauthorized withdrawals. Plaintiff's bald assertion that she learned of the fraud in 2007 is insufficient to trigger the longer time period to commence an action for fraud.

Assuming that the defendant made the unauthorized withdrawals, such withdrawals were made in 2000 and 2002. As the plaintiff correctly points out, the statute of limitations for conversion is three years (CPLR 214[3]; *City Store Gates Mfg Corp. v Empire Rolling Steel Gates Corp.*, 2014 WL 223616 [2d Dept.]). Thus, the time to commence an action for such conversion was in 2003 and 2005. Since this action was commenced in 2009, the plaintiff's second cause of action for conversion is likewise barred by the statute of limitations. As such, the plaintiff's second cause of action for conversion is dismissed as barred by the statute of limitations.

Lastly, the third cause of action for punitive damages must also be dismissed. New York does not recognize an independent cause of action for punitive damages. "A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Rocanova v. Equitable Life Assur. Socy of U.S.*, 83 NY2d 603, 616 [1994]). Accordingly, the motion is granted and this action is dismissed as barred by the statute of limitations.

This constitutes the decision and order of the Court.

Dated: _____

1/24/14

