

Lileika v Estate of DeRosa

2017 NY Slip Op 33200(U)

November 3, 2017

Supreme Court, Nassau County

Docket Number: 600778-17

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:
HON. JEROME C. MURPHY,
Justice.

LAIMA LILEIKA,

Plaintiff,

- against -

**ESTATE OF PATRICK J. DEROSA, JUNE C.
DEROSA, CRISTINA E. MARTINO and ANDREW
DeROSA, co-executors, and JOHN and JANE
DOES,**

Defendants.

TRIAL/IAS PART 18
Index No.: 600778-17
Motion Date: 8/31/17
Sequence Nos.: 003, 004
MD, MG
DECISION AND ORDER

The following papers were read on this motion:

Sequence No. 003:

Notice of Motion, Affirmation and Exhibits.....	1
Defendants' Memorandum of Law.....	2
Defendants' Reply Memorandum of Law.....	3
Reply Affidavit in Further Supp. Of Motion to Dismiss and Opposition to Cross Motion to Amend.....	4

Sequence No. 004:

Notice of Cross-Motion.....	5
Affidavit in Support of Cross-Motion and in Opposition to Motion to Dismiss.....	6
Affirmation in Support and Attachments.....	7
Memorandum of Law in Support and in Opposition to Motion to Dismiss.....	8

PRELIMINARY STATEMENT

In Sequence No. 003, defendants bring this application for an Order, pursuant to CPLR 3211(a)(5), (a)(7), and (a)(1), dismissing the plaintiff's complaint (dated January 27, 2017) on the

grounds of statute of limitations, failure to state a cause of action, and due to a defense founded upon documentary evidence, together with such other and further relief as may be deemed just and proper. Plaintiff opposes this application.

In Sequence No. 004, plaintiff brings this application for an Order, pursuant to CPLR § 3025, granting her leave to amend the complaint dated January 27, 2017, and to file and serve an Amended Complaint, and such other and further relief as this Court deems just and proper. Defendant, June C. DeRosa, has submitted opposition to this application.

BACKGROUND

Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]), the underlying facts are as follows:

Patrick J. DeRosa (referred to herein as the “decedent”) was a Nassau County physician until his death on December 23, 2014. Plaintiff, Laima Lileika, performed accounting and tax work for the decedent “for many years” prior to his death. By March 26, 2009, plaintiff had loaned the decedent the sum of \$153,416.00 which loan obligation was evidenced by a promissory note. Pursuant to this promissory note, the decedent promised and agreed to repay the amount of \$153,416.00 to the plaintiff within five (5) years, with interest. This period ended on March 26, 2014. According to the plaintiff, at the time of the decedent’s death, he owed the plaintiff the entire sum of \$153,416.00 together with interest thereon from March 26, 2009. Plaintiff contends that none of the principal or interest has been paid.

Plaintiff claims that the defendant, June C. DeRosa, the decedent’s wife, was aware of this loan obligation. Yet, given the decedent’s failure and refusal to pay the plaintiff despite due demand,

plaintiff has filed and served a Proof of Claim against the Estate dated September 9, 2016. More than 90 days have elapsed and the demand has been ignored by the Estate. Plaintiff also claims that the Estate has received funds both prior to the issuance of Letters Testamentary and subsequent thereto which belong to it yet no payment has been made to creditors such as the plaintiff.

According to the plaintiff, assets of the estate, including all funds received after decedent's death, whether or not placed in an estate account, were to be held in a fiduciary capacity and were not funds of co-executors as they were to be held for creditors and expenses and then distributed to distributees. Plaintiff claims that the defendants June C. DeRosa, Cristina E. Martino and Andrew DeRosa, as co-executors, owed and continue to owe a fiduciary obligation to the plaintiff, which duty and obligation they breached by diverting said assets to other purposes and their own use. Such funds include payments made by Lois Cloud prior to the issuance of Letters Testamentary and proceeds received from the closing of the sale of a house in Garden City, New York subsequent thereto.

Additionally, plaintiff claims that the decedent's wife – namely, defendant herein, June C. DeRosa – received a transfer from decedent prior to his death of funds and/or an interest in a house in Amagansett, Suffolk County, New York which transfer, made without fair consideration when the decedent was engaged or was about to engage in a business or transaction for which the property remaining in his hand after the conveyance was an unreasonably small capital, and which transfer was made with an actual intent to defraud or to hinder, delay, or defraud either present or future creditors, rendered by the decedent insolvent under the Debtor and Creditor Law §273

In bringing this action, plaintiff asserts eight causes of action: to wit, (1) declaratory judgment against the Estate for the full principal amount of the promissory note, plus interest, and immediate payment from the Estate; (2) breach of fiduciary duty; (3) violation of Debtor and Creditor Law §273;

(4) fraudulent conveyance/violation of Debtor and Creditor Law §274; (5) transfer in violation of Debtor and Creditor Law §275; (6) violation of Debtor and Creditor Law §276; (7) violation of the EPTL §12.1.1; and, (8) accounting.

Upon the instant motion, the defendants seek to dismiss the plaintiff's complaint on the following three grounds. One, the complaint is time barred because the statute of limitations to sue on a demand note accrues upon its execution. Two, as a non-creditor, plaintiff cannot maintain the second through eighth causes of action. Lastly, the seventh cause of action under the EPTL lacks merit because the plaintiff has sued the defendants in their representative capacities as co-executors of the Estate and not in their individual capacities.

The plaintiff opposes the motion and cross moves for leave to amend her complaint. Specifically, according to the plaintiff, she "now seek[s] to amend the Complaint to refine the allegations and to add information we have developed as we continue to investigate [the Estate's attempt to avoid its obligations]" (Lileika Aff., ¶15). Specifically, the proposed amended complaint removes a reference to "5 years" and includes the assertion that payments on the promissory note until at least late 2011, amplifies the claims by adding the three co-executors as individual defendants, possible transferees or distributees, and not simply fiduciaries.

DISCUSSION

The law is clear. A party should be granted leave to serve an amended pleading in the absence of prejudice or surprise resulting from delay (*Fahey v. County of Ontario*, 44 NY2d 934 [1978]; *Northbay Constr. Co. v. Bauco Constr. Corp.*, 275 AD2d 310 [2nd Dept. 2000]). The party opposing the amendment must demonstrate that there will be actual prejudice in permitting the pleading to be amended (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]; *Holchender v. We*

Transp., 292 AD2d 568 [2nd Dept. 2002]; *O'Neal v. Cohen*, 186 AD2d 639 [2nd Dept.1992]). The party seeking leave to serve an amended pleading must make an evidentiary showing establishing merit to the proposed amendment (*Joyce v. McKenna Assoc.*, 2 AD3d 592 [2nd Dept. 2003]); *Morgan v. Prospect Park Assoc. Holdings, L.P.*, 251 AD2d 306 [2nd Dept.1998]). The evidentiary showing establishing merit must be made by one with actual knowledge of the facts surrounding the proposed amendment (*Frost v. Monter*, 202 AD2d 632 [2nd Dept.1994]). The Court will not consider the merits of the proposed amendment unless the proposed amendment is insufficient as a matter of law or totally devoid of merit (*Sunrise Plaza Assoc. v. International Summit Equities Corp.*, 288 AD2d 300 [2nd Dept. 2001]; *Norman v. Ferrara*, 107 AD2d 739 [2nd Dept.1985]).

Based upon a thorough reading of the papers submitted herewith, this Court herewith grants the plaintiff's cross motion to amend her complaint in its entirety.

This Court pauses to acknowledge the defendant's argument that the plaintiff's complaint is time barred because the statute of limitations to sue on a demand note accrues upon its execution. Therefore, the defendants argue, the plaintiff, having alleged in her original complaint that the decedent made no payments of principal or interest on the Demand Note, renders the plaintiff's complaint time barred.

It is true that in this case the note sued upon is entitled "Demand Note" and that the New York UCC at Section 3-122 provides that: "(1) a cause of action against a maker or an acceptor accrues...(b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue" (UCC §3-122; *see also, Phoenix Acquisition Corp. v. Campcore, Inc.*, 81 NY2d 138, 143 [1993]). However where as here the plaintiff seeks to amend her complaint to assert that the decedent in fact made payments on the promissory note until at least late 2011, this Court cannot find as a matter of law that

the complaint is time barred (*see generally*, CPLR 213; *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516 [1976]; *Grant v. Marshall*, 307 AD2d 274 [2nd Dept. 2003]). Nor can this Court deny the plaintiff's application for leave to amend her complaint on the grounds that the proposed amendments are palpably insufficient.

Under these circumstances, the plaintiff's application for an Order, pursuant to CPLR 3025(b), granting her leave to amend the complaint dated January 27, 2017, and to file and serve an Amended Complaint is granted in its entirety.

Consequently, the motion by defendants for an Order, pursuant to CPLR 3211(a)(5), (a)(7), and (a)(1), dismissing the plaintiff's original complaint (dated January 27, 2017) is denied as moot.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
November 3, 2017

ENTERED

NOV 27 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

Jerome C. Murphy
JEROME C. MURPHY
J.S.C.