

Estate of Realuyo v Realuyo

2013 NY Slip Op 33974(U)

November 18, 2013

Supreme Court, New York County

Docket Number: 157692/2013

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ESTATE OF GERTRUDO R. REALUYO and
ROA REALUYO FAMILY FOUNDATION,

Plaintiffs,

-against-

INDEX NO. 157692/13
MOTION DATE 10-23-13
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

AMELIA R. REALUYO, JOSEPHINE R. REALUYO,
FELICIDAD B. TOROTSA, WILLIAM DOYLE
GALLERIES, INC., JP MORGAN CHASE BANK
and CITIBANK, N.A.

Defendants.

The following papers, numbered 1 to 7 were read on this Order to Show Cause for a Preliminary Injunction :

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED	
1 - 3	_____
4 - 7	_____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that plaintiffs' motion for an injunction and restraining order, is denied. Amelia Roa Realuyo and Josephine Roa Realuyo (hereinafter referred to as the "defendants") motion filed under Motion Sequence 002, to dismiss this action pursuant to CPLR §3211 [a][3],[7], for lack of standing and failure to state a cause of action, is granted. Defendants motion filed under Motion Sequence 003, for sanctions pursuant to 22 NYCRR 130-1.1, is denied. Plaintiffs' motion filed under Motion Sequence 004, to file an amended Verified Complaint, is denied.

Plaintiffs seek an Order granting a preliminary injunction and temporary restraining order against William Doyle Galleries, Inc., JP Morgan Chase Bank and Citibank, N.A. preventing Amelia Realuyo from encumbering, withdrawing or otherwise transferring any monies from bank accounts. Plaintiffs also seek to prevent all of the defendants from, selling, auctioning or otherwise disposing of an art and antique collection. Plaintiffs' motion filed under Motion Sequence 004, seeks to file an amended Verified Complaint.

Defendants motion filed under Motion Sequence 002 seeks to dismiss this action pursuant to CPLR §3211 [a][3],[7], for lack of capacity to sue and failure to state a cause of action, and pursuant to CPLR §213[1], for the expiration of the statute of limitations. Defendants motion filed under Motion Sequence 003 seeks sanctions for the bringing of a frivolous lawsuit, pursuant to 22 NYCRR 130-1.1.

On February 15,1977, Amelia Roa Realuyo purchased a duplex cooperative apartment located at 535 Park Avenue, Apartment 6AC, New York, New York. The capital

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

stock and proprietary lease are solely in the name of Amelia Roa Realuyo. The application stated that she intended to reside at the apartment with her parents, Conception and Florencio Realuyo, her sister and co-defendant in this action, Josephine Roa Realuyo, and her brother Gertrudo Roa Realuyo. The attorney handling the closing was her brother, Pompeyo Roa Realuyo. Felicidad B. Tortosa, although not a family member, was approved for residence in the apartment by 535 Park Avenue's board of directors in October of 1996.

On January 7, 1988, the Conception and Florencio Realuyo Foundation, Inc., was incorporated, with a stated purpose of promoting the health and welfare of the Filipino people by grants, scholarships or otherwise for the field of scientific research in medicine and other allied fields. The Foundation, was formed and funded by the ten children of Conception and Florencio Realuyo, which includes the defendants, Gertrudo Roa Realuyo and Pompeyo Roa Realuyo. Pompeyo Roa Realuyo is a trustee and incorporator of the foundation, as is defendant, Amelia Roa Realuyo.

On March 9, 2001, Gertrudo Roa Realuyo filed for bankruptcy in the U.S. Bankruptcy Court, Southern District of New York. The application states that he resided at 535 Park Avenue, Apt. 6A, New York, New York and had, \$150,877.00 in credit card debt with only \$3,670.00 in assets. Schedule B - Personal Property indicates that Gertrudo's "miscellaneous household goods and furnishings" were worth \$1,500.00. On July 5, 2001, his debt was discharged (Amelia R. Realuyo Aff., Exhs. Q, R, S & T). On June 7, 2002, Gertrudo Roa Realuyo died in the Philippines, his death certificate lists Amelia R. Realuyo, M.D., his sister, as the "informant" (Mot. Seq. 002, Exh. C). After Gertrudo Roa Realuyo's burial, a copy of his handwritten, unwitnessed, "My last will and Testament," dated May 29, 2001 was found. The will, dated May 29, 2001, states that all of Gertrudo's properties are being left to the Roa Realuyo Foundation with Celina Realuyo and Albert Realuyo as joint executor's of the Estate (Pompeyo Roa Realuyo Aff., Exh.C).

On March 30, 2013, Amelia Roa Realuyo entered into a contract to sell the proprietary lease and shares in 535 Park Avenue, Apartment 6AC, New York, New York. A buyer was found willing to pay 6.3 million dollars for the apartment and a contract was entered into with a September 11, 2013 closing date. The closing did not go forward and no new date is scheduled. In May of 2013, Amelia Roa Realuyo contacted William Doyle Galleries, Inc., for purposes of placing various furnishings and other items on consignment. The proposed consignment list is three pages long.

Plaintiffs seek an Order granting an injunction and restraining order. Pompeyo Roa Realuyo's affidavit in support of the motion states that he is president of the Roa Realuyo Family Foundation and the Conception and Florencio Realuyo Foundation, Inc. (hereinafter referred to as the "family foundation"). This action was brought to recover the value of an alleged collection of valuable art and antiques that belongs to the Estate of Gertrudo Roa Realuyo and the family foundation as beneficiary of the estate. There are six causes of action asserted in the complaint, forfeiture, fraud, breach of fiduciary duty, rescission of the apartment sale and consignment of the art and antique collection and for a temporary restraining order, for an accounting and imposition of a constructive trust and for injunctive relief.

Pompeyo Roa Realuyo claims that the Roa Realuyo Family Partnership had three members; the defendants and Gertrudo Roa Realuyo. The apartment was purchased in the name of Amelia Roa Realuyo as a fiduciary on behalf of the other members of the Roa Realuyo Family Partnership with the monthly maintenance charges paid by the defendants

and Gertrudo Roa Realuyo. All the furnishings in the apartment except for a piano, were provided by Gertrudo. Plaintiffs claim the antiques and art collection remained in 535 Park Avenue, Apartment 6AC, New York, New York after Gertrudo's death. Amelia Roa Realuyo has sold the apartment and is attempting to consign and sell Gertrudo's valuable art and antique collection, even though she is not the rightful owner, through William Doyle Galleries, Inc.. Plaintiffs claim that an injunction is needed to prevent the defendants' dissipation of the estate's assets and protect the interests of its beneficiary, the family foundation. Amelia Roa Realuyo has sold the apartment and is residing with Felicidad B. Tortosa at 301 East 64th Street, New York, N.Y.. Josephine Realuyo has moved out of the apartment and resides at 165 East 62nd Street, New York, NY.

Defendants oppose plaintiffs' motion for an injunction and temporary restraining order and under Motion Sequence 002, seek to have this action dismissed. Defendants contend that the plaintiffs have no basis to obtain a preliminary injunction because, there has been no attempts to fraudulently remove assets, and there is no documentary evidence to support the plaintiffs' contentions or establish a likelihood of success on the merits. There is no irreparable harm to the plaintiffs as a money judgment can be obtained and is being sought, and the equities are not in their favor.

Defendants seek to dismiss this action contending that the plaintiffs lack standing or legal capacity to bring this action and that the complaint fails to state a cause of action. Defendants claim that Pompeyo Roa Realuyo has not established he is a proper representative of the family foundation or that any of the plaintiffs have the legal capacity to bring this action. Pompeyo Roa Realuyo's license to practice law was recently suspended for failure to comply with Judiciary Law §468-a, and he cannot act as a legal representative (Mot. Exh. AD). The Estate of Gertrudo Roa Realuyo does not have standing because the named executors, Celina Realuyo and Albert Realuyo never filed Gertrudo's May 29, 2001, will with the Surrogate's Court and letters testamentary were not issued to them. The Estate of Gertrudo Roa Realuyo, also lacks legal capacity to sue because the holographic will is not valid since it was not witnessed. The foundation established in the Philippines, is the Conception and Florencio Realuyo Foundation, Inc., not the Roa Realuyo Foundation, which does not exist. The articles of incorporation, bank and tax records establish that Pompeyo Roa Realuyo is not president or a proper representative of the family foundation. Defendants contend that the intended plaintiff, the Conception and Florencio Realuyo Foundation, Inc., is not an appropriate party to this action, because it is seeking relief as a beneficiary of the Estate of Gertrudo Roa Realuyo. As a beneficiary of Gertrudo's estate, the family foundation has no standing or legal capacity to assert any claims to protect or recover estate assets.

Defendants also contend that there never was a Roa Realuyo Family Partnership and even if an alleged partnership did exist, any interest in it terminated when Gertrudo Roa Realuyo died on June 7, 2002. The six year statute of limitations period for the estate to sue on behalf of Gertrudo Roa Realuyo's partnership interest based on constructive trust or for an accounting, expired in 2008, and this action commenced in 2013, is untimely. A new family partnership agreement could not be entered into with Pompeyo Roa Realuyo on behalf of the estate after Gertrudo Roa Realuyo's death because under New York Law an estate cannot be made a partner and letters testamentary had not been issued.

Amelia Roa Realuyo on behalf of the defendants, states that approximately four years before he died, Gertrudo Roa Realuyo sent personal items including two large shipping containers full of furniture to the family home in the Philippines, the items remained there as of the date of his death. The property shipped to the Philippines has

become part of the Conception and Florencio Realuyo Foundation , Inc., in accordance with Gertrudo's wishes. The family foundation is run by other siblings and family members in the Philippines. There is no antique and art collection remaining in the apartment, as is further established by Gertrudo's bankruptcy filings a year before his death. Gertrudo was permitted to reside in the apartment along with other family members and eventually Felicidad B. Tortosa, but he had no ownership interests in it. Josephine Roa Realuyo states in her sworn affidavit that the Roa Realuyo Family Partnership, never existed. She is mentally sound, physically active and resides alone in an apartment a few blocks from her prior residence. She states that Pompeyo Roa Realuyo, has attempted to have her "lie" concerning the existence of a Roa Realuyo Family Partnership, but she will not do so.

The purpose of a preliminary injunction is to maintain the status quo of the parties pending the outcome of the litigation, not to render a final determination as to the rights of the parties (*Jaime B. v. Hernandez*, 274 A.D. 2d 335, 712 N.Y.S. 2d 91 [N.Y.A.D. 1st Dept., 2000]). The issuance of a preliminary injunction is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury absent granting of the preliminary injunction; and (3) that a balancing of the equities favors movant's position" (*Doe v. Axelrod*, 73 N.Y. 2d 748, 532 N.E. 2d 1272, 536 N.Y.S. 2d 44 [1998]). A preliminary injunction should not be granted unless its necessity and justification is clear based on undisputed facts (*Schultz v. 400 Cooperative Corporation*, 292 A.D. 2d 16, 736 N.Y.S. 2d 9 [N.Y.A.D. 1st Dept., 2002]). Irreparable injury requires a showing that there is no other remedy at law, including monetary damages, that could adequately compensate the party seeking relief (*Zodkevitch v. Feibush*, 49 A.D. 3d 424, 854 N.Y.S. 2d 373 [N.Y.A.D. 1st Dept., 2008]).

A motion to dismiss pursuant to CPLR §3211[a][3], is based on lack of legal capacity to sue. To have standing a plaintiff must establish, "an injury in fact that falls within the relevant zone of interests sought to be protected by law." (*Bernfeld v. Kurilenko* 91 A.D. 3d 893, 937 N.Y.S. 2d 314 [N.Y.A.D. 2nd Dept., 2012] citing to *Village of Elmsford v. Knollwood Country Club, Inc.*, 60 A.D. 3d 934, 875 N.Y.S. 2d 560 [N.Y.A.D. 2nd Dept., 2009]). Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

An estate is not deemed a legal entity, therefore any action against the estate must be brought by the executor or administrator in a representative capacity. A plaintiff lacks standing to sue without letters of administration, or "proof of an actual legal stake in the matter being adjudicated" (EPTL 11-3.1, *Grosso v. Estate of Gershenson*, 33 A.D. 3d 587, 822 N.Y.S. 2d 150 [N.Y.A.D. 2nd Dept., 2006] and *Brandon v. Columbian Mutual Life Ins. Co.*, 264 A.D. 2d 436, 694 N.Y.S. 2d 134 [N.Y.A.D. 2nd Dept., 1999]). An executor cannot enter into any formal contract or agreement on behalf of the estate prior to issuance of letters testamentary (*Murphy v. EEG Enterprises, Inc.*, 245 A.D. 2d 495, 666 N.Y.S. 2d 693 [N.Y.A.D. 2nd Dept., 1997]).

Pursuant to EPTL §3-2.1, a will must be signed or acknowledged in the presence of two attesting witnesses. Pursuant to EPTL §3-2.1[a][4] the witnesses within "one thirty day period" must attest the will as witnesses (*Agar v. Agar*, 88 A.D. 2d 882, 452 N.Y.S. 2d 587 [1982]). The witnesses are not mandated to provide addresses, but they must sign attestation clauses in a timely manner (*In re Estate of Neller*, 40 Misc. 3d 1237(A), 2013 N.Y. Slip Op. 51325(U) [N.Y. Surr., Richmond County, 2013]). New York State does not recognize holographic wills except under limited circumstances. Pursuant to EPTL §3-2.2,

holographic wills are only recognized when prepared by, members of the military or naval services engaged in war or armed conflict; a person who serves with or accompanies military or naval personnel engaged in war or conflict; or for mariners at sea (EPTL §3-2.2; Will of Shindell, 60 A.D. 2d 393, 400 N.Y.S. 2d 67 [N.Y.A.D. 1st Dept., 1977]).

A beneficiary of an estate does not have standing to act on behalf of the estate, or to exercise a fiduciary's rights with respect to the estate property. The appropriate means of obtaining the property of the estate is to have a representative appointed pursuant to the requirements of the Estates Powers and Trusts Law (EPTL) (Schoeps v. Andrew Lloyd Webber Art Foundation, 66 A.D. 3d 137, 884 N.Y.S. 2d 396 [N.Y.A.D. 1st Dept., 2009]).

Upon review of the papers submitted with this motion, this Court finds there is no basis to issue a preliminary injunction or temporary restraining order. Gertrudo Roa Realuyo, notified the Bankruptcy Court that the total value of his assets in the apartment was \$3,670.00, the credit card debt of \$150,877.00, was discharged based on the Court's reliance on his claims less than a year before his death. Plaintiffs' claims that any of Gertrudo Roa Realuyo's possessions remain in the apartment, or that they are of value are based on speculation and potential fraud. The likelihood of success on the merits has not been established by the documentary evidence presented. There is no proof of irreparable injury because monetary damages have been sought. The balancing of the equities favor the defendants because there is no basis to maintain this action.

Defendants motion to dismiss this action filed under Motion Seq. 002, establishes that none of the plaintiffs have the legal capacity to bring this action. The defendants have established that the alleged Roa Realuyo Partnership did not exist. The Estate of Gertrudo Roa Realuyo does not have standing to bring this action because no letters of administration were issued. The holographic will that plaintiffs attempt to submit is deemed invalid under New York Law. Even if the estate were to file the holographic will it would be deemed invalid in New York and no letters would be issued. Pompeyo Roa Realuyo has not established that he can act as a representative on behalf of any of the plaintiffs. There is no proof submitted that he is president of the family foundation or authorized to act on its behalf. The family foundation also lacks capacity to sue as beneficiary of Gertrudo's estate.

Defendants motion filed under Motion Sequence 003, seeks sanctions against Pompeyo Roa Realuyo upursuant to 22 NYCRR 130-1.1. Amelia Roa Realuyo claims that Pompeyo Roa Realuyo has continually harassed her and attempted to have her agree to create a foundation to receive the proceeds of the sale of the apartment, ever since she advised him of her intent to sell. He has threatened and then commenced this legal action on behalf of the plaintiffs when she refused to create a foundation with his assistance. Pompeyo Roa Realuyo also has a history of harassing Felicidad B. Tortosa. Plaintiffs have threatened Josephine Roa Realuyo and initaly commenced this action against her.

Plaintiffs oppose the motion for sanctions claiming there was no attempt to harass or threaten any of the defendants. Pompeyo Roa Realuyo claims he only attempted to provide his sisters with good advice. Plaintiffs have a good faith basis to maintain this action based on recovery of the art and antique collection and protecting the interests of the family foundation as a beneficiary of the estate.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party. The Court in its discretion, pursuant to 22 NYCRR 130-1.1, may impose costs and sanctions based on relentless futile actions, material misrepresentations and otherwise

frivolous conduct (In re Matseoane, 110 A.D. 3d 607, 2013 N.Y. Slip Op. 06977 [N.Y.A.D. 1st Dept. 2013]).

Defendants have not established a basis to impose sanctions for bringing this action. Pompeyo Roa Realuyo's actions maybe misguided but are alleged to be motivated by family interests and Gertrudo Roa Realuyo's intent in the will. Conduct seeking to further this litigation, or future claims asserted by Pompeyo Roa Realuyo intending to harass the defendants may result in a determination that sanctions are warranted in the future.

Plaintiffs motion filed under Motion Sequence 004, seeks to amend the complaint removing all of the named defendants except for Amelia Roa Realuyo and Felicidad B. Tortosa. The motion also seeks to reflect the proper plaintiffs, specifically, "Celina and Albert Realuyo, as joint executors of the Estate of Gertrudo R. Realuyo and Concepcion and Florencio Realuyo Foundation, Inc. (a/k/a Roa-Realuyo Foundation)."

Pursuant to CPLR §3025, leave to amend pleadings, "shall be freely granted upon such terms as may be just..." the decision to disallow the amendment is at the Court's discretion (McCaskey, Davies & Associates, Inc. v. New York City, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]).

Defendants contend that the proposed amendments do not prevent this Court from dismissing this action because the plaintiffs still have not established a legal capacity to sue and have not stated a cause of action.

This Court finds that there is no basis to amend the verified complaint because the amendments do not create any further legal capacity to sue and do not state a cause of action.

Accordingly, it is ORDERED that plaintiff's motion for a preliminary injunction and restraining order, is denied, and it is further,

ORDERED, that AMELIA ROA REALUYO and JOSEPHINE ROA REALUYO's Motion Sequence 002, to dismiss this action pursuant to CPLR §3211 [a][3],[7], for lack of standing and failure to state a cause of action, is granted, and it is further,

ORDERED and ADJUDGED, that this action is dismissed and the clerk shall enter judgment accordingly, and it is further,

ORDERED, that AMELIA ROA REALUYO and JOSEPHINE ROA REALUYO's Motion Sequence 003, for sanctions pursuant to 22 NYCRR 130-1.1, is denied, and it is further,

ORDERED, that plaintiffs' Motion Sequence 004, to file an Amended Verified Complaint, is denied

FILED
ENTER:

FEB 11 2014

COUNTY CLERK'S OFFICE MANUEL J. MENDEZ,
NEW YORK J.S.C.

Dated: November 18, 2013

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

Norman Goodman
clerk of the court