

Pare v Pare
2020 NY Slip Op 31984(U)
May 26, 2020
Supreme Court, Richmond County
Docket Number: 152003/2018
Judge: Kim Dollard
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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CLAIRE PARE, ESQ. and JOHN PARE (JOHN PARE as
involuntary Plaintiff),

DCM PART 4
Present:
Hon. Kim Dollard

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 152003/2018

PAUL PARE, ANTHONY IMPERATO, III, MERRILL
LYNCH, PIERCE, FENNER & SMITH, INC., (MERRILL
LYNCH et al as nominal Defendant/ involuntary Plaintiff),
and necessary parties - MARIANNE PARE-AALBUE,
JANICE PARE-SHIRLEY, DONNA COULES and
ELAINE PARE-GULATI,

Motions No. 3

Defendants.

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The following papers numbered 1, 2 & 3 were fully submitted:

Pages Numbered

Notice of Motion to Dismiss pursuant to CPLR §§3211(a)5 & (7) on behalf the defendant, ANTHONY IMPERATO, III, with the attorneys affirmation, memorandum of law and exhibits (Motion No. 3) (Dated: December 30, 2019).....	1
Plaintiff's Affirmation in Opposition with Exhibits (Dated: January 28, 2020).....	2
Defendant, Imperato's, Memorandum of Law in Reply (Dated: February 14, 2020)	3

The defendant, ANTHONY IMPERATO, III, moves to dismiss the plaintiffs' amended complaint pursuant to CPLR §3211(a)(1) and (7).

The plaintiffs' late father, Mr. Ambrose Pare, maintained a certain account at Merrill Lynch. On December 17, 2008, Mr. Pare completed a New Transfer of Death Designation and Agreement which designated the plaintiffs and Mr. Pare's five other children as beneficiaries and distributed the

funds equally among them. On December 7, 2009, Mr. Pare completed a second New Transfer of Death Designation and Agreement again designating his seven children as beneficiaries, but altering percentages given to each of his children. Both Death Designation forms were notarized by the defendant, Anthony Imperato, III (hereinafter, "Imperato").

Mr. Pare expired on January 4, 2010. Within sixty days of Mr. Pare's death, a claim form was sent showing each beneficiary's share in accordance with the second 2009 Death Designation and Agreement. Each beneficiary was requested sign a document in order to receive their distribution.

In her amended complaint, the plaintiff, Claire Pare, claims that the New Transfer of Death Designation and Agreement of December 7, 2009, was executed by her father twenty eight days prior to his death from cancer and advanced Alzheimer's disease. She alleges that it is a forged document. Plaintiff, Claire Pare, claims that defendant, Anthony Imperato, III, who notarized the document, was a friend of defendant, Paul Pare. She claims that the new unequal distribution was inconsistent with her father's promise to treat all children equally.

The plaintiff, Claire Pare, claims in the amended complaint that her father passed away on January 4, 2010, at which time the value of the Merrill Lynch account was approximately \$524,000.00. Within sixty days, she received a claim form in the mail which contained the revised percentages. She was "stunned" by the form, though still very upset over her father's passing. She was suspicious of some type of "overreaching" in connection with the form since her father had cancer and Alzheimer's disease and may have been incompetent. According to her amended complaint, Claire Pare, did not suspect fraud prior to receiving the claim form following her father's death.

The plaintiff, Claire Pare, never signed the claim form. During the several months after her father's passing, she made several telephone calls to her father's broker at Merrill Lynch questioning the distribution and requesting a copy of the December 7, 2009, New Transfer of Death Designation and Agreement. Having not been able to obtain what she needed, the plaintiff, Clare Pare, sent two letters to Merrill Lynch, dated January 11, 2011 and December 23, 2011, advising that she has not yet claimed her funds and is not waiving her rights to same. She requested that the legal department contact her. Though unstated in the letter, Claire Pare alleges that she wanted the legal department

to contact her so that she could request the December 7, 2009 form that her father had signed. She never received a response from Merrill Lynch and was resigned to the fact that she would not receive a response.

In April of 2016, the plaintiff, Claire Pare, received correspondence from Legal Claimant Services concerning forfeiting her money. On August 17, 2016, Claire Pare phoned the Merrill Lynch abandoned property department, and she learned that the date of her father's revised New Transfer of Death Designation and Agreement was December 7, 2009. On September 1, 2016, she spoke with the abandoned property department and requested a copy of the New Transfer of Death Designation and Agreement dated December 7, 2009. The plaintiff, Claire Pare, was advised that she had to reactivate her father's TOD account and then she could obtain more information. Plaintiff, Claire Pare, reactivated the account, but still could not obtain a copy of the New Transfer of Death Designation and Agreement dated December 7, 2009. Plaintiff, Claire Pare, asserts, that after a new Merrill Lynch representative was assigned to the reactivated account and on January 29, 2018, she finally obtained a copy of the New Transfer of Death Designation and Agreement dated December 7, 2009. She purchased this index number and instituted action on August 3, 2018. She claims that her receipt of the New Transfer of Death Designation and Agreement dated December 7, 2009 on January 29, 2018, was her first notice that it was a forgery and the action was instituted within two years of receiving that document and discovering the forgery.

The plaintiff, Claire Pare, asserts two causes of action against defendant, Imperato, one in fraud and the second predicated upon Executive Law §135. Punitive damages are also sought against this defendant.

The defendant, Imperato, moves to dismiss the complaint pursuant to CPLR §§3211 (a) (5) & (7) on the basis that the action is untimely and that the statute of limitations has run.

Turning first to the plaintiffs' cause of action for fraud, this cause of action is barred by the statute of limitations. The statute of limitations for fraud is six years from the date of the commission of the fraud or two years after its actual or imputed discovery, whichever is longer (CPLR §213(8) and CPLR §203(g)).

In the present case, the fraud or forgery allegedly occurred in December 7, 2009, thereby rendering the summons with notice filed on August 3, 2018 untimely. Further, the record supports that the action was not commenced within two years after the plaintiff discovered the fraud or should have discovered the fraud. The issue of when a plaintiff could have discovered the alleged fraud turns on whether the plaintiff possessed knowledge of facts from which he or she could reasonable have inferred that fraud occurred (see, Shannon v. Gordon, 249 A.D.2d 291, 670 N.Y.S.2d 887, 2nd Dept., 1998). A plaintiff may not shut his or her eyes to facts which call for investigation (see, K&E Trading and Shipping v. Radmar Trading Corp., 174 A.D.2d 346, 570 N.Y.S.2d 557).

Here, the plaintiff, Claire Pare, alleges in the complaint that after her father's death on January 4, 2010, she received a claim form in the mail within sixty days, which contained the revised percentages. Claire Pare alleges that she was "stunned" by the form and was suspicious of some type of "overreaching" in connection with the form since her father had cancer and Alzheimer's disease and may have been incompetent. Admittedly, these facts put the plaintiff on notice of a potential fraud. While she initially requested a copy of the New Transfer of Death Designation and Agreement dated December 7, 2009 and did not receive it, no reasonable explanation is proffered for her failure to follow up and obtain this document for a period of approximately four and half years. At that time, she resumed her attempts to obtain the form only after receiving correspondence from the Merrill Lynch abandoned property department.

Inasmuch as the plaintiff, Claire Pare, did not commence this action until more than six years after the alleged fraud and more than two years after the plaintiff, with reasonable diligence, could have discovered the alleged fraud, the cause of action for fraud is barred by the statute of limitations.

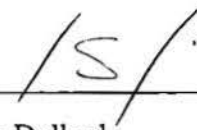
Concerning the plaintiffs' claim based upon the Executive Law §135, the statute of limitations likewise is six years from the date of the fraud. In this case, it would be six years from December 7, 2009, or December 7, 2015. Since plaintiff's action was not instituted until August 3, 2018, the action is untimely. Regardless of whether the extension period of two years after the plaintiff discovered the fraud or should have discovered the fraud is applied, based upon the reasoning set forth herein, the action is still untimely.

Lastly, plaintiffs' claim for punitive damages cannot stand since New York does not recognize a separate cause of action for punitive damages. Such a cause of action must be linked to a viable substantive claim (see, Ehrlich v. Incorporated Village of Sea Cliff, 95 A.D.3d 1078, 945 N.Y.S.2d 98, 2nd Dept., 2012).

Accordingly, it is

ORDERED that the motion of defendant, ANTHONY IMPERATO, III, is granted, and the complaint and amended complaint is dismissed as against this defendant.

ENTER,



Hon. Kim Dollard

Acting Supreme Court Justice

Dated: May 26, 2020