

Matter of Pagach
2023 NY Slip Op 31020(U)
March 10, 2023
Surrogate's Court, Queens County
Docket Number: File No. 2021-55/C
Judge: Peter J. Kelly
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Present: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY

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Probate Proceeding, Will of

BURTON N. PUGACH,

File No. 2021-55/C

Deceased.

-----X
SUPREME COURT: QUEENS COUNTY

-----X
SAMUEL JACOBOWITZ, MARIS R. GORDON
and PETER S. GORDON, TAL PRIEL, CINDI
WEISS, and JOEL JACOBOWITZ,

Index No.
725255/2020
(ACTION NO. 1)

Plaintiffs,

- against -

SHAMIN FRAWLEY, WILLIAM FRAWLEY,
NICHOLAS FRAWLEY, TD AMERITRADE, INC.,
solely in its capacity as a stakeholder, The CHARLES
SCHWAB CORPORATION, solely in its capacity as a
stakeholder, JP MORGAN CHASE BANK, solely in
its capacity as a stakeholder, TD BANK, solely in its
capacity as a stakeholder, and MERRILL LYNCH,
PIERCE, FENNER & SMITH INC., solely in its
capacity as stakeholder,

Defendants.

-----X
SUPREME COURT: QUEENS COUNTY

-----X
NIKOLAOS KONSTANTINIDIS,

Index No.
706767/2021
(ACTION NO. 2)

Plaintiff,

- against -

ESTATE OF BURTON PUGACH, SHAMIN FRAWLEY,
TD AMERITRADE, INC., solely in its capacity as a
stakeholder, The CHARLES SCHWAB
CORPORATION, solely in its capacity as a stakeholder,
JP MORGAN CHASE BANK, solely in its capacity as a

stakeholder, TD BANK, solely in its capacity as a stakeholder, and MERRILL LYNCH, PIERCE, FENNER & SMITH INC., solely in its capacity as stakeholder,

Defendants.

-----X

The plaintiffs Samuel Jacobwitz, Maris R. Gordon, Peter S. Gordon, Tal Priel, Cindi Weiss, and Joel Jacobwitz commenced an action in Supreme Court, Queens County against, among others, Shamin Frawley, William Frawley, and Nicholas Frawley (the "Frawleys"), seeking a declaratory judgment and damages for undue influence, unjust enrichment, and disgorgement. The Supreme Court Complaint alleges that plaintiffs were the beneficiaries of financial accounts originally owned by the decedent, and that shortly before the decedent's demise, the designated beneficiaries were changed. By Order entered on April 7, 2022, the Supreme Court action was transferred to the Surrogate's Court.

Before the Court is a motion by Peter S. Gordon and Maris Gordon (the "Gordons") for an Order partially discontinuing the Supreme Court action. The Gordons also seek an award of motion costs and reasonable attorney's fees on the grounds that the Frawleys failed to sign a Stipulation of Partial Discontinuance that was previously circulated.

The Frawleys oppose the motion on the grounds that the Gordons are seeking the discontinuance to avoid providing essential discovery

and that they will suffer severe prejudice if the Supreme Court action is discontinued because they have asserted counterclaims for abuse of process (i.e. malicious prosecution) and punitive damages.

CPLR § 3217(b) provides that, upon order of the court, an action may be discontinued upon such terms and conditions as the court deems proper. A motion for leave to discontinue an action is addressed to the sound discretion of the court (Matter of Blauvelt Mini-Mall, Inc. v Town of Orangetown, 158 AD3d 678 [2d Dept. 2018]). “Generally such motions should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results” (Haughey v Kindschuh, 176 AD3d 785, 786 [2d Dept. 2019][internal quotation marks omitted]).

Here, the Frawleys failed to demonstrate that they would be substantially prejudiced by the discontinuance (see, e.g. HSBC Bank USA, National Association v Kone, 188 AD3d 836 [2d Dept. 2020]; Wells Fargo Bank, N.A. v Chaplin, 107 AD3d 881 [2d Dept. 2013]).

Initially, the Frawleys contend that they would be prejudiced since they would be precluded from prosecuting their malicious prosecution counterclaim against the Gordons on statute of limitations grounds. However, contrary to the Frawleys’ argument, the one-year statute of limitations for a malicious prosecution cause of action does not begin to run until the termination of the underlying prior proceeding (see CPLR §

215[3]; Williams v CVS Pharmacy, Inc., 126 AD3d 890 [2d Dept. 2015]; Roman v Comp USA, Inc., 38 AD3d 751 [2d Dept. 2007]). Additionally, a defendant's incurrence of defense costs will not, in and of itself, qualify as prejudice sufficient to warrant denial of a motion to discontinue (see Eugenia VI Venture Holdings, Ltd. v Maplewood Equity Partners, L.P., 38 AD3d 264 [1st Dept. 2007]).

To the extent the Frawleys contend that the Gordons are seeking to discontinue the action solely for the purpose of avoiding discovery obligations, this Court has already directed the Gordons to respond to all outstanding demands for discovery and inspection irrespective of this motion's determination, and it is axiomatic that regardless of whether the Gordons are parties or non-parties, they are required to provide full disclosure of all matter material and necessary in the prosecution or defense of an action (see CPLR §§ 3101, 3120).

Accordingly, that branch of the motion seeking to discontinue the causes of action seeking a declaratory judgment and damages for undue influence, unjust enrichment, and disgorgement is granted.

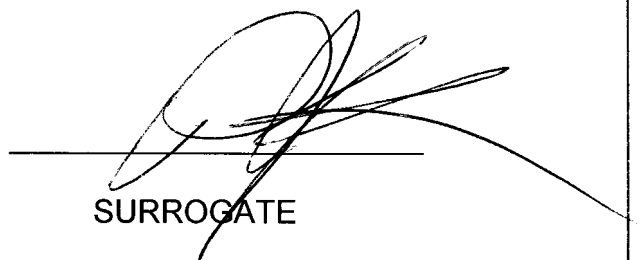
Given the facts and legal issues being contested, the Court finds it is proper to sever and continue the counterclaims (see CPLR § 3217[b]; (see Haughey v Kindschuh, 176 AD3d 785, 786 [2d Dept. 2019][reversing the trial court's denial of the motion to discontinue and finding that the trial court should have granted the motion to discontinue and severed the cross-claims]). However, since the counterclaims as

pled for “abuse of process” and “punitive damages” only involve controversies between living persons, the prosecution of same properly lies in the Supreme Court (see Matter of Deans, 68 AD3d 767 [2d Dept. 2009]). Therefore, pursuant to CPLR § 325(b), the Frawleys are given leave to make a motion in Supreme Court to remove the severed causes of action to the Supreme Court (see SCPA § 209[3],[10]).

That branch of the motion seeking reasonable attorney’s fees and costs for the Gordons having to make this motion is denied (see 22 NYCRR 130-1.1; Joan 2000, Ltd. v Deco Constr. Corp., 66 AD3d 841 [2d Dept. 2009]). The papers do not establish that the Frawleys’ opposition was motivated by an intent to harass or maliciously injure the Gordons.

This is the decision and order of the Court.

Dated: March 10, 2023



SURROGATE