

Demel v Demel

2017 NY Slip Op 31398(U)

June 29, 2017

Supreme Court, New York County

Docket Number: 159361/2014

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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BELINDA DEMEL, ELISE DEMEL, TINA DEMEL
SPIVACK, INDIVIDUALLY AND AS BENEFICIARIES
OF ENVIRO INC. AND ITS ASSETS,

DECISION/ORDER
Index No. 159361/201

Plaintiffs,

-against-

GREGORY DEMEL, LISA SIER DEMEL

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for conversion, defendants Gregory Demel (“Gregory”) and Lisa Sier Demel (“Lisa”) (collectively “Defendants”) move to dismiss the complaint, or, in the alternative, to stay this action, and to cancel the Notice of Pendency.

Plaintiffs Belinda Demel (“Belinda”), Elise Demel (“Elise”), Tina Demel Spivack (“Tina”) (collectively, “Plaintiffs”) and defendant Gregory are siblings. Lisa is Gregory’s wife. The siblings’ parents, Chaim Demel (“Chaim”) and Phyllis Demel (“Phyllis”) are deceased. Gregory, a resident of Puerto Rico, is the executor of his parents’ estates. Puerto Rico was Chaim’s last place of residence until he died in 2004. Puerto Rico was also Phyllis’ place of residence, until she became ill and moved to Florida, where she died in 2011. Plaintiffs commenced this action in or about September 2014.

In 2011, plaintiffs sought letters of administration for authority to act on behalf of Phyllis' estate, to search her safe deposit box in New York for a copy of her will and to recover certain assets. Letters of administration were not issued to plaintiffs, instead, an order was issued permitting Gregory, who had already been formally recognized as executor of Phyllis' estate in Puerto Rico, to open the safe deposit box. On May 2, 2012, the parties inspected the safe deposit box and it was empty.

Plaintiffs then commenced an action against defendants in March 2012 in Puerto Rico to adjudicate issues involving the administration and disposition of Chaim and Phyllis' estates. They alleged that their father had been incapacitated due to Alzheimer's disease and Gregory and Lisa took advantage of his condition to coerce him into signing a new will and power of attorney two months prior to his death, and diverted the parents' assets to their names.

Plaintiffs further claim that Gregory and Lisa acquired an interest in Chaim and Phyllis' property and assets while they were alive. For example, Gregory and Lisa used the parents' funds to create and capitalize a company, Enviro Inc. in New York, which then purchased a condominium apartment located at 530 East 76th Street, Apartment 22H ("the subject premises"), occupied by Lisa and her daughter after Phyllis' death.

Allegedly, the money used by Enviro Inc. to purchase the subject premises was from a Citibank account in Chaim's and Phyllis' names, in trust for all of the siblings. Plaintiffs sought full disclosure of all asset distributions and all transactions made during Chaim's incapacity and sought to prohibit the distribution of their parents' assets until a recalculation of Chaim's and Phyllis' assets. They also sought, *inter alia*, to remove

Gregory as executor, to freeze all accounts of the estate, and to freeze all accounts held by Gregory and Lisa individually. The Puerto Rico action is still ongoing.

On September 28, 2013, Gregory, acting as president of Enviro Inc., conveyed the subject premises to himself personally. Plaintiffs allege that neither Lisa nor Gregory have paid any rent or use and occupancy, or otherwise compensated plaintiffs in any way for use and occupancy of their share of the fair market value of the subject premises.

Further, in 2013, Gregory allegedly transferred 100% of the shares of Enviro Inc. to his own name, and named Lisa as Enviro Inc.'s CEO. The transfer was made without the permission of his siblings and without compensating them in consideration for the transfer. Finally, plaintiffs allege that after Phyllis' death, Gregory and Lisa took jewelry and cash belonging to Phyllis' estate from security deposit boxes at Chase Bank, without plaintiffs' permission and without compensating them in consideration for the removal.

In this action plaintiffs claim that the transfer of Enviro Inc. to Gregory and the conveyance of the subject premises to Gregory must be set aside because they were the result of undue influence. They also assert causes of action for piercing the corporate veil; quantum meruit based on the total amount of unpaid use and occupancy since Lisa began occupying the subject premises in August 2011; conversion of Phyllis' jewelry and cash; replevin due to the unauthorized withdrawal of Phyllis' jewelry and cash; and attorneys fees.

Gregory and Lisa now move to dismiss the complaint because there is a prior action pending in Puerto Rico between the same parties encompassing the same disputes. Defendants also contend that plaintiffs do not have standing to maintain an action as

beneficiaries of Phyllis' estate under the SCPA and cannot bring an action as a beneficiary of a corporation.

Next, defendants argue that the first, second, third and sixth causes of action must be dismissed because documentary evidence disposes of those claims. Chaim and Phyllis were never shareholders of Enviro, Inc. because it was created on March 24, 2005, after Chaim's death. Therefore, Phyllis could never have received his shares as alleged, because he could not have owned shares in a corporation that was created after his death. Further, Enviro, Inc.'s filings with the New York State Department of Taxation demonstrate that the sole shareholders of Enviro, Inc. were the defendants.

Defendants maintain that the first, fourth and fifth causes of action are barred by the statute of limitations. If Phyllis gifted money to defendants, it would have been in or around June 2005, when the apartment was purchased. Nine years have passed between the conveyance of the gift and plaintiffs' claims. Further, the claims for conversion and replevin are also time barred because they arise from the alleged removal of jewelry and funds from a safety deposit box in September/October 2011. If the removal occurred prior to September 24, 2011, the claims are time barred.

Defendants also allege that there is no personal jurisdiction over Gregory. Plaintiffs relied on substituted service pursuant to CPLR 308(2) upon Gregory at his place of business in San Juan, and "conspicuous service" pursuant to CPLR 308(4) at his dwelling. The descriptions and claims in the affidavit of service were untrue, and no contemporaneous affidavits were provided, rather, they were signed and filed two months

after “conspicuous service” was purportedly effectuated and one month after “substituted service” was purportedly effectuated.

Finally, defendants maintain that the notice of pendency must be cancelled because the summons was not served within 30 days of the notice of pendency, and, in any event, if the second, third and sixth causes of action are dismissed, the notice of pendency cannot be sustained.¹

Plaintiffs argue that this action cannot be dismissed because it differs from the Puerto Rico action, which is merely an estate division proceeding. Specifically, in the Puerto Rico action, the will of Phyllis Demel is being contested for lack of testamentary mental capacity, and Gregory’s actions are being impeached for lack of due diligence, as well as “ultra vires” actions, which have caused the estate irreparable damage. This case, on the other hand, is a wrongful conversion action, and the enforceability of the will is not at issue here.

Plaintiffs argue that the transfer of property is the subject of this action – and the undue influence that led to it. When Phyllis purchased the apartment using funds held in trust for her children, she intended the benefit to be enjoyed by all her children. Plaintiffs also claim that two gold bars, cash, 18 carat gold jewelry and bonds were removed from the safe deposit box by defendants without authorization.

¹ Plaintiffs had also argued that defendants should be judicially estopped from asserting prior action pending because of certain motions filed by Gregory in the Puerto Rico action seeking to remove issues involving the subject premises from the Puerto Rico action. However, this issue was addressed before me and the parties conclusively stated that issues involving the subject premises are a part of the Puerto Rico action. Specifically, the dispute as to whether the funds used by Enviro, Inc. to purchase the apartment were an inter vivos gift from Phyllis is being considered in connection with the administration of the estate in Puerto Rico.

Plaintiffs further claim that the statute of limitations does not bar any of their claims because the subject conveyances of Enviro Inc.'s ownership and assets to Gregory occurred in or about September 2013. Further, the conversion of personal property from the safe deposit box occurred in or about September or October 2011 and therefore, the action filed in September 2014 is timely.

Plaintiffs maintain that they have standing because this action was not brought pursuant to the SCPA. Rather, they claim that they were damaged due a series of wrongful actions committed by defendants, which ultimately led to a theft of real and personal property which should have been distributed to them as beneficiaries of Phyllis' estate. Moreover, according to plaintiffs, service was timely and the statements in the affidavits of service were true.

Discussion

Pursuant to CPLR 3211(a)(4) an action must be dismissed where there is another action pending between the same parties for the same cause of action in a court of any state or the United States. An action warrants dismissal as the result of a prior action where the court determines that there is a substantial identity of the parties and causes of action and that the relief sought is the same or substantially the same. *Matter of Willnus*, 101 A.D.3d 1036 (2nd Dept. 2012).

Here, the prior action pending in Puerto Rico warrants dismissal of this action. While plaintiffs define the Puerto Rico action as an estate division proceeding, and this action as essentially a conversion action, in fact, both actions contain the same, or substantially similar allegations and claims and relief sought. The claims and allegations

in this action are subsumed in the Puerto Rico action. In both actions, plaintiffs are seeking proper distribution of the assets of their parents' estate. In both actions, plaintiffs claim that Gregory and Lisa took advantage of their father's illness to exert undue influence upon him to obtain control of his assets, and to divert his assets to themselves. In both actions, they are alleging impropriety with regard to the formation of and actions taken by Enviro, Inc., and impropriety relating to the funding for the subject premises. In both actions, they are seeking money owed to them as the result of Gregory and Lisa's allegedly underhanded and devious behavior. While plaintiffs specifically reference the New York safe deposit box in this action, any purported contents of that box would be considered part of the parents' estate, which would be adjudicated in the Puerto Rico.


In accordance with the foregoing, it is hereby

ORDERED that defendants Gregory Demel's and Lisa Sier Demel's motion to dismiss the complaint is granted, the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that defendants Gregory Demel and Lisa Sier Demel's motion to cancel the Notice of Pendency is granted and the Clerk of the Court is directed to cancel the Notice of Pendency dated October 3, 2014 filed against the property located at 530 East 76th Street, Apartment 22H, New York, NY 10021 and indexed under Block 1487 Lot 1338.

This constitutes the decision and order of the court.

Dated: June 29, 2017
New York, New York


Saliann Scarpulla, J.S.C.