

**Altman v DiPreta**

2015 NY Slip Op 32993(U)

March 24, 2015

Supreme Court, Westchester County

Docket Number: Index No. 52574/2014

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
JEANNE ALTMAN and CHARLES ALTMAN,

Plaintiffs,

DECISION and ORDER

Seq. Nos. 2, 3 & 4

-against-

Index No. 52574/2014

RICHARD S. DIPRETA, THE DIPRETA LAW FIRM, L.L.P.,  
RICHARD J. SLAGLE, and BENTLEY, MOSHER, BABSON  
& LAMBERT, P.C.,

Defendants.

-----X  
CONNOLLY, J.

The following papers were considered in connection with: (1) the plaintiff Charles Altman’s motion for the appointment of a guardian; (2) the motion of the defendant Richard J. Slagle to dismiss the complaint; and (3) the motion of the defendants Richard S. DiPreta and the DiPretta Law Firm, LLP to dismiss the complaint or, in the alternative, change venue to Sullivan County:

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This action was commenced by the plaintiff Charles Altman<sup>1</sup> acting on behalf of himself and purportedly acting on behalf of his mother, the plaintiff Jeanne Altman, to recover damages against the defendants Richard S. DiPreta, Esq., and the DiPreta Law Firm, LLP (hereinafter collectively DiPreta), and the defendants Richard Slagle, Esq., and his law firm Bentley, Mosher Babson &

<sup>1</sup> Mr. Altman is licensed to practice law in New York.

Lambert, P.C.<sup>2</sup> (hereinafter collectively Slagle). Charles Altman seeks to recover damages against DiPreta and Slagle allegedly incurred in connection with a Connecticut conservatorship proceeding in which DiPreta was appointed as Jeanne Altman's conservator, and a New York State guardianship proceeding in Sullivan County in which Charles Altman's brother, Edwin Altman, was appointed guardian of Jeanne Altman's person and DiPreta was appointed guardian of Jeanne Altman's property.

Now, Charles Altman moves for the appointment of a guardian ad litem for Jeanne Altman in the instant action, claiming that such guardian is needed to investigate the actions of DiPreta and Slagle. DiPreta opposes the motion, contending that the relief sought by Charles Altman has previously been determined by the Supreme Court of Sullivan County and the Probate Court of Greenwich, Connecticut.

Further, Slagle and DiPreta separately move to dismiss the complaint on various grounds. Charles Altman opposes these motions.

#### FACTUAL AND PROCEDURAL BACKGROUND

In or about 2010, Jeanne Altman executed a durable power of attorney in favor of her two sons, Charles Altman and Edwin Altman.

In 2012, after disagreements arose between Charles and Edwin Altman regarding financial matters concerning the care of their mother, conservatorship proceedings were commenced in the Probate Court of Greenwich, Connecticut and, on December 4, 2012, Charles Altman was appointed conservator of Jeanne Altman's person and DiPreta was appointed conservator of Jeanne Altman's estate. At that time, Jeanne Altman was residing in a residence owned by Charles Altman.

At some subsequent point, disputes arose between Charles Altman and DiPreta regarding the appropriateness of certain expenses and services for which Charles Altman sought remuneration from Jeanne Altman's estate. When DiPreta refused to pay these expenses from Jeanne Altman's funds, Charles Altman removed Jeanne Altman to New York *unilaterally and without giving notice* to the Connecticut Court, to DiPreta, or to other family members.

On August 2, 2013, the Connecticut Probate Court issued an order removing Charles Altman as conservator of Jeanne Altman's person, finding:

After due hearing had, the Court finds that Mr. Altman has removed the Conserved Person from her home in Greenwich, Connecticut, to the State of New York, without prior approval of this Court, as required by § 45a-656 (b) of the Connecticut General Statutes; that there is an inherent conflict of interest between Mr. Altman's financial

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<sup>2</sup> Bentley, Mosher, Babson & Lambert, P.C. has purportedly not yet been served in this action and, indeed, no affidavit of service has been e-filed attesting that it has.

interest in the conserved person's residence in Greenwich, Connecticut, and his ability to serve her best interests as Conservator of the person, as evidenced by his abrupt removal of her from such residence upon the mere suggestion that the Conservator of the estate was considering withholding future payments of rent in order to off-set an alleged debt of Mr. Altman to the conserved persons' estate; and, that *Mr. Altman has constantly demonstrated his inability to act in the best interests of the Conserved person.*

(DiPreta Exhibit C [emphasis added]).

After Jeanne Altman was moved to the Achieve Rehab and Nursing Facility located in Liberty, NY (Sullivan County), the Administrator of that facility petitioned the Supreme Court, Sullivan County for appointment of a guardian for Jeanne Altman pursuant to Mental Hygiene Law article 81. DiPreta and Slagle traveled from Connecticut to attend the guardianship proceeding.

In a decision and order dated March 27, 2014, the Supreme Court, Sullivan County (Hon. Mark M. Meddaugh, A.J.S.C.), found that Jeanne Altman, who was 94-years of age at the time, was suffering from a number of medical conditions including senile dementia, legal blindness, and failure to thrive; that she was unable to provide for any of her activities of daily living or make appropriate decisions pertaining to her health care; and that she was, therefore, incapacitated pursuant to Mental Hygiene Law § 81.02 (b). Accordingly, based upon, among other things, the testimony of a Court Evaluator,<sup>3</sup> the Court appointed Edwin Altman to be the guardian of Jeanne Altman's person and appointed DiPreta to be the guardian of Jeanne Altman's property. Further, the Court revoked the 2010 power of attorney and a separate health care proxy in favor of Charles Altman, finding that "there is great animosity between the co-agent brothers, and *in light of the unilateral act of Charles Altman in removing Ms. Altman from the State of Connecticut without advising Edwin Altman where she was, and in light of the Order of Probate Court in the State of Connecticut*" (DiPreta Exhibit E [emphasis added]).

### The instant action

According to the amended complaint, Charles Altman claims that various disputes arose between him and his brother, Edwin Altman, in 2011 regarding the payment for the care of their mother. In April 2012, Charles Altman allegedly retained Slagle, an attorney licensed to practice law in Connecticut, to provide legal advice to him and his mother. Slagle advised Charles Altman to initiate conservatorship proceedings in the Greenwich, Connecticut Probate Court. As a result of the conservatorship proceeding, Charles Altman was appointed guardian of Jeanne Altman's person and DiPreta, an attorney licensed to practice law in Connecticut, was appointed guardian of Jeanne

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<sup>3</sup> The evaluator found, among other things, that Mr. Altman had repeatedly acted in his own self interest in dealing with his mother by, among other things, taking inappropriate loans from her, by unilaterally moving her from Connecticut to New York without giving notice to her family, and by failing to disclose Ms. Altman's location (*see* NYSCEF Document No. 88).

Altman's estate.

Disputes arose between Charles Altman and DiPreta, including DiPreta's purported failure to cooperate with Charles Altman in completing an application for home care and DiPreta's refusal "to pay Charles Altman many thousands of dollars of expenses owing to him by the estate of Jeanne Altman for reimbursement for food, supplies, care services and occupancy related expenses" (Amended Complaint ¶ 68). Further, DiPreta refused to reimburse Charles Altman for additional expenses after discovering a \$19,150 loan that Charles Altman had made to himself from his mother's estate under the authority of the durable power of attorney.

After Charles Altman removed his mother from Connecticut to a residence in New Rochelle, DiPreta contacted Jeanne Altman's outside caregiver service and stated that he would no longer pay for their services unless Jeanne Altman was returned to the State of Connecticut. Shortly after the caregivers withdrew, on August 3, 2013, Jeanne Altman suffered a fall at the New Rochelle residence and was hospitalized in White Plains. On August 8, 2013, Jeanne Altman was transported to the Achieve facility in Liberty, New York. According to Charles Altman, DiPreta interfered with Jeanne Altman's social security payments to Achieve.

On or about August 5, 2013, Charles Altman attempted to terminate Slagle as attorney for Jeanne Altman. Slagle refused Charles Altman's requests, stating that he served at the pleasure of the Greenwich, Connecticut Probate Court and could only be removed as Jeanne Altman's attorney by that Court. Thereafter, the Article 81 proceedings were commenced in Supreme Court, Sullivan County. DiPreta and Slagle traveled from Connecticut to Sullivan County to attend that proceeding.

The amended complaint asserts four causes of action sounding in: (1) legal malpractice against Slagle; (2) tortious interference with contractual relations against DiPreta; (3) unjust enrichment by DiPreta; and (4) violation of Judiciary Law § 487 against both Slagle and DiPreta.

As against Slagle, the amended complaint alleges that Slagle committed legal malpractice by failing to advise Charles Altman of, among other things, the costs involved in a Connecticut conservatorship or that, upon appointment of a conservator, the durable power of attorney would no longer be valid in the State of Connecticut. Charles Altman further alleges that Slagle failed to comply with Charles Altman's attempt to terminate him and that he committed a wrongdoing by traveling to Sullivan County to represent Jeanne Altman, when he is not licensed to practice law in the State of New York. The complaint theorizes that, had Slagle not recommended the appointment of a conservator, the estate of Jeanne Altman would not have incurred DiPreta's fees.

As against DiPreta, the amended complaint alleges that he tortiously interfered with contractual relations between Jeanne Altman and her caregivers, causing her to be injured when her caregivers stopped providing services. The complaint also alleges that DiPreta was unjustly enriched when he paid his fees as conservator out of Jeanne Altman's estate. The complaint states:

On information and belief Richard DiPreta transferred \$45,000 from Jeanne

Altman's assets to his own assets or that of his law firm in late 2013, as payment for legal fees at a rate of \$350 per hour and administrative fees at a rate of \$250 per hour *as had been previously approved by the Probate Court* but when all such fees were the subject of pending appeals in the Superior Court Stamford.

(Amended Complaint ¶ 159 [emphasis added]). Charles Altman claims that DiPreta has engaged in a "systematic plan" to control Jeanne Altman's assets.

As against both Slagle and DiPreta, the complaint alleges violations of Judiciary Law § 487, claiming that Slagle and DiPreta traveled to Sullivan County for the purpose of deceiving the Court, that Slagle misrepresented himself as Jeanne Altman's attorney, that both defendants engaged in a series of ad hominem attacks against Charles Altman, and that both defendants improperly obtained copies of the Sullivan County court evaluator's report.

#### Charles Altman's motion for appointment of a guardian ad litem

Charles Altman now moves for appointment of a guardian ad litem in the instant action, contending, in effect, that there is a conflict of interest since DiPreta, the court-appointed guardian of her property, is a defendant in this case and cannot represent her interests.

DiPreta opposes the motion, asking that a determination on the motion be stayed pending resolution of DiPreta and Slagle's separately pending motions to dismiss which, among other things, contend that Charles Altman lacks standing to commence this action on behalf of Jeanne Altman.

#### Slagle's motion to dismiss

Slagle moves to dismiss the complaint pursuant to CPLR 3211 (a) (8) on the ground that the Court lacks jurisdiction over him pursuant to CPLR 301 and 302. Alternatively, he moves to dismiss the complaint pursuant to CPLR 327 (a) on the ground of forum non conveniens.

In an affidavit in support, Slagle avers that he is an attorney licensed to practice law in Connecticut, that his office is in Connecticut, and that he lives in Connecticut. Slagle avers that he was contacted by Charles Altman in 2012 and he recommended a Connecticut conservatorship as a means of resolving financial disputes between Charles and Edwin Altman. Slagle avers that he has never represented Jeanne Altman in the State of New York. He further avers that he has no contacts with New York in that he solicits no business in New York, he owns no property or bank accounts in New York, and he has never consented to jurisdiction in New York. He states that his only contact with New York for purposes of this case was traveling to Sullivan County for the guardianship proceeding on February 24, 2014, which he attended but in which he did not participate.

Slagle contends that the Court has neither general jurisdiction over him pursuant to CPLR 301 under the "doing business" test, nor does it have specific long-arm jurisdiction over him pursuant to CPLR 302. He contends that the due process requirements for exercising jurisdiction

over him under the United States Constitution are not met. Slagle also moves to dismiss on the ground that Connecticut is a more convenient forum, since he has no nexus to New York and the relevant witnesses and documents are located in Connecticut.<sup>4</sup>

DiPreta's motion to dismiss or, in the alternative, change venue

DiPreta moves to dismiss the action pursuant to CPLR 3211 (a) (1), (3), (4), (5), and (7), or, in the alternative, to change venue of this action to Sullivan County pursuant to CPLR 510 (3) and 511.

DiPreta contends that Charles Altman lacks standing to commence this action on behalf of Jeanne Altman. Further, DiPreta contends that the tortious interference with contract cause of action should be dismissed since documentary evidence conclusively establishes that Charles Altman removed his mother from Connecticut and refused to disclose her location to DiPreta. Moreover, DiPreta argues that there was no valid contract between the plaintiffs and a third party since DiPreta, as Jeanne Altman's conservator, has not entered into any contracts to provide her with care in New York. In any event, under the circumstances, DiPreta contends that his interference with the subject contracts was justified. As to the unjust enrichment claim, DiPreta contends, among other things, that he cannot be held liable for payment of his fees that were approved by the Connecticut Probate Court. DiPreta contends that the Judiciary Law § 487 claim must be dismissed against him since he was acting as Jeanne Altman's conservator and guardian—and not as an attorney—when the alleged deceit occurred. Further, he contends that the allegations of deceit should be addressed to the Sullivan County Supreme Court where the alleged misstatements were made, and not in this separate proceeding. DiPreta also contends that the action is barred by res judicata, collateral estoppel, and the doctrine of another action pending. Finally, in the alternative, DiPreta requests a change of venue to Sullivan County.

Charles Altman's opposition

Charles Altman opposes both motions by submitting, among other things, a memorandum of law in opposition to both motions, his own affidavit dated December 23, 2014, and a separate affidavit dated February 2, 2015.

In his memorandum of law, Charles Altman contends that there is jurisdiction over Slagle pursuant to CPLR 302 (a) (2) on the ground that he committed tortious action (legal malpractice) within New York State. While Charles Altman makes numerous allegations regarding Slagle's conduct in Connecticut, the sole acts alleged to have occurred in New York are Slagle's appearance at the guardianship proceeding in Sullivan County. Charles Altman also contends that White Plains is a convenient forum for all parties given its proximity to Greenwich, Connecticut.

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<sup>4</sup> Slagle also joins in and adopts DiPreta's motion to dismiss.

## DISCUSSION/ANALYSIS

1. The branches of DiPreta's motion which are to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) are granted

On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (7), the Court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Further, “[a] motion to dismiss a complaint based upon documentary evidence [pursuant to CPLR 3211 (a) (1)] may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Nunez v Mohamed*, 104 AD3d 921, 922 [2d Dept 2013]).

With respect to the tortious interference with contract claim, DiPreta established through documentary evidence that he was appointed as the conservator of Jeanne Altman's estate on December 4, 2012. As conservator, he had the authority to question any payment sought from Jeanne Altman's assets. Moreover, given Charles Altman's unilateral acts of removing Jeanne Altman from Connecticut and refusal to disclose her whereabouts, in cannot be said under any view of the alleged facts that DiPreta's refusal, in his capacity as Jeanne Altman's conservator, to disburse her assets constituted tortious interference with contract. To plead a cause of action for tortious interference with contract, a plaintiff must allege facts establishing that the intentional breach of a third party's contract with the plaintiff was procured “without justification” (*see Nagan Constr., Inc. v Monsignor McClancy Mem. High School*, 117 AD3d 1005, 1006 [2d Dept 2014] [“The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract *without justification*, and (4) damages” (emphasis added)]). Since DiPreta was unequivocally justified in withholding the funds under the circumstances of Charles Altman's surreptitious removal of his mother from Connecticut, the cause of action must be dismissed.

With respect to the unjust enrichment claim, as the amended complaint itself alleges, DiPreta paid himself \$45,000 from Jeanne Altman's assets that “*had been previously approved by the Probate Court*” (Amended Complaint ¶ 159 [emphasis added]). Under no view of these facts can it be said that DiPreta's receipt of a court-authorized fee was inequitable or unjust (*see County of Nassau v Expedia, Inc.*, 120 AD3d 1178, 1180 [2d Dept 2014] [“The elements of unjust enrichment are that the defendants were enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendants to retain what is sought to be recovered”]).

Finally, the cause of action pursuant to Judiciary Law § 487 must be dismissed as against DiPreta since he was acting as a conservator and not as an attorney when he allegedly made deceitful representations (*see Smallwood v Lupoli*, 107 AD3d 782, 784 [2d Dept 2013] [“Lupoli was not acting as an attorney, but as a guardian, and he was represented by counsel. Therefore, [Judiciary Law § 487] did not apply to him”]; *see also Crown Assocs. v Zot, LLC*, 83 AD3d 765, 768 [2d Dept

2011)). Moreover, the Judiciary Law § 487 cause of action must be dismissed as to both defendants since Charles Altman's remedy for the alleged deceit lies, if at all, in the Sullivan County guardianship proceeding and not in a separate plenary action (*see Melnitzky v Owen*, 19 AD3d 201 [1st Dept 2005 ["The action [alleging violations Judiciary Law § 487] was properly dismissed on the ground that plaintiff's remedy, if any, for defendant's alleged deception of Civil Court lies exclusively in the Civil Court action itself, not a second plenary action collaterally attacking the judgment in that action"]]).

Accordingly, the branches of DiPreta's motion which are to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211 (a) (1) and (7) are granted.

2. The branch of Slagle's motion which is to dismiss pursuant to CPLR 3211 (a) (8) is granted

"Although the ultimate burden of proof regarding personal jurisdiction rests with the plaintiff, to defeat a CPLR 3211(a)(8) motion to dismiss a complaint, the plaintiff need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court" (*Whitcraft v Runyon*, 123 AD3d 811, 812 [2d Dept 2014]).

Here, Charles Altman alleges that Slagle is subject to the jurisdiction of the Court pursuant to CPLR 302 (a) (2) on the ground that he committed a tortious act within the state. While the complaint sets forth numerous allegations regarding Slagle's involvement in the Connecticut conservatorship proceeding, the sole act that Slagled is alleged to have committed in the State of New York is traveling to the Sullivan County guardianship proceeding and stating to the Court that he was Jeanne Altman's attorney. The Court does not view Slagle's conduct as constituting a tortious act within the State of New York and, in any event, the Judiciary Law § 487 claim, which is the sole cause of action asserted against Slagle for his acts within the State of New York must be dismissed as against him for the reasons stated above. Accordingly, Charles Altman has failed to make a prima facie showing that Slagle is subject to jurisdiction in New York (*see Krajewski v Osterlund, Inc.*, 111 AD2d 905, 906 [2d Dept 1985] ["Jurisdiction under CPLR 302 (a) (2) . . . is lacking because there was [no] tortious act within the State"]]).

Since Slagle's acts do not fall within the ambit of CPLR 302 (a) (2), the Court need not determine whether exercising jurisdiction over him comports with due process (*see Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 247 [2d Dept 2005] [the due process analysis is "an additional step to the jurisdictional analysis" to be reached once it has been determined that the defendant's conduct falls within the long-arm statute]).

Accordingly, the branch of Slagle's motion which is to dismiss the complaint insofar as asserted against him is granted. To the extent Slagle joins in and adopts DiPreta's motion, the branch of Slagle's motion which is to dismiss the Judiciary Law § 487 cause of action pursuant to CPLR 3211 (a) (7) is granted.

3. Charles Altman's motion to appoint a guardian ad litem is denied

In light of the dismissal of the action against both defendants, Charles Altman's motion to appoint a guardian ad litem for Jeanne Altman is denied as academic.

Moreover, Charles Altman had no authority to commence this action on behalf of Jeanne Altman, as the durable power of attorney in favor of him has been revoked. Further, the action was commenced without the consent of Edwin Altman, the guardian of Jeanne Altman's person, and DiPreta, the guardian of her property.

Finally, to the extent that the appointment of a guardian ad litem rests within the Court's discretion (*see Matter of Nancy C. v Alison C.*, 57 AD3d 986, 987 [2d Dept 2008]), given the existing record of judicial findings that Charles Altman has continuously acted against his mother's best interests, the Court declines to make such an appointment.

Accordingly, the complaint is dismissed in its entirety.

Based upon the foregoing, it is hereby

ORDERED that the plaintiff Charles Altman's motion for the appointment of a guardian ad litem for Jeanne Altman is denied; and it is further

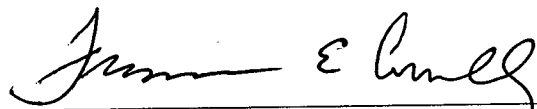
ORDERED that the branches of the defendant Richard J. Slagle's motion which are to dismiss the complaint pursuant to CPLR 3211 (a) (8) and to dismiss the Judiciary Law § 487 cause of action pursuant to CPLR 3211 (a) (7) are granted; and it is further

ORDERED that the branches of the motion of the defendants Richard S. DiPreta and the DiPreta Law Firm, LLP which are to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) are granted; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
March 24, 2015

  
HON. FRANCESCA E. CONNOLLY, J.S.C.