

Lipin v Danske Bank

2014 NY Slip Op 32694(U)

October 8, 2014

Supreme Court, New York County

Docket Number: 150972/2014

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

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

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JOAN C. LIPIN,

Plaintiff,

-against-

DECISION AND
ORDER

Index No. 150972/2014

DANSKE BANK, DAVID E. HUNT, ULF BERGQUIST,
EVELYN F. ELLIS, JOSEPH R. MAZZIOTTI, DANA A.
SAWYER, KRAININ REAL ESTATE, ANN SUSAN
MARKATOS, ROBERT GARY LIPIN, DAVID A. BERGER,
ALLEGAERT BERGER & VOGEL LLP, MARK K. ANESH,
and DEBORAH LOVEWELL,

Defendants.

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HON. ANIL C. SINGH, J.:

In this action for, inter alia, abuse of process, motion sequence 1 through 10, 12 and 13 are consolidated herein for purposes of review. Plaintiff who is a law school graduate brings this action pro se. The gravamen of plaintiff's claims stem from the probate of her father's will and estate in Maine's Cumberland County Probate Court from 2005 through 2010. Plaintiff disagreed with the disposition of said proceedings and has since then initiated numerous lawsuits in various venues and multiple countries against the parties involved in the probate, which include a judge, attorneys associated with the matter, a bank, and others.¹

In her ten motions pending before the court, plaintiff seeks supervision of disclosure by the court (mot. seq. 001), an adjournment (mot. seq. 005), several attorney disqualifications in three separate motions (mot. seq. 006 – 008), a default judgment against all defendants (mot. seq.

¹ In the New York Supreme Court of New York County alone, plaintiff has initiated nine different lawsuits before different judges. Furthermore she is currently subject to a filing injunction in all federal courts under the ambit of the United States Court of Appeals for the Second Circuit and must first obtain leave of the court in order to make any related filing.

009), to quash an information subpoena (mot. seq. 010), to vacate an order issued by this court, same court, same justice (mot. seq. 012), and to quash another information subpoena. All of the defendants have moved to dismiss the verified complaint for the exception of defendant David E. Hunt has not appeared in this matter.

Subpoenas

The court will first turn to the information subpoenas. Plaintiff has sought for the information subpoena sent to American Express dated March 31, 2014 (mot. seq. 10) and the information subpoena and restraining notice sent to JP Morgan Chase Bank N.A. dated April 2, 2014 (mot. seq. 13) to be quashed. The subpoenas were issued pursuant to CPLR §5224 in aid of the enforcement of a money judgment originally granted by the Maine Probate Court on May 14, 2008. The foreign judgment from the Main Probate Court was authenticated and filed in New York Supreme Court in a different matter, *Estate of Theordore Lipin Robert Lipin and Ann Susan Markatos v. Joan C Lipin*, under Index Number 109305/2008 pursuant to CPLR §5402.

Plaintiff attempted to quash the aforementioned subpoenas again, by a proposed order to show cause, which this court declined to endorse on May 6, 2014. (“I decline to sign this order to show cause as the information subpoena was issued in a different matter under index no. 109305-08.”). Plaintiff then moved in Motion Sequence 12, to vacate the same decision issued by this court, same justice which declined to endorse her proposed order to show cause. Plaintiff argued such a decision violated her due process of law.

The aforementioned subpoenas were issued in a different matter, *Estate of Theordore et al. v. Joan C Lipin*, under Index Number 109305/2008 which was assigned to Justice Tingling. Plaintiff had the procedure available to her to make a motion to quash before Justice Tingling pursuant to CPLR §2304 which states, “[a] motion to quash. . . shall be made promptly in the

court in which the subpoena is returnable.” “Contrary to [plaintiff’s] contention, ‘returnable in a court’, pursuant to CPLR 2304, is not the same thing as returnable in a courthouse. It means within a court action or proceeding.” (Brooks v City of New York, 178 Misc 2d 104, 105 [Sup Ct 1998]). Therefore, despite plaintiff’s disapproval of this established legal procedure, it does not constitute a violation of her due process.

Notwithstanding plaintiff’s improper civil procedure, the motions to quash are without merit (see CPLR §2304). The information subpoenas were properly issued since the judgment creditor is entitled to enforce the judgment pursuant to CPLR §5524. Moreover according to the Affirmation of David Berger, the motion to quash is moot since the recipients of those subpoenas have already provided the requested information (see Berger Aff. ¶4 NYSCEF Doc. No. 290). As such, plaintiff’s motions to quash the subpoenas in motion sequences 10, 12 and 13 are denied.

Motions to Dismiss

The court will next turn to the defendants’ motion to dismiss. Defendants Hon. Joseph Mazziotti and Mark Anesh, Esq. (mot. seq. 002), Defendants Ulf Bergquist, Evelyn F. Ellis, Krainin Real Estate, Ann Susan Markatos, Robert Gary Lipin, David A. Berger, Deborah Lovewell, Dana A. Sawyer, and Allegaert Berger & Vogel (mot. seq. 003), and Defendant Danske Bank (mot. seq.004), have all moved to dismiss plaintiff Joan C. Lipin’s Verified Complaint pursuant to CPLR §3211(a).

Jurisdiction

As a threshold issue, the parties have asserted arguments for dismissal for lack of personal jurisdiction pursuant to CPLR 3211 (a)(8). The plaintiff bears the burden of proof to establish personal jurisdiction (O'Brien v Hackensack Univ. Med. Ctr., 305 AD2d 199, 200 [1st

Dept 2003]). This means the plaintiff must allege jurisdictional contacts that, if proven, would be sufficient to demonstrate that the exercise of personal jurisdiction would be proper under either New York's general jurisdiction statute (CPLR 301) or New York's long-arm statute (CPLR 302), and that the exercise of jurisdiction comports with the constitutional limits of due process (see LaMarca v Pak-Mor Mfg. Co., 95 NY2d 210, 214 [2000]).

The Complaint alleges a conspiracy centered in Maine and Europe, with no connection to New York. Defendants Evelyn Ellis, Robert Lipin, and Dana Sawyer are residents of New Hampshire. (Ellis Aff. ¶ 2; Robert Gary Lipin Aff. ¶ 2; Sawyer Aff. ¶ 2; Complaint ¶ 153). Defendant Deborah Lovewell is a resident of Massachusetts. (Lovewell Aff. ¶ 2; Complaint ¶ 53). Defendant Krainin Real Estate is a Maine corporation with its principal place of business in that state. (Margaret Krainin Aff. ¶ 2). None of these defendants own real property in New York, maintain a bank account in New York, has a telephone line or listing in New York, or conducts business or maintains a business presence in New York (see Affs. of Ellis, Lipin, Lovewell, Sawyer ¶¶ 3-4; Krainin Aff. ¶¶ 3-5). The Complaint and plaintiff's opposition styled as a cross motion does not allege otherwise. None of these non-resident defendants has contacts with New York sufficient to support the exercise of personal jurisdiction. As such, the motions to dismiss based upon lack of jurisdiction are granted as to those defendants.

Collateral Estoppel and Res Judicata

The doctrine of collateral estoppel bars claims "[w]here a pending issue was raised, necessarily decided and material in a prior action, and where the party to be estopped had a full and fair opportunity to litigate the issue in the earlier action." (Bansbach v Zinn, 1 NY3d 1, 10 [2003]). On the other hand, res judicata bars claims where a judgment on the merits has been issued in a prior action between the same parties and involving the same subject matter (In re

Hunter, 4 NY3d 260, 269 [2005]). Res judicata also bars claims that “could have been raised in the prior litigation.” (Id.) Applying the principles of res judicata, a court should bar all other claims arising out of the “same transactions or series or transactions” or “factual grouping,” even if different elements of proof, measures of liability, or kinds of relief would apply to the other claims (see O'Brien v City of Syracuse, 54 NY2d 353, 358 [1981]).

The issue of personal jurisdiction has already been litigated and decided by New York Courts for the identical fact pattern that is alleged by plaintiff in her verified complaint before the court now. As such, plaintiff's verified complaint is dismissed against Ulf Bergquist (see Lipin v Bergquist, 574 F Supp 2d 423, 432 [SDNY 2008] (dismissing Bergquist, who is a citizen and resident of Sweden, “[b]ecause Plaintiff has not made a prima facie showing that personal jurisdiction can be exercised over Bergquist in accordance with New York's long-arm statute”) and against David E. Hunt, which this court grants dismissal sua sponte (see Lipin v Hunt, 538 F Supp 2d 590, 598 [SDNY 2008] (“Because Plaintiff's Amended Complaint does not support the exercise of personal jurisdiction under New York's long-arm statute, Hunt's motion to dismiss is granted.”)).

Plaintiff also asserts identical claims against Danske Bank which have previously been dismissed for failure to state a cause of action; thus, it is dismissed herein (Lipin v Hunt, 538 F Supp 2d 590, 603 [SDNY 2008] (“Because Plaintiff states no valid causes of action against Danske Bank, its motion to dismiss is granted.”))

Lastly, plaintiff's claims against Judge Joseph R. Mazziotti arise from his presiding over the probate of plaintiff's father's estate is also dismissed under res judicata (Lipin v Ellis, 07-92-P-S, 2007 WL 2198876 [D Me July 26, 2007] affd., CIV. 07-92-P-S, 2007 WL 2701493 [D Me Sept. 10, 2007] (finding “[t]he gravamen of Lipin's complaint against Mazziotti is that he

conspired with . . . others to render Probate Court rulings adverse to her. . . .The law is clear that in the face of such allegations a judge is absolutely immune from suit. . . . Mazziotti hence is entitled to dismissal with prejudice.”)

Failure to State a Claim

Defendants Mark K. Anesh, David A. Berger and the law firm of Allegaert Berger & Vogel LLP moved for dismissal pursuant to CPLR 3211(a)(7). The merits of these claims will be analyzed in turn. When resolving a motion to dismiss for failure to state a cause of action, the court must accept as true the facts as alleged in the complaint and afford plaintiff the benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable theory. [Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977)].

Defendant Mark K. Anesh argues that plaintiff’s allegations do not give rise to a cause of action (see Verified Complaint ¶¶197- 199). This court agrees. In plaintiff’s complaint she alleges that the civil procedures defendant Anesh took in another action, amounted to defamation per se (see Order of the United States Court of Appeals for the Second Circuit, dated May 7, 2012 in Re Joan C. Lipin, Nos. 11 Civ, 147, 11 Civ 213, 11 Civ1384, 11 Civ 1492). Here, plaintiff has failed to plead the elements of defamation with sufficient particularity (Chiavarelli v Williams, 256 AD2d 111, 113 [1st Dept 1998]). Moreover, seeking sanctions and failing to consent to the removal of a case within a judicial proceeding are actions entitled to immunity and do not separately give rise to a cause of action (see infra).

As for plaintiff’s claims in her verified complaint at ¶¶85, 178 and 179, that defendant Anesh violated the New York Penal Code, a private citizen lacks standing to assert cognizable claims under state criminal law (Kinberg v Kinberg, 48 AD3d 387, 387 [1st Dept 2008])

(dismissing private citizen's claim for perjury since it is the district attorney who generally retains sole authority to prosecute such criminal activity).

Plaintiff alleges attorney misconduct by David A. Berger and the law firm of Allegaert Berger & Vogel LLP. These allegations rely upon false statements made in the course of judicial proceedings contained in removal notices filed with the District Court for the Southern of New York (see Verified Complaint ¶¶ 80-83, 164). "Statements made by parties, attorneys, and witnesses in the course of a judicial or quasi-judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be resolved in the proceeding." (Bisogno v Borsa, 101 AD3d 780, 781 [2d Dept 2012]). The statements in question here, were pertinent to the litigation in which they were made thus, they are subject to absolute immunity and do not give rise to a valid cause of action.

Plaintiff asserts claims pursuant to N.Y. Jud. L. § 487. "Although on a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference, where, as here, the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration." (Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 [1st Dept 1994]). Plaintiff's claims fail because her allegations "do not amount to acts of deceit, and do not give rise to any inference that the defendant lawyers making the statements, which mainly consist of simple advocacy, acted with intent to deceive." (Seldon v Lewis Brisbois Bisgaard & Smith LLP, 116 AD3d 490, 491 [1st Dept 2014]).

Sanctions and Injunctive Relief

Now turning to the defendants' motion for sanctions and injunctive relief against plaintiff Joan C. Lipin. In considering whether to enjoin plaintiff, the Court must inquire whether plaintiff is "abusing the judicial process through vexatious litigation" and whether the restrictions imposed would not be "so burdensome as to deny [her] meaningful access to the courts." (Brady v State of New York, Inc., 36 Misc 3d 1230(A) [Ct Cl 2012]). Defendants alleged that plaintiff has continuously engaged in harassing and vexatious litigation against any party or lawyer who crosses her path with no substantive merit.

The court is declining to impose sanctions at this time but, given the extent of plaintiff's frivolous and voluminous motions discussed supra, the court is granting a permanent injunction enjoining plaintiff from commencing any action in this court relating to the her deceased father's estate, or estate property or actions taken in connection with legal proceedings involving that estate or estate property unless she first obtains prior approval of the Administrative Judge of this Court (see Lammers v Lammers, 235 AD2d 286, 286 [1st Dept 1997] (holding that a result of the numerous frivolous motions made by the party, it was a proper exercise of discretion for the court to enjoin her from making any further motion in this action without judicial approval); In re Chiofalo, 78 AD3d 9, 17 [1st Dept 2010] (finding that as a result of attorney's filing of action intending to harass and advance unwarranted claims where no personal jurisdiction and judicial immunity existed a two year suspension against the attorney who filed the actions pro se was warranted).

Plaintiff's Remaining Motions

All remaining motions, which include plaintiff's motion for supervision of disclosure by the court (mot. seq. 001), an adjournment (mot. seq. 005), several attorney disqualifications (mot. seq. 006 – 008), and default judgments against all defendants (mot. seq. 009) are denied as moot.

Conclusion and Order

Accordingly it is,

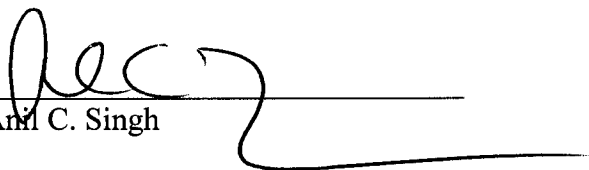
ORDERED that defendants' motions to dismiss plaintiff Joan C. Lipin's verified complaint are granted without leave to re-plead; and it is further

ORDERED that plaintiff's remaining motions are denied; and it is further

ORDERED that plaintiff Joan C. Lipin is permanently enjoined from commencing any action in the New York Supreme Court of New York County relating to the her deceased father's estate, or estate property or actions taken in connection with any legal proceedings involving that estate or estate property unless she first obtains prior approval of the Administrative Judge of this Court; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants and against plaintiff with costs and disbursements as taxed by the Clerk.

Date: October 8, 2014
New York, New York


Anil C. Singh