

Hundley v Smith

2016 NY Slip Op 32890(U)

May 10, 2016

Supreme Court, Rockland County

Docket Number: 030412/16

Judge: Gerald E. Loehr

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of 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 ROCKLAND

-----X
FRANK B. HUNDLEY, Guardian for
JAMES HUNDLEY, a minor and
MELANIE LANCASTER, Guardian for
TOMMY LANCASTER, JR. a minor,,

Plaintiffs,

DECISION AND ORDER

Index No.: 030412/16

-against-

LYNNE SMITH, LAUREL N.
HUGGINS, TERRY HUGGINS SIMEON
and SARAH L. KEATING,

Defendants.

-----X

LOEHR, J.

The following papers numbered 1-4 were read on the motion of Defendants Smith, Huggins and Simeon to dismiss the Complaint pursuant to CPLR 3211(a)(2), (a)(7) and (a)(8).

	<u>Papers Numbered</u>
Notice of Motion - Affidavit - Exhibits	1
Memorandum of Law in Support	2
Affidavit in Opposition - Exhibit	3
Reply Affidavit	4

Upon the foregoing papers, as alleged in the Complaint filed on February 5, 2016, on March 11, 2010, Hazel Lancaster (the "Decedent") executed a Will naming each of the two

minor Plaintiffs as a 10% beneficiary. Defendant Lynne Smith was also a 10% beneficiary. The Plaintiffs resided in New Jersey and Alabama while the Defendants reside in this County. Where the Decedent resided is not set forth. It is further alleged that the Decedent broke her leg in March 2014; that after the Decedent returned home from a rehabilitation facility, Defendant Simeon began to reside with the Decedent; that on June 26, 2014, the Decedent executed a Revocable Trust with Defendant Huggins (the mother of Defendant Simeon) as a Trustee and with Defendant Simeon as a 25% beneficiary of the Trust on the Decedent's death but with the Plaintiffs no longer beneficiaries; that on August 19, 2014, the Decedent executed a new Will naming Defendant Huggins as Executor and provided that all her assets would pour into the Trust; that the Decedent passed away on August 25, 2014; and that on January 6, 2015 the Decedent's 2014 Will was admitted to probate, Defendant Huggins was issued Letter Testamentary and the Decedent's assets were distributed in accordance with the 2014 Will. Based on such allegations, in Counts One and Three of the Complaint, the Plaintiffs then assert the Defendants committed "Elder Fraud" by having the Decedent execute documents for the Defendants' own profit and gain.¹ Such Defendants now move to dismiss the Complaint.

Defendants first move to dismiss the Complaint for a lack of subject matter jurisdiction (CPLR 3211[a][2]). As this is the supreme court, this Court has subject matter jurisdiction over this action. Defendants next move to dismiss for a lack of personal jurisdiction (CPLR 3211[a][8]). As the time to effectuate service has not expired (*see* CPLR 306-b), the motion is denied as premature. Finally, the Defendants move to dismiss the Complaint as failing to state a cause of action.²

While it is true there is no such cause of action as Elder Fraud in New York, such statutory cause of action, as it exists in other jurisdiction, is generally a variation of the common

¹ Count Two asserts that Defendant Keating, an attorney, aided and abetted the Defendants in such Elder Fraud. The Plaintiffs discontinued the action as against Defendant Keating after she moved to dismiss the Complaint.

² While the Defendants clearly moved to dismiss Counts One and Three of the Complaint, it is not clear whether they were also moving to dismiss Count Four. Count Four is predicated on the allegation that after the Decedent's death, Defendant Huggins removed the Plaintiffs names from Totten Trust bank accounts by using an invalid power of attorney. Assuming the Defendants are moving to dismiss that count, the motion is denied as it clearly alleges a valid cause of action within this Court's jurisdiction.

law causes of action of fraud, undue influence and/or breach of fiduciary duty or constructive trust (*see, eg* Washington Rev. Code, § 74:34.200; *Davis v Zlatos*, 211 Ariz 519 [2006]). Based on the allegations of the Complaint, it appears to the Court that the Plaintiffs are, in fact, asserting the common law torts (*see, eg, Matter of Aoki*, ___ NY3d ___, 2016 wL 1247698). Be that as it may, inasmuch as the Plaintiffs assert that the 2014 Will was admitted to Probate, the decree approving same is, unless and until set aside by that Court, res judicata with respect to the alleged invalidity of the 2014 Will.³

Accordingly, Counts One and Three are dismissed as failing to state a cause of action based on res judicata. The parties shall appear for a preliminary conference with respect to Court Four on June 1, 2016 at 10 am.

This constitutes the decision and order of the Court.

Dated: New City, New York
May 10, 2016



HON. GERALD E. LOEHR
J.S.C.

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³ While unclear, it appears that Plaintiffs are also asserting that they were not provided notice when Defendants sought to have the 2014 Will admitted to probate. If so, and if they were entitled to notice (*see* SCPA Section 1403[1]), they may be able to have the decree set aside. Be that as it may, it cannot be collaterally challenged in this Court.

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