

Ajaero v Zak

2020 NY Slip Op 32750(U)

August 21, 2020

Supreme Court, New York County

Docket Number: 450156/2018

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

ANTHONY AJAERO,
Plaintiff,

- v -

OSHRIE ZAK; MADISON PORZIO; DIANA CARNEMOLLA; H.
HERSHENHORN; BX PUBLIC ADMIN. RANDAZZO & THEIR
FIRMS, AGENTS & REPRESENTATIVES; MICHAEL
GOLDSTEIN, ESQ.; GAIR, GAIR, CONASON; and REDDY, LEVY,
ZIFFER L.P.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 87, 88, 89, 90, 91,
92, 93, 94, 95, 96, 97, 98, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120,
121, 129, 130, 131, 132, 133, 134, 135, 136, 137, 149, 154, 155, 156, 161, 162, 163, 164, 165, 166,
167, 168, 169, 170, 171, 172, 173, 174, 175, 178, 179, 180

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 177

were read on this motion to/for OSC - RECUSAL/STAY

Self-represented plaintiff Anthony Ajaero brings this action to, among other
things, stay the distribution of his decedent father Innocent N. Ajaero's estate and
preclude distributions to Innocent Ajaero's daughters Catherine, Beatrice, and
Donna Ajaero. Plaintiff alleges that defendants Frank Randazzo, the Bronx Public
Administrator (BPA) were not authorized to order the distribution. The BPA moves
in MS 2 to dismiss this action on the basis that this court lacks jurisdiction
pursuant to CPLR 3211(a)(8) and on the basis that plaintiff fails to state a cause of
action pursuant to CPLR 3211(a)(7). Plaintiff opposes the motion.

Separately, plaintiff submitted a proposed Order to Show Cause (OSC)
docketed as MS 5 to this court on July 20, 2020 seeking the recusal of this court in
this matter, a stay of the instant matter, and the issuance of temporary restraining
orders (TRO) against HSBC and Wells Fargo. The court declines to sign the OSC for
reasons stated below.

PROCEDURAL BACKGROUND

Plaintiff initiated this action by OSC in Supreme Court, Bronx County on September 16, 2016 (NYSCEF # 89). The OSC was signed by Hon. Julia Rodriguez and returned to plaintiff. The OSC required personal service on all parties on or before September 27, 2016 (*id.* at 3).

On November 3, 2016, the Bronx County Supreme Court issued an order recusing itself from this ca and directing transfer of this case (NYSCEF # 92). A subsequent administrative transfer order from the Deputy Chief Administrative Judge of New York City Courts dated November 15, 2017, transferred this case to the New York County Supreme Court (*id.*). Plaintiff's initial OSC has yet to be heard in this court as the paper file was incomplete due to the transfer.

Subsequent to the transfer, defendant Justice Jack McKeon filed for and obtained a dismissal of this case as against him (NYSCEF # 99 – February 14, 2019 Decision and Order).

The BPA now seeks the same relief in MS 2 that was filed in this court on February 14, 2019 with a return date of March 25, 2019 (NYSCEF # 87). Opposition was due on March 18, 2019. Plaintiff filed an opposition labeled “Motion to Deny All Defendants Dismissal” on March 26, 2019, and continued filing various opposing documents through December 15, 2019, without leave of court (NYSCEF #107 – Pl’s Memo in Opposition; NYSCEF ## 106-121, 129-137, 149, 154-156, 161-175). However, this court accepted plaintiff's various papers after the opposition deadline because the original transfer file was still incomplete at that time. Given plaintiff's voluminous response, this court granted leave to the BPA to file a reply, which it did on July 22, 2020 (NYSCEF # 178).

THE BPA'S MOTION TO DISMISS

In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleadings, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). “The court must determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon*, 84 NY2d at 88). However, the court need not accept “conclusory allegations of fact or law not supported by allegations of specific fact” or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

The BPA's motion to dismiss is granted for lack of personal and subject matter jurisdiction pursuant to CPLR 3211(a)(8). Plaintiff's claims that the BPA did not obtain proper authorization to order the distribution and to stay the estate

distributions must be filed in Surrogate's Court and served on the New York City Comptroller's Office. The Surrogate's Court Procedure Act (SCPA) § 1110(3) states:

“Any person aggrieved by any act or omission of a public administrator and any person entitled to receive any money or property for which the public administrator may be held to account, shall have each and every remedy against the city of New York as would be available against a fiduciary in like case and may initiate in the surrogate's court having jurisdiction a proceeding for the enforcement of his claim or right and shall serve process thereon on the comptroller of the city.”

(SCPA § 1110[3])

Accordingly, this court does not have subject matter jurisdiction over this case as this action against the BPA should have been filed in Surrogate's Court. Indeed, this court is without subject matter jurisdiction over this entire matter and it must be dismissed outright (*see Fin. Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008] [“a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action”]).

All of plaintiff's claims against defendants Diana Carnemolla, Howard Hershenhorn, Gair, Gair, Conason, and Reddy, Levy & Ziffer, P.C., relates to the defendants' alleged conduct on behalf of the BPA or in the course of a Surrogate's Court proceeding. Plaintiff alleges that these parties engaged in fraudulent conduct on behalf of the BPA. As plaintiff's claims are derivative from his claims against the BPA, those too should be before the Surrogate's Court. Consequently, this case is dismissed as it is not properly before this court.

Moreover, this court does not have personal jurisdiction over the BPA. Plaintiff never served the comptroller of the city as required by SCPA § 1110(3). The BPA provides an affidavit from Division Chief of Claim Support, Johnny Thomas of the New York City Comptroller's Office, averring that he searched the Comptroller's record that revealed that the Comptroller was never served with plaintiff's initial OSC or the Complaint (NYSCEF #96 – Affidavit of Johnny Thomas, ¶¶1-4). Plaintiff provides no evidence that he served the comptroller. Accordingly, plaintiff failed to serve the BPA in accordance with SCPA § 1110(3).

It is also noted that plaintiff failed to personally serve the OSC on the BPA as required (NYSCEF # 89 at 3). It appears that plaintiff delivered a single copy of the OSC to the BPA's “in-house counsel” and co-defendant in this suit, Reddy, Levy, and Ziffer, P.C. at 85 Worth Street, New York, New York 10013 (NYSCEF #97 – Affirmation of Jay Ziffer, ¶ 4). Ziffer affirms that a “single copy of the Order to Show

Cause and what can only be described as a random collection of documents, without any affidavit in support, was deliver to our office” (*id.*). Plaintiff offers no evidence that he effectuated service on the BPA personally. Ziffer’s affirmation indicates that the affidavit in support was not served as required on the BPA and therefore service of the OSC was improper.

Plaintiff also appears to have attempted service of the OSC by certified mail (NYSCEF # 114 at 2). However, as the OSC required delivery by personal service, service by certified mail was improper. The “mode of service provided for in an order to show cause is jurisdictional and must be literally followed” and “pro se status is not an excuse for noncompliance,” hence this court does not have personal jurisdiction over the BPA (*Ruine v Hines*, 57 AD3d 369, 370 [1st Dept 2008]). As plaintiff failed to properly effectuate service, this case is dismissed against the BPA.

In any event, even if this court had jurisdiction over this matter, plaintiff fails to state a claim and this matter would be dismissed on CPLR 3211(a)(7) grounds. Here, plaintiff argues that the BPA was not authorized to administer Innocent Ajaero’s estate. However, the Bronx County Surrogate’s Court issued letters of administration to the BPA on May 25, 2011 (NYSCEF # 95). Plaintiff offers no plausible evidence to show that the Letters of Administration are illegitimate. This conclusively establishes that the BPA was authorized to administer the estate and thus plaintiff has no valid claim against the BPA.

Additionally, the submitted evidence also rebuts plaintiff’s claim that Catherine, Beatrice, and Donna Ajaero are not Innocent Ajaero’s issues. Indeed, plaintiff’s own Petition for Letter of Administration filed on April 5, 2011, lists Catherine, Beatrice, and Donna as Innocent’s daughters (NYSCEF # 93). Further, the BPA provides the birth certificates for Catherine, Beatrice, and Donna confirming that Innocent Ajaero was their father (NYSCEF # 94). Plaintiff has no answer for this conclusive proof that they are proper issues of Innocent Ajaero.

Plaintiff’s submission entitled “Motion to Deny All Defendants Motion to Dismiss [sic] and to Grant Plaintiff Summary Judgment With Prejudice Purs to CPLR 3025[B], 301, 302(A)(1), (A)(2), 306-B, 5001(A), 5004 Judicial Law Section 487, EPTL 5-4.6, 4-1.1, 4-1.2, PEN 187.25, 190.26, Title 42 USC § 1983, SCPA 17A, 18, 402, 2103, EPTL 5-1.4 (A)(1), RPAPL 501, 522, 543, Dodd-Frank Act & EMTALA” (NYSCEF #132 [all capitalization omitted]) is not a properly submitted motion or cross-motion pursuant to CPLR 2214 or 2215. As such, plaintiff’s submission is considered only as it relates to his opposition to the BPA’s motion to dismiss.

Accordingly, the BPA’s motion to dismiss is granted for the aforementioned reasons. This matter is dismissed in its entirety for lack of subject matter jurisdiction

PLAINTIFF'S PROPOSED ORDER TO SHOW CAUSE (MS 5)

This court declines to sign plaintiff's July 20, 2020 proposed OSC, which asks this court to issue three distinct orders: (1) recusal of this court based on alleged biases; (2) stay the instant matter pending resolution of a Southern District of New York (SDNY) case; and (3) entering temporary restraining orders against HSBC and Wells Fargo in unrelated cases. All three requests are baseless and do not warrant emergency ex-parte relief.

Plaintiff alleges that this court has a conflict of interest that merits recusal. Plaintiff baselessly alleges that this court has a "bias toward Democrats" and "cronyism towards Democratic Justices" and shielded other Justices of the court due to this court's relationship with Fordham University (NYSCEF # 177 – Proposed OSC).

Plaintiff offers no legitimate basis for this court to recuse itself in this matter. Plaintiff makes no claim for recusal covered by Judiciary Law § 14. Thus, this court has sole discretion in deciding whether recusal is warranted on any other basis (*see Schwartz v Schwartz & Schlacter*, 188 AD2d 285, 285 [1st Dept 1992] ["Absent an allegation that recusal is mandated under Judiciary Law § 14, the judge is the sole arbiter of whether recusal is warranted"]). Plaintiff's proposed OSC offers no basis for his claims regarding this court's alleged biases. These claims are specious and lack merit. Therefore this court declines to sign this branch of plaintiff's OSC.

Next, plaintiff moves to stay the instant matter pending the appeal and resolution of plaintiff's federal case captioned *Ajaero v Entire Appellate Div., Appellate Term* (US Dist Ct, SD NY, 19-CV-11272 [CM], McMahon, J., Jan. 10, 2020) that alleges a massive conspiracy on the part of the New York Unified Court System. "[A] stay should be granted only when the other proceeding shares complete identity of parties, claims and relief sought... [or] when there is substantial identity between state and federal actions" (*Asher v Abbott Labs.*, 307 AD2d 211, 211 [1st Dept 2003]). The key concern is "[t]he duplication of effort, waste of judicial resources, and possibility of inconsistent rulings in the absence of a stay" (*OneBeacon Am. Ins. Co. v Colgate-Palmolive Co.*, 96 AD3d 541 [1st Dept 2012]). Here, there is no risk of inconsistent decisions as this matter and the federal action do not have identity of parties or issues. Indeed, in the federal action, the allegations are against the New York Unified Court System, whereas the instant action regards the conduct of the BPA, and various attorneys involved in the administration of Innocent Ajaero's estate. There is simply no risk of inconsistent decisions. As such, there is no reason to stay the instant matter pending the resolution of the federal matter.

Finally, plaintiff's request for temporary restraining orders against HSBC and Wells Fargo lacks specificity as there is no information as to what is to be restrained and what immediate harm he may sustain. CPLR 6313 governs the issuance of TROs and states: "[i]f, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice" (CPLR 6313). Here, plaintiff has not shown what immediate injury he may sustain. Indeed, plaintiff has not specified any particular actions HSBC and Wells Fargo plan to take that requires this court's intervention. As such, the court declines to sign the OSC and enter a TRO.

Accordingly, it is ORDERED that the Bronx Public Administrator's motion to dismiss is granted pursuant to CPLR 3211(a)(8) for lack of personal and subject matter jurisdiction. Plaintiff's claims against the BPA and Frank Randazzo are dismissed; it is further

ORDERED that this case is dismissed in its entirety for lack of subject matter jurisdiction; it is further

ORDERED that the BPA serve this Decision and Order with notice of entry on all parties and the Clerk of the Court electronically within fifteen (15) days; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

As to motion sequence 005, this court declines to sign plaintiff's proposed OSC for the reasons stated above.

8/21/2020
DATE


MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT