

**Winiarski v Pachter**

2021 NY Slip Op 31937(U)

February 8, 2021

Supreme Court, Queens County

Docket Number: 717648/19

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IAS Part 2  
Justice



\_\_\_\_\_  
DAVID WINIARSKI, ESTHER WINIARSKI  
AND MYRON WINIARSKI,

Index No. 717648/19

Motion Dates: 1/14/21  
12/23/20

Plaintiffs,

-against-

Motion Seq. Nos. 1 & 2

ADIV PACHTER,

Defendant.  
\_\_\_\_\_

The following numbered papers read on this pre-answer motion by defendant Adiv Pachter, (Pachter), seeking to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1), (2), (3), (7) and (8).

	Papers Numbered
Notice of Motion - Affidavit - Exhibits .....	EF 5-21; 41-49
Answering Affidavits- Exhibits.....	EF 24-35
Reply Affidavits.....	EF36-37

Upon the foregoing papers it is ordered that the motion is determined as follows:

At the outset, defendant's motion to submit additional supplemental documents (Seq 2), in support of its motion for summary judgment, (Seq 1), is granted without opposition.

In their complaint, plaintiffs allege that the defendant fraudulently caused them to incur legal fees to defend against discovery proceedings in a probate proceeding for the estate of Judith Lindenberg that resulted in the revocation of the will from probate, and the substitution of an administrator for the estate in intestacy. The plaintiffs are not beneficiaries, or heirs at law to the decedent Judith Lindenberg. However, they were partners in various real estate

ventures summoned to account for these assets to the estate. The defendant Pachter was acting as the named executor in the now revoked will. In a “global settlement”, Surrogate Justice Kelly permitted the executor to withdraw, revoked the will, and thus the intestate estate continued with Rena Pachter, as the administrator. The beneficiaries, heirs at law and interests in the estate are identical to those involved with the revoked will. The plaintiffs contend that due to the actions of the defendant, the discovery proceedings on behalf of the estate in the probate proceeding were knowingly illegitimate, thereby causing their damage from this fraud in form of unnecessary legal fees. The defendant moves to dismiss the complaint in this pre-answer motion, asserting, among other things, collateral estoppel, and the failure to state a cause of action.

When considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory. (*See Leon v Martinez*, 84 NY2d 83 [1994]; *Travelsavers Enterprises, Inc., v Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017].) However, if it is shown that a material fact as claimed by the pleader is not a fact at all, dismissal is warranted. (*See Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *MJK Building Corp., v Fayland Realty Inc.*, 181 AD3d 860 [2d Dept 2020]; *Pinnacle Realty of New York, LLC, v 255 Butler, LLC*, 125 AD3d 952 [2d Dept 2015].)

On a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (1), the documentary evidence must utterly refute the plaintiff’s allegations. (*See Phillips v Taco Bell Corp.*, 152 AD3d 806 [2d Dept 2017].) Such evidence must be unambiguous, authentic and undeniable such as judicial records and documents such as a contract, the contents of which are essentially undeniable. (*Id.*)

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue that was raised in a prior action and decided against that party or those in privity. (*See Buechel v Bain*, 97 NY2d 295 [2001]; *Coleman v JP Morgan Chase Bank, N.A.*, –AD3d–, 2021 WL 262389 [2d Dept 2021]; *Lamberti v. Plaza Equities, LLC*, 161 AD3d 837 [2d Dept 2018].) To invoke collateral estoppel, there must be a showing that there is an identity of issue which has necessarily been decided in the prior action, decisive of the issue in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling by the party against whom it is being asserted. (*Id.*)

Legal fees incurred in representation of a party’s interests is not generally considered “damages” recoverable by a victorious party, except by statute, contract or court rule. (*See Congel v Malfitano*, 31 NY3d 272 [2018].)

In support of its motion, the defendant submits, among other things, his attorney's affirmation, the pleadings, and copies of court decisions submitted in order to invoke the doctrine of collateral estoppel. In opposition, the plaintiffs submit inter alia, their attorney's affirmation, and copies of the aforesaid will and other probate documents.

In *Pachter et al., v RNR Realty Group LLC*, Ind No. 518318/2019, Supreme Court, Kings County, one of the decisions and orders submitted by the defendants for consideration of collateral estoppel, the plaintiffs as members or united in interest with the LLC, contested discovery. Judge Fisher acknowledged the substitution of Rena Pachter as administrator of the intestate estate for Adiv Pachter the outgoing executor of the probate estate and the court validated the necessity for the continuation of the discovery proceedings.

In *Winiarski et al., v Chernick*, Supreme Court, New York County, Ind. No. 159239/2019, a nearly identical matter to this, wherein the plaintiffs brought suit against the notary who notarized the revoked will in the Lindenberg estate, the court ruled that any legal fees incurred by the plaintiffs in the prior and ongoing discovery proceedings regarding mutually owned property with the decedent, were not recoverable as damages. The other decisions and orders submitted in support by the defendant, also support the issue of necessity and legitimacy of discovery proceedings brought by the defendant in his capacity as executor of the estate prior to the revocation of the will.

Since the plaintiffs have had ample opportunity to defend and be heard in prior court proceedings in matters determining the issues raised herein as decided, these prior court decisions submitted by the defendant in support of his motion, this court finds the doctrine of collateral estoppel precludes the plaintiff from pursuing its claims regarding legal fees incurred for representation in necessary and properly conducted discovery proceedings involving the mutually owned properties of the plaintiffs with the deceased Judith Lindenberg.. (See *Buechel*, 97 NY2d 295; *Coleman*, -AD3d-, 2021 WL 262389; *Lamberti* 161 AD3d 837.)

Turning to the defendant's claim under CPLR 3211 (a) (7), an independent review of the complaint, and the evidence submitted demonstrates that the plaintiff has failed to state a cause of action. Discovery in both probate and intestate proceedings, for the necessary and dutiful purpose of ascertaining the assets of the estate that were, and are, in the control of the plaintiffs is not an illegitimate exercise. Incurring legal fees to defend or represent the interests of the plaintiffs in otherwise meritorious proceedings, absent a showing that a statute, contract or court rule requires otherwise, does not constitute damages. (See *Congel*, 31 NY3d 272.) Although the probate proceeding was terminated due to the revocation of the will, such was done as a "global settlement", and there has been no finding of wrongdoing or fraud. The discontinuance of the underlying proceeding in probate, regardless of the reason, did not

vitate actions taken by the executor of the estate, or by the substituted administrator of the intestate estate, acting not in their individual capacities but for the benefit of the estate beneficiaries, and therefore each was and is, duty bound to conduct discovery proceedings to ascertain the assets of the estate. Even absent collateral estoppel, this court is in agreement with the persuasive analyses and determinations made by Justices Ruchelsman, Fisher and Billings.

Therefore, the plaintiff has failed to state a cause of action, and is collaterally estopped from pursuing redress against the defendant, for any damages including but not limited to legal fees incurred in participating in any of the proceedings of the erstwhile probate proceeding, or arising out of any administration proceeding. Even were collateral estoppel inapplicable, the plaintiff has failed to state a cause of action pursuant to CPLR 3211 (a) (7).

Accordingly, defendant's motion is granted pursuant to CPLR 3211 (a) (1) and (7), and the plaintiffs' complaint is dismissed in its entirety with prejudice. In light of the foregoing, this court need not determine the claims under CPLR (a) (2), and (3). It is noted that the summons and complaint having been re-served upon the defendant, without opposition, that branch of the defendant's motion contesting service is deemed moot.

Dated: February 8, 2021

  
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J.S.C.

