

Lopez v Fenn

2010 NY Slip Op 31918(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 603781/09

Judge: Eileen A. Rakower

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

PRESENT:

PART 15

Index Number : 603781/2009

LOPEZ, WILFREDO

vs

FENN, RICHARD A.

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

1, 2

3, 4

5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 15 2010

**COUNTY CLERK'S OFFICE
NEW YORK**

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 7/7/10


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
WILFREDO LOPEZ,

Plaintiff,

- against -

RICHARD A. FENN, J.P. MORGAN CHASE & CO.,
MERRILL LYNCH, PIERCE, FENNER & SMITH
INC., and REDDEN'S FUNERAL HOME,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Index No.
603781/09

**DECISION
and ORDER**

Mot. Seq.
001

FILED

JUL 15 2010

**COUNTY CLERK'S OFFICE
NEW YORK**

Plaintiff Wilfredo Lopez ("Lopez") claims to be the surviving domestic partner of the Reverend Charles E. Whipple ("Whipple") from 1987 until Whipple's death on February 20, 2009. Lopez claims that the two cohabitated with one another throughout their 22-year relationship. On February 20, 2009, Whipple died at the age of 95 and left behind an estate worth over \$10 million. Lopez alleges in his complaint that, since Lopez was of lesser means, Whipple sought to provide for Lopez in the event that Whipple predeceased him. For example, Lopez states that Whipple established bank accounts with Lopez in which the two were joint tenants with rights of survivorship.

The complaint states that in 2005, Whipple executed a Will ("the 2005 Will") wherein Whipple left Lopez a life estate in his beach property located at 30 Bay View Walk in the Cherry Grove community in Fire Island, New York ("the Cherry Grove house"). In addition, the 2005 Will bequeathed 5% of the remainder of Whipple's estate (approximately \$500,000, according to the complaint) to Lopez.

Subsequent to the signing of the 2005 Will, Whipple executed a power of attorney to Defendant Richard Fenn ("Fenn"). The complaint states that Fenn became acquainted with Whipple approximately ten years earlier, and was aware of the domestic partnership between Lopez and Whipple. Lopez claims that Fenn "resented"

Lopez, “and consistently sought to denigrate, disparage and intimidate” him. The complaint alleges that because Fenn felt that Lopez was not “deserving” of the benefits of Whipple’s estate plan, Fenn took, and continues to take deliberate measures to harm Lopez’s personal and economic interests.

First, Lopez alleges that Fenn acted to deprive Lopez of the benefit of a bank account maintained by Whipple at J.P. Morgan Chase in which Whipple and Lopez were joint tenants with a right of survivorship, and which had a balance of approximately \$570,000. Lopez claims that, in February 2007, Fenn, “through his authority under the power of attorney and/or confidential relationship” with Whipple, withdrew \$565,907.86, leaving Lopez with a balance of \$3.48. Lopez maintains that Fenn transferred the funds “to an account which was not in whole or part in Plaintiff’s name.” Lopez states that In June 2008, title was altered to make Whipple and Lopez tenants in common to a second Chase account. Lopez alleges that upon transfer of the account to a tenancy in common, Fenn caused \$300,000 to be withdrawn from it, and that these funds were never restored. Approximately a month later, title was altered to make Whipple and Lopez joint tenants with right of survivorship.

In addition, the complaint states that Whipple established a joint tenancy with right of survivorship account for himself and Lopez at Merrill Lynch which had a balance of approximately \$1.4 million, and that, on October 16, 2008, Fenn caused \$725,000 to be wired out of the Merrill Lynch account in order to thwart Whipple’s intention that Lopez be provided for. Lopez further alleges that the proceeds from this account were transferred to an HSBC bank account that Fenn jointly held with Whipple.

Lopez further claims that Fenn interfered with Whipple’s plans to provide for Lopez by preventing the conveyance of the Cherry Grove house to Lopez. According to the complaint, Whipple conveyed ownership of the Cherry Grove house to Lopez on September 20, 2008. The conveyance was prepared by Joseph Lieb, Esq., who also supervised and witnessed the execution and delivery of the deed to Lopez. The deed and supporting papers were then transmitted to the Suffolk County Clerk on September 22, 2008 and received by the clerk the following day. However, the complaint states that Fenn caused Lieb to recover the deed from the Suffolk County Clerk, and that he was successful in doing so.

In February 2008, Whipple revised his will, allegedly at Fenn’s insistence.

Whipple further executed a codicil to his will in July 2008 (collectively “the 2008 Will”). As a result of the alterations, a \$300,000 bequest and a 5% residuary interest originally intended for Lopez was instead bequested to Fenn.

Lopez claims that Fenn’s efforts to deprive Lopez of the benefits Whipple intended him to have intensified upon Whipple’s death in 2009. The complaint alleges that these efforts entailed (1) falsely asserting the right to possess and determine the interment of Whipple’s remains; (2) wrongfully locking Lopez out of his home at 8 Perry Street in Manhattan on June 3, 2009; (3) wrongfully locking Lopez out of the Cherry Grove house; and (4) seeking to have Whipple’s remains interred in a Philadelphia crypt, contrary to Lopez’s wishes.

In connection with the foregoing allegations, Lopez’s complaint brings twenty causes of action against Fenn. These claims sound in breach of fiduciary duty; conversion; detainer under RPAPL §853; intentional infliction of emotional distress; interference with the right of sepulcher under Public Health Law §4201; constructive trust; and *prima facie* tort.

Fenn moves to dismiss Lopez’s complaint against him pursuant to CPLR §3211(a)(1), (4), (5), & (7), and Surrogate’s Court Procedure Act (“SCPA”) §205. Fenn claims that the complaint must be dismissed because Lopez’s causes of action (1) should be litigated before the Surrogates Court rather than Supreme Court; (2) are conclusively refuted by documentary evidence submitted by Fenn; (3) should be dismissed due to the existence of a prior action; (4) are barred by the doctrines of *res judicata* and collateral estoppel; and/or (5) fail to state a cause of action. Fenn submits an affidavit and a memorandum of law in support of his motion. In opposition, Lopez submits an affidavit and a memorandum of law. In reply, Fenn submits an affidavit and a memorandum of law.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence; or

- (4) there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
- (5) the cause of action may not be maintained because of... collateral estoppel... [or] res judicata...; or
- (7) the pleading fails to state a cause of action...

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the 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]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Dismissal pursuant to CPLR §3211(a)(4) is warranted as a matter of judicial comity “to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction” (*White Light Prods. v. On The Scene Prods.*, 231 A.D.2d 90, 93 [1st Dept. 1997]). A matter is subject to dismissal under §3211(a)(4) where there is “sufficient identity as to both the parties and the causes of action asserted in the respective actions” (*id.*). “With respect to parties, the requirement is that there be substantial identity” (*id.* at 93-94).

The doctrine of collateral estoppel

‘precludes a party from relitigating in a subsequent action

or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same' (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500; see also, *Burgos v Hopkins*, supra, 14 F3d, at 792). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Ryan v New York Tel. Co.*, supra, at 500-501). '[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding' (*id.*, at 501). (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 [1999]).

Under the doctrine of res judicata,

a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, 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" (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343,347 [1999]).

SCPA §205 provides that "[t]he surrogate's court of any county has jurisdiction over the estate of a decedent who was a domiciliary of the state at the time of his death, disappearance or internment...."

Lopez's breach of fiduciary duty claims (Causes of Action 1-4) revolve around Fenn's alleged depletion of the joint J.P. Morgan Chase and Merrill Lynch accounts during Whipple's lifetime pursuant to his power of attorney. In addition, Lopez claims that Fenn's denying Lopez access to 8 Perry Street and the Cherry Grove house (as well as Fenn's alleged failure to account for rent monies obtained while Lopez was wrongfully denied access to the Cherry Grove house) constitutes breaches

of Fenn's fiduciary duties.

With respect to Lopez's breach of fiduciary duty claims concerning the J.P. Morgan Chase and Merrill Lynch accounts (Lopez's first and second), the court finds that the complaint fails to state a cause of action. Lopez fails to allege any facts which establish that Fenn had a fiduciary relationship with Lopez. Nor does Lopez allege any facts in support of the proposition that a fiduciary relationship existed between Whipple and Lopez. The existence of a joint tenancy with rights of survivorship, standing alone, is insufficient to establish a fiduciary relationship between the co-tenants (*see Mullen v. Linnane*, 218 A.D.2d 50 [1st Dept. 1996]). Moreover, the documentary evidence submitted by Fenn indicates that the money allegedly transferred out of the Merrill Lynch Account by Fenn and into a joint account of Fenn and Whipple was actually transferred by Whipple, and not Fenn, to an HSCB IOLA escrow account held by the law firm of Morrison Cohen LLP for dispersal in connection with legal expenses and settlement of a lawsuit against Whipple in Maine.

To the extent that Lopez claims that funds were improperly withdrawn in excess of Whipple's 50% share as a joint tenant, such a claim may be asserted against Whipple's estate in the Surrogate's Court proceeding currently being litigated in New York County, titled *In re Estate of Charles E. Whipple*, File No. 1255-2009) ("the Surrogate's Court Action" (*see Kleinberg v. Heller*, 38 N.Y.2d 836, 840-42 [1976])).

As for Lopez's breach of fiduciary duty claim concerning the wrongful denial of access to the premises of 8 Perry Street and (the third cause of action), the court finds that this cause of action is barred by principles of res judicata, based on the Stipulation of Settlement entered into by the parties in an ejectment action previously before this court (*Estate of Charles Everett Whipple v. Lopez*, Index No. 114852) ("the Ejectment Action"). There, Lopez agreed to vacate the premises by July 31, 2010, and that a judgment of possession in favor of Whipple's estate be entered. The stipulation further provided that "This action is disposed of on the merits with prejudice... as to matters concerning 8 Perry St., 2nd Fl. as described in the pleadings in these proceedings."

With regard to Lopez's breach of fiduciary duty claim relative to the alleged wrongful ejection of Lopez (the fourth cause of action) from the Cherry Grove house, the court finds that dismissal pursuant to CPLR §3211(a)(4) is warranted. Lopez asserts identical allegations as to the estate's (through Fenn, as Executor) wrongful

ejection of Lopez, as well as the wrongful renting of the house and failure to turn over rent monies to Lopez by Fenn, as Executor (*see* Seigel, N.Y. Prac. §262 [4th Ed]) (“If the only difference between the two actions is that the relief demand differs and it appears that the relief demanded in either action could by amendment be demanded in the other, the motion to dismiss should be granted”). While dismissal for a prior action pending in a court of concurrent jurisdiction is permissive, dismissal is particularly warranted in this case, since New York courts recognize a “strong preference” that all matters affecting the administration of a decedent’s estate be resolved by the Surrogate’s Court (*Lawrence v. Miller*, 48 A.D.3d 1, 6 [1st Dept. 2007]).

Turning next to Lopez’s conversion claims, the court finds that Lopez’s claim with respect to the Merrill Lynch account (the sixth cause of action) is flatly contradicted by documentary evidence demonstrating that Whipple, rather than Fenn, removed the \$725,000 in order to pay a settlement and legal expenses in connection with a lawsuit in Maine, as noted above. However, with respect to the Chase account (the fifth cause of action), Lopez alleges an actionable claim for conversion that is not conclusively refuted by documentary evidence (*see Lenczycki v. Shearson Lehman Hutton, Inc.*, 23 A.D.2d 248 [1st Dept. 1997]). The conversion claim with respect to the Cherry Grove house (the seventh cause of action) is dismissed pursuant to CPLR §3211(a)(4) due to the claims asserted in the Surrogate’s Court Action.

Lopez’s detainer claim pursuant to RPAPL §853 in connection with his wrongful ejection from 8 Perry Street is dismissed under the doctrine of res judicata pursuant to the stipulation of settlement in the Ejection Action. Lopez’s detainer claims pursuant to RPAPL §853 with respect to his being ejected from the Cherry Grove house (the ninth and tenth causes of action) are dismissed pursuant to CPLR §3211(a)(4) due to the claims asserted in the Surrogate’s Court Action.

Lopez’s IIED claims (the eleventh through thirteenth causes of action) revolve around Fenn’s actions with respect to all of the foregoing factual allegations and for Fenn’s overall “campaign against the personal and financial interests” of Lopez. These causes of action are dismissed for failure to state a claim. In order to state a claim for IIED, a plaintiff must allege conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society” (*Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205 [1st Dept. 2002]). The court finds that Lopez’s IIED

claims must be dismissed. In *Plaza v. Estate of Wisser*, (211 A.D.2d 111 [1st Dept. 1995]), the plaintiff alleged, *inter alia*, that the defendants interfered with his right to attend the decedent's (his companion) funeral, and refused to allow him to live in the decedent's condominium, contrary to the decedent's wishes, causing plaintiff emotional distress. The First Department affirmed the lower court's dismissal of plaintiff's IIED claim, finding that

[w]hile these allegations reflect conduct which may have caused distress and anxiety to plaintiff, they can hardly be said to allege conduct which is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society (*id.* at 120).

Lopez's eighteenth cause of action alleges that Fenn violated Lopez's right of sepulcher pursuant to Public Health Law §4201. The complaint alleges that Lopez possessed the right of sepulcher, that Fenn knew this, and that Fenn nevertheless proceeded with the interment of a portion of Whipple's remains in Philadelphia contrary to Lopez's wishes. As this matter was specifically litigated and resolved in the Surrogate's Court Action, this cause of action is barred by principles of collateral estoppel.

On October 28, 2009, Lopez moved by order to show cause to prevent Fenn from interring Whipple's remains in Philadelphia that coming Saturday, October 31, 2009. Lopez claimed that he was Whipple's domestic partner and, as such, that he "ha[d] the exclusive right to control the disposition of [Whipple's] remains." In addition, Lopez sought an order directing Fenn to deliver Whipple's remains to him. Fenn, as Executor, opposed the motion, arguing that Whipple wished to have his ashes placed in three locations: (1) in the dunes of Cherry Grove; (2) at St. Mary's Church in Falmouth, Maine; and (3) in the floor of the crypt chapel at the St. Clement's Church in Philadelphia.

By order dated November 9, 2009, Surrogate Webber stated

At the call of the calendar on October 30, 2009, the Court heard argument on the issue [of disposal of Whipple's remains] and directed that the Philadelphia disposition of

[Whipple's] remains will take place on a Saturday after December 4, 2009. Further, the executor will retain the last 1/3 of [Whipple's] ashes and Mr. Lopez will plan the interment of said ashes in Maine which will take place in Spring 2010.

Accordingly, since Surrogate Webber found that the interment of a third of Whipple's ashes in Philadelphia by Fenn was appropriate and in accord with Whipple's wishes, Lopez is barred from relitigating the issue here.

Lopez's nineteenth cause of action asserts a constructive trust as against bequests made to Fenn in Whipple's 2008 Will. The complaint alleges that Fenn "acquired property through bequests in the 2008 Will and Codicil... in such circumstances that he may not in good conscience retain the beneficial interest received (or due) from the Estate of Charles E. Fenn [sic]." The court finds that Lopez's nineteenth cause of action fails to satisfy the pleading requirements of CPLR §CPLR §3013, which states that

Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

(*see Foley v. D'Agostino*, 21 A.D.2d 60, 63 [1st Dept. 1964]) (CPLR §3013 requires that pleadings contain "the essential facts required to give 'notice'..."); (*see also Comm'rs. of the State Ins. Fund v. Ramos*, 2009 NY Slip Op 4361, *1 [1st Dept. 2009]) (defense was properly dismissed "as pleading only a bare legal conclusion without supporting facts"). Moreover, any claim that Fenn improperly and/or unjustly benefitted from the 2008 Will is more appropriately raised in the Surrogate's Court Action.

Finally, the court finds that Lopez fails to state a cause of action for prima facie tort, as Lopez has failed to sufficiently allege special damages (*see Vigoda v. DCA Prods. Plus Inc.*, 293 A.D.2d 265, 266 [1st Dept. 2002]).

Wherefore it is hereby

ORDERED that Lopez's 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th causes of action are dismissed; and it is further

ORDERED that Fenn's motion to dismiss is denied as to Lopez's 5th cause of action; and it is further

ORDERED that defendants are directed to serve their answer within ten days of receipt of a copy of this order with notice of entry thereof; and it is further

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: July 7, 2010.


EILEEN A. RAKOWER, J.S.C.

FILED

JUL 15 2010

**COUNTY CLERK'S OFFICE
NEW YORK**