

**First Trinity Life Ins. Co. v Advanced Funding
Solutions LLC**

2021 NY Slip Op 30415(U)

February 11, 2021

Supreme Court, New York County

Docket Number: 652780/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

-----X

FIRST TRINITY LIFE INSURANCE COMPANY,

Plaintiff,

- v -

ADVANCED FUNDING SOLUTIONS LLC, SUSANNE
GENNUSO, ROBERT SCHACHT, DAN CEVALLOS,
MONICA RAY, RUBEN MARTINEZ

Defendant.

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INDEX NO. 652780/2020

MOTION DATE N/A,
02/10/2021

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for DISMISS.

Motion sequence numbers 003 and 004 are consolidated for disposition.

The motion (MS003) by defendant Susanne Gennusa (incorrectly sued as Gennuso) to dismiss is granted. The motion (MS004) by defendant Robert Schacht to dismiss is granted.

Background

This case is about a lottery winner: defendant Martinez. Martinez won a New York State Lottery game in April 2008 that had a minimum prize of \$2 million. In August 2016, Martinez entered into an agreement with defendant Advanced Funding (“AF”) in which he agreed to assign 32 months of prize payments totaling over \$800,000 in exchange for a lump sum payment

of \$465,000. AF then assigned its right to the money to plaintiff in exchange for a payment in excess of \$500,000.

In connection with Martinez's assignment a petition was brought in Schenectady approving the transfer. However, Martinez later moved (via a new attorney) to strike the assignment and disavow an affidavit he signed in which he agreed to the transaction. He later withdrew the order to show cause in exchange for an increased lump sum payment. Then Martinez brought another application seeking to stop any more payments by the state's Lottery Commission because AF allegedly did not make the additional payments promised to him in the settlement.

Plaintiff brought this case because it claims it paid a substantial amount of money to AF for the rights to Martinez's lottery prize and the assignment is now in question due to AF's alleged failure to pay Martinez additional monies.

Defendant Gennusa was the attorney for AF in the underlying petition in Schenectady in which approval was sought for the underlying lottery payments. Defendant Schacht was the first attorney for Martinez. Gennusa claims that there is no breach of contract claim viable against her because plaintiff never entered into a contract with her. She also insists that the causes of action for unjust enrichment, fraud, aiding and abetting fraud, civil conspiracy, and violation of New York Judiciary Law § 487 must also be dismissed because she was merely AF's attorney.

Defendant Schacht makes similar arguments. He emphasizes that the relationship between him and plaintiff is far too attenuated for any of the causes of action against him to remain.

In opposition to Gennusa's motion, plaintiff claims that it did its due diligence before entering into the assignment with AF for Martinez's remaining winnings (totaling over

\$800,000). Plaintiff insists that Gennusa acted on behalf of AF and therefore was part of the contract. Alternatively, plaintiff argues that Gennusa could be held liable under the theory of unjust enrichment because she acted on behalf of AF and provided false representations to the Court.

In opposition to Schacht's motion, plaintiff questions Schacht's conduct in the underlying case and points out that he did not use an interpreter despite Martinez's limited English proficiency, Schacht did not meet Martinez or communicate with him until after the lottery winnings were assigned. Plaintiff agrees to withdraw the breach of contract claim but insists it has valid claims for unjust enrichment, aiding and abetting fraud, civil conspiracy, and violation of Judiciary Law § 487.

Discussion

“On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

The Court grants the motion. The facts alleged by plaintiff do not state any viable causes of action against the attorneys sued in this case. Plaintiff is upset that it paid money to AF under the theory that AF had properly acquired Martinez's rights to the lottery winnings. Apparently, Martinez (via a different attorney than Schacht) tried to invalidate his assignment, then dropped his challenge only to bring another application when AF apparently did not make the additional

payments agreed to when Martinez's first challenge was resolved. That case remains pending in Schenectady although it is unclear what losses plaintiff suffered.

In any event, nothing in these papers demonstrate why the attorney for AF and the first attorney for Martinez could be liable to plaintiff. Gennusa was AF's attorney; even if there were issues with AF's conduct relating to the assignment with Martinez, that does not mean that AF's attorney is personally liable. Plaintiff had an agreement with AF not with AF's attorney. And her conduct was simply to file a petition in Schenectady County to approve the assignment. To find that a cause of action exists is tantamount to finding that an attorney is personally responsible for the acts of her client. That is ludicrous.

Schacht presents a slightly different factual scenario but still compels the same result. The alleged improprieties perpetrated by Schacht could theoretically give rise to a malpractice case by Martinez,¹ but that cause of action lies with Martinez. The Court does not see how a third-party could recover against Schacht, especially where the assignment at issue was never invalidated. That he was paid as an attorney for Martinez does not state a cause of action for unjust enrichment.

The Court dismisses the civil conspiracy cause of action against these defendants because “[c]ivil conspiracy is not recognized as a cause of action in New York” (*Project Cricket Acquisition, Inc. v FCP Inv'rs VI, L.P.*, 159 AD3d 600, 601, 74 NYS3d 517 [1st Dept 2018]).

Summary

The Court recognizes that plaintiff is upset that its transaction is at risk. If the assignment is invalidated, it will have paid over \$500,00 for lottery winnings to which it is not entitled. But

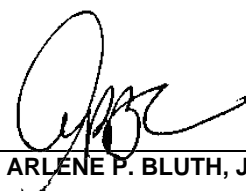
¹ The Court makes no finding about a potential malpractice case against Schacht. It merely observes that the allegations against him, if true, represent a troubling set of actions.

that does not mean that it can sue the attorneys for AF and Martinez. The acts of their clients are not automatically attributed to their counsel.

Accordingly, it is hereby

ORDERED that the motion by defendant Gennusa (MS003) and Schacht (MS004) to dismiss the causes of action alleged against them is granted and the Clerk is directed to enter judgment in favor of these defendants along with costs and disbursements upon presentation of proper papers therefor.

Remote Conference: May 17, 2021.

<u>2/11/2021</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE