

Mosey v Williams

2018 NY Slip Op 33561(U)

April 12, 2018

Supreme Court, Erie County

Docket Number: I2013-000188

Judge: Catherine N. Panepinto

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

FILED
ACTIONS & PROCEEDINGS
APR 13 2018
ERIE COUNTY
CLERK'S OFFICE

STATE OF NEW YORK : COUNTY OF ERIE
SUPREME COURT

ACEA MOSEY, as Voluntary Administrator
of the Estate of WORTH L. FARRINGTON,

Plaintiff,

vs.

Index # I2013-000188
MEMORANDUM
DECISION

EDWARD J. WILLIAMS, JR., and
BRIANNE WILLIAMS,

Defendants.

Appearances:

ALAN BOZER, ESQ.
JOANNA CHEN, ESQ.
Attorney for Plaintiff
One Canalside
125 Main Street
Buffalo, New York 14203
(716) 847-8400

BRIAN MELBER, ESQ.
Attorney for Defendants
2100 Main Place Tower
Buffalo, New York 14202
(716) 855-1050

Hon. Catherine Nugent Panepinto, J.S.C.

Defendants, EDWARD J. WILLIAMS, JR. and BRIANNE WILLIAMS, moved for summary judgment with an attorney affirmation with exhibits, a memorandum of law, and reply memorandum of law. Plaintiff, ACEA MOSEY, as Voluntary Administrator of the Estate of WORTH L. FARRINGTON, submitted an attorney affidavit in opposition with exhibits and

memorandum of law in opposition to summary judgment and in support of her cross motion to amend, as well as a reply memorandum of law in further support for leave to amend. Defendants submitted an attorney affirmation with exhibits and memorandum of law in opposition to Plaintiff's cross motion to amend. Incidentally, it is noted the caption is inaccurate given Ms. Mosey's recent election to the Surrogate bench.

This is an interesting case in which Plaintiff seeks to recover money allegedly wrongly obtained by Defendants relative to their relationship with non-party Joan Morgante. Ms. Morgante was a geriatric aide hired in 2006 to care for WORTH L. FARRINGTON and his sister, June Farrington. Morgante pled guilty to a class D felony; to wit, attempted grand larceny in the second degree; admitting she attempted to steal money, in excess of \$50,000.00 from WORTH L. FARRINGTON. Plaintiff's complaint alleges five causes of action: 1) Conversion; 2) Aiding & abetting in breach of fiduciary duty; 3) Aiding & abetting in constructive fraud; 4) Constructive trust; and 5) Money had & received. The five causes of action revolve around thirteen checks written between August, 2007 through March, 2011.

Defendants argue for summary judgment based upon the alleged inability of Plaintiff to satisfy requisite elements of each of Plaintiff's five causes of action. Elements of each are argued unsatisfied because four of the thirteen checks originated from the June M. Farrington Revocable Trust; of which Morgante was named a beneficiary; June died in 2008. Because Plaintiff doesn't have a possessory right or interest in the Trust money which passed to Morgante, Defendants argue each of the causes of action requiring such a right and/or interest must be dismissed. Further, Defendants argue they did not owe Plaintiff any fiduciary duty, nor did they knowingly aid or abet one who did. The remaining nine checks were written by Morgante from a joint account she held with WORTH to pay Defendants for various well documented goods and/or services. Because said funds were properly earned by Defendants and Plaintiff benefitted from those goods and/or services, requisite elements of Plaintiff's causes of action are legally unsustainable.

Plaintiff responds there are multiple questions of fact relative to the legitimacy and value of goods and/or services allegedly provided by Defendants in exchange for funds payed pursuant to the nine checks referenced above. As to the four checks which were drawn upon funds originating from the June Farrington Revocable Trust, Plaintiff argues June's claims relative to same were assigned to WORTH. To "provide clarity and to promote the interest of justice, Plaintiff cross-moves to amend the complaint to allege the assignment". The complaint was filed in January, 2013 and amended in July, 2015. Plaintiff does not specifically argue facts relative to requisite elements of its cause of actions; instead, primarily

arguing the summary judgment motion should be denied for "equitable reasons". Further, Plaintiff argues there are questions of fact for a jury to resolve as to Morgante's authority to authorize payments to Defendants for various goods and/or services. Plaintiff alleges Defendants should have been on notice that Morgante was exceeding the scope of her authority. Plaintiff also argues Defendants will not be prejudiced should this Court allow amendment of its complaint and further, Plaintiff asks for allowance to demand punitive damages. The parties appeared for oral argument on January 18, 2018; this Court reserved decision.

The movant on a motion for summary judgment bears the "initial burden of tendering evidentiary proof in admissible form sufficient to demonstrate that judgment should be granted to him or her as a matter of law." *Brust v. Town of Caroga*, 287 AD2d 923 (3rd Dept., 2001); see *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). Once that burden is met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *Id.*

Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. CPLR §3025(b)

The terms which may be just are "committed to the sound discretion of the trial court." *Oil Heat Institute of Long Island Ins. Trust v. RMTS Associates, LLC*, 4 AD3d 290, 293 (1st Dept., 2004) ["leave to amend a pleading is, in the absence of prejudice or surprise to the opposing party, freely granted."] "Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay." *Jablonski v. County of Erie*, 286 Ad2d 927 (4th Dept., 2001). Moreover, trial courts should consider when evidence/facts were known to the party seeking to amend a pleading. See, *Dawley v. Decker*, 45 AD3d 1399 (4th Dept., 2007) [Motion made more than one year after answer served and plaintiff established she "would suffer significant prejudice" if court granted motion. Further, defendant failed to establish a reasonable excuse for the year long delay and the subject reports/facts were known and available at the time defendant served his answer.] "Prejudice has been defined as a special right lost in the interim, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment." *Id.*

In this case, Plaintiff seeks to amend her complaint to add allegations as to four of the thirteen checks originated from the June M. Farrington Revocable Trust; of which Morgante was named a beneficiary. June Farrington died in 2008; her estate assigned any claims she may have to Plaintiff in May, 2012. Further, Defendants submitted proof that they disclosed to Plaintiff in 2013 that certain funds received by Defendant WILLIAMS were reported by non-party Morgante to "have originated with June Farrington and were obtained through an inheritance". As referenced above, with this knowledge, Plaintiff served her original complaint in 2013 and amended it in 2015. Further in 2015, attorney Ken Manning, was deposed in this matter in his role at that time, as guardian of the property of WORTH FARRINGTON. Mr. Manning unequivocally stated this cause of action relates only to Mr. WORTH FARRINGTON's money and not that of non party June Farrington.

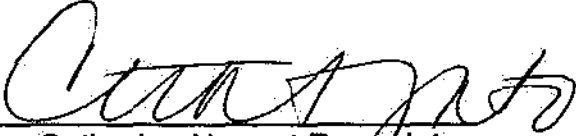
Because of the over four year delay, Defendants claim they would be prejudiced should this Court allow amendment to the complaint. The transactions Plaintiff seeks to address as part of amendment occurred in 2008 and 2009. The parties would have to return to the discovery process. Unlike funds related to WORTH FARRINGTON, there has been no criminal proceedings involving non party Joan Morgante, who likely will continue to assert any money she received from June Farrington was obtained properly through inheritance. Given that June died ten years ago, Defendants would have to rely heavily on testimony from Ms. Morgante, handicapped by advanced age and ill health.

This Court agrees with Defendants that the prejudice as described mandates denial of Plaintiff's cross motion. There is ample proof Plaintiff was well aware of Ms. Morgante's inheritance from June Farrington prior to Plaintiff filing her original complaint and the prior Plaintiff guardian disavowed any allegation relative to funds inherited from June Farrington. Moreover, given this long held knowledge, it is especially damaging Plaintiff makes no excuse for her failure to act upon that knowledge. *Raymond v. Ryken*, 98 AD3d 1265 (4th Dept., 2012). As to punitive damages, there is insufficient proof justifying an amendment to so allege.

After careful review of the transcripts of deposition testimony in this matter, as well as other evidentiary proof in admissible form, this Court finds Defendants met their burden to "demonstrate that judgment should be granted to him or her as a matter of law". *Brust*, *Supra*. Ergo, the burden shifted to Plaintiff to produce evidentiary proof to require "a trial of material questions of fact". Plaintiff has failed to do so. The only argument offered by Plaintiff is that Defendants should have known Ms. Morgante did not have the authority to authorize the work performed by Defendants in exchange for various payments. However, the individuals deposed in this matter all

support the opposite conclusion, i.e. that Mr. WILLIAMS had no reason to doubt Morgante's authority and was not part of any interactions and/or discussions which others may have had relative to Ms. Morgante taking advantage of WORTH FARRINGTON. To the contrary, deposed non-parties witnessed WILLIAMS working exactly as he testified, earning whatever money he was paid. Attorney speculation, absent proof that this may not have been the case is insufficient to justify denial of summary judgment.

Consequently, Defendant's motion is hereby granted in its entirety. Defendant is hereby directed to submit the appropriate order on notice.



Hon. Catherine Nugent Panepinto
Supreme Court Justice

Dated: April 12, 2018
Buffalo, New York