

**Sutton v Mathews**

2020 NY Slip Op 31841(U)

June 9, 2020

Supreme Court, New York County

Docket Number: 652939/2019

Judge: Nancy M. Bannon

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

**PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM**

*Justice*

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STEVEN SUTTON,

Plaintiff,

- v -

DONETTE MATHEWS, CHAN HAMILTON, MILES  
HAMILTON

Defendant.

-----X

INDEX NO. 652939/2019

MOTION DATE 01/23/2020

MOTION SEQ. NO. 001

**AMENDED  
DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, s33

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

*The court's prior order dated April 24, 2020, is hereby amended to reflect that the determination of MOT SEQ 001 was a Non-Final Disposition, and the order is otherwise unchanged.*

In this action to recover unpaid attorney's fees, the plaintiff, a former counsel to defendants Donette Hamilton and Chan Hamilton, moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability, and dismissal of the defendant's affirmative defenses. The defendants purport to cross-move to stay the action, remove the action to the Surrogate's Court, Bronx County, pursuant to CPLR 325(e), or for summary judgment dismissing the complaint. The motion and cross-motion are denied without prejudice.

Defendant Donette Hamilton is the Executor of two estates, that of Stella Pennington, who died in 1996, and that of Pennington's son, Donald Hamilton, who died in 2014. In her last will and testament, Pennington had left real property in the Bronx to Donald Hamilton and the three defendants in equal shares. However, Donald Hamilton concealed the will, obtained letters of administration, conveyed the property to himself, mortgaged the property and retained the mortgage proceeds. After his death, in 2016, the mortgagor, CIT Bank commenced a foreclosure action in the Supreme Court, Bronx County.

In August 2016, defendants Donette Hamilton and Chan Hamilton retained the plaintiff to represent them in the foreclosure action. Although he is included in the retainer agreement, defendant Miles Hamilton was not a signatory to that agreement. The retainer describes a “hybrid” fee arrangement wherein the plaintiff would be paid an hourly fee of \$325 and also 25% of the net proceeds of the sale, less any hourly fees paid. The defendants paid a \$5,000 retainer fee. The plaintiff withdrew from that representation in July 2018. At that time, the property had not been sold. Around the same time, Donette Hamilton retained counsel to assist her in becoming the Executor of Pennington’s estate, and to represent both estates’ interest in the foreclosure action. In August 2018, Donette was appointed Preliminary Executor of Pennington’s estate and in March 2019, she was issued Letters Testamentary in Donald Hamilton’s estate, both by the Surrogate of Bronx County. In March 2019, Hamilton’s estate entered into a contract of sale of the property, the only asset of the estate, and title closed in April 2019. The Surrogate Court proceedings are still pending. This action ensued. The plaintiff asserts that, notwithstanding the extensive legal work he performed in the foreclosure action, the defendants have not paid him any hourly fee or any percentage of the sale proceeds. The defendants do not dispute that some amount is due the plaintiff but argue that he is not entitled to any sale proceeds since he did not procure the sale. The defendants, who have not filed any Notice of Cross-Motion, ask the court to stay this action and remove the matter to the Surrogates’ Court or, in the alternative, dismiss the complaint.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2<sup>nd</sup> Dept. 2013); O’Halloran v City of New York, 78 AD3d 536 (1<sup>st</sup> Dept. 2010). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1<sup>st</sup> Dept. 1990) *quoting Nesbitt v*

Nimmich, 34 AD2d 958, 959 (2<sup>nd</sup> Dept. 1970). The plaintiff has not met his burden on the motion. He relies largely on the retainer agreement which does not address the circumstances of a sale of the subject property occurring after he ceases representation. The same retainer agreement is not signed by defendant Miles Hamilton, raising an issue of that defendant's liability, if any, in regard to the plaintiff's fees. Notably, the plaintiff does not explain the circumstances of his termination of services. Having failed to meet his burden in the first instance, the court need not determine the sufficiency of the opposing papers. In any event, even though the defendants' oppose the motion only by an attorney affirmation (see Zuckerman v City of New York, 49 NY2d 557 [1980]; Trawally v East Clarke Realty Corp., 92 AD3d 471 [1<sup>st</sup> Dept. 2012]), the attorney has personal knowledge of some of the material facts of this case. Furthermore, no discovery has been conducted in this case. See CPLR 3212(f).

In the defendants' attorney's affirmation, she seeks affirmative relief a stay, a transfer to the Surrogate's Court and, in the alternative, dismissal of the complaint. However, the defendants did not serve or file a Notice of Cross-Motion. Indeed, the attorney's affirmation is the only document filed in opposition to the plaintiff's motion. To obtain affirmative relief, a cross-movant must serve and file a Notice of Cross-Motion. See CPLR 2215. Since a cross-motion may be denied even where the Notice of Motion is deficient (see Abizadeh v Abizadeh, 159 AD3d 856 [2<sup>nd</sup> Dept. 2018]), it may certainly be denied when it is non-existent. Here, the main relief sought by the defendant, as articulated in the attorney's supporting affirmation, removal to Surrogate's Court and a stay, is vastly different from the relief sought by the plaintiff in his Notice of Motion, and do not require the same showings. Compare Fried v Jacob Holding, Inc., 110 AD3d 56 (2<sup>nd</sup> Dept. 2013) [plaintiff moved for a default judgment pursuant to CPLR 3215 and defendant "cross-moved" to extend the time to answer]. Thus, the cross-motion is denied as procedurally improper. However, the denial is without prejudice to renewal on proper papers.

Although the court need not reach the merits of the purported cross-motion, contrary to the plaintiffs' contention, the defendants make a colorable argument in favor of a transfer to Surrogate's court. Article VI, § 12 of the New York State Constitution provides that the Surrogate's Court shall have jurisdiction of "all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto...and such other actions and proceedings . . . as may be provided by law." NY Const. Art. VI, § 12(d); see SCPA 201, et seq. SCPA 202 expressly

provides that the Surrogate's Court may also exercise jurisdiction over "incidental" matters, and SCPA 209(4) expressly provides that such incidental jurisdiction authorizes the court "[t]o determine a decedent's interest in any property claimed to be property available for distribution under his [or her] will" or "to determine the rights of any persons claiming an interest therein, as against the decedent, or as between themselves, and to construe any instruments made by him [or her] affecting such property." Indeed, "for the Surrogate's Court to decline jurisdiction, it should be abundantly clear that the matter in controversy in no way affects the affairs of a decedent or the administration of his [or her] estate." Matter of Piccione, 57 NY2d 278, 288 (1982); see Matter of Stern, 91 NY2d 591 (1998); Wagenstein v Shwarts, 82 AD3d 628 (1<sup>st</sup> Dept. 2011).

The defendants' remaining requests for relief are also denied without prejudice.

Accordingly, it is,

ORDERED that the plaintiff's motion for partial summary judgment is denied, without prejudice, and it is further

ORDERED that the defendants' purported cross-motion is denied in its entirety without prejudice to renewal on proper papers. and it is further

ORDERED that the parties shall appear for a preliminary conference on August 20, 2020, at 2:30 p.m.

This constitutes the Decision and Order of the Court.

  
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 NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

6/9/2020

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER