| **Fixler v Reisman** |
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| 2014 NY Slip Op 30590(U) |
| March 5, 2014 |
| Supreme Court, Kings County |
| Docket Number: 502884/2013 |
| Judge: Debra Silber |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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HELENE FIXLER,

Plaintiff,

-against-

STEVEN REISMAN, A/K/A RABBI STEVEN REISMAN, A/K/A YISROEL REISMAN, A/K/A RABBI YISROEL RESIMAN, A/K/A SRULY REISMAN, A/K/A RABBI SRULY REISMAN, AND ESTHER REISMAN A/K/A ESTIE REISMAN,

Defendants.

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DECISION/ORDER

Index No. 502884/13

Submitted: 1/30/14
Mot. Seq. # 1

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to dismiss the complaint.

| Papers | Numbered |
|---|---|
| Notice of Motion, Affidavits and Exhibits and Memorandum of Law..... | 1-5 |
| Affirmations in Opposition..... | 6-8 |
| Reply Affirmation and Memorandum of Law..... | 9 |

**Upon the foregoing cited papers, the decision/order on this motion is as follows:**

Defendants move, pre-answer, to dismiss the plaintiff's complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(1) and (7). In support of the motion, there is an affirmation of counsel which merely asks permission to file Exhibit 2 "Under Seal." Said exhibit being plaintiff's Statement of Net Worth dated December 5, 2011 from her divorce action. This request was granted at oral argument. A sealing

order is issued simultaneously herewith so the exhibit may be filed as a sealed document with the County Clerk when this decision and the motion papers are filed. There is a copy of the complaint annexed to the Notice of Motion. There are two Memos of Law in support of the motion. There is an affirmation from plaintiff's ex-husband which was submitted with the Reply Memo of Law and must be treated as a Reply.

**Background**

At oral argument, counsel explained that plaintiff and defendant Reisman are siblings and co-trustees of an *inter vivos* irrevocable trust set up in 2001 by their parents. Plaintiff filed a lawsuit against defendant Reisman and a third trustee simultaneously with this action, under Index No. 502886/13. Defendants in that action are represented by the same counsel as in this action, and moved to dismiss plaintiff's complaint as well. Both motions were argued together.

Plaintiff's complaint states that defendant Steven Reisman is her brother and defendant Esther Reisman is his wife. It alleges that plaintiff had a bank account with $133,000 in it in 2008, which may have been a life insurance distribution following the death of plaintiff's father, but this is not entirely clear. At oral argument, and in his affirmation in opposition, this is what plaintiff's counsel has alleged. Plaintiff provides an affirmation (on religious grounds) in opposition to the motion in which she concurs that the funds were from the life insurance paid following her father's death, one half to her and one half to defendant, her brother. Plaintiff avers that defendant Reisman, her older brother and a respected Rabbi, advised her that he would safeguard the funds for

her[1], so in reliance on this promise, she withdrew the funds and he opened an account in his name, in trust for his wife, defendant Esther Reisman, with the funds. He gave her the passbook to hold. Plaintiff then alleges that she brought the passbook to the bank in December 2012 and was told that defendant Steven Reisman had reported the passbook lost and had withdrawn the funds and closed the account. Plaintiff alleges that she then retained counsel who sent defendants a demand for the return of the funds, and for an accounting of the interest that had accrued. When the funds were not returned to her, she commenced this action. There are five causes of action in the complaint: Declaratory judgment that she is the rightful owner of the funds, conversion, unjust enrichment, constructive trust, and accounting.

In support of the motion, the papers contain the complaint and the above-referenced Net Worth Statement, which is dated December 5, 2011. In addition, a Memo of Law was submitted. This document contains numerous averments from counsel, which are not made with his personal knowledge, are not affirmed, and are thus not admissible as evidence. To be clear, the document titled memorandum of law is the only document with any discussion of the motion. There is no affidavit from defendants.

Counsel argues that plaintiff is barred from bringing this action for the return of her funds by the principal of judicial estoppel, that is, because she did not list the funds in her Net Worth Statement in her divorce action, she is barred from "taking one position in a court proceeding and subsequently taking an inconsistent position in a second proceeding." Counsel cites one case in support of this theory, *Festinger v*

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[1]In her affirmation, she states she wanted to "safeguard her funds" as she was contemplating a divorce.

*Edrich*, 32 AD3d 412 (2nd Dept 2006). In that case, after he was indicted, the plaintiff gave property for safekeeping to his sister, then told the U.S. District Court he was indigent. He was convicted of fraud and ordered to pay more than Two Million Dollars in restitution to those he defrauded. He was subsequently convicted of 49 counts of violation of probation regarding his failure to report assets and income which were available to make restitution. Ten years after he gave his sister the property to hold, and after all of his criminal proceeding had ended, and after his sister had died, he sued her children and former husband for the return of the property. The court affirmed the dismissal of the action on two grounds, unclean hands and judicial estoppel. The court noted that on the unclean hands theory, he had endeavored to place the assets out of the reach of his creditors, so he could not recover them as a matter of public policy. Transfers of property to place it out of reach of creditors, knowing an action has been commenced or is about to be commenced, is a violation of New York's Debtor and Creditor Law. On the theory of judicial estoppel, the court states that the lenient sentence he received was the benefit, for the purposes of the doctrine.

Counsel also argues that the complaint must be dismissed as to defendant Esther Reisman, as it does not allege any wrongdoing on her part.

**Discussion**

Generally, "[o]n a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703,

703-704 [2008]; *see also Manfro v McGivney*, 11 AD3d 662, 663 [2004]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, conclusory allegations in a pleading are not entitled to favorable inferences, and a complaint based on legal conclusions is insufficient and cannot survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009], citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1994]). Bare legal conclusions are not presumed true (*see e.g. Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022 [2007]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]), and factual claims flatly contradicted by the record are not entitled to any beneficial inferences (*Morone v Morone,* 50 NY2d 481 [1980]; *Gertler v Goodgold,* 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985]; *Gershon v Goldberg*, 30 AD3d 372, 373 [2006]).

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2nd Dept 2005]. *See also Leon v Martinez,* 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg,* 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens,* 273 AD2d 193 [2nd Dept 2000].

The standard of review on such a motion is not whether the party has artfully drafted the pleading, "but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; See also *Leviton*

*Manufacturing Co., Inc. v Blumberg,* 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC,* 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester,* 282 AD2d 561, 562. The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez, 84* NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

Applying this analysis to the motion, defendants' motion makes out a prima facie case for dismissal under CPLR 3211 (a) (7) as to defendant Esther Reisman. A "trust" account at a bank does not give the person named any right to withdraw any funds unless and until the account holder dies. As it is undisputed that Steven Reisman is alive, Esther Reisman could not have withdrawn any funds. Plaintiff does not allege any wrongdoing on her part in the Complaint. Therefore, the action is dismissed as against her.

Applying this analysis to the remainder of the motion, defendants' motion fails to make out a prima facie case for dismissal under CPLR 3211 (a) (7). Counsel's reliance on the *Festinger* decision is inapposite. First, plaintiff did not transfer funds to keep them away from her creditors. Second, she was not being criminally prosecuted for defrauding people of money and claiming indigence. Third, if the funds at issue were in fact a life insurance distribution from the death of a family member, the funds would

have been categorized as separate property, not marital property, in the divorce action. The divorce action was settled between the parties and not judicially decided. Finally, this matter is a completely private one. It does not invoke public policy concerns. *Rosner v Rosner,* 766 F Supp2d 422 (USDC EDNY 2011). Defendant Steven Reisman cannot utilize his sister's alleged wrongdoing , wrongdoing which he is claimed to have willingly participated in before their falling out over their parents' *inter vivos trust*, as a shield to protect him from liability for retaining the plaintiff's funds, if in fact it is established that plaintiff entrusted him with the funds. Further, it is noted that the Armin and Marilyn Reisman Family Trust, the *inter vivos* trust referred to above, is not listed on the plaintiff's Net Worth Statement either. Surely defendant is not intending to claim plaintiff has no interest in the trust because her divorce attorney left it off the Net Worth Statement.

The decision in *Jones Language Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168 (1st Dept 1998) simplifies the principle:

> The doctrine of judicial estoppel or the doctrine of inconsistent positions "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." As stated by the United States Supreme Court, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." "The doctrine rests upon the principle that a litigant 'should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.' (internal citations omitted).

The doctrine of judicial estoppel is thus applicable only where there has been a favorable judgment in the first judicial proceeding. *Crespo v Crespo*, 309 AD2d 727 (2nd Dept 2003). In this matter, the divorce action was settled, and there was no judicial

determination. Additionally, if the funds were in fact from life insurance proceeds as alleged, they were separate property and would not have been included in a judicial determination of equitable distribution. While plaintiff's ex-husband states in his affirmation in reply that if he had known of the funds, it would have "almost certainly affected the terms I agreed to" in settling the case, this is mere speculation. Plaintiff listed interests in four family businesses in her Net Worth Statement, and numerous other assets. She omitted the family trust as well as the funds at issue. Surely he was aware of the trust, which was established in 2001 and has been providing distributions to his adult children since then. There were no minor children at the time of the divorce, and no child support or maintenance obligations in the settlement agreement. The parties merely divided the marital assets in their agreement. There was no "favorable judicial determination" and so judicial estoppel is inapplicable.

Turning to the branch of the motion seeking dismissal pursuant to CPLR 3211 (a) (1), the court finds defendants' motion also fails to make out a prima facie case for dismissal on this ground. A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) will be granted if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [2002] [internal quotation marks omitted]; *see also Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2010]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). Documents where the contents are "essentially undeniable" include judicial records, mortgages, deeds, contracts and other written agreements (*Fontanetta*, 73 AD3d at 84-85). An insurance policy also suffices as "documentary evidence" for CPLR 3211 (a) (1) purposes (*see e.g. Sands Point Partners Private Client Group v Fidelity Natl. Tit. Ins. Co.*, 99 AD3d

982 [2012] [copy of policy conclusively established entitlement to 3211 (a) (1) dismissal of complaint]). Lastly, a complaint containing factual claims flatly contradicted by documentary evidence should be dismissed (*Well v Yeshiva Rambam*, 300 AD2d 580, 581 [2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [1997], *cert. denied* 522 US 967 [1997]).

The court cannot determine what documentary evidence defendants claim entitle them to have the complaint dismissed. Indeed, there are no documents whatsoever annexed to the motion.

In conclusion, the court finds that defendant Esther Reisman has made out a prima facie case for the relief requested in her motion. The action is dismissed as to her.

The court finds that defendant Steven Reisman has failed to make out a prima facie case for the relief requested in his motion. The motion is denied as to him.

The foregoing constitutes the Decision and Order of this Court.

Dated: Brooklyn, New York
March 5, 2014

**Hon. Debra Silber, A.J.S.C.**

Hon. Debra Silber
Justice Supreme Court

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