Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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MICHAEL RUSSO,

Plaintiff,

-against-

JOANNE MACCHIA-SCHIAVO and LUCY MACCHIA,

Defendants.

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Index No.: 10502/08
Motion Date: 7/16/08
Motion Cal. No: 38
Motion Seq. No.: 1

The following papers numbered 1 to 13 read on this motion for an order dismissing the matter in its entirety upon the grounds that defendants have a defense founded upon documentary evidence; this Court lacks subject matter jurisdiction; plaintiff is collaterally estopped from bringing the claim as he failed to take the necessary action to allege his claims in the Surrogate's Court of Bergen County, New Jersey, at the time the Will of Anthony Russo was probated; and the complaint fails to state a cause of action, all pursuant to CPLR § 3211.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 8
Memorandum of Law in Opposition.....	9 - 10
Reply Affirmation-Exhibits.....	11 - 13

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action for, inter alia, the imposition of a constructive trust commenced by plaintiff Michael Russo ("plaintiff") against defendant Lucy Macchia ("Macchia"), his sister, and defendant Joanne Macchia-Schiavo ("Schiavo"), his niece and Macchia's daughter, arising from the alleged failure of Schiavo to fulfill a promise she purportedly made to decedent Anthony Russo ("Russo"), the brother of plaintiff and Macchia, to distribute his estate upon his death to plaintiff and Macchia in equal 50% shares. Russo died testate as a resident of New Jersey on July 5, 2004; the Will was admitted to Probate in the Surrogate's Court of Bergen County, New Jersey; and Letters Testamentary were issued to Schiavo on July 28, 2004. Following probate of the Will, and upon Schiavo's failure to make the anticipated distribution to plaintiff, he commenced this action asserting

four causes of action: the imposition of a constructive trust, damages for unjust enrichment and breach of fiduciary duty, and for an accounting. Defendants seek dismissal of the complaint, pursuant to CPLR § 3211, upon the grounds that defendants have a defense founded upon documentary evidence; this Court lacks subject matter jurisdiction; plaintiff is collaterally estopped from bringing the claim as he failed to take the necessary action to allege his claims in the Surrogate's Court of Bergen County, New Jersey, at the time the Will of Russo was probated; and the complaint fails to state a cause of action.

Generally on a motion to dismiss the complaint for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Leon v. Martinez, 84 N.Y.2d 83 (1994); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000); Jacobs v. Macy's East, Inc., 262 A.D.2d 607 (2nd Dept.1999); Doria v. Masucci, 230 A.D.2d 764 (2nd Dept.1996). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept.2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, supra, 84 N.Y.2d at 88; International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005).

Here, in viewing the instant complaint in its most favorable light, although this Court finds that there are potentially viable claims asserted therein, any finding to that effect is belied by the documentary evidence in this case, one of the asserted grounds for dismissal. It is well settled that "'[a] motion pursuant to CPLR 3211(a)(1), to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (citations omitted)." Ruby Falls, Inc. v. Ruby Falls Partners, LLC, 39 A.D.3d 619 (2nd Dept. 2007); Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 570-571 (2005); Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); Held v. Kaufman, 91 N.Y.2d 425, 430-431 (1998); Levenherz v. Povinelli, 14 A.D.3d 658 (2nd Dept. 2005). "In order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the document relied upon must conclusively dispose of the plaintiff's claim [see, Sammarco Garden Ctr. v. Sammarco, 173 A.D.2d 456, 570 N.Y.S.2d 80 (2nd Dept. 1991); Greenwood Packing Corp. v. Associated Tel. Design, 140 A.D.2d 303, 527 N.Y.S.2d 811 (2nd Dept. 1988)]." Mest Management Corp. v. Double M Management Co., Inc., 199 A.D.2d 479, 480 (2nd Dept. 1993); see also, Goshen v Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); Montes Corp. v Charles Freihofer Baking Co., 17 A.D.3d 330 (2nd Dept. 2005); New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc., 305 A.D.2d 563 (2nd Dept. 2003).

Here, defendants proffered the Last Will and Testament of Russo, executed by him, witnessed by Mary Ann Sita and Linda Burzynski, and notarized by attorney Philip Feintuch("Feintuch") on December 20, 2002, naming Schiavo as the sole heir of his estate. In further support of the motion, the defendants also proffered, inter alia, the affidavit of Feintuch, the New Jersey attorney who prepared the Will. Feintuch stated that he knew Russo for almost thirty years, represented him throughout that time, and that as is his custom, he went over the terms of the Will with Russo in preparing the instrument, and it was his understanding that the Will represented the desires that Russo intended. Lastly, Feintuch contends that he was not aware of any other conveyance arrangement pursuant to which Schiavo would hold Russo's estate in trust for plaintiff and Macchia. This Court finds that the proffered documentary evidence conclusively disposes of this action. Contrary to plaintiff's contention that the Will is irrelevant to this action, this Court finds that the Will is central to the claims asserted in the complaint. Indeed, plaintiff contends that there was a plan between the testator Russo, plaintiff and Macchia, for the estate of Russo to be held in trust by Schiavo, who purportedly made an oral promise to Russo to distribute his estate upon his death to plaintiff and Macchia in equal 50% shares. However, there is no indication in the Will, in the first instance, that Russo's estate was to be held in trust by Schiavo, whom he named not only as the Executor of his estate, but his sole heir.

Further, assuming there was a promise made by Schiavo to distribute Russo's estate upon his death to plaintiff and Macchia, such promise must satisfy section 13-2.1 of the New York State Estates, Powers and Trusts Law, entitled "Agreements involving a contract to establish a trust, to make a testamentary provision of any kind, and by a personal representative to answer for the debt or default of a decedent, required to be in writing." That statutory provision, in pertinent part, provides:

> (a) Every agreement, promise or undertaking is unenforceable unless it or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> (1) Is a contract to establish a trust.
>
> (2) Is a contract to make a testamentary provision of any kind.
>
> (3) Is a promise by a personal representative to answer for the debt or default of his decedent.

Thus, as neither the purported plan allegedly devised by Russo, nor Schiavo's alleged oral promise made to Russo to make plaintiff and Macchia the distributees of his estate was memorialized in a writing, the promise is unenforceable pursuant to EPTL 13-2.1(a)(2). See, In re Urdang, 304 A.D.2d 586 (2nd Dept. 2003); Lowinger v. Lowinger, 287 A.D.2d 39 (1st Dept. 2001); In re Huyot, 276 A.D.2d 697 (2nd Dept. 2000); see, also, General Obligations Law § 5-701(a)(1). Consequently, that

branch of defendants' motion for an order granting dismissal of the action, pursuant to CPLR § 3211(a)(1), on the ground that there is a defense based upon documentary evidence, is granted. Arguendo, even if the Will was not dispositive of the action, which this Court finds it is, defendants' motion must still be granted under the doctrine of collateral estoppel.

"It is well settled that under the transactional approach adopted by New York in res judicata jurisprudence, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' (citations omitted). Pursuant to this approach, the doctrine bars not only claims that were actually litigated but also claims that could have been litigated, if they arose from the same transaction or series of transactions." Marinelli Associates v. Helmsley-Noyes Co., Inc., 265 A.D.2d 1, 5 (1st Dept. 2000); see, also, Mancini v. Hardscrabble Commons Associates, 31 A.D.3d 719 (2nd Dept. 2006); Fogel v. Oelmann, 7 A.D.3d 485 (2nd Dept. 2004); MacGregor-Phillips v. MacGregor, 273 A.D.2d 206 (2nd Dept. 2000). Moreover, "collateral estoppel, a corollary to the doctrine of res judicata, 'precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same' (citation omitted). The two basic requirements of the doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination (citations omitted)." CRK Contracting of Suffolk, Inc. v. Jeffrey M. Brown & Associates, Inc. 260 A.D.2d 530 (2nd Dept. 1999); see, also, Abraham v. Hermitage Ins. Co., 47 A.D.3d 855 (2nd Dept.2008); Harley v. Adler, 7 A.D.3d 570 (2nd Dept. 2004); Lozada v. GBE Contracting Corp., 295 A.D.2d 482 (2nd Dept. 2002).

Here, despite plaintiff's contentions to the contrary, under his theory of relief, the first failure of the plan upon which he relies was not Schiavo's failure to adhere to the promise and distribute the property in accordance with such plan, as he contends, but Russo's failure to draft his Will in a manner consistent with his estate being held in trust by Schiavo for the benefit of his siblings. This claim should have been raised by plaintiff in the New Jersey Surrogate's Court as a challenge to the Will during the probate process. "Although the instant action [is] based on different theories and [seeks] different remedies, it [is] grounded on the same transaction or series of transactions as the prior action." Fogel v. Oelmann, 7 A.D.3d 485, 486 (2nd Dept. 2004). Accordingly, defendants' motion to dismiss on the ground of res judicata, pursuant to CPLR § 3211 (a)(5), also must be granted, as must that prong of the motion seeking dismissal on the ground that this Court lacks subject matter jurisdiction over the issues sought to be raised in this action, which should have been adjudicated in the Surrogate's Court in New Jersey.

Accordingly, the motion for an order dismissing the matter in its entirety upon the grounds that defendants have a defense founded upon documentary evidence; this Court lacks subject matter jurisdiction; plaintiff is collaterally estopped from bringing the claim as he failed to take the necessary action to allege his claims in the Surrogate's Court of Bergen County, New Jersey, at the

time the Will of Anthony Russo was probated; and the complaint fails to state a cause of action, all pursuant to CPLR § 3211, is granted, and the complaint hereby is dismissed in its entirety.

Dated: October 1, 2008

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J.S.C.