

Selvaggio v Selvaggio
2019 NY Slip Op 31166(U)
March 29, 2019
Supreme Court, Richmond County
Docket Number: 100040/2018
Judge: Wayne M. Ozzi
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

Part 23
Present:
Hon. Wayne M. Ozzi

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CHRISTINA SELVAGGIO,

Plaintiff,

DECISION AND ORDER

-against-

JACK SELVAGGIO, PATRICIA SELVAGGIO, THE
ESTATE OF JACK SELVAGGIO, LISA SCONZO,
ESQ., JOHN F. RAGANO, ESQ., LYNNE DERI, ESQ.,

Index No. 100040/2018
Motion Nos. 3249-001
3501-002
3686-003
4919-004

Defendants.

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The following papers numbered 1 to 12 were marked submitted on the 17th day of January, 2019:

Notice of Motion to Dismiss

By Defendant Lisa Sconzo, Esq.,
with Supporting Papers, Exhibits and Memorandum of Law
(dated July 25, 2018) 1

Notice of Cross Motion to Dismiss

By Defendant Lynne Deri, Esq.,
with Supporting Papers and Exhibits
(dated August 14, 2018)..... 2

Notice of Cross Motion to Dismiss

By Defendant John Ragano, Esq.,
with Supporting Papers, Exhibits and Memorandum of Law
(dated August 28, 2018)..... 3

Supplemental Affirmation in Support of Lisa Sconzo's Motion to Dismiss

By Defendant Lisa Sconzo, Esq
(dated September 26, 2018)..... 4

Notice of Cross Motion to Dismiss

By Defendants Jack Selvaggio, Patricia Selvaggio and Estate of Jack Selvaggio,
With Supporting Papers and Exhibits
(dated November 19, 2018)..... 5

Plaintiff's Reply in Opposition to Defendants' Motion to Dismiss

By Plaintiff, with Supporting Papers
(dated January 3, 2019)..... 6

Affidavit in Support of Plaintiff's Reply in Opposition to Defendants' Motion To Dismiss
 By Plaintiff
 (dated January 3, 2019)..... 7

Reply Affirmation
 By Defendant Lynne Deri, Esq., with Supporting Papers and Exhibits
 (dated January 9, 2019)..... 8

Reply Affirmation in Further Support of Defendant Lisa Sconzo, Esq.'s Motion To Dismiss
 By Defendant Lisa Sconzo, Esq, with Supporting Papers and Exhibits
 (dated January 13, 2019)..... 9

Attorney Reply Affirmation Submitted in Further Support of Pre-Answer Motion to Dismiss Plaintiff's Complaint
 By Defendant John F. Ragano, Esq, with Supporting Papers and Exhibits
 (dated January 14, 2019)..... 10

Affidavit in Support of Plaintiff's Reply to Defendant's Pre-Answer Motion to Dismiss Plaintiff's Complaint
 By Plaintiff
 (dated January 25, 2019)..... 11

Affidavit in Support of Plaintiff's Reply to Defendant's Pre-Answer Motion to Dismiss Plaintiff's Complaint
 By Plaintiff, with Supporting Papers
 (dated January 25, 2019)..... 12

Upon the foregoing papers, the motions to dismiss are granted, and Plaintiff's Verified Complaint is dismissed.

In this action, Plaintiff alleges damages as a result of various fraud based claims against the Defendants, i.e., conspiring to defraud and deny Plaintiff a share in her late father's estate.¹ In relevant part, Defendants Jack Selvaggio and Patricia Selvaggio, as co-executors of the decedent's estate, filed a petition to probate their late father's Last Will and Testament dated March

¹ Decedent Jack Selvaggio, Sr. passed away on May 19, 2011.

10, 2011 (hereinafter the “Will”) in the Queens County Surrogates Court.² The Will did not contain provisions for Plaintiff. Consequently, Plaintiff filed objections to the probate of the Will, initiating a contested Probate Proceeding.

After completion of the discovery process, including depositions³, the Defendant/co-executors filed a motion for summary judgment in the contested Probate Proceeding. Plaintiff Christina Selvaggio filed opposition papers. In a decision and order dated May 5, 2014, the Queens County Surrogate granted the motion for summary judgment⁴, and the Will was admitted to probate. In the decision and order, the Surrogate addressed Plaintiff Christina Selvaggio’s various objections to probate, including (1) lack of due execution; (2) lack of testamentary capacity; (3) undue influence; (4) fraud; (5) forgery and (6) that the paper writing offered was not the decedent’s Last Will and Testament.⁵ The Surrogate ultimately determined that the co-executors had “established a prima facie case for probate, and there being no genuine issues of fact as to the will’s execution, testamentary capacity, undue influence or fraud, or that the instrument itself is not decedent’s last will,” granted summary judgment dismissing all objections to the probate of the Will (*see In the Matter of the Probate Proceeding, Will of Jack Selvaggio a/k/a Jack F. Selvaggio, Sr a/k/a Jack F. Selvaggio*, File No.: 2011-2375/B [Sur Ct, Queens County 2014]).

² *In the Matter of the Probate Proceeding, Will of Jack Selvaggio a/k/a Jack F. Selvaggio, Sr a/k/a Jack F. Selvaggio*, File No.: 2011-2375/B (Sur Ct, Queens County 2014).

³ Depositions of Defendants Jack Selvaggio, Patricia Selvaggio and John F. Ragano, Esq were conducted.

⁴ In support of their motion for summary judgment, the Defendant co-executors submitted a copy of the Will, which contained an attestation clause; the attesting witness affidavits; the transcript of the SCPA 1404 examination testimony of the attorney-draftsperson who supervised the execution ceremony and acted as an attesting witness; the transcript of the SCPA 1404 examination of the second attesting witness; the deposition transcripts of the Defendant co-executors, the adult objectants, along with the decedent’s bank and home health care records (*see In the Matter of the Probate Proceeding, Will of Jack Selvaggio a/k/a Jack F. Selvaggio, Sr a/k/a Jack F. Selvaggio*, File No.: 2011-2375/B, Sur Ct, Queens County).

⁵ Objections were also made by non-party David Del Rio, Jr.

The Surrogate’s Court decision and order was affirmed by the Appellate Division, Second Judicial Department on January 18, 2017 (*see Matter of Selvaggio*, 146 AD3d 891 [2nd Dept 2017]), which stated therein that the objectant, Christina Selvaggio, failed to raise a triable issue of fact in opposition to the petitioner’s prima facie showing of entitlement to judgment as a matter of law, through her allegations of fraud, undue influence and whether the decedent’s signature on the propounded will was a forgery (*id.* at 892). On May 9, 2017, the Court of Appeals denied Plaintiff’s motion for leave to appeal (*see In re Selvaggio*, 29 NY3d 908 [2017]).

On or about May 15, 2018, Plaintiff commenced the instant action against the Defendant co-executors Jack Selvaggio and Patricia Selvaggio and the Estate of Jack Selvaggio. Plaintiff has also asserted claims against Defendant John F. Ragano, Esq., the decedent’s attorney who supervised the execution of the Will; Defendant Lisa Sconzo, Esq., the defendant co-executors’ substituted attorney⁶; and Defendant Lynne Deri, Esq., a “neighbor of the decedent” (*see Verified Complaint*).

Doctrine of Res Judicata

Pursuant to CPLR 3211(a)(5), a party may move to dismiss a cause of action based on the doctrine of *res judicata*. The doctrine of *res judicata* bars the litigation of a claim or defense if, in a former litigation between the parties (or those in privity with them) where a final conclusion was reached, the subject matter and the causes of action were identical or substantially identical. Typically, principles of *res judicata* require that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*see Williams v. City of Yonkers*, 160 AD3d

⁶ The Consent to Change Attorney is dated May 14, 2013 (*see Defendant Sconzo’s Exhibit “D”*).

1017, 1018 [2nd Dept 2018]). Where a plaintiff in a later action brings a claim for damages that could have been presented in a prior proceeding against the same party, based upon the same harm and arising out of the same or related facts, the claim is barred by *res judicata* (*id.* at 1018).

Here, the allegations set forth by Plaintiff Christina Selvaggio in the Verified Complaint are similar, if not identical, to the allegations and arguments made by Plaintiff in her Verified Objections, Amended Verified Objections and Memorandum of Law in the contested Probate Proceeding, each of which were considered and dismissed by the Surrogate's Court. Accordingly, Defendants' motions pursuant to CPLR 3211(a)(5) to dismiss the Verified Complaint as barred by the doctrine of *res judicata* is granted.⁷

Doctrine of Collateral Estoppel

Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which had been previously decided against him/her in a prior proceeding where (s)he had a full and fair opportunity to litigate such issue. The two elements that must be satisfied to invoke the doctrine of collateral estoppel are: (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue (*see Luscher v. Arrua*, 21 AD3d 1005, 1007 [2nd Dept 2005]).

⁷ The branch of the motion to dismiss pursuant to the doctrine of *res judicata* is granted as to the Defendants involved in the contested Probate Proceeding, namely Defendant Jack Selvaggio and Patricia Selvaggio. To the extent that the Court finds Defendant John F. Ragano, Esq. and Defendant Lisa Sconzo, Esq. are in privity, the motions to dismiss under the doctrine of *res judicata* are also granted. In this regard, Defendant John F. Ragano, Esq. was deposed in the contested Probate Proceeding as the attorney-draftsperson who supervised the execution ceremony and acted as an attesting witness. Defendant Lisa Sconzo, Esq., represented the co-executor Defendants in the contested Probate Proceeding. Under the doctrine of *res judicata*, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action involving the parties to a litigation and those in privity with them (*see Luscher v. Arrua*, 21 AD3d 1005, 1006 [2nd Dept 2005]).

Here, the doctrine of collateral estoppel is applicable since the issues of whether there was (1) lack of due execution; (2) lack of testamentary capacity; (3) undue influence; (4) fraud; (5) forgery and whether (6) the paper writing offered was in fact the decedent's Last Will and Testament, were decided by the Queens County Surrogate, before whom the Plaintiff had a full and fair opportunity to contest such issues. In this regard, Plaintiff had submitted Verified Objections, Amended Objections and a Memorandum of Law. Accordingly, Defendants' motions pursuant to CPLR 3211(a)(5) to dismiss the Verified Complaint as barred by the doctrine of collateral estoppel is granted.⁸

Statute of Limitations

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled, is otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period (*see Coleman v. Wells Fargo & Co.*, 125 AD3d 716 [2nd Dept 2015]). A cause of action based upon fraud must be commenced within six years from the time of the fraud, or within two years from the time the fraud was

⁸ The branch of the motion to dismiss under the doctrine of collateral estoppel is granted as to the Defendants involved in the contested Probate Proceeding, namely Defendant Jack Selvaggio and Patricia Selvaggio. To the extent that the Court finds Defendant John F. Ragano, Esq. and Defendant Lisa Sconzo, Esq. are in privity, the motions to dismiss under the doctrine of collateral estoppel are also granted. In this regard, Defendant John F. Ragano, Esq. was deposed in the contested Probate Proceeding as the attorney-draftsperson who supervised the execution ceremony and acted as an attesting witness. Defendant Lisa Sconzo, Esq., represented the co-executor Defendants in the contested Probate Proceeding. In the context of collateral estoppel, privity does not have a single well-defined meaning. Rather, privity is an amorphous concept not easy of application and includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and those who are coparties to a prior action. In addressing privity, courts must analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances (*see Buechel v. Bain*, 97 NY2d 295, 304-305 [2001]; *see also Gramatan Home Inns Corp v Lopez*, 46 NY2d 481, 486 [1979]).

discovered, or with reasonable diligence could have been discovered, whichever is longer (*see* CPLR 203[g]; 213[8]; *see Clarke-St. John v. City of New York*, 164 AD3d 742 [2nd Dept 2018]; *Coleman v. Wells Fargo & Co.*, 125 AD3d at 716).

Here, Plaintiff clearly possessed knowledge of the facts underlying her allegations of fraud some time in “September of 2011”, the date on which she filed an objection and initiated the contested probate proceeding (*see* Verified Complaint, Preliminary Statement). Therefore, the statute of limitations for Plaintiff’s fraud based claims expired in September of 2017, approximately eight months before this action was commenced. In opposition, Plaintiff failed to raise a question of fact. Accordingly, Defendants’ motions pursuant to CPLR 3211(a)(5) to dismiss the causes of action alleging fraud as time-barred are granted.

Defendant Lynne Deri. Esq.

Finally, defendant Deri, the only named individual not a party, directly or indirectly, to the aforementioned proceeding in Queens Surrogates’ Court, moves for dismissal. She is the subject of the Eighth Cause of Action in which it is alleged that she was a neighbor of decedent, and conducted a random search on ACRIS to see what decedent owned, and was angry at decedent over a “fence deal.” The allegations, assuming them to be true, fail to state a cognizable cause of action upon which relief can be granted. (*Asgahar v. Tringali Realty Inc.*, 18 AD3d 408 [2d Dept.]).

Accordingly, it is hereby

ORDERED that the motions (Nos. 3249-001, 3501-002, 3686-003, 4919-004) by Defendants Lisa Sconzo, Lynn Deri, John F. Ragano, Jack Selvaggio, Patricia Selvaggio and

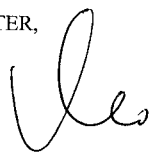
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RECEIVED NYSCEF: 03/29/2019

Estate of Jack Selvaggio are granted to the extent that the Verified Complaint is hereby dismissed with prejudice; and it is further

ORDERED that the Clerk mark his records accordingly.

ENTER,



J.S.C. **HON. WAYNE M. OZZI**
J.S.C.

DATED: March ²⁹, 2019