

Nall v Estate of Powell
2012 NY Slip Op 33413(U)
March 28, 2012
Sup Ct, New York County
Docket Number: 106958/2011
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

LILLIAN N. NALL and 1439 CORP.,

Plaintiffs,

-against-

ESTATE OF DAWN POWELL, et al.,

Defendants.

INDEX NO. 106958/2011

MOTION DATE Dec. 8, 2011

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion, inter alia, to dismiss the complaint

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-5, 6

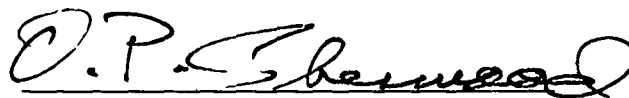
7-8

9

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers, defendants' motion, *inter alia*, to dismiss the complaint and plaintiffs' cross motion for leave to amend the complaint are decided in accordance with the accompanying decision and order.

Dated: 3/28/12


O. PETER SHERWOOD, J.S.C.

Check one:

☒ **FINAL DISPOSITION**

☐ **NON-FINAL DISPOSITION**

Check if appropriate:

☐ **DO NOT POST**

☐ **REFERENCE**

☐ **SUBMIT ORDER/ JUDG.**

☐ **SETTLE ORDER/ JUDG.**

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 49**

-----X
LILLIAN N. NALL and 1439 CORP.,

Plaintiffs,

-against-

**ESTATE OF DAWN POWELL, KAREN POWELL,
THEA BADAL, JAMES POWELL, CHRISTINE
HAMBY, YORK AMUSEMENT CO., INC., and
228-32 WEST 42nd STREET REALTY CORP.,**

Defendants.

**DECISION AND ORDER
(Mot. Seq. No. 001)
Index No. 106958/11**

-----X
O. PETER SHERWOOD, J.:

This is an action for specific performance of a contract, a declaratory judgment and an injunction, arising from a dispute over the ownership of real property located in New York, Arizona and Missouri. Defendants move, pursuant to CPLR 3211(a) (1), (5) and (7), for an order dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 3025, for an order granting leave to file an amended complaint.

BACKGROUND

This action arises out of a handwritten "Term Sheet" agreement (Agreement), dated November 14, 2004, which was entered into by plaintiff Lillian Nall (Nall), her late sister Dawn Powell and Dawn Powell's daughter, defendant Thea Badal (Badal). The Agreement was executed by Powell's attorney and signed by Nall, Dawn Powell and Badal in California.

The Agreement provided for the division among the parties of their ownership, through certain corporations, of several real properties. The properties are referred to in the Agreement as: the Best Buy Property, located in Missouri; the Chandler property, located in Arizona; the Wood Street property, located in Arizona; the CVS property, located in Schenectady, New York; and the 567 Seventh Avenue property (the Seventh Avenue Building), which is a four-story commercial building located in New York City.

The Agreement provided that the parties would merge two New York corporations, defendant York Amusement Co., Inc. (York) and defendant 228-32 West 42nd Street Realty (42nd Street). The combined assets would remain with 42nd Street, which would be the surviving corporation.

Thereafter, 42nd Street would transfer certain assets to a newly formed company called Newco, which was to be formed and wholly-owned by Nall. Specifically, 42nd Street was required to transfer the Seventh Avenue Building, the CVS Property and the Wood Street property to Newco. 42nd Street would retain ownership of the Best Buy Property, the Chandler Property and all remaining cash. At the time the Agreement was executed, York and 42nd Street were owned by Nall, Powell and Badal. After the formation of Newco, Nall was required to relinquish her interest in the surviving 42nd Street company, which would then be owned by Powell and Badal.

Relevant here, the Agreement provided that all of the above steps were to be completed on or before December 31, 2004. Also relevant here, the Agreement did not contain a choice of law clause.

According to the complaint, on December 6, 2004, Nall created a company called 1439 Corp., in the state of Nevada, to function as the Newco corporation referred to in the Agreement. However, as of January 2008, neither the merger nor the transfer of assets had been effected. The complaint states that in February 2009, Dawn Powell and Badal, without Nall's consent, sold the Wood Street Property.

Dawn Powell died in June of 2009 and her shares in the defendant corporations were eventually transferred to two trusts, of which her daughter, defendant Karen Powell, is the sole trustee.¹ The additional defendants in this action are Dawn Powell's husband, defendant James Powell, and her daughter, Christine Hamby.

Plaintiffs allege that, despite Nall's objections, Badal and the trusts, through Karen Powell, have solicited and considered non-party offers to sell or lease the Seventh Avenue Building.

Plaintiffs commenced this action in June, 2011, asserting claims for: 1) specific performance of the Agreement; 2) a judgment declaring that 1439 Corp. owns the Seventh Avenue Building and declaring that defendants cannot sell such building without her consent; and 3) a permanent

¹ The trusts are titled The Dawn N. Powell Marital Trust, and The Dawn N. Powell Bypass Trust.

injunction restraining defendants from selling the Seventh Avenue Building without Nall's consent. Plaintiffs also filed a Notice of Pendency against the Seventh Avenue Building, simultaneous to the filing of the summons and complaint.

Essentially, the complaint alleges that defendants materially breached the Agreement by failing to cause the merger of York and 42nd Street Realty and by failing to transfer certain assets, including the Seventh Avenue Building, to 1439 Corp. The complaint also alleges that defendants' attempts to sell or lease the Seventh Avenue Building are in breach of Nall's rights under the Agreement and in violation of the applicable provisions of the Business Corporation Law.

Defendants move to dismiss the complaint for lack of jurisdiction as to certain of the defendants and, as to all defendants, on the ground that plaintiffs' claims are barred by the applicable statute of limitations. Defendants also move to dismiss the complaint for failure to state a cause of action. Plaintiffs cross-move to amend the complaint.

DISCUSSION

1. Jurisdiction

Defendants Karen Powell, James Powell and Christine Hamby move, pursuant to CPLR 3211(a) (8), to dismiss the complaint for lack of personal jurisdiction. They assert that none of them is a New York resident, and they do not own any real property here. They also state that they do not conduct any business in New York and are not the beneficiaries of Dawn Powell's estate.

CPLR 302 (a) provides, in relevant part, that the court may exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, transacts any business within the state or contracts anywhere to supply goods or services in the state or who owns, uses or possesses any real property situated within the state. CPLR 302 (a) (1), (4). *See Brax Capital Group, LLC v WinWin Gaming, Inc.*, 83 AD3d 591, 591-92 (1st Dept 2011).

Here, the complaint does not allege any facts to demonstrate that Karen Powell, James Powell or Christine Hamby is subject to jurisdiction in New York under the criteria set forth above. Moreover, plaintiffs state that the issue is now moot because, since the commencement of this action, Dawn Powell's estate has been probated and the beneficiaries of the Estate are the two trusts, not any of the moving defendants. In fact, in the cross-motion to amend the complaint, plaintiffs seek to add

the trusts as defendants and remove Karen Powell, James Powell and Hamby from the caption as defendants.

In light of the foregoing, the motion to dismiss the complaint against Karen Powell, James Powell and Christine Hamby, for lack of personal jurisdiction, is granted.

2. Statute of Limitations

The remaining defendants move to dismiss the complaint on the ground that this action, which was commenced in June 2011, is untimely. Specifically, defendants assert that plaintiffs' claims accrued in California and are therefore subject to California's four-year statute of limitations for contract actions. *See* Cal. Code Civ. Proc. § 337(1). Defendants argue that plaintiffs' claims accrued on December 31, 2004, which is the date by which the parties were to have completed their various obligations under the Agreement, including the merger and transfer of title to the various properties. Defendants argue that, therefore, this action had to be commenced no later than December 31, 2008.

Defendants further argue that, even if New York's six-year statute of limitations applies, this action would still be untimely, because it had to be commenced no later than December 31, 2010. *See* CPLR § 213.

Plaintiffs argue that their claims are governed by New York's statute of limitations, not California's, because this action involves real property located in New York. As such, they argue that their claim accrued in New York, not California. Plaintiffs also argue that their claims did not accrue until November, 2008, when defendants sold the Wood Street property, in violation of the terms of the Agreement. As such, plaintiffs argue that this action is timely under both New York and California law.

Neither plaintiff is a resident of New York. "When a nonresident sues in New York's courts on a cause of action accruing outside the state, our 'borrowing statute' (CPLR 202) requires that the cause of action be timely under the limitation periods of both New York and the jurisdiction where the claim arose." *Kat House Productions, LLC v Paul, Hastings, Janofsky & Walker*, 71 AD3d 580 (1st Dept 2010), citation omitted. For purposes of the borrowing statute, "a cause of action accrues at the time and in the place of the injury." *Global Financial Corp. v Triarc Corp.*, 93 NY2d 525, 529 (1999). "[W]hen an alleged injury is purely economic, the place of injury usually is where the

plaintiff resides and sustains the economic impact of the loss.” *Id.*; see *Portfolio Recovery Associates, LLC v King*, 14 NY3d 410 (2010).

Here, the court finds that plaintiffs’ claims accrued in California for the purposes of applying New York’s borrowing statute and California’s statute of limitations therefore applies to plaintiffs’ claims.

Nall is a California resident and 1439 Corp. is a Nevada corporation with offices in California. Further, plaintiffs’ claims arise from the alleged breach of a contract which was negotiated and executed in California. As such, the economic impact of the alleged breach was sustained in California, not New York.

Plaintiffs assert that their claims accrued in New York, because two of the properties at issue are located in New York State. However, the Agreement is not simply one for the transfer of New York property. The Agreement first required the merger of two corporations and then the subsequent transfer of real property and cash, including properties located in Arizona and Missouri. Plaintiffs have not set forth any cases to demonstrate that, in a breach of contract action involving properties located in more than one state, the borrowing statute would not apply because one of the properties was located in New York.

In any event, the court finds that plaintiffs’ claims are untimely under both California and New York law. The Agreement provided that all of the steps, including the merger of York and 42nd Street, the creation of Newco, and the transfer of assets, including the various properties, would occur on or before on or before December 31, 2004. Thus, once that date passed with neither the merger nor the transfer of assets having occurred, plaintiffs’ claims for breach of the Agreement accrued. In fact, the proposed amended complaint acknowledges such accrual, stating that, in the fall of 2006, Nall “reiterated her rights under, and willingness to implement the Agreement, but refrained from filing suit” at that time. Proposed Amended Complaint, ¶ 55. This is contrary to plaintiffs’ assertion that their claim did not accrue until November, 2008.

The original complaint states that in the four years after the Agreement was executed, the parties, on a continuing basis, extended the Agreement to permit themselves “time to seek counsel and determine the optimal way to effect the provisions in consideration of, among other things, tax consequences of the merger and transfer of assets.” Complaint, ¶ 23. However, the complaint does

not allege any facts in support of this assertion such as would demonstrate that plaintiffs' cause of action did not accrue in December of 2004.

The proposed amended complaint states that, after the December 31, 2004 deadline had passed, the parties continued to exchange drafts of documents related to the transactions at issue, and continued to work towards fulfilling the terms of the Agreement. *See* Proposed Amended Complaint, ¶ 48. However, the proposed amended complaint specifically notes that such actions were taken by the parties with full reservation of their rights under the Agreement. *See Id.*, ¶¶ 54, 55, 56. Thus, this does not support plaintiffs' assertion that their claim did not accrue in December, 2004.

Plaintiffs argue that their claims did not accrue on December 31, 2004, because the Agreement did not specify that time was of the essence. Plaintiffs analogize this action to actions involving the sale of real property. In such cases, it has been stated that if the terms of the sale do not state that time is of the essence, and no party has otherwise provided notice to that effect, then the law "permits a reasonable time in which to tender performance, regardless of whether the terms of the sale designate a specific date for performance." *Ramnarain v Ramnarain*, 30 AD3d 394, 395 (2d Dept 2006).

Plaintiffs' argument is misplaced. The Agreement is not simply one for the sale of real property. As set forth above, the Agreement involved the merger of two companies (York and 42nd Street), the creation of a new corporation (Newco) and the division of assets, including the transfer of title to certain of the properties to Newco. Plaintiffs have not demonstrated that, under such circumstances, the failure to state that time was of the essence created an extension of the parties' time in which to perform under the Agreement.

In light of the foregoing, the court finds that plaintiffs' claims here accrued as of December 31, 2004 and that this action, which was commenced in June 2011, is untimely under the applicable four-year California statute of limitations. The action would also be untimely under the six-year New York statute of limitations. Therefore, defendants' motion to dismiss the complaint is granted and the complaint is dismissed.

3. Cross-Motion to Amend the Complaint

Plaintiffs cross-move for leave to amend the complaint to amplify their allegations that the parties agreed to adjourn the closing and to extend their time in which to perform under the

Agreement. “A motion for leave to amend the complaint pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit.” *Bishop v Maurer*, 83 AD3d 483, 485 (1st Dept 2011)(internal quotation marks and citation omitted).

Here, as discussed above, the proposed amended complaint asserts that the parties continued to exchange drafts of documents and continued to work towards fulfilling the terms of the Agreement. *See* Proposed Amended Complaint, ¶ 48. However, the proposed amended complaint also notes that such actions were taken with full reservation of their rights under the Agreement. *See Id.*, ¶¶ 54, 55, 56. Moreover, plaintiffs have not alleged any new facts to demonstrate that their claims would not be time-barred, as set forth above.

4. Notice of Pendency

CPLR § 6514(a) provides, in relevant part, that the court shall direct the County Clerk to cancel a notice of pendency:

if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519.

Here, because the court has dismissed the complaint, the notice of pendency must be canceled. *See Yenom Corp. v 155 Wooster Street Inc.*, 23 AD3d 259, 260 (1st Dept 2005); *184 Joralemon LLC v Brooklyn Law School*, 31 Misc3d 1201(A) (Sup. Ct. Kings Co. 2011 [Demarest J.]).

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendants Estate of Dawn Powell, Karen Powell, Thea Badal, James Powell, Christine Hamby, York Amusement Co., Inc., and 228-32 West 42nd Street Realty Corp. to dismiss the complaint is GRANTED and the complaint is DISMISSED, with costs and disbursements to movants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants’ motion to cancel the notice of pendency pursuant to CPLR

6514(a) is GRANTED and the New York County Clerk is directed to cancel the notice of pendency thirty (30) days from the date a copy of this order with Notice of Entry is served upon plaintiffs, provided that no timely appeal is taken; and it is further

ORDERED that the cross motion by plaintiffs Lillian Nall and 1439 Corp. to amend the complaint is DENIED.

DATED: 3/28/12

ENTER,

A handwritten signature in black ink, appearing to read "O.P. Sherwood", written over a horizontal line.

O. PETER SHERWOOD

J.S.C.