

Rosario v Peskin

2019 NY Slip Op 35061(U)

November 22, 2019

Supreme Court, Bronx County

Docket Number: Index No. 20299/2019E

Judge: Julia I. Rodriguez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 20299/2019E**

Raymond Rosario and Livia McElhaney,
Plaintiffs,

-against-

DECISION & ORDER

Richard S. Peskin and Maria Ofelia Rosario,

Defendants.

Present:

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(4) and 3211(a)(7).

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmations of R. Rosario and L. McElhaney	2

The complaint in this action alleges three causes of action: (1) frivolous litigation; (2) malicious prosecution; and (3) undue influence and/or fraud in the preparation and execution of a will. All causes of action concern a matter pending in Bronx County Surrogates Court captioned In the Matter of the Estate of Ramona Rosario, Deceased, File No. 2016-2312/A.

Defendants now move for the dismissal of the complaint pursuant to CPLR 3211(a)(4) and CPLR 3211(a)(7), on the grounds that: (1) there is another action pending between the same parties for the same cause of action in Bronx County Surrogates Court and (2) the complaint fails to state a cause of action. Alternatively, defendants move for summary judgment on the ground that there are no triable issues of fact.

The first cause of action in the complaint alleges that: The Last Will and Testament of Ramona Rosario was executed in the state of Texas and was admitted to probate by the Bronx County Surrogate Court. The decedent's only property in New York are shares of a co-op located at 933 Tiffany Street, Bronx, NY 10459. The Will bequeaths the co-op shares to defendant Maria Ofelia Rosario. On or about January 8, 2018, Richard S. Peskin filed with the Bronx County Surrogate's Court, on behalf of himself and Maria, a Verified Petition pursuant to SCPA 2103 alleging that plaintiffs took possession of and retained or disposed of decedent's personal property in Texas. Defendants filed the petition without any knowledge or reasonable

belief as to the accuracy of the allegations, without any probable cause, in bad faith, and “with the singular and purposeful intent of harassing and maliciously injuring Plaintiffs.” Defendants should have known that the petition should have been filed in Texas, it being the decedent’s domicile at the time of her death and the location of the allegedly stolen property. Defendants knew or should have known that plaintiffs would have to hire outside counsel in New York to defend against defendants’ unsupported and frivolous petition. Plaintiffs were forced to hire counsel to defend against defendants’ malicious petition. Plaintiffs have been forced to spend their working hours reviewing and defending defendants’ malicious petition.

As this claim concerns a matter currently pending between the parties in Bronx County Surrogates Court, it is more appropriately addressed in that proceeding. Indeed, plaintiffs raised essentially the same allegations in their “ANSWER AND OBJECTIONS TO VERIFIED PETITION BY FIDUCIARY PURSUANT TO SPCA 2103,” filed in Surrogate’s Court on May 1, 2018. The Court also notes that in a So-Ordered Stipulation dated October 17, 2019, the Surrogate’s Court set a “[c]ontrol date with regard to the respondent’s claims and disposition of Supreme Court proceedings which also appear to concern same for compliance conference to be held at 9:30 a.m. on January 9, 2020.” The Stipulation was signed by Richard Peskin and counsel for Raymond Rosario and Livia McElhaney.

To succeed on a malicious prosecution claim, the plaintiff must prove malice (a purpose other than the adjudication of a claim), lack of probable cause to believe the action will succeed, a highly substantial and identifiable interference with person, property, or business, and that the civil prosecution ended in failure. *Engel v. CBS, Inc.*, 93 N.Y.2d 195, 711 N.E.2d 626 (1999). Here, the conclusory allegations in the complaint that the Petition: (1) was brought entirely without probable cause, (2) was brought entirely out of malice, and (3) was ultimately resolved in favor of Plaintiffs is insufficient to state a cause of action for malicious prosecution. Also, the fact that the proceeding in Surrogate’s Court is still pending, and the parties are in the discovery phase of that proceeding, is inconsistent with the allegation that the civil prosecution ended in failure.

Nor does the complaint state with sufficient specificity that the Last Will and Testament of Ramona Rosario was the “product of undue influence and/or fraud on the decedent.” In any event, this claim would necessarily be resolved in the Surrogate’s Court proceeding.

Based upon the foregoing, defendants’ motion to dismiss the complaint, pursuant to CPLR 3211(a)(4) and CPLR 3211(a)(7), is **granted** and it is hereby

ORDERED, that the Complaint is dismissed.

The Clerk is directed to enter Judgment.

Dated: Bronx, New York
November 22, 2019



Hon. Julia I. Rodriguez, J.S.C.