

State of New York v Stellato
2019 NY Slip Op 34379(U)
June 26, 2019
Supreme Court, Albany County
Docket Number: Index No. 901177-18
Judge: Michael H. Melkonian
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

STATE OF NEW YORK,

Plaintiff,

-against-

DECISION
AND
ORDER

ROBERTA STELLATO,

Defendant.

(Supreme Court, Albany County, Motion Term, April 5, 2019)

Index No. 901177-18

(RJI No. 01-19-131134)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES:

Letitia James
Attorney General of the State of New York
Attorney for Plaintiff
(Domenico M. Pirrotta, Assistant Attorney General,
of Counsel)
The Capitol
Albany, New York 12224-0341

Jesse Stellato, Esq.
Attorney for the Defendant
75 Park Lane
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MELKONIAN, J.:

Plaintiff the State of New York (“plaintiff”) commenced this action to recover from defendant Roberta Stellato (“defendant”) pension benefit overpayments erroneously paid by the New York State Teachers’ Retirement System (“NYSTRA”) to defendant’s late husband,

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Peter Stellato ("Mr. Stellato"), from January 15, 2013, the date of his death, through May 31, 2014, plus interest and collection costs, representing 22% of the sum due, pursuant to State Finance Law § 18(5). Defendant now moves pursuant to CPLR § 3211(a)(1) to dismiss the complaint claiming that documentary evidence exists establishing a defense as a matter of law. Plaintiff opposes and cross-moves for an order granting summary judgment pursuant to CPLR § 3212. Defendant opposes the motion for summary judgment.

Mr. Stellato received a pension from NYSTRS as a retired teacher and his monthly benefit was deposited in a bank account he shared with his wife. Mr. Stellato died on January 14, 2013. Mr. Stellato elected to have his pension benefits terminate upon his death. In May 2014, the defendant contacted NYSTRS seeking information about a cost of living raise. This was the first time NYSTRS learned of Mr. Stellato's death. NYSTRS notified the defendant that she was not entitled to receive her late husband's pension. NYSTRS informed the defendant that she received \$64,706.77 in overpayments since her husband's death. NYSTRS was able to reclaim \$12,283.14 from the bank account leaving an overpayment balance in the amount of \$52,423.63.

Defendant and NYSTRS had numerous communications in regard to the overpayment balance. On September 4, 2014, the parties agreed to a payment plan. In a letter dated September 10, 2014, NYSTRS confirmed the payment of \$52,423.63 and stated:

We have come to the agreement that this amount will be repaid over a six year time frame, with the first payment due on December 10, 2014. Payments should be sent in the amount of \$728.11, due the 10th of each month. We also agreed that

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NYSTRS will send out monthly reminders for these payments.

Please acknowledge receipt of the agreement to these payment terms by signing the bottom of this letter and returning it to NYSTRS.

The defendant did not sign the letter acknowledging the payment plan, but made payments in October – December 2014 in the amount of \$7,318.34. The plaintiff claims the defendant made the payments only in order to reduce her tax liability for tax year 2104. In January 2015, the parties agreed to a new monthly payment arrangement of \$728.11 per month and a current balance of \$45,105.29. NYSTRS again requested that the defendant acknowledge the plan. The defendant failed to sign the letter or make the first three payments in 2015. As a result, NYSTRS decided to refer the matter to the Office of the Attorney General (“OAG”) for collection with notice to the defendant. The defendant continued to make monthly payments.

State Finance Law § 18 allows for interest at the rate of 3.5% and allows a collection fees equal to 22% of the amount due from the referral date to the OAG. On January 18, 2019, the plaintiff commenced this action to recover the amount due along with costs and interest. The plaintiff alleges causes of action based on conversion, unjust enrichment, money had and received and misappropriation of public property. The defendant concedes liability and has paid the original overpayment balance of \$52,423.63. The plaintiff maintains the primary dispute is whether the plaintiff is entitled to interest and the 22%

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collection fee as authorized by State Finance Law § 18. In lieu of answering the complaint, the defendant moves to dismiss the complaint pursuant to CPLR § 3211.

In support of the motion to dismiss based upon documentary evidence, the defendant offers copies of all payment checks and communications with NYSTRS and the OAG demonstrating the overpayments have been paid. The defendant claims she had a valid contract with NYSTRS to pay the amount due within six years. The defendant maintains the payment agreement did not require the payment of interest. The defendant alleges that her offers to settle this matter were never responded to by NYSTRS and that she should not be subject to the payment of interest and collection fees. The defendant alleges the complaint should be dismissed as the parties attained an “accord and satisfaction,” the matter is moot as the overpayments have been paid, laches, the failure to mitigate damages and the conversion action is time-barred. The defendant also claims she should not be required to pay an additional \$16,000 in interest, fees and costs.

The plaintiff alleges it did not enter into a contract with the defendant for the repayment of the funds as the defendant never accepted the terms of the proposed agreement. On February 25, 2015, the OAG notified the defendant that NYSTRS requested its assistance in the collection of the overpayment retirement benefits which “includes interest and fees, where applicable.” The notification also enclosed a notice which stated: **“NOTICE - Failure to pay the debt described in the accompanying letter will result in and increase in your liability.”** The Notice also informed the defendant that “interest

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will be compounded daily on the principal balance . . .” and “a collection fee equal to 22% of the amount then due, including interest, may be added to the amount which you owe.” The Notice also referenced its authority under New York State Law including State Finance Law § 18 and State Tax Law § 171-f.

In response to a motion pursuant to CPLR § 3211, the pleadings shall be liberally construed, the facts alleged accepted as true, and every possible favorable inference given to plaintiff (Leon v Martinez, 84 NY2d 83 [1994]). A motion to dismiss pursuant to CPLR § 3211 will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law (AG Capital Funding Partners. L.P. v State St. Bank and Trust Co., 5 NY3d 582 [2005]). The Court’s sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory (Unadilla Silo Co. Inc. v Ernst & Young, 234 AD2d 754 [3rd Dept. 1996]).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable (CPLR § 3211 [a] [1]). “To succeed on a [CPLR § 3211 (a) (1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff’s claim.” Ozdemir v Caithness Corp., 285 AD2d 961, 963 (3rd Dept. 2001). In other words, “documentary evidence [must] utterly

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refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]).

After a review of the record, the Court finds the defendant failed to demonstrate she is entitled to the dismissal of the complaint. The causes of action alleged by the plaintiff adequately state claims relating to the overpayment of pension benefits received by her after her husband's death. Defendant admits she received the funds and she has reimbursed the plaintiff for the overpayments. The only dispute at this time is whether the plaintiff is entitled to interest, costs and commissions pursuant to State Finance Law § 18. The defendant has not shown, by documentary evidence, that the plaintiff is not entitled to these costs and fees as a matter of law (Integrated Constr. Servs., Inc. v Scottsdale Ins. Co., 82 AD3d 1160 [2nd Dept. 2011]). The Court has reviewed the other contentions of the defendant, including the allegation that the conversion cause of action is untimely and concludes they either lack merit or are unpersuasive given the Court's determination (Hubbard v County of Madison, 71 AD3d 1313 [3rd Dept. 2010]).

The plaintiff cross-moves for summary judgment and maintains it is entitled to judgment as a matter of law. The plaintiff does not dispute that the defendant has paid the full amount of the arrears. However, the plaintiff alleges it is entitled to interest, costs and collection fees pursuant to State Finance Law § 18. The defendant alleges that the plaintiff failed to respond to its settlement offers and failed to mitigate damages.

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The defendant alleges plaintiff's motion for summary judgment is premature as issue has not been joined as required by CPLR § 3212(a). The Court agrees. The defendant has not answered the complaint, which precludes the plaintiff from moving for summary judgment at this time. "A motion for summary judgment may not be made before issue is joined (CPLR § 3212[a]) and the requirement is strictly adhered to" (Rochester v Chiarella, 65 NY2d 92, 101 [1985]). While the Supreme Court is authorized to treat a pre-answer motion to dismiss pursuant to CPLR § 3211 as a motion for summary judgment upon "adequate notice to the parties" (see, CPLR § 3211[c]), in this instance, no such notice was given and the plaintiff has not demonstrated that any of the exceptions to the notice requirement is applicable (Jones v Rochdale Village, Inc., 96 AD3d 1014 [2nd Dept. 2012]). As a result, the Court finds the summary judgment motion is unavailable to either party prior to the joinder of issue absent notice that the motion to dismiss the complaint was being treated as one for summary judgment (Four Seasons Hotels, Ltd v Vinnik, 127 AD2d 310 [1st Dept. 1987]). After a review of the record, the Court finds plaintiff's motion for summary judgment must be denied as it was premature since it was made before issue was joined (see, CPLR § 3212[a]; see, Schoenborn v Kinderhill Corp., 98 AD2d 831, 832 [3rd Dept. 1983]).

Accordingly, the defendant's motion to dismiss the complaint is denied. The plaintiff's cross-motion for summary judgment is also denied.

The Court is mindful that since both motions are denied, the same issues remain. The

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elderly defendant, who is living on a fixed income, has consistently repaid \$64,706.77 to the NYSTRS and the OAG over a period of five years. The plaintiff contends it is entitled to interest and costs pursuant to State Finance Law § 18, which amounts to approximately \$16,000. The defendant's son, who is her attorney, claims he attempted to settle this matter with NYSTRS, but received no replies to his inquiries. Before this matter is set for trial, this Court firmly believes that this case is ripe for settlement and should be resolved without resorting to further motion practice.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for plaintiff. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
June 26, 2019


MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated March 14, 2019;
2. Affirmation of Jesse Stellato, Esq. dated March 8, 2019, with exhibits annexed;
3. Memorandum of Law dated March 8, 2019;
4. Notice of Cross-Motion dated April 12, 2019;
5. Affirmation of Domenico M. Pirrotta, Esq., dated April 12, 2019 with

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exhibits annexed;

6. Memorandum of Law dated April 12, 2019, with exhibits annexed;
7. Affirmation of Jesse Stellato, Esq., dated April 18, 2019;
8. Memorandum of Law dated April 18, 2019; and
9. Affirmation of Domenico M. Pirrotta, Esq., dated April 18, 2019.