

Perez v Perez

2018 NY Slip Op 33252(U)

December 12, 2018

Supreme Court, Kings County

Docket Number: 516348/17

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 9th day of December, 2018

12th

P R E S E N T: HON. LOREN BAILY-SCHIFFMAN,
Justice.

LEONARDO PEREZ and JINETT PEREZ ACEVEDO, Each individually, as heirs-at-law and as proposed Administrators of the Estate of Leonardo Perez, Deceased,

Plaintiff

- against -

ANIBAL PEREZ,

Defendant.

Index No.:516348/17

Motion Seq. # 1

DECISION AND ORDER

As required by CPLR 2219(a), the following papers read on this motion for summary judgment

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavit and Exhibits	1
Memorandum of Law in Support of Motion	2
Affirmation, Affidavit and Exhibits in Opposition	3
Reply Affidavit and Exhibits	4
Memorandum of Law in Reply	5

This matter involves claims for constructive trust, unjust enrichment, conversion, breach of fiduciary duties, injunction, accounting and punitive damages. Defendant moves for summary judgment dismissing the complaint.

BACKGROUND

Defendant was the title owner of a property at 530 39th Street, Brooklyn, NY from 1976 to 2016 when he sold the property to a third party. Plaintiffs are the son and daughter of defendant's deceased brother, Leonardo Perez. As heirs of Leonardo Perez, plaintiffs assert that they are entitled to the property because they allege that Leonardo Perez managed and

maintained the property and, other than the fact that his name was not on the deed, he acted as the owner of the property. Plaintiffs, in essence, allege that Anibal Perez held title to the property for the benefit of Leonardo Perez.

Defendant asserts that he alone purchased the property and that he permitted his brother Leonardo to manage the property and retain the net profits from the rental income in lieu of a management fee. Defendant disputes plaintiffs' assertion that he held the property for the benefit of Leonardo or that Leonardo claimed or was entitled to any interest in the property. After Leonardo's death in 2003, defendant states that he permitted plaintiffs to manage the property and to retain the net profits as their father had. In 2008, defendant took back the management of the property from plaintiffs and had his son, Anibal J. Perez ("AJ") manage the property. In 2013, Defendant transferred ownership of the property to an LLC that he controlled. In 2016, Defendant sold the property to a third party.

STANDING

Defendant first argues that plaintiffs lack standing to commence this action because they have not been appointed personal representatives for the estate of Leonardo Perez. Plaintiffs sue as "heirs-at-law and proposed administrators of the estate of Leonardo Perez, deceased". Defendant/movant asserts that only a personal representative who has received Letters of Administration can sue on behalf of an estate, citing EPTL §11-3.1. Plaintiffs argue that as heirs of Leonardo Perez, they are entitled to the subject property because their father was entitled to an ownership interest in the property. Therefore, plaintiffs are asserting the interest of the estate of Leonardo Perez. When this action was brought no Letters of Administration had been issued

by the Surrogate's Court and, therefore, there was no representative to sue on behalf of the estate. A beneficiary of an estate cannot act on behalf of the estate or exercise a fiduciary's rights with respect to estate property. *Stallsworth v Stallsworth*, 138 AD3d 1102 (2nd Dept 2016), citing *Jackson v. Kessner*, 206 AD2d 123 (1st Dept 1994) and *McQuade v. Perot*, 223 NY 75 (1918). The procedure to be followed is to be appointed a representative of the estate as indicated in the EPTL. *Stallsworth*, supra at 1102-3, citing *Schoeps v. Andrew Lloyd Wever Art Foundation*, 66 AD3d 137 (1st Dept 2009). As here, where a beneficiary or heir of an estate sues in that capacity, the plaintiff lacks standing to sue. *Id.* The fact that plaintiffs later were issued Letters of Administration does not change the court's holding that they did not have standing to commence the instant action. As the Court of Appeals stated in *Carrick v Central General Hospital*, 51 NY2d 242, 250 (1980) "the statutory requirement of a duly appointed administrator is in the nature of a condition precedent to the right to bring the suit". Accordingly, the instant action must be dismissed on the basis of Plaintiffs' lack of standing to sue.

CONSTRUCTIVE TRUST

The requirements of a constructive trust are: (1) that there is a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment. *Sharp v. Kosmalski*, 40 NY2d 119 (1976). The Complaint in this action asserts only that Defendant and Leonardo Perez were brothers. A family relationship alone does not establish the first element of a constructive trust: that there be a confidential or fiduciary relationship. *Sley v. Wasserman*, 2011 US Dist LEXIS 109470, p. 32 (SDNY 2011). A fiduciary relationship may exist when family members are involved in a co-owned family business, as in the cases cited by

Plaintiffs. However, in the case at bar nowhere is it alleged that Defendant and his brother, Leonardo, were involved in a co-owned family business. The affirmation in opposition refers to the relationship only as "business-like". This does not create a question of fact as to whether there was a fiduciary relationship between Defendant and Leonardo.

Defendant/movant asserts that Plaintiffs cannot establish the promise requirement of a constructive trust because the only statements supporting the promise are barred by the Dead Man's Statute. The court need not address this issue because it finds that no fiduciary relationship existed between Defendant and his brother, Leonardo. Accordingly, a constructive trust cannot be established and this cause of action must be dismissed.

CAUSES OF ACTION FOR CONVERSION, BREACH OF FIDUCIARY DUTY, INJUNCTION,
ACCOUNTING, PUNITIVE DAMAGES AND ATTORNEYS FEES

The claim for conversion must be dismissed because no cause of action for conversion may be brought where the property involved is real property. *Garelick v. Carmel*, 141 AD2d 501 (2nd Dept 1988). The claim for breach of fiduciary duty must be dismissed because Plaintiffs cannot establish that there was a fiduciary duty owed by Defendant to Leonardo Perez or to the Plaintiffs. The claim for an accounting is dismissed because it must be premised on a fiduciary relationship which is lacking here. The cause of action for injunction must be dismissed because Plaintiffs have failed to establish that they do not have an adequate remedy at law. The cause of action for punitive damages must be dismissed because, even if true, the allegations in the complaint do not rise to the level of supporting a claim for punitive damages. As to the claim for attorneys fees, Plaintiffs have not provided any support for an entitlement to attorneys fees.

CONCLUSION

Based upon the foregoing, IT IS HEREBY ORDERED THAT Defendant's motion is granted in its entirety and the complaint in this action is dismissed.

This is the Decision and Order of the court.

ENTER



LOREN BAILY-SCHIFFMAN
J.S.C.

HON. LOREN BAILY-SCHIFFMAN

KINGS COUNTY CLERK
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