

Levis v Levis

2020 NY Slip Op 30514(U)

January 31, 2020

Supreme Court, New York County

Docket Number: 159176/18

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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WILLIAM LEVIS a/k/a WILLIAM R. LEVIS,
Plaintiff,

Index Number 159176/18

-against-

WILLIAM G. LEVIS, Individually and as
Attorney-in-Fact for William Levis, ROBERT W.
LEVIS, Individually and as Attorney-in-Fact for
WILLIAM LEVIS, and WILLIAM R. LEVIS
IRREVOCABLE TRUST,
Defendants.

Motions Seq. No.: 001 & 002

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WILLIAM G. LEVIS, Individually and as Attorney-
in-Fact for WILLIAM LEVIS, and ROBERT W. LEVIS,
Individually and as Attorney-in-Fact for WILLIAM LEVIS,
Third-Party-Plaintiffs

-against-

TINA M. RENDINI,
Third-Party-Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 36, 38, 39, 40, 44, 48, 51

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 41, 42, 43, 45, 49, 52, 53

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

DORIS LING-COHAN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence number 001, third-party defendant Tina M. Rendini (Rendini) moves, pursuant to CPLR 3211 (a) (7), to dismiss the third-party complaint. In motion sequence number 002,

plaintiff William Levis a/k/a William R. Levis moves, pursuant to CPLR 3212, for summary judgment on the first through the fourth causes of action alleged in his complaint, for an order setting aside a deed from William G. Levis, to William R. Levis Irrevocable Trust, which deed was recorded with the Office of the City Registry of the City of New York on August 24, 2018, CRFN 2018000285184 for the property located at 151 West 17th Street, Unit 5A, New York, N.Y. 10011, Block 793, 1215, and for attorneys' fees/disbursements.

The third-party complaint alleges the following two causes of action: (1) tortious interference with contractual relationships; and (2) undue influence. Upon review of the submissions, the claim for tortious interference must be dismissed, because there is no allegation that third-party defendant Rendini's activities were the "but for" of any breach of contract, an essential element of such a claim. *See Meer Enterprises, LLC v Kocak*, 173 AD3d 629, 630 (1st Dept 2019), citing *Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 (1st Dept 2002). Instead, the third-party complaint alleges only that Rendini induced plaintiff to terminate a power of attorney that he had given to his late wife and to his sons, defendants William G. Levis and Robert W. Levis, and to commence this action to terminate a trust. Neither the termination of a power of attorney by the grantor, nor the commencement of a lawsuit, however, without more, constitutes a breach of contract. Thus, the tortious interference with contractual relationships claim is dismissed.

The undue influence claim fails, because an essential element of such a claim is an allegation of wrongful conduct. *Matter of Cacchioli v Hoberman*, 31 NY2d 287, 292 (1972); *see Benjamin Goldstein Prods. v Fish*, 198 AD2d 137, 138 (1st Dept 1993). The third-party complaint herein merely alleges that third-party defendant Rendini overmastered plaintiff's will

by threatening to leave his employ, and to end her romantic relationship with him. Rendini had a right to do both, and neither constitutes wrongful conduct sufficient to support an undue influence claim. “A threat to do that which one has the right to do does not constitute duress.” *Gerstein v 532 Broad Hollow Rd. Co.*, 75 AD2d 292, 297 (1st Dept 1980). The third-party complaint also alleges that Rendini induced plaintiff to take certain actions by performing sexual acts with him. The complaint does not, however, allege that these acts were performed by duress. Notably, while third-party plaintiffs question the wisdom of plaintiff’s actions, they do not even suggest that plaintiff is incompetent.

The complaint alleges the following four causes of action: (1) conversion of property by agent; (2) unjust enrichment; (3) breach of fiduciary duty; and (4) a demand for attorney’s fees. This case arises from defendants’ use of the power of attorney that is referred to above, pursuant to which defendant William G. Levis created defendant William R. Levis Irrevocable Trust (“Trust”), without the knowledge or specific consent of plaintiff, and granted the Trust a deed (Deed) to plaintiff’s condominium apartment, naming William G. Levis and his brother Robert W. Levis as sole beneficiaries, upon the death of plaintiff.

Defendants argue that, absent any discovery to date, plaintiff’s motion is premature. However, they are silent as to what information they might seek through discovery, which would be necessary to defeat plaintiff’s motion. While defendants deny the allegations of the complaint, that they caused the Deed to be prepared, and executed it, without plaintiff’s knowledge (*see* complaint, ¶¶ 9 - 11 and verified answer, ¶¶ 9-11), an email sent by defendant Robert Levis to plaintiff, subsequent to the recording of the Deed, confirms that, notwithstanding their verified denial, they did precisely that. *See* Scollars Affidavit (2/8/19), Exhibit E at 2.

Indeed, that email explicitly recognizes that the transfer of the condominium to the Trust was contrary to plaintiff's express wishes, and taken "to protect [plaintiff] from ... irrational and irreparable acts." *Id.* Moreover, an email sent on July 17, 2018, by plaintiff's then-attorney to defendants William Levis and Robert Levis, among others, a short time prior to the creation of the undated Trust, clearly states that plaintiff needed additional time to think about whether to place his condominium in a trust. *See* Complaint, Exhibit C. Accordingly, it is undisputed that defendants created the Trust, which withdraws control over the ownership of the condominium from plaintiff, despite knowing that plaintiff did not want his apartment placed in a trust, at that time.

Defendants point out that the power of attorney, pursuant to which they created the Trust, and conveyed the condominium to it, authorized them to do both of those things. The use of powers granted by a power of attorney, however, are not limited solely by the terms thereof, but also by statute and court decisions. In *Matter of Ferrara* (7 NY3d 244, 254 [2006]), the Court held that an agent, acting under a power of attorney, "must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing. (internal quotation marks and citation omitted)." More specifically, the Court held that one acting under a power of attorney is authorized to make gifts to him or herself "only . . . insofar as these gifts [are in the grantor's] best interest, interpreted by section 5-1502M as gifts to carry out the principal's financial, estate or tax plans." *Id.* Here, by contrast, defendants placed plaintiff's principal asset in the trust and named themselves the beneficiaries thereof. A gift that an agent makes to him or herself, or to an other, of property that is the subject of an agency relationship "carries with it the presumption of

impropriety and self-dealing, a presumption which can be overcome only with the clearest showing on the part of the principal to make the gift.” *Matter of Audrey Carlson Revocable Trust [Daly]*, 59 AD3d 538, 540 (2d Dept 2009) (internal quotation marks and citation omitted). Here, on the contrary, there is a clear showing that plaintiff did not intend to place the condominium into a trust controlled by defendants. That showing is not affected by the fact that, prior to the death of plaintiff’s wife, plaintiff had written a will naming her and defendants as his legatees.

Turning to the causes of action alleged in the complaint, conversion consists of a defendant’s exercise of dominion over property, in derogation of the plaintiff’s possessory right to it. *Reif v Nagy*, 175 AD3d 107, 120 (1st Dept 2019), citing *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). Here, plaintiff had an undisputed possessory right to his condominium, and defendants exercised a knowingly unauthorized dominion over that property.

A plaintiff alleging unjust enrichment must show “that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.” *Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182 (2011) (internal quotation marks and citation omitted); *see also Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516-518 (2012). Here, defendants used the power of attorney granted by plaintiff to take plaintiff’s apartment out of his control, and place it in an irrevocable trust, of which they are the beneficiaries. This Court has no hesitation in holding that equity and good conscience bar defendants from keeping what they have seized. While defendants may have acted in fear that their elderly father was making choices that threatened his financial

security and independence, absent any allegation of plaintiff's incapacity, they had no legal right to interfere with his decisions. *See* Mental Hygiene Law § § 81.01, 81.16 (b).

Moreover, by using their power of attorney to act in explicit opposition to what they knew were plaintiff's wishes, defendants have also violated their fiduciary duties. Finally, plaintiff has shown neither a contractual, nor a statutory, basis for his claim of attorney's fees. Accordingly, that claim is denied.

Accordingly, it is hereby


ORDERED that, in motion sequence number 001, the motion of third-party defendant Tina M. Rendini to dismiss the third-party action is granted with costs and expenses as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that, in motion sequence number 002, the fourth cause of action is dismissed, and the motion of plaintiff William Levis a/k/a William R. Levis for summary judgment is granted with respect to the first three causes of action in the complaint; and it is further

ORDERED and ADJUDGED that the deed from William G. Levis to William R. Levis Irrevocable Trust, which deed was recorded with the Office of the City Registry of the City of New York on August 24, 2018, CRFN 2018000285184 for the property located at 151 West 17th Street, Unit 5A, New York, N.Y. 10011, Block 793, 1215, is cancelled; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon all parties, as well as the Office of the City Register and upon the office of the managing agent for 151 West 17th Street Condominium.

Dated: Jan 3, 2020


Doris Ling-Cohan, J.S.C.

JUSTICE DORIS LING-COHAN