Harris v Lichtenstein
2021 NY Slip Op 30487(U)
February 19, 2021
Supreme Court, New York County
Docket Number: 154155/17
Judge: Nancy M. Bannon

NEW YORK STATE SUPREME COURT

COUNTY OF NEW YORK: IAS PART 42

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TAMARA HARRIS and BETSY HARRIS,

Plaintiffs, Index No.: 154155/17

- against -

ANDREW LICHTENSTEIN, ALLISON HARRIS SCIFINI, TJ MONTANA ENTERPRISES LLC, BERNICE HARRIS, 17 PHILIP COURT PORT WASHINGTON LLC, and John Doe (Member/Shareholder 17 Philip Court Port Washington LLC), DECISION and ORDER

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

Plaintiffs Tamara Harris and Betsy Harris move to dismiss the counterclaims of defendants TJ Montana Enterprises, LLC (TJ) and Andrew Lichtenstein, and to sanction them for frivolous conduct pursuant to 22 NYCRR 202.7. Defendants Lichtenstein and TJ cross-move, pursuant to CPLR 3212 and 3211 (a) (7), for partial summary judgment dismissing the claims against them and for attorney's fees, costs, and disbursements.

II. BACKGROUND

Plaintiff Betsy Harris and nonparty Steven Harris were in a romantic relationship for 44 years until Steven died on April 24, 2017. Plaintiff Tamara Harris is their daughter. Defendant

Bernice Harris is Steven's widow and defendant Allison Harris Schifini is their daughter. At the time of Steven's death, he had owned for many years a 19.35% membership interest in TJ, a company that he founded with defendant Lichtenstein in 1994. Allison owns a 30.65% interest in TJ and Lichtenstein a 50% interest. Betsy and Tamara allege that Steven made an assignment and a will transferring his 19.35% interest in TJ to Betsy for the remainder of her life and then to Tamara. The handwritten assignment is dated March 7, 2017.

After Betsy and Tamara Harris commenced the instant action to enforce their ownership of Steven's 19.35% membership interest in TJ, Bernice and Allison commenced an action (the second action) in this court (*Harris v Harris*, Sup Ct, NY County, Index No. 656962/2017). Bernice and Allison sued individually and derivatively on behalf of TJ and named as defendants Betsy, Tamara, Lichtenstein as nominal defendant, and TJ. On April 23, 2020, four of the five causes of action in the second action were dismissed, leaving one cause of action for a declaratory judgment (NYSCEF 172, court's decision). Also pending is an action on Steven's will in Bronx County Surrogate Court, File No. 2017-1035.

Defendants contend that the assignment and the will are ineffective to pass Steven's membership in TJ to Betsy and that his interest properly passes to his widow Bernice. Their cross motion is based on the provisions of the operating agreement and plaintiffs' alleged lack of standing to maintain the instant action. Plaintiffs move for dismissal on the grounds that TJ's and Lichtenstein's counterclaims fail to state a cause of action, are time-barred, and are barred by the doctrines of res judicata and collateral estoppel. The movants do not identity a particular statute, but the motion appears to fall under CPLR 3211.

III. DISCUSSION

A. Legal Standards

A motion to dismiss for failure to state a claim pursuant to CPLR 3211 (a) (7) will not be granted if the factual allegations "within the pleadings' four corners . . . manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). The facts alleged in the complaint (or the counterclaims) must be accepted as true and accorded the benefit of every possible favorable inference (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, the movant bears the initial burden of establishing, prima facie, that the time in which to sue has expired (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017]).

To succeed on a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, by advancing evidence that proves the absence of any material and triable issues of fact (*Silverman v Perlbinder*, 307 AD2d 230, 230 [1st Dept 2003]).

B. Cross-Motion by Defendants TJ and Lichtenstein

Defendants argue that TJ's operating agreement renders plaintiffs' claims untenable. They maintain that the assignment by which Betsy alleges that she became owner of Steven's interest in TJ is void because Steven did not follow the procedure in the operating agreement by allowing the other members the right of first refusal to purchase Steven's interest. The defendants further aver that the operating agreement provides that, in the event that Steven is

sick or disabled, Bernice Harris shall have power of attorney to sign on his behalf and that in the event of his death, she shall accede to his interest in TJ.

Summary judgment cannot be granted pursuant to the operating agreement. In its decision of April 23, 2017 in the second action, the court determined that there were issues of fact as to whether there are multiple versions of the operating agreement, whether a formalized agreement was ever made, and whether the operating agreement is enforceable (NYSCEF 172, at 3). The court also stated that, even if the operating agreement were operative, there would still be a triable issue of fact as to whether it irrevocably conveyed Steven's membership to Bernice, such that Steven's subsequent will and assignment transferring his membership interest to Betsy were void (*id.*, at 4).

Defendants argue that Betsy and Tamara have no standing to pursue this action since they have not proven that Steven's interest passed to Betsy. It is precisely to determine the ownership of Steven's interest that these three actions are in the process of being litigated. Betsy and Tamara's position that Steven's interest passed to Betsy and that they hence have a cognizable stake in these issues is sufficiently alleged. "The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution" (*Security Pac. Nat. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]). The cross motion to dismiss the complaint is denied.

C. Motion by Plaintiffs Betsy and Tamara Harris

In their answer, TJ and Lichtenstein allege that for many years Steven Harris gave Betsy Harris $10,500 a month derived from Steven's 19.35% interest in TJ. During the six years

preceding his death, he gave her $750,000. Betsy and Tamara Harris control a bank account that is under TJ's name at Chase Manhattan Bank, and used it to convert funds belonging to TJ. Defendants further allege that cancelled checks from TJ's operating account at Bank of America reveal that while Steven was on life support in the cardiac intensive care unit and after he died on April 24, 2017, Betsy deposited in the Chase Manhattan account checks drawn on the TJ account at Bank of America. These checks were purportedly signed by Steven and were dated from April 23, 2017 through May 2, 2017. According to the complaint in the second action, the value of the checks deposited between April 23, 2017 and May 2, 2017 was $9,000 (NYSCEF 171).

The first counterclaim alleges that plaintiffs diverted $750,000 from TJ, that Betsy Harris was Steven Harris's "accomplice" in those actions, that "the diversion of TJ's funds to Betsy by Steven was not authorized by all the members of TJ," and that the diversion of funds by Steven to Betsy was a breach of Steven's fiduciary duty to TJ (NYSCEF 170, para. 188).

The first counterclaim sounds in conversion against Betsy and Tamara. There seems to be an attempt to allege breach of fiduciary duty and aiding and abetting, but conversion is the only claim that is clearly stated. The second counterclaim alleges that both plaintiffs were unjustly enriched by $750,000. The third is based on conversion and alleges that Betsy deposited unauthorized checks of TJ worth $9,000 in the Chase Manhattan account. The fourth counterclaim is based on the $9,000 amount and alleges unjust enrichment against Betsy.

To state a cause of action for conversion, the complaint must plead the plaintiff's possessory right or interest in the property and defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]). Where the plaintiff does not plead facts indicating ownership of the property allegedly converted or some interest in the property that would entitle plaintiff to possession, a claim for

conversion is not stated (*TechnoMarine SA v Jacob Time, Inc.*, 905 F Supp 2d 482, 497 [SD NY 2012]; *Pompez Exhibition Co. v Flatto*, 261 App Div 613, 613 [1st Dept 1941]).

The counterclaims allege that plaintiffs converted the money that Steven derived from his 19.35% membership interest in TJ, presumably his share of TJ's profits or distributions. Defendants do not clearly state why Steven, during his lifetime, could not give away the money and why that money (as distinguished from the membership interest) belongs to TJ or Lichtenstein. However, defendants do state that Betsy and Tamara controlled an account bearing TJ's name, that Betsy deposited checks into that account, and that the checks were drawn on another account bearing TJ's name. These allegations sufficiently suggest that Betsy and Tamara took funds belonging to TJ.

An unjust enrichment claim is sufficiently pleaded where the claimant alleges that another party was enriched at the claimant's expense and that it is against equity and good conscience for that party to retain what the claimant seeks to recover (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *Miller v Schloss*, 218 NY 400, 407 [1916]). The counterclaims allege that plaintiffs were enriched by taking money that belonged to defendants. Defendants sufficiently plead claims for unjust enrichment.

Plaintiffs contend that the counterclaims are time-barred. The statute of limitations for a conversion claim is three years and accrues when the conversion or taking occurs (*Harlem Capital Ctr., LLC v Rosen & Gordon, LLC*, 145 AD3d 579, 580 [1st Dept 2016]). New York does not identify a specific statute of limitations period to bring an unjust enrichment claim (*Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]). Rather, the statute of limitations takes the form of the claim to which it is pled in the alternative, and where the unjust enrichment claim flows from tortious conduct, it is governed by a three-year period (*Bandler v DeYonker*,

174 AD3d 461, 462 [1st Dept 2019]; *Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 582 [1st Dept 2010]). The statute of limitations for unjust enrichment generally accrues upon "the occurrence of the alleged wrongful act giving rise to restitution" (*Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003]; *Campaign v Esterhay*, 61 Misc 3d 662, 667 [Sup Ct, NY County 2018]). In this case, three years is the proper period of time for an unjust enrichment claim which flows from conversion.

This action commenced via summons with notice on May 4, 2017, and the claims are deemed interposed on that date (CPLR 304 [a]; NYSCEF 8, court docket). The counterclaims were served on June 26, 2020 (NYSCEF 164). Although a defense or counterclaim is interposed when the pleading containing it is served (CPLR 203 [d]), a different rule governs for statute of limitation purposes, as discussed below.

According to defendants, May 2, 2017 was the last day on which the claims for conversion or unjust enrichment could have accrued. That was the last time that Betsy allegedly took money belonging to TJ. The statutes of limitations for those counterclaims expired on May 2, 2020, three years after the date that the main action commenced on May 4, 2017. Plaintiffs assert that the counterclaims are barred since they were interposed after their statutes of limitations lapsed.

However, a counterclaim is actually deemed interposed for statute of limitations purposes when the main action commences (*International Fid. Ins. Co. v County of Rockland*, 98 F Supp 2d 400, 410 n 2 [SD NY 2000]; *Balanoff v Doscher*, 140 AD3d 995, 996 [2d Dept 2016]). A defense or counterclaim is not barred by its statute of limitations if it was not so barred at the time that the claims asserted in the main action were interposed (CPLR 203 [d]; Siegel, NY Prac

§ 48 [6th ed Westlaw]; 84 NY Jur 2d, Pleading § 170 [Westlaw ed]). Any counterclaims asserted by defendants that were not expired on May 4, 2017 are not barred.

As for those of defendants' counterclaims that were expired by May 4, 2017, they are not barred to the extent of the demand in the complaint as long as they arise from the same transactions as the claims in the complaint (CPLR 203 [d]). A counterclaimant may assert an otherwise untimely claim which arose out of the same transaction alleged in the complaint, but only to obtain recoupment or offset, and not to obtain affirmative relief (*Estate of Mantle v Rothgeb*, 537 F Supp 2d 533, 544 [SD NY 2008]; *California Capital Equity, LLC v IJKG, LLC*, 151 AD3d 650, 651 [1st Dept 2017]). The counterclaims arise out of the same facts as plaintiffs' claims, and defendants concede that the relief that they seek may be limited to an offset against any damages that plaintiffs may be awarded.

Neither res judicata, nor collateral estoppel, preclude adjudication of the counterclaims. The doctrine of res judicata bars a claim which was reduced to a final judgment on the merits in a prior action between the same parties (*Matter of Hunter,* 4 NY3d 260, 269 [2005]). All other claims arising out of the same transactions are barred, even if asserted under different theories (*Anderson v New York City Dept. of Educ*., 93 AD3d 538, 538 [1st Dept 2012]). The collateral estoppel doctrine applies to an issue that was necessarily decided in a prior action against a party or one in privity with a party, this issue is identical to the one sought to be precluded, and the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*Buechel v Bain*, 97 NY2d 295, 303–04 [2001]).

The complaint in the second action contained the same causes of action for unjust enrichment and conversion as here, based on the same factual allegations. The court dismissed the causes of action for conversion and unjust enrichment, because they impermissibly mixed the

individual claims of plaintiffs Bernice and Allison and the derivative claims made on behalf of TJ (NYSCEF 172, at 5-6). There was no final judgment on the merits of the claims, and the derivative claims are not identical to the claims here, as TJ appears here on its own behalf, not derivatively.

D. Applications for Sanctions

Each side seeks sanctions against the other. Plaintiffs contend that defendants acted frivolously by advancing the position that plaintiffs lack standing to maintain this action, and defendants argue that plaintiffs were frivolous because they made a motion without merit. Neither party has established entitlement to that relief.

IV. CONCLUSION

In conclusion, it is hereby

ORDERED that plaintiffs' motion to dismiss the counterclaims is denied; and it is further

ORDERED that the motion to dismiss the complaint by defendants Andrew Lichtenstein's and TJ Montana Enterprises LLC is denied, and it is further

ORDERED that the parties' respective applications for sanctions, attorneys fees and costs are denied.

Dated: February 19, 2021

ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON