

Zacharius v Kensington Publ. Corp.

2018 NY Slip Op 33387(U)

December 27, 2018

Supreme Court, New York County

Docket Number: 652460/2012

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X
SUZANNE MANGOLD ZACHARIUS :
 :
 Plaintiff, :
 :
 -against- :
 :
 KENSINGTON PUBLISHING CORPORATION, :
 STEVEN ZACHARIUS, and JUDITH :
 ZACHARIUS :
 :
 Defendants. :
-----X

Index No. 652460/2012
Motion Sequence No. 16

DECISION AND ORDER

EILEEN BRANSTEN, J.S.C.:

Defendants move for summary judgment, pursuant to CPLR 3212, seeking a dismissal of the Plaintiff’s sole remaining cause of action which seeks a declaration that the purported voting agreement is void as it was not executed by all the named parties. *See* Amen. Comp. ¶¶97 – 102.

I. PROCEDURAL HISTORY

Plaintiff commenced this action on July 16, 2012 by filing a summons and complaint. In February 5, 2013 the Plaintiff filed an amended complaint alleging six causes of action. On January 6, 2014 this Court ruled on Defendants’ motion to dismiss the amended complaint, dismissing all but the first cause of action – declaratory judgment based on Plaintiff’s allegations that Walter Zacharius did not physically execute the Voting Agreement. In the five years since filing the initial Complaint, there has been extensive discovery including the depositions of at least 14 witnesses and review of approximately 44,000 documents.

A Note of Issue was due on February 16, 2017 but was not filed until May 26, 2017. On January 9, 2017, Plaintiff moved to amend the Complaint a second time. By Order dated March

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16, 2017, this Court denied the motion for defective papers. The Plaintiff then re-filed the motion to amend on March 23, 2017. On June 20, 2017 this Court denied the Plaintiff's motion to amend, finding the proposed amendment was both without merit and would cause unnecessary prejudicial delay in resolving this matter, especially given that the Plaintiff was aware of the potential claims since at least 2014. By Order dated December 6, 2018 the Appellate Division, First Department, affirmed this Court's Decision finding the proposed amendment was "devoid of merit".

II. BACKGROUND

Plaintiff, Suzanne Mangold Zacharius, is the widow of Walter Zacharius. *See* Defendants' 19-A Statement (hereinafter Defendant's 19-A) ¶1. Walter Zacharius co-founded Kensington Publishing Corp., an independent book publisher, in 1974. *Id at* ¶¶ 2-3. Defendants Steven and Judith Zacharius are directors in Kensington publishing. *Id at* ¶ 4.

On December 16, 2005 Walter Zacharius, Steven Zacharius, and Judith Zacharius entered into a purported Voting Agreement which addresses the election of Kensington Publishing's board of directors. *See Amen. Comp.* ¶¶ 28-29. This voting agreement is alleged to be a forgery.

The Plaintiff alleges that the Purported Agreement was signed on December 16, 2005, when none of the alleged directors were present. *See id at* ¶ 32. Second, the signature page containing Walter Zacharius' signature — page 5 of the Agreement — is alleged to have been appended to the foregoing pages.¹ *See id at* ¶33. Third, there are missing sections from the

¹ While it is alleged that there was no notarized signature, the authenticity of Walter Zacharius' signature on that page is no longer in question. *See Defendants' 19-A* ¶ 32, *Plaintiff's Response* ¶32.

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Agreement. *See id at* ¶34. Fourth, Walter Zacharius' Shareholder Receivable Account did not reflect a charge for work performed on the Voting Agreement; and sixth Walter Zacharius never made mention of the Voting Agreement to the Plaintiff. *See id at* ¶¶ 35-36.

Upon these allegations, the Plaintiff seeks a declaration that Walter Zacharius did not execute the Voting Agreement and that it is null and void.

A. Drafting and Execution of the Voting Agreement

In 2005 Duane Morris drafted a Voting Agreement and sent those drafts to Kensington's general counsel Barbara Bennett. *Defendants' 19-A at* ¶¶ 24-30; *see also* Plaintiff's Response Statement (hereinafter "Plaintiff's Response") ¶25 (noting that the version submitted was not a draft which was prepared by Alexander Sudnik, a former associate of Duane Morris). Walter Zaccharius was aware of this Voting Agreement as he had met with attorneys from Duane Morris to discuss its creation. *See Defendants' 19-A* ¶31.

A Voting Agreement was signed by Walter Zacharius on December 16, 2005. *See Defendants' 19-A at* ¶36; Plaintiff's Response at ¶36. The signing was witnessed by Steven Zacharius and Barbara Bennett. *See Defendants' 19-A at* ¶37, 38; *see also* Plaintiff's Response at ¶¶ 37-38 (noting that the Affirmation of Barbara Bennet does not concretely state she witnessed the signing, rather she recalled both Walter Zacharius and Steven Zacharius had signed the Voting Agreement on or about December 16, 2005). Also on December 16, 2005 Steven Zacharius and Michael Rosamilia, on behalf of Kensington, executed the Voting Agreement. *See Defendants' 19-A at* ¶¶ 39 – 40. Judith Zacharius then executed a copy of the

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Voting Agreement the first week of January 2006, while on a visit to New York. *See* Defendants' 19-A at ¶42.

B. Forensic Analysis of the Voting Agreement

Forensic analysis has determined that the Voting Agreement was signed on or around December 16, 2005. *See* Defendants' 19-A at ¶43; *see also* Plaintiff's Response at ¶43 (admitting only that page 5 was signed on December 16, 2005). There were no inconsistencies with the Voting Agreement shown to the Defendants' expert in 2016 that indicate there was "page substitution, text alteration, text addition, signature insertion, or other irregularities". *See* Defendants' 19-A at ¶¶ 45 – 46; *see also* Plaintiff's Response at ¶¶ 45 – 46.

III. ANALYSIS

Defendants now move for summary judgment dismissing the Plaintiff's first cause of action which seeks to declare the voting agreement a nullity for not having been executed by Walter Zacharius.

CPLR 3212 provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." *See* CPLR 3212. "The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action sufficiently to warrant the court as a matter of law in directing judgment." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

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Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions.” *Genger v. Genger*, 123 A.D.3d 445, 447 (1st Dept 2014), quoting *Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 (1st Dept 1993). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *See Zuckerman v. City of New York*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep’t 1994) (“It is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...”).

A. Plaintiff’s Claim for a Declaratory Judgment (Count 1)

In cases involving claims attacking the integrity of a document, “[s]omething more than a bald assertion of forgery is required to create an issue of fact” on a summary judgment motion. *See Peyton v. State of Newburgh, Inc.*, 14 A.D.3d 51, 53, (1st Dept. 2004); *see also Bronsnick v. Brisman*, 30 A.D.3d 224, 224 (1st Dept. 2006). Any claim that a signed writing is not binding or enforceable must be duly substantiated because, under New York law, “[a]s a general rule, the signer of a written agreement is conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract.” *See State Bank of India, N.Y. Branch v. Patel*, 167 A.D.2d 242, 243 (1st Dept. 1990).

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The Plaintiff's Response Statement is riddled with textbook "whataboutism"² which fails to raise a dispute of fact. *See* Plaintiff's Response ¶¶ 25; 31; 32; 34; 37; 38; 39; 40; 45-47; 51-99. Notably, the Plaintiff does not dispute the authenticity of Walter Zacharius' signature on page five of the Voting Agreement, nor does she dispute that page five was signed on or around December 16, 2005, nor does she dispute that the agreement, as it was shown to the Defendants' expert in 2016, was unaltered, nor does the Plaintiff dispute references to the Voting Agreement were present in Kensington's Minute Book. *See* Defendants' 19-A ¶¶ 32, 43, 45, 46; *see also* Plaintiff's Response ¶¶ 32, 43, 45, 46.

In light of these admissions, this Court concludes that there is no triable issue of material fact as to whether Walter Zacharius signed and executed the document in 2005. The document was, in fact, executed by Walter Zacharius in 2005 and, as such, there was a meeting of the minds between the named parties to the Voting Agreement. The Voting Agreement is, therefore, not null and void and the court, therefore grants summary judgment in the Defendants' favor.

** Continued on Next Page **

² The common vernacular for the Latin term *et tu quoque* meaning "and you're another". *See e.g. Virgin Enterprises Ltd. v. Am. Longevity*, 2001 WL 1111981, at *1 (S.D.N.Y. Sept. 20, 2001); *United States v. Rahman*, 861 F. Supp. 266, 279 (S.D.N.Y. 1994); *In re Amidon*, 164 A.D. 869, 869-70 (1st Dep't 1914); *Halberstadt v. New York Life Ins. Co.*, 194 N.Y. 1, 5 (1909).

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IV. DECISION

In light of the foregoing it is hereby

ORDERED the Plaintiff's first cause of action is dismissed; further

ORDERED the court declares the voting agreement was executed by Walter Zacharius, is a binding agreement, and is not a nullity; and it is further

ORDERED the clerk is directed to enter a judgment in the Defendants' favor dismissing the Complaint as against them.

Dated: Dec. 27, 2018

ENTER:



HON. EILEEN BRANSTEN, JSC