

Colazzo v Ponte

2019 NY Slip Op 31131(U)

April 26, 2019

Supreme Court, New York County

Docket Number: 154614/2018

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART IAS MOTION 12EFM

-----X

TONINO COLAZZO, DANIELLE COLAZZO, and
NICHOLAS COLAZZO,

Plaintiffs,

- v -

VINCENT F. PONTE, VINCENT J. PONTE,
CHARLES C. JACOBSON, KEVIN SHERIDAN,
and, as nominal defendants, AMALVI
ENTERPRISES LLC, PONTE STEAK HOUSE INC.,
270 WEST STREET, LLC, and JOHN DOE
ENTITIES,

Defendants.

-----X

INDEX NO. 154614/2018

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

HON. BARBARA JAFFE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9-36
were read on this motion to dismiss.

This action follows a proceeding brought in Richmond County Surrogate’s Court relating
to the estate of the late Marguerite Colazzo, who died intestate in 2013 (Index no. 2013-1138).
(NYSCEF 10, 11). On January 10, 2014, Marguerite’s husband, plaintiff Tonino Colazzo, was
granted letters of administration for her estate by the Richmond County Surrogate. (NYSCEF
35). Plaintiffs Danielle Colazzo and Nicholas Colazzo are the couple’s two adult children.
(NYSCEF 10, 11). Plaintiffs are all beneficiaries of Marguerite’s estate. (*Id.*).

By notice of motion, defendants move, pre-answer and pursuant to CPLR 3211(a)(1) and
(7), for an order dismissing the complaint, or in the alternative, for an order pursuant to CPLR
325(e) transferring this action to the Surrogate’s Court, Richmond County.

I. THE PONTE FAMILY AND THEIR TRUSTS AND COMPANIES

Siblings Marguerite and defendant Vincent F. Ponte were the children of the late Joseph Ponte, a successful Manhattan businessman and real estate investor who transferred his interests in many of his businesses and real estate holdings to an *inter vivos* trust he established in 2003. (NYSCEF 13). Marguerite and Vincent F. are its lifetime beneficiaries and one another's trustee. Their issue become the trust's life beneficiaries upon their parents' deaths. (*Id.*). Joseph also created two subtrusts, the Marguerite Ponte Collazo Trust and the Vincent F. Ponte Trust, for the benefit of Marguerite's and Vincent F.'s respective children.

Vincent F. is a managing member of both the Ponte family trusts and the Ponte family companies. Defendant Vincent J. Ponte, Marguerite's and Vincent F.'s cousin, is a managing member of the Ponte family companies. Defendant Charles C. Jacobson is an independent trustee of the Ponte family trusts and an executive officer of the Ponte family companies. Defendant Kevin Sheridan is the attorney for the Ponte family companies and trusts. Corporate defendants Almavi Enterprises, LLC, Ponte Steak House, Inc. (PSH), and 270 West Street, LLC (270 West) are among the Ponte family companies. Defendants John Doe Entities are other Ponte family companies in which plaintiffs hold either direct interests and/or interests as beneficiaries of the Ponte family trusts. (*Id.*). Vincent F., Vincent J., Jacobson, and Sheridan are the Ponte defendants. (*Id.*).

II. THE COMPLAINT (NYSCEF 11)

Joseph's late wife, Annette Ponte, established a similar trust for the benefit of her children and grandchildren, which defendants neither admit nor deny. Joseph's and Annette's trusts are together referenced as "the Ponte family trusts." Plaintiffs also assert that Marguerite

and Vincent F. were given ownership interests in other family-owned businesses that were originally incorporated by Joseph and remain in operation (the Ponte family companies). (*Id.*).

Shortly after Marguerite's death, Tonino sought from Vincent F. documents relating to Marguerite's interests in the Ponte family trusts and companies. Although Vincent F. had convinced Tonino that a formal accounting was unnecessary, Tonino came to believe that he intended to conceal the nature and extent of his late sister's interests in order to deprive her estate and her beneficiaries of their distributions. (*Id.*). Defendants terminated and/or restricted payments to them from the Ponte family trusts and companies, refused to provide them with information and/or documents regarding the trusts and companies, unsuccessfully pressured Danielle to have her father removed as the executor of her mother's estate, concealed the existence of Annette's trust from Danielle and Nicholas, filed fraudulent tax documents, and wrongfully had Marguerite's burial crypt altered to reflect only her maiden name. (*Id.*).

Plaintiffs thus advance causes of action for: 1) breach of fiduciary duty; 2) aiding and abetting breach of fiduciary duty; 3) fraudulent misrepresentation; 4) aiding and abetting fraudulent misrepresentation; 5) fraudulent concealment; 6) aiding and abetting fraudulent concealment; 7) fraudulent inducement; 8) aiding and abetting fraudulent inducement; 9) breach of trust; 10) aiding and abetting breach of trust; 11) conversion; 12) aiding and abetting conversion; 13) negligent misrepresentation; 14) intentional infliction of emotional distress; 15) aiding and abetting intentional infliction of emotional distress; 16) an accounting; 17) removal of a trustee and fiduciary; and 18) unjust enrichment. (NYSCEF 11).

In support of their claim for breach of fiduciary duty, plaintiffs allege that (1) Vincent F. filed false tax returns for the Ponte family trusts, filed false financial statements for the Ponte family companies, refused to provide them with duly demanded corporate tax and financial

information regarding the Ponte family trust and companies, concealed funds from the Ponte family trust and companies that were to be paid to Danielle and Nicholas, falsely represented the state of Almavi's finances, and refused to provide duly demanded information concerning same; 2) Jacobson provided Danielle and Nicholas with false financial information regarding the Ponte family trusts, withheld from them duly demanded financial information concerning the trusts and trust proceeds, attempted to coerce Danielle into removing Tonino as executor of her mother's estate, and wrongfully operated undisclosed trusts which had been created for Danielle and Nicholas; and 3) Sheridan concealed information about assets of certain undisclosed trusts that had been created for Danielle's and Nicholas's benefit, and refused to provide information and/or made false statements regarding plaintiffs' interests in the Ponte family trusts and companies.

In advancing their cause of action for fraudulent misrepresentation, plaintiffs allege that at the time of Marguerite's death, the Ponte defendants acknowledged plaintiffs' inherited interests in the family trusts and companies, and represented to them that they would continue to receive their proportionate shares of the proceeds. Soon after Marguerite's death, however, plaintiffs discovered that those representations were false, and that defendants thereby "exploited their position of superiority and influence." They also allege that defendants made the misrepresentations to induce them fraudulently to: 1) not seek an accounting during the probate of Marguerite's estate; 2) sell them their interests in the Ponte family trusts and companies for an unjustifiably low settlement price; 3) continue to allow defendants to manage the trusts and companies; and 4) delay taking remedial action against them.

Plaintiffs contend that they entrusted to the Ponte defendants specific property interests inherited from Marguerite and the family trusts, that they have an immediate and

superior right to those entrusted property interests and their proceeds, and that with knowledge of the superior rights, the Ponte defendants participated in and benefited from the exercise of unauthorized dominion and control over the property that plaintiffs entrusted to them by virtue of, *inter alia*: (1) their failure to disclose to them information necessary to identify the property and interests under the control of the Ponte defendants; (2) their diversion of plaintiffs' property interests and their proceeds for the personal purposes of the Ponte defendants; and (3) their wrongful retention of plaintiffs' property. As a direct and proximate result of the Ponte defendants' unlawful conduct, plaintiffs have each been damaged and continue to be damaged.

Plaintiffs' cause of action for negligent misrepresentation is supported by the following allegations: Notwithstanding the duty of each Ponte defendant to provide plaintiffs with correct information about actions taken on their behalf and matters related to their interests in the Ponte family companies and trusts under their control, they falsely represented, and should have known that their representations were false about: (1) plaintiffs' interests in the companies and trusts; (2) the status of plaintiffs' interests; (3) the status of the companies and trusts; and (4) the termination of distributions and restriction of financial support to plaintiffs from the companies and trusts. They also maintain that the Ponte defendants knew that plaintiffs wanted the aforementioned information for a "serious purpose," that Ponte defendants intended that plaintiffs rely on it, and that plaintiffs justifiably relied on it to their significant detriment.

In alleging that the Ponte defendants engaged in extreme and outrageous conduct against them, plaintiffs allege that they forged Tonino's signature on a sworn and notarized document submitted to the local diocese, falsely informed the local diocese that Marguerite and Tonino had divorced and thereby secretly arranged for the diocese to have Marguerite's married name

removed from her burial crypt, falsely reported Danielle's credit card charges as fraudulent to the credit card company when she was an in-patient at a medical facility, and then withheld financial support from plaintiffs in bad faith to punish them for protecting their interests in the Ponte family companies and trusts, all with the intent to cause, or in disregard of the substantial probability of causing them, emotional distress.

In support of their causes of action for breach of trust and removal of trustee and fiduciary, plaintiffs allege a trust relationship between them and the Ponte defendants under which plaintiffs entrusted their property to them for each plaintiff's benefit, and that with the knowledge and participation of each Ponte defendant, the Ponte defendants breached their trust obligations to plaintiffs by, *inter alia*: (1) misappropriating the assets and proceeds of the companies and trusts in which plaintiffs held interests; (2) misrepresenting and concealing the interests of plaintiffs entrusted to them; and (3) intentionally failing to account for plaintiffs' interests under their control, with their resulting damages.

III. DISCUSSION

A. Threshold matters (NYSCEF 21, 30, 34)

1. Tonino's standing

Defendants assert that Tonino lacks standing because he is neither a beneficiary of a Ponte family trust nor an owner of a Ponte family company. They claim that only a trust beneficiary, or one suing on behalf of a beneficiary, has standing to challenge a trustee's actions. While they do not deny that he is the duly appointed executor of Marguerite's estate, they contend that due to unspecified conflicts of interest, he may be a faithless executor. And, while defendants concede that an executor has standing to maintain causes of action "to preserve estate

assets for the protection of those persons eventually entitled to receive them” and that 50 percent of Marguerite’s direct interest in Almavi and all other property rights she held as an individual may pass to Tonino once her estate is probated, they maintain that Tonino lacks standing because he is a legatee of her estate with no independent right to maintain an independent cause of action for recovery of the property of the estate.

Plaintiffs maintain that Tonino appears here in both an individual and representative capacity as the executor of Marguerite’s estate, although he is not so designated in the caption, and that absent discovery, Tonino’s status as a beneficiary of a Ponte family trust is unclear. They also observe that as defendants acknowledge only Joseph’s trust, and concealed the existence of Annette’s (*id.*, NYSCEF 11), the trust interests under defendants’ control are unknown and defendants will not disclose it. They thus assert that discovery is needed to resolve the issue of whether Tonino is a trust beneficiary.

Plaintiffs offer no authority for the proposition that a non-beneficiary has standing to assert claims against trustees, and do not allege in the complaint that Tonino is a trust beneficiary or offer any documentary evidence that he is a beneficiary. That Danielle and Nicholas may be beneficiaries of Annette’s trust is no basis for inferring that Tonino may be one.

That Tonino is an heir of his late wife’s estate does not negate his role as executor. (*Gaentner v Benkovich*, 18 AD3d 424, 426 [2d Dept 2005] [executor has legal standing to assert causes of action to recover and preserve estate property]). Thus, to the extent that plaintiffs seek in any of their causes of action to preserve those estate assets, Tonino has legal standing to pursue them, but does not have standing to assert claims against defendant trustees for actions taken by them in bad faith (*see, e.g., Naversen v Gaillard*, 38 AD3d 509, 509 [2d Dept 2007] [non-beneficiary defendants lacked standing to challenge actions of plaintiff-trustee]).

Causes of action which do not relate to trust or estate property may be advanced by Tonino as an individual. Thus, he has standing to assert the causes of action for intentional infliction of emotional distress and aiding and abetting the intentional infliction of emotional distress stemming from defendants' alleged defacement, or having caused the defacement of, Marguerite's burial crypt.

2. Removal to Surrogate's Court

Defendants otherwise contend that the balance of this action should be transferred to the Surrogate's Court, where Danielle and Nicholas's interests in their mother's estate and family's trust arrangements "may be best protected," and to avoid Tonino's attempt to take control over the assets and resources that his late wife's family put in trust for her children.

Plaintiffs deny that they seek to affect the affairs of a decedent or administration of an estate. Rather, their action is "tort-based" and brought against living defendants for their fraudulent and wrongful activities against living plaintiffs and their interests.

Pursuant to CPLR 325(e):

Where an action pending in the Supreme Court affects the administration of a decedent's estate which is within the jurisdiction of the Surrogate's Court, the Supreme Court, upon motion, may remove the action to such Surrogate's Court . . .

As most of plaintiffs' causes of action are addressed to defendants' alleged fraudulent acts committed in managing the Ponte family trusts and companies and as defendants claim that neither the Ponte family trusts nor the majority of the companies passed to Marguerite's estate, Richmond County Surrogate's Court would have no jurisdiction over most of the property which is the subject of this litigation. (*See, e.g., Benjamin v Morgan Guar. Trust Co. of N.Y.*, 173 AD2d 373 [1st Dept 1991] [Surrogate's Court generally has no jurisdiction over *inter vivos* trusts]).

Marguerite's estate is still being probated in that court; Joseph's, which includes the Ponte family trusts and some of the Ponte family companies, is not.

As defendants admit that Marguerite's 12.5 percent ownership interest in Almavi is part of her estate, and as the documentary evidence demonstrates that Tonino is her executor, pursuant to CPLR 325, plaintiffs' claims against this estate property must be removed to Surrogate's Court, where Tonino may pursue claims involving that entity in his capacity as executor. Neither Danielle nor Nicholas may advance their individual claims concerning this property in Richmond County Surrogate's Court as they are mere "legatees" of their mother's estate who must rely on the executor. (*Gaentner*, 18 AD3d at 426 [cause of action to recover and preserve estate asset should have been dismissed as asserted by executor in individual capacity as legatee under will; legatees have no independent right to maintain independent cause of action for recovery of estate property]).

B. Legal sufficiency

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211(a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Where, however, the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and favorable inferences are rebutted. (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001], *affd as mod sub nom. Goshen*, 98 NY2d at 314, citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

1. Breach of fiduciary duty (first cause of action)

a. Contentions

Defendants maintain that plaintiffs state no cause of action for a breach of fiduciary duty, and that their allegations constitute a claim for breach of contract. While plaintiffs maintain that they state such a cause of action, they do not address defendants' argument that their allegations more properly state a claim for a breach of contract.

Defendants also assert that the cause of action for breach of fiduciary duty fails as it includes no plea for damages relating to Danielle and/or Nicholas. (NYCSEF 21).

To state a claim for breach of fiduciary duty, a plaintiff must plead the existence of a fiduciary relationship, the defendant's breach thereof, and resulting damages. (*Kurtzman v Bergstol*, 40 AD3d 588 [2d Dept 2007]).

The allegations set forth *supra* (II., at 3-4), state a claim for a breach of fiduciary duty by each Ponte family defendant, each of which is specified. That the allegations may also support a cause of action for breach of contract is immaterial.

2. Fraudulent misrepresentation (third cause of action)

Defendants assert, and plaintiffs deny, that this cause of action is conclusorily pleaded. Defendants also maintain that the allegations fatally lack an allegation that plaintiffs took any action or declined to take any action as a result of an alleged misrepresentation.

To recover damages for fraudulent misrepresentation, a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) [that] the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) [a] justifiable reliance by the plaintiff on the misrepresentation or material omission, and (4) injury.

(*Lewis v Wells Fargo Bank, N.A.*, 134 AD3d 777, 778 [2d Dept 2015]; citing *Blanco v Polanco*, 116 AD3d 892 [2d Dept 2014]; *Bernardi v Spyrtos*, 79 AD3d 684, 687 [2d Dept 2010]; *Pidwell*

v Duvall, 28 AD3d 829, 831–832 [3d Dept 2006]).

The misrepresentations specified in the complaint, *supra* (II. at 4-5) pertain to the nature, extent, and status of plaintiffs' interests in the family trusts and companies, and plaintiffs allege that defendants exploited their superior position which unfairly advantaged them. These allegations state a claim for fraudulent misrepresentation. (*See, e.g., Hirsch v Stellar Mgt.*, 148 AD3d 588, 588 [1st Dept 2017], citing *Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 748 [1st Dept 2013]). Moreover, plaintiffs need not plead damages with particularity. (*Cf. Solomon Cap., LLC v Lion Biotechnologies, Inc.*, AD3d , 2019 NY Slip Op 02621, *2 [1st Dept 2019] [CPLR 3016 (b) requires only that for claims or defenses based on fraud, circumstances constituting wrong be detailed], citing *A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 383 [1957]).

3. Fraudulent concealment (fifth cause of action)

Absent any argument that plaintiffs fail to state a cause of action for fraudulent concealment, and as the cause of action is sufficiently specific, defendants offer no legal basis for dismissing this cause of action.

4. Fraudulent inducement (seventh cause of action)

Having alleged several false representations of material facts, that defendants knew them to be false and intended to induce plaintiffs' reliance and forbearance from further inquiry, to the extent that plaintiffs would justifiably rely on such false representations and be damaged as a result (*MBIA Ins. Corp. v Credit Suisse Sec.[USA] LLC*, 32 Misc 3d 758, 773 [Sup Ct, NY County 2011], citing *Schumaker v Mather*, 133 NY590, 595 [1892]), plaintiffs state a claim for fraudulent inducement. In any event, defendants do not specify any ground for dismissal beyond arguing that the claim is insufficiently specified.

5. Aiding and abetting (second, fourth, sixth, eighth causes of action)

Plaintiffs allege that defendants aided and abetted one another in breaching their fiduciary duty, fraudulently misrepresenting material facts, fraudulently concealing facts, and fraudulently inducing plaintiffs to rely on same. Defendants offer no legal arguments directed specifically at these causes of action. In any event, having sufficiently pleaded a breach of fiduciary duty, that defendants knowingly participated in the breach by providing substantial assistance to one another, and damages resulting from the breach, the cause of action is stated. (*See Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006], citing *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]).

To plead a cause of action for aiding and abetting fraudulent misrepresentation, a plaintiff must allege all of the elements of fraudulent misrepresentation and the additional element that defendants have provided “substantial assistance” to the primary tortfeasor. (*E.g., Gansett One, LLC v Husch Blackwell, LLP*, 168 AD3d 579, 580 [1st Dept 2019]). In alleging “substantial assistance,” plaintiffs contend that defendants “concealed material information,” which is identified as certain trust documents, tax records, and corporate information, thereby pleading the element with sufficient particularity. “Substantial assistance” must also be pleaded in addition to the other elements of fraudulent concealment to set forth a cause of action for aiding and abetting fraudulent concealment. (*See e.g., William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 509 [1st Dept 2018]).

In alleging “substantial assistance,” plaintiffs set forth the same acts of concealment of documents and information with respect to fraudulent misrepresentation, and it is thus pleaded with sufficient particularity.

To state a claim for aiding and abetting fraudulent inducement, the plaintiff must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Defendants raise no argument.

6. Conversion and aiding and abetting conversion (eleventh and twelfth causes of action)

a. Contentions

Defendants argue that plaintiffs' causes of action for conversion and aiding and abetting a conversion state no claim given Jacobson's "absolute" discretion as independent trustee to disburse money from the trust. Thus, they claim, a decision not to disburse funds from the trust cannot be an impermissible exercise of dominion and authority.

According to plaintiffs, as the conversion claims relate to both trust and non-trust property, and because the trustee's discretion not unlimited, their claims are well-grounded.

b. Analysis

"Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights [internal citations omitted]." (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). A claim of aiding and abetting a conversion additionally requires that a plaintiff allege that the defendant "knowingly aided" in the conversion. (*See, e.g., Weisman, Celler, Spett & Modlin v Chadbourne & Parke*, 253 AD2d 721, 721 [1st Dept 1998], citing *Lenczycki v Shearson Lehman Hutton*, 238 AD2d 248 [1st Dept 1997]).

Where a trustee rightfully possesses trust funds, its continued custody of them and refusal to surrender them to a beneficiary until the beneficiary proves his entitlement to them does not constitute an assertion of dominion or control sufficient to establish a conversion. (*Matter of Sinzheimer v Bank of Am., N.A.*, 161 AD3d 414, 415 [1st Dept 2018], citing *Bradley v Roe*, 282

NY 525, 531 [1940]). Thus, a trust property is converted by a trustee only where there is a “defiance” of the beneficiary’s right, a determination to exercise dominion and control over the property and exclude the beneficiary from the exercise of his rights. (*Cf. Bradley v Roe*, 282 NY at 531-532).

As plaintiffs allege that defendants acted with defiance with respect to plaintiffs’ rights, they state claims with all of the requisite elements of both causes of action.

6. Negligent misrepresentation (thirteenth cause of action)

The elements of negligent misrepresentation are (1) “the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” (*Ginsburg Dev. Cos., LLC v Carbone*, 134 AD3d 890, 894 [2d Dept 2015], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

As the allegation in the complaint of a “special or privity-like relationship” among the parties essentially references the Ponte defendants’ duty to impart accurate information to plaintiffs, the cause of action is sufficiently stated.

7. Intentional infliction of emotional distress (fourteenth cause of action)

Defendants argue that plaintiffs fail to allege “extreme and outrageous” conduct and cite case law which plaintiffs seek to distinguish.

A cause of action for intentional infliction of emotional distress and for aiding and abetting it requires proof of the following elements: (1) extreme and outrageous conduct, (2) intent to cause or disregard of a substantial probability of causing severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) resulting severe emotional distress. (*Lau v S&M Enters.*, 72 AD3d 497, 498 [1st Dept 2010]).

The high standard that must be met to demonstrate extreme and outrageous conduct is conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016], quoting *Howell v New York Post Co.*, 81 NY2d 115, 122 [1993]). It is “designed to filter out petty complaints and assure that the emotional distress is genuine.” (*Chanko*, 27 NY3d at 57 [internal citations omitted]).

That defendants falsely reported Danielle’s credit card charges as fraudulent to the credit card company when she was an in-patient at a medical facility, and then withheld financial support from plaintiffs in bad faith to punish them for protecting their interests in the Ponte family companies and trusts, all with the intent to cause, or in disregard of a substantial probability of causing them, emotional distress, while obnoxious and distasteful, do not rise to the level of outrageousness contemplated in the case law.

The alleged defacement of Marguerite’s burial crypt, including the misconduct leading up to it, *supra* (II., at 5), presents a more difficult issue given society’s abhorrence of conduct disrespectful to the dead. To the extent that the Ponte defendants’ conduct in defacing Marguerite’s burial crypt contravenes state policy that incidents of death be treated with dignity and respect, the alleged conduct is sufficiently outrageous to constitute the intentional infliction of emotional distress.

8. Breach of trust and removal of trustee and fiduciary (ninth and seventeenth causes of action)

According to defendants, these claims “are contradicted by the trust document and are in the wrong court,” and barred by trust provisions that afford them sole and absolute discretion to make all decisions regarding payments to beneficiaries.

Plaintiffs argue that a trust may not waive its accounting responsibilities, nor is there any limitation of claims against a trustee that are based on bad faith or tortious conduct.

As most of the trust assets under defendants' management never became part of Marguerite's estate, there is no need for Danielle or Nicholas to bring suit in Surrogate's Court.

As a fiduciary, a trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust no matter how broad the settlor's directions allow the trustee free rein to deal with the trust. The trustee is liable if he or she commits a breach of trust in bad faith, intentionally, or with reckless indifference to the interests of the beneficiaries.

(*Boles v Lanham*, 55 AD3d 647, 648 [2d Dept 2008], citing *Matter of Heller*, 6 NY3d 649, 655 [2006]).

The ultimate issue for determination . . . is whether the trustee's discretionary power was exercised reasonably and in good faith," and "[i]t is not the task of the court to decide whether we agree with the trustee's judgment; rather, our task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion.

(*Matter of Bank of N.Y. Mellon*, 127 AD3d 120, 125 [1st Dept 2015]).

Having alleged that the Ponte defendants misappropriated the assets and proceeds of the companies and trusts in which plaintiffs held interests, misrepresented and concealed the interests that were entrusted to them, and intentionally failed to account for them, plaintiffs adequately set forth acts of bad faith by defendants as the trustees of Danielle's and Nicholas's beneficial interests in Joseph's trust. That the trustees were accorded great discretion does not immunize them from liability for acts undertaken in bad faith, and pursuant to EPTL § 7-2.6, Danielle and Nicholas are entitled to move for an order of removal of a trustee.

9. Accounting (sixteenth cause of action)

As none of the plaintiffs is a member of PSH or 270 West, defendants assert that they have no informational or accounting rights. They also maintain that the trust provision exempting

defendants from an affirmative duty to account to Danielle and Nicholas proves that plaintiffs cannot state a claim for an accounting.

“The essential ingredient of a trust is the accountability of the trustee, . . . exculpatory provisions . . . are valid in inter vivos trusts so long as there is some accountability, at least, to the settlor.” (*Bauer v Bauernschmidt*, 187 AD2d 477, 478-479 [2d Dept 1992] [internal citations omitted]). Here, the settlor, Joseph, is dead, as is Marguerite, the original life-beneficiary. It is well-settled that “any attempt to completely excuse the obligation of a trustee to account is void as against public policy” because “[a] circumstance in which the settlor who is the trustee and accountable only to himself is the equivalent of a provision in which the trustee is accountable to no one.” (*Matter of Malasky*, 290 AD2d 631, 632 [3d Dept 2002]; citing *Matter of Kassover*, 124 Misc 2d 630, 631 [Surrogate’s Court, Nassau County 1984]). Absent any living parties to whom defendants might account, other than themselves, they must account to Danielle and Nicholas regarding their management of trust property. In any event, EPTL § 7-2.7 expressly affords trust beneficiaries like Danielle and Nicholas the right to demand an accounting from a trustee in Supreme Court, notwithstanding LLC Law or the trust provision.

10. Unjust enrichment (eighteenth cause of action)

Defendants maintain that plaintiffs fail to specify how they have been enriched at their expense. While the complaint may contain facts supporting a cause of action for unjust enrichment, plaintiffs raise no argument against its dismissal in their opposition papers and are thus deemed to have abandoned it.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that so much of this action as asserts claims to the 12.5 percent ownership interest in corporate defendant Almavi Enterprises LLC that is held by the Estate of Marguerite Colazzo, deceased, as described in the above decision, shall be severed and dismissed with leave to refile in the proper court; it is further

ORDERED, that the motion of defendants Vincent F. Ponte, Vincent J. Ponte, Charles C. Jacobson, Kevin Sheridan, Almavi Enterprises LLC, Ponte Steak House Inc., 270 West Street, LLC, and the John Doe Entities to dismiss the complaint (mot. seq. number 001) is granted solely with respect to the eighteenth cause of action, and to the extent of removing Almavi Enterprises LLC as a defendant, but is otherwise denied; it is further

ORDERED that plaintiffs Tonino Colazzo, Danielle Colazzo, and Nicholas Colazzo are granted leave, pursuant to CPLR 3025 (b), to serve and file an amended complaint in which:

- (1) the dismissed eighteenth cause of action alleging unjust enrichment is omitted; and Tonino Colazzo is named as a plaintiff on only the fourteenth and fifteenth causes of action, respectively, intentional infliction of emotional distress and aiding and abetting the intentional infliction of emotional distress;
- (2) the fourteenth cause of action alleging intentional infliction of emotional distress shall be repleaded, in compliance with CPLR 3016 (b), to contain only the allegations regarding the forgery of Tonino's signature on a sworn and notarized document submitted to the local diocese, the false advice to the local diocese that Marguerite and Tonino had divorced, and the secret arrangement for the diocese to have Marguerite Colazzo's married name removed from her burial crypt ; and
- (3) defendant Almavi Enterprises LLC is not named as a defendant; it is further

ORDERED, that the amended complaint shall be served and filed within 20 days after service on plaintiffs' attorney of a copy of this order with notice of entry; and it is further

ORDERED, that, in the event that plaintiffs fail to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the complaint shall be dismissed.

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BARBARA JAFFE, J.S.C.

4/26/2019
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE