

Winiarski v Cherrick
2020 NY Slip Op 30913(U)
April 8, 2020
Supreme Court, New York County
Docket Number: 159239/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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DAVID WINIARSKI and ESTHER WINIARSKI, Index No. 159239/2019

Plaintiffs

- against -

DECISION AND ORDER

ELLEN R. CHERRICK,

Defendant

-----X

LUCY BILLINGS, J.S.C.:

Plaintiffs sue for damages based defendant's notarial misconduct that plaintiffs claim injured them by causing them to incur \$200,000.00 in attorneys' fees and litigation expenses. Defendant moves to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(1), (2), (3), and (7).

I. THE COMPLAINT

The Verified Complaint alleges that on or about May 8, 2018, defendant received the Last Will and Testament of Judith Lindenberg, signed defendant's name to the will as a notary public, and certified that the will was executed by Judith Lindenberg and three witnesses on May 1, 2018. The complaint alleges that defendant's certification must be false, however, because the will was not prepared until May 7, 2018. The complaint further alleges that this notarial misconduct resulted in the appointment of Judith Lindenberg's nephew, nonparty Adiv

Pachter, as executor pursuant to the will. When he submitted the will for probate, the Surrogate's Court in Queens County then issued Letters Testamentary appointing him as executor of Judith Lindenberg's estate.

Pursuant to his duties as executor, on August 31, 2018, Adiv Pachter commenced a proceeding in the Surrogate's Court to discover the assets of Judith Lindenberg's estate. N.Y. Surr. Ct. Proc. Act § 2103. On May 23, 2019, Adiv Pachter commenced an accounting action against several limited liability companies (LLCs). On August 9, 2019, nonparties Rena Pachter and Carmi Lindenberg, Judith Lindenberg's siblings and the beneficiaries of her will, based on their claimed interests in real property co-owned by the estate and two other LLCs, commenced partition actions against each of those LLCs.

Plaintiffs allege that they were engaged in real estate investments with Judith Lindenberg. As joint venturers and co-owners of real property and real estate business entities with Judith Lindenberg and as members of the LLCs affected by the nonparties' discovery proceeding and accounting and partition actions, plaintiffs allege that defendant's notarial misconduct violated New York Real Property Law § 330 and Executive Law § 135. Plaintiffs allege that defendant's statutory violations caused plaintiffs to incur expenses defending that proceeding and those actions and sue to recover those expenses.

II. DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

In evaluating defendant's motion to dismiss the complaint under C.P.L.R. § 3211(a)(7), the court must accept plaintiffs' allegations as true, liberally construe them, and draw all reasonable inferences in plaintiffs' favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). Dismissal is warranted only if the complaint fails to allege facts that fit within any cognizable legal theory. ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Mill Financial, LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dep't 2014).

III. THE STATUTES UNDER WHICH PLAINTIFFS CLAIM

Real Property Law § 330 provides that:

An officer authorized to take the acknowledgment of proof of a conveyance or other instrument, or to certify such proof or acknowledgment, or to record the same, who is guilty of malfeasance or fraudulent practice in the execution of any duty prescribed in law in relation thereto, is liable in damages to the person injured.

Defendant maintains that this statute does not apply to wills, citing to Real Property Law § 290(3), which specifically excepts wills from "conveyances" as used in Real Property Law Article 9,

of which § 330 is a part. While a will may not be a "conveyance," defendant fails to show that it does not qualify as an "other instrument." N.Y. Real Prop. Law § 330. Therefore the question remains whether plaintiffs allege facts showing that defendant committed any "malfeasance or fraudulent practice" in acknowledging or certifying Judith Lindenberg's will that caused plaintiffs any damages. Id.

Executive Law § 135 provides plaintiffs a private right of action if defendant notary's misconduct damaged them. Mars v. Grant, 36 A.D.3d 561, 562 (1st Dep't 2007); Amodei v. New York State Chiropractic Assn., 160 A.D.2d 279, 282 (1st Dep't 1990), aff'd, 77 N.Y.2d 890 (1991). See Guicha Inc. v. A.M.A.A. Realty Corp., 172 A.D.3d 442, 442 (1st Dep't 2019); Jennings-Purnell v. Donner, 149 A.D.3d 499, 500 (1st Dep't 2017). Therefore plaintiffs' claim under this statute raises the similar question whether plaintiffs allege facts showing that defendant committed any misconduct in acknowledging or certifying Judith Lindenberg's will that caused plaintiffs any damages.

IV. THE ALLEGED DAMAGES FROM ANY STATUTORY VIOLATION

A. The Absence of Causation

Plaintiffs' bald allegation that they incurred attorneys' fees and litigation expenses of \$200,000.00 fails to show that defendant's acknowledgment or certification of Judith Lindenberg's will caused those expenses. Specifically,

plaintiffs fail to allege that the discovery proceeding and accounting and partition actions would not have been commenced against plaintiffs or the LLCs in which plaintiffs held an interest but for defendant's notarial misconduct. Guicha Inc. v. A.M.A.A. Realty Corp., 172 A.D.3d at 442; Amodei v. New York State Chiropractic Assn., 160 A.D.2d at 282, aff'd, 77 N.Y.2d 890. See Jennings-Purnell v. Donner, 149 A.D.3d at 500; Mars v. Grant, 36 A.D.3d at 562.

Plaintiffs point out that the Surrogate's Court vacated its order appointing Adiv Pachter as executor. Yet plaintiffs fail to show that another executor or an administrator of Judith Lindenberg's estate would not have commenced similar proceedings and actions against plaintiffs or their LLCs, based on the same duty as Adiv Pachter was carrying out, to ascertain, account for, and marshal the estate's property. In sum, because plaintiffs nowhere allege that, but for defendant's notarial misconduct, the proceeding and actions in which plaintiffs incurred legal expenses would not have been commenced, plaintiffs fail to allege a causal connection between any misconduct by defendant and plaintiffs' claimed damages. Guicha Inc. v. A.M.A.A. Realty Corp., 172 A.D.3d at 442; Amodei v. New York State Chiropractic Assn., 160 A.D.2d at 282, aff'd, 77 N.Y.2d 890.

B. Attorneys' Fees and Expenses Do Not Qualify as Damages.

The attorneys' fees and litigation expenses plaintiffs claim, moreover, do not qualify as damages. The fora for and targets of plaintiffs' claims for attorneys' fees and litigation expenses were the Surrogate's Court proceeding and the accounting and partition actions in which plaintiffs incurred the fees and expenses, against the parties who commenced that litigation. Emery Roth & Sons v. National Kinney Corp., 44 N.Y.2d 912, 914 (1978); 930 Fifth Corp. v. King, 42 N.Y.2d 886, 887 (1977); O'Connell v. 1205-15 First Ave. Assoc., LLC, 28 A.D.3d 233, 234 (1st Dep't 2006); Wavertree Corp. v. 136 Waverly Assoc., 258 A.D.2d 392, 392 (1st Dep't 1999). While defendant was not a party to any of that litigation, her absence only points up the absence of a causal connection between her conduct and plaintiffs' claimed expenditures. If defendant somehow was connected to the commencement of that litigation, plaintiffs show no impediment to impleading her as a party responsible for the claims by Judith Lindenberg's relatives against plaintiffs or the LLCs in which plaintiffs held an interest. Plaintiffs' silence regarding their recovery of attorneys' fees and expenses for defending against the Surrogate's Court proceeding and the accounting and partition actions in those fora bars plaintiffs from now seeking that recovery through a separate claim. E.g., 67-25 Dartmouth St. Corp. v. Syllman, 29 A.D.3d 888, 889-90 (2d

Dep't 2006).

Moreover, no statute, regulation, or contract by the parties entitles plaintiffs to attorneys' fees and expenses for that litigation. Attorneys' fees and litigation expenses are not recoverable unless authorized by a statute, a regulation, or a contract by the parties. Mt. Vernon City School Dist. v. Nova Cas. Co., 19 N.Y.3d 28, 39 (2012); Fleming v. Barnwell Home & Health Facilities, Inc., 15 N.Y.3d 375, 379 (2010); Reif v. Nagy, 175 A.D.3d 107, 131 (1st Dep't 2019); URS Corp.-N.Y. v. Expert Elec., Inc., 151 A.D.3d 520, 521 (1st Dep't 2017). Executive Law § 135 does not provide for the recovery of attorneys' fees and litigation expenses. Chicago Tit. Ins. Co. v. LaPierre, 140 A.D.3d 821, 822 (2d Dep't 2016). "Even if this statute could 'arguably support an implied right' to those fees and costs," the public policy of the rule limiting attorneys' fees to the instances specified above militates against classifying attorneys' fees as damages. Id. (quoting Baker v. Health Mgt. Sys., 98 N.Y.2d 80, 88 (2002)). Plaintiffs do not claim that Real Property Law § 330, any other statute, or any regulation or contract provides for their recovery of attorneys' fees or litigation expenses.

While attorneys' fees may be recoverable when a party has "acted with disinterested malevolence" and intentionally sought "to inflict economic injury" on another party by forcing the

party to engage an attorney, plaintiffs allege no facts that permit application of this exception. Reif v. Nagy, 175 A.D.3d at 131 (quoting Brook Shopping Ctrs. v. Bass, 107 A.D.2d 615, 615 (1st Dep't 1985)). Therefore plaintiffs' attempt to recover attorneys' fees and litigation expenses incurred from defendant's notarial misconduct also fails because attorneys' fees and litigation expenses are not recoverable as damages in this separate action where those fees and expenses were not incurred.

V. CONCLUSION

Having failed to allege damages caused by defendant's notarial misconduct, plaintiffs fail to allege facts that fit within a cognizable legal theory under Real Property Law § 330 or Executive Law § 135. For all the reasons explained above, the court grants defendant's motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7). In view of the dismissal on this ground, the court need not determine defendant's motion pursuant to C.P.L.R. § 3211(a)(1)-(3). The court disregards defendant's request to strike plaintiffs' opposition, raised in defendant's reply, as moot. This decision constitutes the court's order and judgment of dismissal.

DATED: April 8, 2020

Lucy Billings

LUCY BILLINGS, J.S.C.

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