

Toribio v Battle

2010 NY Slip Op 34090(U)

February 11, 2010

Supreme Court, New York County

Docket Number: 109297/2009

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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DOMINGO TORIBIO, as Administrator of the
Estate of JANNIN TORIBIO, Deceased

DECISION AND
ORDER

Index No. 109297/2009

Plaintiff,

-against-

THE ESTATE OF JOSE MIGUEL BATTLE, SR.
DECEASED, JOSE MIGUEL BATTLE, JR.,
MANUEL ISAAC MARQUEZ, SR., JULIO ACUNA,
GUSTAVO BATTLE, JORGE DAVILA, JOSE
ALUART, and JOHN DOES "1" through "10", being
fictitious names of persons and entities whose identities
are not presently known to the plaintiff,

Defendants.

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O. PETER SHERWOOD, J.:

This action arises from the tragic death of plaintiff's decedent, three-year-old infant Jannin Toribio, and her babysitter, Laura Sirgo, in the 1984 firebombing of a Manhattan shoe store that was part of an ongoing series of criminal activities initiated by the "Cuban Mafia", an organization allegedly headed by the deceased defendant, Jose Miguel Battle, Sr. ("Battle Sr."), in which Battle Sr's son, defendant Jose Miguel Battle, Jr. ("Battle Jr."), and others participated. Plaintiff Domingo Toribio, as Administrator of the Estate of Jannin Toribio commenced the instant action to recover damages for Jannin's personal injuries and wrongful death under section 213-b (2) of the CPLR and EPTL §§ 5-4.1, *et seq.* and 11-3.1, *et seq.*

Defendant Gustavo Battle ("Gustavo") *pro se* moves for an order pursuant to CPLR § 3211 (a) (7) dismissing the complaint for failure to state a cause of action on the ground that he was never convicted of the arson that resulted in the death of plaintiff's decedent or of any other crime in New York and that plaintiff's claims are time-barred (motion sequence no. 001).

Defendant Battle Jr. *pro se* moves for similar relief on essentially the same grounds (motion sequence no. 002) (Gustavo and Battle Jr. are referred to collectively herein as "defendants"). Plaintiff opposes the motions.

Motion sequence nos. 001 and 002 are consolidated for purposes of disposition. For the reasons that follow, both the motions are denied.

On June 30, 2009, plaintiff commenced the instant action alleging two causes of action against the Estate of Battle Sr., Battle Jr., Gustavo and others to recover compensatory and punitive damages for the wrongful death and personal injuries of the plaintiff's decedent upon a theory that defendants acted in concert and aided one another in criminal racketeering activities which included the subject firebombing. The complaint alleges that following the death of the plaintiff's decedent and her babysitter, four individuals, not named as party defendants to this action, were arrested and convicted in 1986 and 1987 in New York County Criminal Court, upon their pleas of guilty, of crimes connected to the firebombing.

Thereafter, in 2004, criminal proceedings were commenced in the United States District Court for the Southern District of Florida charging each of the defendants named in this action and others with involvement in a number of violent and other criminal acts constituting a pattern of racketeering activity under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO) statutes (18 USC §§ 1961, *et seq*; *see generally*, *United States v Battle*, 473 F Supp 1185 [Dist. Ct. S.D. Fla. 2006]). The superseding indictment charged an enterprise conspiracy under Title 18, United States Code, § 1962 (c). One of the predicate acts comprising the pattern of racketeering activity was the subject 1984 firebombing. Gustavo pleaded guilty on May 30, 2006, to the one count charged in the superseding indictment, namely the Federal RICO charge, and was sentenced to time served with two years of supervised release. Battle Jr. pleaded guilty on March 16, 2007, also to the one count charged in the superseding indictment and was sentenced to a term of 188 months imprisonment to be served concurrently with a sentence imposed in an unrelated federal case and, upon release from imprisonment, to a term of three years supervised release.

Both Battle Jr. and Gustavo move to dismiss the complaint on the grounds that CPLR 213-b (2) is not applicable because they were not convicted of the arson underlying this civil action. They argue further that the statute of limitations applicable to the causes of action alleged in the complaint, namely personal injury and wrongful death, has expired.

In opposition, plaintiff argues that defendants' respective motions are fatally defective as they have failed to attach to their moving papers a copy of the complaint and have also failed to submit

documents in support of their claims that they were not found to have engaged in any crimes associated with the death of plaintiff's decedent. Plaintiff further argues that the two causes of action alleged in the complaint have been properly plead under CPLR § 213-b. Specifically, plaintiff claims that by pleading to the one count of the federal superseding indictment, namely enterprise conspiracy, that the defendants are deemed to have pleaded guilty to each of the predicate acts one of which was the firebombing resulting in the infant plaintiff's injuries and death. The crimes charged for such firebombing, namely arson in the first degree, is a violent felony offense as defined in the New York Penal Law. Thus, defendants' federal RICO convictions satisfy the requirements of CPLR § 213-b. Moreover, because this action was commenced within ten (10) years of the respective defendants' date of conviction, the action is timely.

The standard for a motion to dismiss pursuant to CPLR § 3211 (a) (7) is well settled. On such a motion, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 318 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, allegations consisting of bare legal conclusions, as well as factual claims flatly contradicted by the documentary evidence command no such deference (*see, Maas v Cornell University*, 94 NY2d 87, 91 [1999]; *Gertler v Goodgold*, 107 AD2d 481, 485 [1st Dept 1985, *aff'd for reasons stated below* 66 NY2d 946 [1985]).

CPLR § 213-b provides that a crime victim or the representative of a crime victim may commence an action to recover damages from a defendant convicted of a crime, which is the subject of the action, for any injury or loss resulting therefrom (*see, City of New York v College Point Sports Assn.*, 61 AD3d 33, 41 [2d Dept 2009]; *Elkin v Cassarino*, 248 AD2d 35, 40 [2d Dept 1998]). The ten year limitations period set forth in CPLR § 213-b (2) can be invoked when: (1) the plaintiff is a crime victim; (2) the defendant has been convicted of a crime, (3) the defendant's crime is the

subject of the civil action, and (4) the plaintiff's injury resulted from that crime (*see College Point Sports Assn.*, 61 AD3d at 40; *Boice v Burnett*, 245 AD2d 980 981 [3d Dept 1997]). New York courts have determined that because CPLR 213-b is a procedural statute it should be construed expansively to conform to the legislature's intent to significantly enhance the rights of crime victims to recover damages (*see, Elkin*, 245 AD2d at 38-39; *Cavanaugh v Watanabe*, 10 Misc3d 1043, 1044 [Sup. Ct. Westchester Co. 2005]).

The statute does not specifically define crime and does not limit the crimes to which it is applicable. As such, the legislature did not intend to restrict such terms as they are in the Executive Law which is applicable to the so-called "Son of Sam Law" (Executive Law § 632-a; *see, Elkin*, 245 AD2d at 38). Thus, CPLR § 213-b (1) is not limited to crimes specifically enumerated and defined by the laws of this State or to Penal Law felonies, but has been found to be applicable to victims of federal crimes committed in New York State (*id.*). It appears that the benefit of CPLR § 213-b has been denied only where there is a lack of causal connection between the crime for which the defendant was convicted and the damages sought (*see, Respass v Dean*, 7 AD3d 503 [2d Dept 2004]; *Boice*, 245 AD2d at 982; *Cavanaugh*, 10 Misc3d at 1044).

However, plaintiff here proceeds under subdivision (2) of the statute which requires that the defendant be convicted of a specified crime as defined in paragraph (e) of New York Executive Law § 632-a. That section defines such specified crime, insofar as relevant here, as:

(A) a violent felony offense as defined in subdivision one of section 70.02 of the penal law; (B) a class B felony offense defined in the penal law; * * * (G) an offense in any jurisdiction which includes all the essential elements of any of the crimes specified in clauses (A) through (F) of this subparagraph and either the crime victim * * * was a resident of this state at the time of the commission of the offense or the act or acts constituting the crime occurred in whole or in part in this state.

Here, the Court finds that accepting the allegations of the verified complaint as true and drawing all reasonable inferences in favor of the plaintiff, all of the elements enumerated in CPLR § 213-b have been adequately stated and the Court, at this pleading stage, declines to find as a matter of law that no causal connection exists between the federal RICO crime of which defendants stand convicted and the damages plaintiff has suffered. The superseding indictment to which both

defendants pleaded guilty is annexed to the verified complaint as Exhibit "2". One of the predicate acts enumerated therein in support of the federal enterprise conspiracy states that on or about October 26, 1984, Battle Sr., Battle, Jr. and others "each aiding the other" intentionally damaged a building by causing a fire while plaintiff's decedent and her babysitter were present causing their physical injury and death in violation of certain provisions of the New York Penal Law, specifically, arson in the first degree (Penal Law § 150.20), a class A-I felony offense, and criminal liability for conduct of another as defined by Penal Law § 20.00. Thus, the specified crime essentially contains all of the essential elements of a felony as defined by the laws of this State. Thus, the federal RICO crime for which defendants stand convicted falls within the reach of CPLR § 213-b and this action commenced within ten (10) years of such federal RICO convictions is timely. In reaching this conclusion, the Court further notes that an essential similarity has been found between the New York State felony of enterprise corruption in violation of Penal Law § 460.20 and the federal crime of racketeering conspiracy under 18 USC § 1962 (d) (*see, Matter of Weiss*, 58 AD3d 203 [1st Dept 2008]; *Matter of Schulman*, 51 AD3d 220 [1st Dept 2008]).

Based upon the foregoing discussion, it is

ORDERED, that the respective motions of defendant Gustavo Battle (motion sequence no. 001) and defendant Jose Miguel Battle, Jr. (motion sequence no. 002) to dismiss the verified complaint is denied; and it is further

ORDERED, that the matter is scheduled for a preliminary conference in Part 61, 60 Centre Street, Room 341, on March 31, 2010, at 9:30 a.m.; and it is further

ORDERED, that plaintiff's counsel shall serve a copy of this order with notice of entry upon defendants within twenty (20) days of entry.

This constitutes the decision, order and judgment of the court.

DATED: 2/11/10

ENTER,



O. PETER SHERWOOD

J.S.C.