

**Wartburg Home of the Evangelical Lutheran Church
v Franklin**

2021 NY Slip Op 31910(U)

March 29, 2021

Supreme Court, Bronx County

Docket Number: 21171/2020E

Judge: Eddie J. McShan

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This opinion is uncorrected and not selected for official publication.

PART IA-32

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

-----X

WARTBURG HOME

Index No. 0021171/2020

-against-

Hon. Eddie J. McShan,

FRANKLIN, MADELINE

Justice.

-----X

The following papers numbered 1 to ___ Read on this motion,
Noticed on and duly submitted as No. 001 on the Motion Calendar of ___

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion, Answering Affidavits, Replying Affidavit, etc.

This Notice of Motion (Motion Seq. #001) submitted by Defendant Alphonso Franklin seeking an order of dismissal is granted. The Amended Notice of Cross-Motion seeking leave to amend the Summons and Complaint is denied in accordance with the Court's Decision and Order dated March 29, 2021.

In light of the foregoing, it is hereby

ORDERED that Defendant Alphonso Franklin's application to dismiss Plaintiff's sixth, seventh and eighth causes of action as asserted against him for failure to state a cause of action pursuant to CPLR 3211(a)(7) is granted in accordance with the Court's findings hereinabove; and it is further

ORDERED that Plaintiff's cross-motion pursuant to amend its Summons and Complaint to substitute Alphonso Franklin as the administrator of the estate of Madeline Franklin in place of Madeline Franklin pursuant to CPLR 3025(b) is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED that Defendant Alphonso Franklin's application to dismiss this action based upon Plaintiff's failure to join the Estate of Madeline Franklin as a necessary party pursuant to CPLR 3211(a)(10) is denied as moot in accordance with the Court's findings hereinabove; and it is further

ORDERED that the Clerk shall dismiss this matter in its entirety without prejudice to Plaintiff commencing the proper proceeding in the surrogate's court because the causes of action alleged against Defendant Madeline Franklin are a nullity in accordance with the Court's findings hereinabove.

This shall constitute the decision and order of the Court.

Dated: March 29, 2021

Signature of Eddie J. McShan
Hon. Eddie J. McShan, J.S.C.

1. CHECK ONE X CASE DISPOSED IN ITS ENTIRETY [] CASE STILL ACTIVE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-32

WARTBURG HOME OF THE EVANGELICAL
LUTHERAN CHURCH,

Plaintiff,

-against-

MADELINE FRANKLIN and
ALPHONSO FRANKLIN,

Defendants.

DECISION AND ORDER

Index No. 21171/2020E

Present:

HON. EDDIE J. MCSHAN

The following e-filed documents, listed on NYSCEF as document numbers 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 on this motion to dismiss and cross-motion seeking to amend.

Upon the foregoing cited papers, the Decision and Order of this Notice of Motion and Cross-Motion is as follows:

Defendant Alphonso Franklin (“Defendant”) submits this motion seeking to dismiss all causes of action against him pursuant to CPLR 3211(a)(7). Defendant also moves to dismiss this entire action based upon Plaintiff’s failure to join the Estate of Madeline Franklin as a necessary party pursuant to CPLR 3211(a)(10). Plaintiff opposes Defendant’s applications, and cross-moves to amend its Summons and Complaint to substitute Alphonso Franklin as Administrator of the Estate of Madeline Franklin in place of Defendant Madeline Franklin pursuant to CPLR 3025(b). Defendant opposes Plaintiff’s application. The Court determines the parties’ respective applications as follows.

Background

Plaintiff commenced the instant proceeding against defendants Madeline Franklin and her son Alphonso Franklin on or about January 23, 2020 to recover an alleged nursing home debt incurred by the nursing home resident Madeline Franklin. Defendant Madeline Franklin allegedly stayed at Plaintiff’s nursing home for three separate periods between July 24, 2017 and

December 4, 2018 totaling 120 days. Plaintiff seeks the amount of \$19,140 based upon resident-defendant's failure to remit private payments and/or timely apply for and secure third-party payment for the services Plaintiff provided to her. Defendant Madeline Franklin passed away in or about February 2019.

Failure to State a Cause of Action

Defendant argues that Plaintiff's sixth, seventh and eighth causes of action asserting actual and fraudulent conveyances against him must be dismissed for failure to state a cause of action. Defendant emphasizes that both CPLR 3016(b) and New York's Debtor and Creditor Law ("DCL") require that a cause of action for actual fraudulent conveyance must be pled with sufficient particularity. Defendant contends Plaintiff makes conclusory allegations of actual fraudulent conveyances which are only a recitation of the elements of the cause of action. Defendant contends that Plaintiff does not include any facts regarding the alleged transfers, when the alleged transfers occurred, the intent behind the transfers, to whom the transfers were made and the lack of consideration for such transfers. Defendant asserts that Plaintiff's conclusory allegations are insufficient to survive the motion to dismiss. Defendant states that Plaintiff's mere suspicions of fraudulent conveyances are not sufficiently pled to support a cause of action for actual fraudulent conveyance.

Defendant acknowledges that the pleading standards under DCL §§ 273 and 275 are more liberal but insists that conclusory allegations alone are insufficient to sustain the claims of constructive fraudulent conveyance. Defendant reiterates that Plaintiff failed to provide any details regarding the alleged transfers, and notes that Plaintiff's baseless allegations are upon information and belief. Relying on *County of Monroe v Estate of Patterson* to dismiss the actual and constructive fraudulent conveyance causes of action against him, Defendant emphasizes that "plaintiff must allege some facts to support its claim . . . simply track[ing] the

statute does not meet the bare minimum requirements of notice pleading” (2019 WL 5851143 [NY Sup. Ct. 2019]). Defendant asserts that a lawsuit cannot be instituted as a discovery tool.

Plaintiff opposes Defendant’s application arguing that it has sufficiently pled every element of the fraudulent conveyance cause of action against him. Plaintiff acknowledges the heightened pleading requirements of actual fraudulent conveyance but asserts that its complaint is “nearly identical[ly]” pled pursuant to DCL § 276 as the one in *Apex Rehabilitation and Care Center v Butler*, 173 AD3d 658 (2d Dept 2019). Plaintiff contends that fraudulent intent is “typically presumed in law, and is seldom evident through additional facts at the pleading stage.” Plaintiff further contends that given its elusive nature of the direct evidence establishing fraudulent intent, courts consider “badges of fraud,” and argues that Defendant unreasonably expects Plaintiff to assert additional facts beyond those set forth in the complaint. Plaintiff insists that the facts as alleged in the Amended Verified Complaint are sufficient to place the Defendant on notice of the allegations set forth against him pursuant to DCL § 276. Plaintiff asserts that its Amended Verified Complaint provides sufficient information and detail to place the Defendant on notice of the allegations asserted against him.

Plaintiff further argues that its allegations that Madeline Franklin transferred her assets and income to the Defendant without consideration in order to prevent Plaintiff from recovering its claims, and that the Defendant accepted said conveyance sufficiently pleads the elements of DCL § 275. Plaintiff emphasizes that there is no element of intent in DCL § 275, and therefore, no heightened pleading standard for its constructive fraud cause of action. Plaintiff also emphasizes that the nature of Defendant’s relationship with his mother Madeline Franklin render it “difficult to prove, or even definitively quantify” fraudulent conveyance. Plaintiff contends that its assertion that Defendant received the assets and income of Madeline Franklin during the time of her residency at Plaintiff’s facility provide sufficient details concerning the allegations

set forth against him. Plaintiff emphasizes that Defendant also fails to annex an affidavit in support of his application and relies on his attorney's affirmation to make factual assertions similarly based upon his attorney's "information and belief." Plaintiff argues that Defendant may not "cast doubt upon Plaintiff's allegations being premised 'upon information and belief' but then bring numerous factual allegations before this Court based only upon counsel's own information and belief. . . ."

Defendant asserts in his reply that Plaintiff acknowledges that it has failed to allege "at least some elements of their fraudulent conveyance claims, but then states that it cannot be expected to be able to allege facts sufficient to support those claims." Defendant argues that Plaintiff's alleged "cumulative term" approach reverses the burden of the pleading and imposes an obligation on him to prepare defenses in the event Plaintiff deems certain conveyances fraudulent. Defendant insists that this approach is prejudicial because it renders his preparation for his defense impossible. Defendant emphasizes that there is nothing in Plaintiff's Amended Verified Complaint identifying badges of fraud. Defendant also emphasizes that Plaintiff does not provide any caselaw in support of its assertion that "where a cause of action is difficult to prove this Court should forgive the lack of the factual allegations."

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*Leon v Martinez*, 84 NY2d 83 [1994] citing *Monroe v Monroe*, 50 NY2d 481 [1980]; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). The court must accept facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d 83). The court must consider not whether the complaint has stated a cause of action but rather whether, upon examining the four corners of the

pleading, do the factual allegations contained within it indicate the existence of a cause of action (see *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

In the instant matter, after accepting the facts as alleged in the complaint as true, and according the Plaintiff every possible favorable inference, the Court finds that the Plaintiff has failed to state a cause of action for actual fraudulent conveyance under DCL § 276 against Defendant Alphonso Franklin. In order to assert a cause of action for actual fraudulent conveyance, the movant must plead actual intent to defraud in compliance with the heightened particularity requirements of CPLR 3016(b) (see *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476 [1st Dept 2018]). Moreover, ““fraudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act”” (see *Setters v AI Properties and Developments (USA) Corp.*, 139 AD3d 492 [1st Dept 2016] quoting *Marine Midland Bank v Murkoff*, 120 AD2d 122 [2d Dept 1986]; *Wall Street Associates v Brodsky*, 257 AD2d 526 [1st Dept 1999]). Hence, in order to support its claim of fraudulent intent, the claimant is permitted to rely on badges of fraud *Wall Street Associates*, 257 AD2d 526 (*Setters*, 139 AD3d 492).

Plaintiff on this record merely suggests that the defendants had a close relationship by virtue of their mother-son relationship, and conclusively alleges that “[u]pon information and belief, the Resident-Defendant wrongfully conveyed her assets and income to the Defendant, ALPHONSO FRANKLIN, without fair consideration.” Plaintiff does not provide any allegations in its Amended Verified Complaint to suggest when the alleged fraudulent transfer took place, particularly since Ms. Franklin may have been suffering from dementia during her stay in the nursing home (see for example *Carlyle, LLC*, 160 AD3d 476). Plaintiff conclusively alleges in its third cause of action that the alleged fraudulent transfers “were made at a time when the Resident-Defendant intended or believed she would incur debts beyond her ability to pay as they matured.” The Court finds the allegation to be overly broad and vague and

insufficient to determine if the alleged fraudulent transfer was made during her residency in the nursing home or years before.

In addition, Plaintiff does not make any suggestion that Ms. Franklin retained control of the subject property after the alleged fraudulent transfer and that either party had knowledge that entry of a money judgment was imminent to convey the badges of fraud as Plaintiff suggests in its opposition papers (*Wall Street Associates*, 257 AD2d 526). Furthermore, Plaintiff's key allegations regarding the alleged fraudulent conveyances are based on information and belief, and are inadequate under CPLR 3016(b) because Plaintiff failed to reveal the source of that information (*see RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477 [1st Dept 2015]). As such, the Court finds nothing within the four corners of the complaint to indicate that there are badges of fraud to infer the intent to defraud sufficiently to survive the instant motion to dismiss.

The Court similarly finds that Plaintiff conclusory allegations fail to state a cause of action under DCL 275. Constructive fraudulent conveyance pursuant to DCL § 275 provides that “[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.” Plaintiff failed to sufficiently allege that the fraudulent transfers were made without fair consideration because the relevant allegations were all made “[u]pon information and belief” again without revealing the source of the information (*see Carlyle, LLC*, 160 AD3d 476). Based upon the foregoing, Plaintiff's sixth, seventh and eighth causes of action as asserted against Defendant Alphonso Franklin are dismissed for failure to state a cause of action.

Substitution of Party and Amendment of Complaint

Plaintiff's cross-motion seeking leave to amend its Summons and Complaint to substitute Alphonso Franklin, as Administrator of the Estate of Madeline Franklin must be denied in its entirety. It is well settled that “a party may not commence a legal action or proceeding against a

dead person, but must instead name the personal representative of the decedent's estate" (*Jordan v City of New York*, 23 AD3d 436 [2d Dept 2005]). Moreover, any action commenced after a party's death is a nullity since a dead person cannot be sued (*Vello v Liga Chilean de Futbol*, 148 AD3d 593 [1st Dept 2017] *citing* *Marte v Graber*, 58 AD3d 1 [1st Dept 2008]).

It is undisputed that Plaintiff commenced the instant action against Defendant Madeline Franklin approximately one year following her death on or about February 2019. Any order issued by this Court affecting Defendant Madeline Franklin would be a nullity because she died before Plaintiff commenced this action (*see Vello*, 148 AD3d 593). In addition, Plaintiff's suggestion that Defendant Alphonso Franklin does not have standing to challenge its application to amend the pleadings does not authorize this Court to issue an order of substitution against a person that died before the commencement of the action. Accordingly, this action is dismissed against Defendant Madeline Franklin.

Failure to Join Necessary Party and Amend

Defendant Alphonso Franklin's application to dismiss this action based upon Plaintiff's failure to join a necessary party is denied as moot.

In light of the foregoing, it is hereby

ORDERED that Defendant Alphonso Franklin's application to dismiss Plaintiff's sixth, seventh and eighth causes of action as asserted against him for failure to state a cause of action pursuant to CPLR 3211(a)(7) is granted in accordance with the Court's findings hereinabove; and it is further

ORDERED that Plaintiff's cross-motion pursuant to amend its Summons and Complaint to substitute Alphonso Franklin as the administrator of the estate of Madeline Franklin in place of Madeline Franklin pursuant to CPLR 3025(b) is denied in accordance with the Court's findings hereinabove; and it is further

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ORDERED that the Clerk shall dismiss this matter in its entirety without prejudice to Plaintiff commencing the proper proceeding in the surrogate's court because the causes of action alleged against Defendant Madeline Franklin are a nullity in accordance with the Court's findings hereinabove.

This shall constitute the decision and order of the Court.

Dated: March 29, 2021



J.S.C.