

McQuillan v The Holy Land Art Co.

2008 NY Slip Op 30596(U)

February 22, 2008

Supreme Court, New York County

Docket Number: 0116134/2006

Judge: Joan Madden

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

MCQUILLAN,

INDEX NO.

116134/06

- v -

MOTION DATE

MOTION SEQ. NO.

003

THE HOLY LAND ART Co.,

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *sequence 003 is consolidated for disposition with motion sequence 004, and the consolidated motions are determined in accordance with the annexed decision and order.*

FILED

MAR 04 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: February 28, 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
DOLORES JOAN McQUILLAN,

Index No: 116134/06

Plaintiff,

-against-

THE HOLY LAND ART COMPANY, CHRISTINE
DEGHERI CLEARY, THE EDWARD O'TOOLE
COMPANY, THE THERESA AND EDWARD O'TOOLE
FOUNDATION, THE BANK OF NEW YORK
and BERNARD DEGHERI, CO-TRUSTEES,
Defendants.

-----X
JOAN A. MADDEN, J.:

In motion sequence no. 003, The Holy Land Art Company (Holy Land), Christine Degheri Cleary (Cleary), and the Theresa and Edward O'Toole Foundation (Foundation) (collectively, the Remaining Defendants) move for an order dismissing the complaint as to them, and for sanctions. In motion sequence no. 004, plaintiff moves, pursuant to CPLR 3025 (b), for an order granting her leave to amend her complaint to add a claim for breach of fiduciary duty against the Bank of New York (the Bank) and Bernard Degheri, Jr and to notify the Attorney General's Office of the allegations regarding the administration of the Foundation.¹

Plaintiff has, since 1979, been litigating an alleged fraud that is purported to have occurred between 1923 and 1925. Plaintiff is the granddaughter of John O'Toole. John O'Toole had a number of children including plaintiff's uncle, Edward O'Toole, plaintiff's aunt, Catherine O'Toole Hennessey, and plaintiff's mother Mac O'Toole Peters. The alleged fraud concerns the disposition of John O'Toole's 50% ownership in the Edward O'Toole Company, Inc. (the Company), a company that sold religious goods. Plaintiff's principal allegation is that Edward O'Toole and his wife, Theresa O'Toole, deprived John O'Toole of his ownership interest in the Company and covered up their malfeasance by concealing or destroying all evidence of John O'Toole's ownership interest.

¹ Motions sequence nos. 003 and 004 are consolidated for disposition.

John O'Toole died in 1925.

The Company flourished until it was dissolved in 1970. Edward O'Toole died in 1967, leaving all of his estate to his wife. Theresa O'Toole died in 1979, leaving the bulk of her estate to the Foundation. Bernard Degheri and the Bank are co-trustees of the Foundation. Cleary, who allegedly served as a consultant to the Foundation, is the daughter of the late Chris Degheri, who, prior to his death in 1998, was a co-trustee of the Foundation². Holy Land is a religious goods store, whose President and CEO, Thomas Cleary is Cleary's husband.

This action was commenced by plaintiff by her "attorney-in-fact" Donald Brown. The complaint alleges the following three causes of action: (1) that plaintiff, as the granddaughter of John O'Toole, is entitled to a share of Holy Land, because the late Christopher Degheri, Jr. worked as an employee of defendant The Edward O'Toole Company, of which John O'Toole owned 50%, and misappropriated funds and proprietary information from that company which he then invested and used for the benefit of Holy Land, a competitor of The Edward O'Toole Company; (2) that Cleary has fraudulently received fees from the Foundation which she has used for the benefit of Holy Land, without any benefit to the Foundation; and (3) that Christopher Degheri, Jr. and the Bank, who were the executors of the Estate of Theresa O'Toole, and Trustees of the Foundation failed to distribute John O'Toole's share of the Edward O'Toole Company to plaintiff's mother, and misused funds of the Foundation in financing Holy Land and in making payments to Cleary.

By order, dated April 13, 2003, in McQuillan v St. Vincent's Hosp. (Index No. 117364/02 [Sup Ct, NY County 2003], aff'd 8 AD3d 148 [1st Dept 2004]), Justice Richter reviewed the history of the litigation plaintiff has commenced during the last 20 years, and prohibited plaintiff from commencing any further litigation against any of the defendants named in that action without prior court approval. The Bank and Bernard Degheri³, were among the defendants named in the action

² While there appears to be a family relationship between Cleary and Bernard Degheri, the nature of the relationship is unclear from the papers.

³In the action before Justice Richter, Bernard Degheri was sued as "Bert Degheri."

then pending before Justice Richter.

In its decision and order dated July 31, 2007, this court dismissed the complaint against the Bank and Bernard Degheri, writing that “[w]hile it appears to this court that plaintiff sincerely believes in the justice of her position, it is clear that in naming the Bank and [Bernard] Degheri as defendants in this action, plaintiff has directly and willfully violated the unambiguous order of Justice Richter.” However, the court did not hold defendants in contempt based on this violation of Justice Richter’s order. Likewise, although Mr. Brown was not an attorney, the court declined to punish him for contempt but instead found that it was a sufficient sanction to strike plaintiff’s notice of cross motion, which Mr. Brown signed.

The Remaining Defendants now argue that the complaint against them must be dismissed as (1) it was signed and filed by Donald Brown in furtherance of his unauthorized practice of law, (2) the claims against the Foundation and Cleary are without merit as there is no private right of action against a charitable trust, (3) the claims against Holy Land fail to state a cause of action and are time barred, (4) the claims are barred by the doctrines of res judicata and collateral estoppel.

In opposition, plaintiff argues that the dismissal motion is improper as it was made after Holy Land and Cleary answered the complaint, and the notice of motion is defective as it fails to specify the basis for the motion. Plaintiff also argues that the complaint is sufficient to state a claim as in Holy Land’s verified answer, it is admitted that Cleary is married to the President and CEO of Holy Land, and that Cleary has been compensated for her services as a consultant to the Foundation. In support of her claims, plaintiff submits tax returns of the Foundation for the years 1999-2004 which show that an individual identified as C. Cleary was paid at least \$178,625 in consultant and/or advisory fees.⁴

⁴While the tax returns for 1999 through 2002 indicate that Cleary was paid advisory and/or consulting fees totaling \$178,625 for this period (\$9,112 in 1999, \$35,443 in 2000, \$62,512 in 2001, and \$73,488 in 2002), the 2003 tax return does not indicate any payment of consultant or advisory fees, including to Cleary, while the 2004 return indicates that consultant fees in the amount of \$55,907 were paid, but does not specify the recipient of such fees.

Plaintiff's opposition is unavailing. First, with respect to the procedural issues raised, although Cleary and Holy Land answered the complaint, they are not precluded from seeking its dismissal on the grounds asserted here, including failure to state a cause of action, and on statute of limitations grounds, both of which were raised as affirmative defenses in their respective answer. See Hertz Corporation v. Luken, 126 AD2d 446, 449-450 (1st Dept 1987). Moreover, under these circumstances, the mislabeling of the motion as one for dismissal as opposed to one for summary judgment on a ground provided under CPLR 3211 "caused no prejudice...and should be disregarded." Id., at 449. Moreover, while defendants should have specified in their notice of motion the grounds for the motion, this error does not warrant denial of their motion, and plaintiff cite no law to the contrary.

With respect to the merits of defendants' motion, as the first cause of action is predicated on actions alleged to have been taken by Christopher Degheri, Jr., it is time-barred as Christopher Degheri, Jr. died in 1998. The applicable limitations period for a claim of injury to property is three years (CPLR 214), and the fact that plaintiff seeks relief in the form of a declaration of her rights in Holy Land does not extend the limitations period. Solnick v Whalen, 49 NY2d 224 (1980).

Similarly, the third cause of action is time-barred since, as a number of courts have already held, any cause of action grounded upon the distribution of the assets of the Estate of Theresa O'Toole is untimely. Moreover, this court has already dismissed the complaint as against the Bank.

The second cause of action is not time-barred, but plaintiff lacks standing to assert a claim on behalf of the Foundation, or to seek to prevent the Foundation from deviating from the purposes for which it was founded. A donor of a charitable gift, or the donor's successor in interest, has standing to enforce the terms thereof (Associate Alumni of Gen. Theological Seminary of Prot. Episcopal Church in U.S. of Am. v General Theological Seminary, 163 NY 417 [1900]), as does the legal representative of the estate of the donor (Smithers v St. Luke's-Roosevelt Hosp. Ctr., 281 AD2d 127 (1st Dept 2001)). In addition, the Attorney General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes (EPTL 8-1.1(f)), and individual

beneficiaries of a charitable trust have no standing to sue (Lefkowitz v. Lefkowitz, 68 AD2d 488 [1st Dept 1979], aff'd, 51 NY2d 442 [1980], although there is an exception to this rule “where a particular group of people has a special interest in funds and the class of potential beneficiaries is sharply defined and limited in number.” Alco Gravure, Inc. v. The Knapp Foundation, 64 NY2d 458, 465 (1985)(citations omitted).

Here, plaintiff is neither the donor, nor the legal representative of a donor, nor a member of a defined group of beneficiaries of the Foundation. Rather, she alleges this cause of action as the granddaughter of John O’Toole, and the underpinning of her claim is her oft-repeated claim that a portion of the funds that Theresa O’Toole bequeathed to the Foundation ultimately derived from John O’Toole’s ownership share in The Edward O’Toole Company. This does not suffice to give her standing in this matter. Accordingly, this court need not reach defendants’ additional arguments that the complaint should be dismissed as it was signed and filed by an individual not authorized to practice law, and that the action is barred by the doctrines of collateral estoppel and/or res judicata.

Plaintiff’s proposed amended complaint seeks to add a cause of action alleging that the Bank and Bernard Degheri, Jr. breached their fiduciary duties to the Foundation (i) by permitting Bernard Degheri, Jr. to use the funds of the trust “to donate them to self-dealing causes⁵,” and (ii) by misusing the funds of the trust to pay Cleary consulting fees as indicated in the Foundation’s 1999-2004 tax returns⁶.

⁵In support of the allegations regarding Bernard Degheri, plaintiff submits a December 23, 2003 article published in The Boston Globe which states that Bernard Degheri used the Foundation’s funds to donate \$1 million to his prep school to build an art building to bear his name and to donate a \$5 million alumni center at University of San Diego which also will bear his name. However, the trust provides that its funds may be used, inter alia, for “tax-exempt...educational organizations ...selected by the Trustees,” and thus on their face, the donations do not appear to violate the terms of the trust.

⁶The trust provides that the “Trustees shall have full power in their discretion...to engage or employ any other person or persons whom they select for the performance of any services to the Foundation...and to fix the compensation of such persons. ” Although it appears that under this provision that the Trustees had authority to hire Cleary as a consultant and to pay her for her services, the issue raised here is whether Cleary provided any benefit to the Foundation in exchange for the compensation she received from the Foundation.

While leave to amend a pleading is to be freely given, absent prejudice or surprise resulting directly from the delay (CPLR 3025 [b]; McCaskey, Davies and Assoc., Inc. v New York City Health & Hosp. Corp., 59 NY2d 755 [1983]), leave should be denied when the proposed amendment is patently lacking in merit. Sharon Ava & Co. v Olympic Tower Assoc., 259 AD2d 315 (1st Dept 1999). Here, as indicated above, plaintiff is a stranger to the Foundation, and she lacks standing to assert her proposed additional cause of action.

That said, the court notes that, in their attempt to show that plaintiff had no reason to name Cleary as a defendant, the Remaining Defendants represent in their moving papers that Cleary, the daughter of Christopher Degheri, Jr., is "[a]n art teacher for students in the first through fourth grades in the Hillside Elementary School in Closter, New Jersey ... a resident of New Jersey and--contrary to Plaintiff's bald assertions in the complaint--does not serve as a consultant to the Foundation and does not receive any fees as a consultant from the Foundation." Memorandum in Support of Remaining Defendants' Motion To Dismiss, at 3-4. This broad statement carefully drafted in the present tense avoids the issue of Cleary's past consultation fees as evidenced by the Foundation tax returns, prepared by the Bank's tax department and submitted by plaintiff with her papers in opposition. As indicated above, these returns show that from 1999 through 2002, the Foundation paid Cleary consulting or advisory fees of at least \$178,625.

In response, the Remaining Defendants assert that "[e]ven if ... Ms. Cleary did at one time serve as a consultant to the Foundation, ... [t]here is no conceivable way that Plaintiff could ever have a cause of action against Ms. Cleary." Reply Mem., at 6.

This conclusion is correct since even if plaintiff's allegations are true that Cleary accepted funds from the Foundation without providing any benefit to the Foundation, plaintiff, who has no ownership claim in the Foundation, would have no cause of action against Cleary. However, as indicated above, the Office of the Attorney General of the State of New York has statutory duties involving the administration of charitable trusts such that it is the proper authority to review the Bank's and Bernard Degheri's administration of the Foundation. With the exception tax returns

* 8]
indicated above, the court does not have before it records relating to the administration of the trust and the payment of consulting fees. Thus, while the court makes no determination as to the issues raised by plaintiff, it is appropriate that the court send a copy of this decision to the Charities Bureau of the Attorney General's Office for review.

The Remaining Defendants, together with the Bank and Bernard Degheri, moved for sanctions in their initial motion to dismiss. In the August 3, 2007 decision, this court determined that the appropriate sanction for non-attorney Donald Brown's drafting of the complaint and cross motion was to strike the cross motion. The Remaining Defendants have given no reason for the court to impose any greater sanctions now.

Accordingly, it is hereby

ORDERED that the motion of The Holy Land Art Company, Inc., Christine Degheri Cleary, and the Theresa & Edward O'Toole Foundation is granted to the extent that the complaint is dismissed; and it is further

ORDERED that plaintiff's motion to amend is denied.

Dated: February 27, 2008

FILED
MAR 14 2008
NEW YORK
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S.C.