

Tutino v Tutino

2017 NY Slip Op 33119(U)

September 20, 2017

Supreme Court, Cortland County

Docket Number: EF16-249

Judge: David H. Guy

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF CORTLAND

KATHLEEN M. TUTINO, THE PETER J. TUTINO
TRUST, AND AMY L. PIATAK,
Each as Remainderpersons of the Theresa K. Tutino Trust,

Petitioners,

v.

AMERY A. TUTINO, JR., and
THERESE A. TUTINO-JONES, as Trustees and
Remainderpersons of the Theresa K. Tutino Trust

Defendants.

DECISION AND ORDER


Index No.: EF16-249
RJI No.: 2016-0199-C

Appearances: Scott A. Lickstein, Esq., Attorney for Petitioner
David B. Thurston, Esq., Attorney for Defendants

PROCEDURAL HISTORY

This motion pertains to an action commenced by Petitioners regarding the Theresa K. Tutino Trust ("Tutino Trust"). Petitioners Kathleen Tutino and Amy Piatak, and Defendants Amery Tutino and Therese Tutino-Jones, are all siblings and children of Theresa Tutino, who died on November 27, 2014. Theresa Tutino established the Tutino Trust, which is the largest shareholder of the family real estate business known as Amery Realty Co., Inc. The parties/siblings are also individual shareholders of Amery Realty Co. and holders of a beneficial interest in the Tutino Trust. Amery Realty Co. owns several commercial and residential properties in the Cortland area as well as a mortgage held against another property.

On May 10, 2016, Petitioners commenced this action, alleging causes of action for breach of trust, breach of fiduciary duty, a demand for an accounting, and seeking the removal of the trustees. Petitioners allege Defendants have failed to distribute the assets of the Tutino Trust, in

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violation of the trust's terms. On June 14, 2016, Defendants served their answer, which included general denials of fact and seven affirmative defenses.¹

Discovery was concluded in June 2017, and Petitioners filed and served the trial Note of Issue and Certificate of Readiness on July 21, 2017. Defendants did not move to strike the Notice.

On August 17, 2017, Defendants filed the motion presently before the Court, asking for permission to file an amended answer with new counterclaims against Petitioners Amy Piatak, and the Peter J. Tutino Trust.

On September 6, 2017, Petitioners filed opposition to Defendants' motion for leave to amend the answer, as well as a motion seeking summary judgment on Petitioners' claims.² Oral argument on this motion was held on September 15, 2017.

STATEMENT OF FACTS

On September 20, 2005, Theresa Tutino created the Tutino Trust and transferred assets into it at the time of the Trust's establishment. The trust instrument names Defendants Amery Tutino and Theresa Tutino-Jones as trustees. Section 2.5 of the Trust states that "this Trust shall not continue beyond the death of the Settlor. Upon the death of the Settlor, as soon as practical thereafter, the Trustee shall distribute the remaining corpus and any accumulated income in

¹ In the original answer, Defendants asserted the following affirmative defenses: Petitioners failed to state a cause of action upon which relief could be granted; Defendants possess a defense founded upon documentary evidence; Petitioners failed to state a cause of action because no substantial or willful misconduct was shown; Petitioners failed to allege Defendants are guilty of misconduct or seriously impeded the proper administration of the trust; Petitioners have an adequate remedy at law; the Peter J. Tutino Trust lacks legal capacity to maintain this action; and Petitioners are barred from asserting claims due to the doctrine of unclean hands.

² The only motion presently being decided on September 15, 2017 is Defendants' motion for leave to amend the answer. Petitioners' summary judgment motion will be given a later return date.

accordance with the provisions for distribution set forth herein.” Theresa’s Will, executed on August 12, 2008, directs that all her assets be distributed by her executor to the Tutino Trust.

Theresa Tutino died on November 27, 2014. Her Will was probated in Cortland County Surrogate’s Court on April 30, 2015. Letters testamentary were issued to Defendants, the named executors. To date, the assets in the Estate have not been transferred to the Trust.

PROPOSED COUNTERCLAIMS

By this motion, Defendants seek to interpose two counterclaims against Petitioners. In the first proposed counterclaim, Defendants allege that on or about September 30, 2004, Amy Piatak purchased real property located at 3844 South Point Drive, Orlando, FL. It is alleged that Piatak borrowed the purchase price, mortgage payment, tax money, association dues, and other carrying costs for the property from Theresa Tutino, executing a series of promissory notes dated December 27, 2006, November 12, 2008, and December 6, 2008, all in favor of Teresa Tutino. The December 27, 2006 note indicates that the loan would be repaid to Theresa Tutino “upon sale of this property.” It is further alleged that on or about May 15, 2015, Piatak sold the property but failed to repay Theresa Tutino. The proposed answer does not contain a request for a certain amount sought in a judgment against Piatak in favor of Theresa Tutino for the alleged failure to repay the promissory notes.

The second proposed counterclaim alleges that “at all relevant times,” Peter Tutino, as trustee for the Peter J. Tutino Trust, was and still is a stockholder of Amery Realty Co., and that Peter Tutino caused Amery Realty Co. to enter into a series of loan transactions with entities separately and solely owned by Peter Tutino (P.J.T. Enterprises, Inc.; P.J.T. Properties, Inc.; P.J.T.’s Ship Motel, Inc.; P.J.T.’s Ship Restaurant, Inc.; Four Flags; and the Sirloin Saloon). It is further alleged that Peter Tutino caused Amery Realty Co. to act as the lender for these loans,

which solely benefited the entities owned by Peter Tutino and had no genuine business purpose or advantage for Amery Realty Co. The complaint alleges that Peter Tutino individually or the entities owned by Peter Tutino defaulted on the loans owed to Amery Realty Co., and Peter Tutino engaged in waste and conversion of corporate assets of Amery Realty Co. No specific amount is alleged to be owed by Peter Tutino and/or the entities solely owned by Peter Tutino to Amery Realty Co.

In support of this motion, Defendants recite the principle that leave to amend should be freely granted and argue that the Petitioners will not suffer any prejudice if the counterclaims are allowed against Defendants, as the proposed counterclaims were “peculiarly within their knowledge.” They also allege that the existence and factual circumstances regarding the counterclaims could not be discovered without a diligent search of the corporate and trust records after this action was commenced. Defendants assert Petitioners will not suffer surprise if the counterclaims are allowed, as Petitioners were “questioned regarding these proposed counterclaims during their respective depositions, and Defendants submitted their proposed amendment” to Petitioners’ counsel prior to filing this motion.

APPLICABLE LAW & ANALYSIS

CPLR 3025(b) states that leave to amend a pleading “shall be freely given upon such terms as may be just.” The decision to allow or disallow the amendment is within the court’s sound discretion. *Edenwald Contracting Co. v. New York*, 60 N.Y.2d 957, 959 (1983). While leave to amend “shall be freely given” absent prejudice or surprise resulting from the delay, “once an action has been certified as ready for trial, judicial discretion in permitting the amendment of a pleading should be exercised only in the most discreet, circumspect, prudent and cautious circumstances.” *Yavorski v. Dewell*, 288 A.D.2d 545, 546 (3d Dept 2001). Leave is

properly denied when the proposed amendments are devoid of merit and are legally insufficient, and when there has been an extensive and unexplained delay in making the motion. *Duffy v. Wetzler*, 260 A.D.2d 596, 597 (2d Dept 1999) (citing *Smith v. Sarkisian*, 63 A.D.2d 780, 781 (3d Dept 1978).

A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading. CPLR 203(f). This provision provides an opportunity for a party to amend its pleadings to seek not only recoupment, but affirmative relief under a cause of action otherwise barred by the statute of limitations, but such opportunity exists “only if the original pleading gave notice of the transactions and occurrences underlying the new claim.” *United States Fid. & Guar. Co. v. Delmar Dev. Partners, LLC*, 22 A.D.3d 1017, 1021 (3d Dept 2005).

Defendants’ request to amend their answer to add the two counterclaims is denied because the inclusion of these claims is untimely, without a reasonable excuse for the delay in interposing the claims; inclusion of these claims at this stage would result in prejudice and surprise to Petitioners; and the counterclaims contain legal insufficiencies, such that even if they were not prejudicial or unreasonably untimely, they would substantively fail as a matter of law.

Defendants have not provided a reasonable excuse for the delay in asserting these counterclaims against Petitioners. On March 21, 2017, Defendants served on Petitioners a Second Notice for Discovery and Inspection, in which Defendants asked for records and information related to loans, indebtedness, gifts, distributions, transfers, and/or lines of credit given to Peter J. Tutino, the Peter J. Tutino Trust, or any of Peter Tutino’s entities by the Amery

Realty Co., Theresa Tutino, or the Tutino Trust. The Notice also sought disclosure of records of past or present indebtedness, loans, lines of credit, gifts, distributions, or any transfers to Amy Piatak from the Amery Realty Co., Theresa Tutino, or the Tutino Trust, “specifically including but not limited to any such loan related to the real property commonly known as 3844 Southpointe Drive, Orlando, Florida 32822 and/or the real property commonly known as 362 King Christian Circle, Virginia Beach, Virginia 23462.”

As early as March 2017, Defendants personally knew or should have known that Peter Tutino may have owed debts to Amery Realty Co., either individually or in his capacity as the operator of the corporate entities in his name, and that Amy Piatak potentially owed money to Amery Realty Co., Theresa Tutino, or the Tutino Trust. By Defendants’ own concession, the information leading to the “discovery” of this claim came from the documents produced by Defendants in the course of discovery. Defendants have not provided a reasonable explanation why they could not interpose the counterclaim against Peter Tutino in March 2017, prior to the conclusion of discovery.

The Court also finds that Petitioners would be prejudiced if the counterclaims were allowed to proceed at this late stage in the litigation. Discovery was concluded in June 2017, and the Trial Note of Issue was filed on July 21, 2017 and tacitly approved by Defendants, who did not move to strike the note of issue within 20 days of it being served, as required by 22 NYCRR 206.12(d). It would be unfair to allow these counterclaims to proceed, when Petitioners knew of the information underlying the claims, could have asserted them as of March 2017, and waited until after the close of discovery and the filing of the Trial Note of Issue to ask the Court for permission to add the counterclaims against Petitioners. The Court is mindful that discovery was conducted without an opportunity for Petitioners to seek disclosure and ask questions in

depositions of Petitioners and other witnesses regarding these counterclaims. It would be prejudicial at this stage for Petitioners to have to conduct entirely new discovery on brand new claims.

As the Trial Note of Issue has been filed, the Court may only allow Defendants to amend their answer to add the counterclaims under the most “discreet, circumspect, prudent and cautious circumstances.” *Yavorski, supra* at 546. As such, the Court must closely scrutinize the substantive merits of the proposed counterclaims.

The basis of the proposed first counterclaim, asserted against Amy Piatak, is three alleged promissory notes executed by Amy Piatak in favor of Theresa Tutino. Initially, it should be noted that this counterclaim is improper because the Estate of Theresa Tutino is the appropriate party who could assert this claim, and the Estate is not a party to this action. Further, the alleged promissory notes are dated after the creation of the Tutino Trust, and Defendants, who are the executors of the Estate, have not alleged that the Estate’s potential right to collect on the notes was transferred into the Tutino Trust. This claim would have to be brought in Surrogate’s Court, on behalf of the Estate of Theresa Tutino. The counterclaim against Amy Piatak is being asserted by the wrong parties and thus is legally insufficient.

Further, the promissory notes that form the basis of the counterclaim against Amy Piatak do not all seem to comply with requirements for promissory notes. In New York, the law applicable to negotiable promissory notes is found in Article 3 of the New York Uniform Commercial Code. Article 3 requires that the note be signed by the maker, contain an unconditional promise to pay a sum certain, and be payable to order or bearer, to be a negotiable instrument. *See* UCC § 3-104. Article 3 also requires the note to be payable on demand or at a definite time to be negotiable.

A close review of the three documents submitted by Defendants as Exhibit B to the proposed amended answer reveals that the November 12, 2008 and November 22, 2008 letters from Amy Piatak to Theresa Tutino could not, as a matter of law, be considered promissory notes. The letters do not contain any language that could possibly be construed as an unconditional promise that Amy Piatak would pay Theresa Tutino a sum certain. The letters seem to recite monthly mortgage payment amounts and homeowner association fees paid from January to December 2008, related to the 3844 Southpoint Drive property. The third letter, dated December 26, 2006, does contain the promise that "Upon sale of this property, I will reimburse Theresa K. Tutino for all mortgage payments plus the following fees."

Similarly, the proposed counterclaim against the Peter J. Tutino Trust does not stand up to close scrutiny. The proposed counterclaim alleges that Peter, in his individual capacity, was the sole shareholder, officer, and director of various entities and that in the 1980s, Amery Realty Co. made loans to these entities; and that in 1986, the Peter Tutino entities defaulted on obligations to Amery Realty Co.

Like the first counterclaim, this proposed counterclaim fails as a matter of law because the parties alleged to owe and be owed money are not actually named parties in this lawsuit. Peter Tutino individually, the Peter Tutino corporate entities, and Amery Realty Co. are not named parties in this suit. The alleged debtors are the entities individually and solely owned by Peter Tutino, each of which were corporations or similar limited liability entities. For Peter Tutino to be held individually liable for any of the debts of the entities, the corporate veil of the corresponding entity would have to be pierced. Inclusion of this counterclaim would lead to a confusion of the issues and indicate that the shareholders of Amery Realty Co. should bring a derivative action against Peter Tutino and/or the entities owned by Peter Tutino alleged to owe

the debts. Therefore, a claim asserting that Peter Tutino individually or Peter Tutino's corporate entities owes money to Amery Realty Co. cannot be allowed to proceed.

Further, this proposed counterclaim fails to state a valid cause of action because there is no action in law or equity for a claim of waste and conversion of corporate assets against a debtor who is not a director or officer of the corporation whose assets he allegedly wasted or converted. A cause of action for waste of corporate assets is provided for in NY Bus Corp § 720, which allows for shareholders to bring a cause of action against officers and directors of a corporation but not against recipients of the corporate assets upon which the claim is based. So shareholders of Amery Realty Co. could bring an action for waste against Peter, as an officer or director of Amery Realty Co. Neither Peter, nor Amery Realty Co. are parties in this litigation.

The proposed counterclaim asserted against the Peter Tutino Trust would also be barred by either the applicable three- or six-year statute of limitations. The alleged loans and guarantees made by Amery Realty Co. to the entities owned by Peter Tutino occurred in 1986, nearly 30 years before this action was commenced. Both CPLR 213(7), which has a six-year statute of limitations for claims of corporate waste and CPLR 214(3), which has a three-year statute of limitations for claims of conversion, support preclusion of this proposed counterclaim. In accordance with CPLR 203(f), this time-barred claim can only now be asserted if Defendants' original answer gave notice of the transactions and occurrences underlying this claim. There is no mention in the original answer of the entities individually owned by Peter Tutino taking loans from Amery Realty Co. As such, the time-barred allegations contained in the second proposed counterclaim cannot now be asserted, and this counterclaim thus lacks the legal merit to be allowed to proceed.

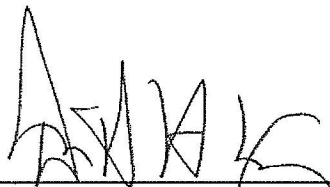
Petitioners ask the Court to award attorney's fees associated with defending this motion, arguing that the timing of the motion is improper and the proposed counterclaims are "completely frivolous." Petitioners also ask the Court to award sanctions against Defendants, arguing that Defendant Amery Tutino and attorney Thurston made sworn statements that blatantly misrepresent how and when they discovered the information upon which the proposed counterclaims are based. At oral argument of this motion it became clear to the Court that the identification and joinder of necessary parties associated with various aspects of the Trust (and Estate) have not been strictly followed by either side. The Court declines to exercise its discretion to award fees or sanctions.

Based on the foregoing, it is hereby:

ORDERED, that Defendants' motion for leave to amend the answer is **DENIED**.

This Decision constitutes the Order of the Court.

Dated: September 20, 2017



Hon. David H. Guy
Acting Justice Supreme Court