

Moskowitz v Moskowitz
2014 NY Slip Op 32771(U)
October 15, 2014
Supreme Court, Kings County
Docket Number: 505263/2013
Judge: David I. Schmidt
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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of October, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT

Justice.

-----X

RICHARD MOSKOWITZ,

Plaintiff,

- against -

Index No. 505263/13

BETH MARSHA MOSKOWITZ AND DARLEEN J.

MEEHAN,

Defendants.

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1 - 2

Opposing Affirmations/ Memorandum in Opposition _____

3

Reply Affidavits (Affirmations) _____

4

_____ Affidavit (Affirmation) _____

Other Papers Correspondence from Counsel _____

Upon the foregoing papers, defendants Beth Marsha Moskowitz (Beth Marsha) and Darleen J. Meehan (Meehan), move, pursuant to CPLR 3211, for an order dismissing the instant action and awarding the defendants legal fees and sanctions as against the plaintiff, Richard Moskowitz (Richard).

Background

The following factual background is taken from the defendants' counsel's affirmation and exhibits in support of the instant motion as the plaintiff, within his opposition, has not contested same.

The underlying action, herein, involves title to family owned real property located at 1322 East 22nd Street, Brooklyn, New York (the subject premises). Pursuant to a bargain and sale deed dated July 23, 2004, decedent, Benjamin Moskowitz¹ transferred his ownership interest in the subject premises to the defendants as joint tenants with right of survivorship. In his summons with notice, Richard alleges that the subject premises was transferred to the defendants as a result of undue influence during a time when the decedent was of diminished mental capacity. Richard further claims that, but for the allegedly improper transfer, he would have inherited a 25% interest in the subject premises under his father's will.

Benjamin Moskowitz died on November 24, 2005, sixteen months after the subject transfer. On March 25, 2009, the decedent's will was admitted to probate in the Kings County Surrogate's Court and letters testamentary² issued to the nominated executor, co-

¹ The decedent is father to plaintiff Richard and co-defendant Beth Marsha. Richard and Beth Marsha are also brother and sister.

² Letters Testamentary - A probate-court order approving the appointment of an executor under a will and authorizing the executor to administer the estate (Black's Law Dictionary [9th ed. 2009], letters testamentary). As above noted, in Brooklyn, the "probate-court" is the Kings County Surrogate's Court.

defendant Beth Marsha. During the accounting phase of the Surrogate's Court action, Richard filed objections to Beth Marsha's account, alleging, among other things, that:

“[Beth Marsha Moskowitz] violated her fiduciary duty by failing to initiate a discovery proceeding against [Darlene J.] Meehan to investigate the circumstances of the transfer of the [subject premises] and alleging that the decedent was either incompetent or subject to undue influence at the time thereof.”

Beth Marsha thereafter moved for summary judgment, seeking to have Richard's objections dismissed. By decision and order dated September 14, 2009, Kings County Surrogate Judge, Margarita López Torres, dismissed Richard's objections writing:

“[T]he movant [Beth Marsha] having established a *prima facie* showing of a valid *inter vivos* gift of the [subject premises] and the respondents³ having failed to raise any triable issue of fact regarding the propriety of the transfer, the decedent's capacity at the time thereof or the exertion of undue influence, the movant's motion to dismiss the respondents' objections to the accounting . . . [including, among other things, the] failure to institute a discovery proceeding regarding the transfer of [the subject premises] is granted.”

According to the defendants, rather than taking an appeal of the Surrogate's decision, Richard elected to institute the underlying Kings County Supreme Court action. While not delineated as such, the defendants ostensibly seek dismissal pursuant to CPLR 3211 (a) (5). In sum, defendants argue that the plaintiff seeks the same relief he was denied in the prior proceeding, that the instant issues were completely litigated in the prior action, and that two of the parties are identical to both, thus, the instant action is barred under the doctrines of *res*

³ In the Surrogate's Court proceeding, Richard was joined by Sheila Roberts, as joint objectors therein. Sheila Roberts is not listed as a plaintiff in the instant matter.

judicata and collateral estoppel. Further, defendants contend that, in light of the Surrogate's prior decision, the plaintiff's filing of the instant suit constitutes outrageous conduct warranting an order of attorneys' fees and sanctions.

Plaintiff opposes the instant motion claiming, "if the [Surrogate's] [d]ecision . . . [is] to be viewed as collateral estoppe[1], one must analyze what factual determinations were made by the Court. Factual determinations are made after a hearing. No hearing was held in Surrogate's Court." As a consequence, as plaintiff contends, there is no collateral estoppel. Richard further argues that even if the court should find in Beth Marsha's favor, the action should proceed as against Meehan as she was not a party to the Surrogate's Court litigation.

In reply, defendants contend that plaintiff's opposition does nothing more than to attempt to divert the court's attention from the "all encompassing" decision of the Surrogate's Court, without offering any evidence in support of his contentions.

The court will first address the defendants' motion. After such discussion, the court will address an issue concerning plaintiff's counsel that bears directly upon the underlying litigation.

Discussion

Branch Seeking Dismissal Pursuant to CPLR 3211 (a) (5)

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Richard commenced the instant action by filing a summons with notice on September 6, 2013. On October 4, 2013, in response thereto, defendants served a notice of appearance with a demand for a complaint (*see* CPLR 3012). After reviewing the instant moving papers and the Kings County Clerk's electronic filing system, it appears that no complaint was ever filed or served in response to defendants' demand. Further, while both, the defendants' motion and the plaintiff's opposition make several references to a "complaint", neither has annexed same as an exhibit to the papers, nor have defendants even annexed the summons with notice with which they were served. Despite not having been served a complaint, the defendants chose to move for dismissal pursuant to CPLR 3211 (a) (5) as compared to CPLR 3012 (b).⁴ "[T]he only statutorily permitted response to the service of a summons with notice is the service of a notice of appearance with or without a demand for a complaint (*see* Siegel, New York Practice 4th § 60)" (*Petrova v Investors Capital*, 24 Misc3d 977, 978-979 [Sup Ct, Kings County 2009]; *see NGH Associates, Ltd. v United Parcel Service, Inc.*, 17 Misc.3d 746, 748 [2007]). While the defendants have properly demanded a complaint, moving for dismissal, pursuant to CPLR 3211, prior to service of such complaint, was premature (*Petrova, supra; NGH, supra*).

⁴ CPLR 3012 (b) states, in relevant part, "The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision."

As the *Goshen* court stated, when addressing a motion to dismiss, the court must afford the *pleadings* a liberal construction and take the allegations of the *complaint* as true. “CPLR 3011⁵ sets forth the types of pleadings permitted in New York practice. Pleadings include a complaint, an answer, and a reply. A summons with notice is not a pleading” (*Petrova, supra; NGH, supra*). A summons with notice does not contain causes of action, only “a notice stating the nature of the action and the relief sought” (CPLR § 305[b]). A summons with notice does not provide the facts upon which such causes of action are based. As it relates to the instant motion, absent a complaint, the court is bereft of the factual allegations necessary to determine if *res judicata* or collateral estoppel attaches to the plaintiff’s action (*see generally, Fraley v. Desilu Productions, Inc.*, 23 AD2d 79 [1965]; *NGH, supra*). As a consequence of moving against the plaintiff’s summons with notice, the defendants’ application for dismissal pursuant to CPLR 3211 (a) (5) is denied as premature without prejudice to renewal after service of a complaint, in accordance with the remainder of this decision (*see Fraley, supra; see also David D. Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:55*).

⁵ CPLR 3011 states, in pertinent part: “There shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff and a cross-claim against a defendant. A defendant’s pleading against another claimant is an interpleader complaint, or against any other person not already a party is a third-party complaint. There shall be a reply to a counterclaim denominated as such, an answer to an interpleader complaint or third-party complaint, and an answer to a cross-claim that contains a demand for an answer. If no demand is made, the cross-claim shall be deemed denied or avoided. There shall be no other pleading unless the court orders otherwise.

Branch Seeking Fees and Sanctions

The court is authorized to impose financial sanctions for frivolous conduct pursuant to 22 NYCRR 130-1.1(a).

“Among the types of conduct which will be considered frivolous are those determined to be ‘completely without merit in law’ or ‘undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another’ (22 NYCRR 130-1.1[c][1], [2]; see *Ofman v Campos*, 12 AD3d 581; *Stow v Stow*, 262 AD2d 550. In making that determination, the court must consider ‘the circumstances under which the conduct took place’ and ‘whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent’ (22 NYCRR 130-1.1[c]).”
(*Glenn v Annunziata*, 53 AD3d 565 [2008]).

“Making claims of colorable merit can constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1 if ‘undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another’” (*Ofman v Campos*, 12 AD3d 581, 582 [2004], quoting *Stow v Stow*, 262 AD2d 550, 551[1999], quoting 22 NYCRR 130-1.1 [c] [2]). The defendants’ single-paragraph argument fails to evidence the conduct envisioned by the above cited case law. While the court notes that improper conduct will not be countenanced, it declines to award attorneys’ fees and sanctions at this time, subject to reconsideration if later warranted.

Plaintiff's Counsel

The court takes judicial notice that, on September 30, 2014, during the pendency of the instant motion, plaintiff's counsel, Michael M. Lippman, pled guilty to two counts of Grand Larceny in the 3rd Degree (Class D Felonies) in the Bronx Supreme Court before Acting Justice Steven Barrett. The entry of his guilty plea constitutes Mr. Lippman's conviction of a felony for the purposes of Judiciary Law § 90 [4] [a] (*see In re Serlin*, 95 AD3d 147, 148 [2012]; *Matter of Boyd*, 157 AD2d 136, 137 [1990]; *Matter of Cohen*, 107 AD2d 189 [1985]; *Matter of Swirsky*, 103 AD2d 195 [1984]; Judiciary Law §90 [4] [a]). It has long been established that, pursuant to Judiciary Law § 90 (4) (a), upon conviction of a felony committed under the laws of this state, an attorney is *ipso facto* disbarred by operation of law and no further action, judicial or otherwise, is required to constitute the fact; the subsequent proceeding to strike his name from the rolls is merely the recording of the fact that had already occurred (*see Mitchell v. Association of Bar of City of New York*, 40 NY2d 153, 155-156 [1976]; *Matter of Barash*, 20 NY2d 154, 157 [1967]; *In re Bentil*, 115 AD3d 48 [2 Dept. 2014]; *Boyd* at 137; Judiciary Law § 90 [4] [a]).

CPLR 321 (c) states, in pertinent part:

“If an attorney . . . is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action⁶ against the party for whom he

⁶ Despite the automatic stay of CPLR 321 (c), the court is permitted to dispose of the defendants' instant motion since such disposition has no adverse effect on the plaintiff, the litigant who has, through no fault of his own, been deprived of the services of his counsel (*see Moray v Koven & Krause, Esqs.*, 15 NY3d 384, 389 [2010]).

appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.”

Accordingly, as a result of the foregoing, it is,

ORDERED that this action was automatically stayed by operation of CPLR 321 (c) on September 30, 2014, the date when plaintiff’s counsel was disbarred after pleading guilty to multiple felonies under New York State law. Accordingly, no further proceedings shall be taken in this action against plaintiff, without leave of court, until the expiration of 30 days after personal service upon plaintiff of a copy of this decision and order, with notice of entry, which shall constitute notice to appoint another attorney pursuant to CPLR 321(c). It is further,

ORDERED that upon filing a notice of appearance, plaintiff’s incoming counsel shall serve a complaint upon defendants, or otherwise accordingly move, within 30 days after filing such notice, in response to the defendants’ October 4, 2013 notice of limited appearance and demand for a complaint.

Conclusion

To recapitulate, that branch of defendants’ motion seeking dismissal is denied as premature without prejudice to renewal after service of a complaint in accordance with this decision.

That branch of defendants’ motion seeking fees and sanctions is denied at this time, however, the court reserves the right to reconsider this issue if later warranted.

As a result of the disbarment of plaintiff's counsel no further proceedings shall be taken in this action against plaintiff, without leave of court, until the expiration of 30 days after personal service upon plaintiff of a copy of this decision and order, with notice of entry. From the date a notice of appearance is filed, plaintiff's incoming counsel shall then have an additional 30 days within which to serve a complaint on the defendants or otherwise accordingly move.

The court, having considered the defendants' remaining contentions, finds them without merit. All relief not expressly granted herein is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,


J. S. C.

HON. DAVID I. SCHMIDT