

Matter of Tinsley v Walsh Manning Corp.
2009 NY Slip Op 31458(U)
June 30, 2009
Supreme Court, New York County
Docket Number: 114489/07
Judge: Doris Ling-Cohan
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PRESENT: Hon. Doris Ling-Cohan

PART 36

Justice

Index Number : 114489/2007
TINSLEY, SIR J. EDWARD
 VS.
WALSH MANNING CORP.
 SEQUENCE NUMBER : # 001
 DISMISS COMPLAINT

INDEX NO. 114489-07
 MOTION DATE _____
 MOTION SEQ. NO. #001
 MOTION CAL. NO. _____

read on this motion to/for dismiss
1-4

PAPERS NUMBERED

1, 2
3
4
5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

order dated 2/23/09

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss is granted
in accordance with the attached memorandum decision.

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

FILED
 JUL 06 2009
 COUNTY CLERKS OFFICE
 NEW YORK

HON. DORIS LING-COHAN

Dated: 6/30/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
ESTATE OF SIR J. EDWARD TINSLEY and
DESMOND TINSLEY,

Plaintiffs,

Index No. 114489/07

- against -

Motion Seq. No. 001

WALSH MANNING CORP., THE STILLWATER
ASSET BACKED FUND, L.P., LEONARD
BARNES, ALEXANDER GOTTESMAN and
GF CAPITAL FUNDING CORP.,

Defendants.

FILED
JUL 06 2009
COUNTY CLERKS OFFICE
NEW YORK

DORIS LING-COHAN, J.:

Defendant The Stillwater Asset Backed Fund, L.P. ("Stillwater") moves to dismiss the Complaint, pursuant to CPLR 3016(b), 3017(b) and 3211(a). The purported "cross motion" by plaintiff, Desmond Tinsley, which seeks to have this action transferred to the Surrogate's Court, New York County, has not been considered since the submissions do not include a notice of cross motion. The court notes, however that, subsequent to the submission of the within motion, Desmond Tinsley filed a motion (seq. no. 003) to transfer this case to the Surrogate's Court, New York County, which will be decided by separate order.

Further, by order of this court dated February 23, 2009, in accordance with CPLR 3211(c), the parties were put on notice that this court would treat the within motion to dismiss by

defendant Stillwater, as a motion for summary judgment; the parties were supplied time to submit additional papers.

BACKGROUND

The following facts are gleaned from the submissions of the parties. Desmond Tinsley is the son of Sir J. Edward Tinsley, who died on March 13, 2003. At the time this action was commenced, no administrator or executor had been appointed for plaintiff Estate of Sir J. Edward Tinsley (the "Estate") (Compl ¶ 2).

Before his death, Sir J. Edward Tinsley owned several parcels of real property, including properties located at 2126-2128 Frederick Douglass Boulevard, New York, New York, and 280 West 115th Street, New York, New York (the "Subject Properties"). The Complaint alleges that "all properties that the deceased owned now belongs to his estate" (Compl ¶ 2). Thus, while it is unclear in the Complaint, it appears that Desmond Tinsley asserts ownership interest in the Subject Properties as a result of the death of his father and as a distributee of the Estate.

Desmond Tinsley also claims that he sought to obtain a \$20,000.00 loan against his share of the Estate. He further maintains that he formed a corporation, D. Tinsley, Ltd., for the limited purpose of securing the loan. In addition, he states that without the assistance of counsel, he transferred ownership of the Subject Properties to D. Tinsley, Ltd. and then to Leonard Barnes ("Barnes"), in order to secure the loan. He also claims that Barnes formed and became a principal stockholder of defendant Walsh Manning Corp. ("Walsh"), and that Barnes fraudulently transferred ownership of the Subject Properties to Walsh.

On October 17, 2006, Walsh obtained from Stillwater a mortgage of \$1,800,000.00, secured by the Subject Properties.

The Complaint alleges that Desmond Tinsley transferred ownership of the Subject Properties based upon misrepresentations made to him, and that defendant Walsh obtained deeds and the \$1,800,000.00 mortgage in a scheme to defraud the rightful owners. Plaintiffs seek a judgment declaring that Walsh, aided by the other defendants, fraudulently obtained ownership of the Subject Properties and, as such, the transfers of the Subject Properties, as well as the loans and mortgage secured thereby, are void.¹

Stillwater moves to dismiss the Complaint on the grounds that Desmond Tinsley lacks standing to bring this action and the Complaint fails to state a valid claim for relief. As noted above, by order of this court dated February 23, 2009, the parties were put on notice that such motions to dismiss would be treated as a motion for summary judgment.

DISCUSSION

At the outset, given that Desmond Tinsley has commenced this lawsuit in his individual capacity, it appears that he has asserted individual claims based on his alleged ownership interest in the Subject Properties. However, the assertions in the Complaint are devoid of any facts to establish an individual ownership interest by Desmond Tinsley sought to be protected by law (*see*

¹ Walsh has commenced a separate action against Desmond Tinsley and D. Tinsley Ltd. in this Court entitled *Walsh Manning Corp. v D. Tinsley Ltd., Desmond Tinsley and the NYC Department of Finance Office of the City Register*, Index No. 600353/08, seeking an order declaring the deeds transferring the Subject Properties dated October 28, 2006 and filed on December 1, 2006 from D. Tinsley Ltd. to Desmond Tinsley, invalid and void.

Caprer v Nussbaum, 36 AD3d 176, 183 [2d Dept 2006]). Thus, any claims brought by Desmond Tinsley in his individual capacity must be dismissed.

Nor has Desmond Tinsley established standing to bring the action on behalf of the Estate. “An estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity” (*Grosso v Estate of Gershenson*, 33 AD3d 587, 587 [2d Dept 2006]) (internal quotations and citations omitted). The existence of a duly appointed executor or administrator is essential to the commencement and prosecution of an action on behalf of an estate (*see id.*; *see also Brandon v Columbian Mut. Life Ins. Co.*, 264 AD2d 436 [2d Dept 1999]; *Palladino v Metropolitan Life Ins. Co.*, 188 AD2d 708, 709 [3d Dept 1992]). Any action commenced by or against an estate without a duly appointed executor or administrator must be dismissed as a matter of law (*Grosso*, 33 AD3d at 587).

Here, the Complaint states that Sir J. Edward Tinsley died on March 13, 2003, and since the date of his death, all properties that the deceased owned now belong to the Estate. The Complaint further states that an administrator of the Estate has not yet been appointed, and that Desmond Tinsley “is applying to be appointed as the administrator” of the Estate (Compl, Grill Affirm, Exh A at 1-2). As such, it is clear that this action was commenced without a duly appointed executor or administrator and, thus, the Complaint, insofar as brought by the Estate, must also be dismissed.

Moreover, even assuming that Desmond Tinsley had standing to prosecute this action both in his individual capacity and on behalf of the Estate, the pleading fails to state a viable

claim against defendants. As stated, plaintiffs seek a judgment declaring that the loans and \$1,800,000.00 mortgage secured by the Subject Properties are null and void since Walsh, aided by the other defendants, fraudulently obtained ownership of said properties. "To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). In addition, the circumstances constituting the alleged fraud must be stated in detail (CPLR 3016[b]; *Small*, 94 NY2d at 57). Here, however, the conclusory allegations that defendants fraudulently transferred ownership of the Subject Properties simply do not describe the circumstances constituting the alleged fraud in detail and, as such, are insufficient to satisfy the pleading requirements for a valid cause of action for fraud (*see* CPLR 3016[b]).

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed in its entirety, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that within 30 days of entry of this order, defendant Stillwater shall serve upon all parties a copy of this order with notice of entry.

Dated: 6/30/09

FILED
 JUL 06 2009
 COUNTY CLERK'S OFFICE
 NEW YORK
 Hon. Doris Ling-Cohan, J.S.