

Buff v Nemeth
2021 NY Slip Op 32532(U)
December 1, 2021
Supreme Court, New York County
Docket Number: Index No. 152732/2021
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER TISCH

PART

18

Justice

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CAROLYN BUFF,

Plaintiff,

INDEX NO. 152732/2021MOTION DATE 06/10/2021MOTION SEQ. NO. 001

- v -

LENORE NEMETH,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 27

were read on this motion to/for

DISMISS

Plaintiff Carolyn Buff is the daughter of Alfred M. Buff (Alfred or decedent), who was married to defendant Lenore Nemeth (Lenore or defendant) at the time of his death on July 4, 2018. Plaintiff alleges that Alfred always kept her apprised of his estate planning initiatives, which included, at least since around 2012, that, in the event of his passing, he intended to provide for Lenore for as long as she was alive and that the remainder of his estate would pass to plaintiff and her brother. Plaintiff alleges that, after meeting with an estate attorney in January 2013, Alfred did not take any steps until Lenore “duly executed a will of her own with a provision stating that she would segregate assets and create a special account upon my father’s death to which she would add all sums received from my father, and that upon her death those sums would revert to my brother and [plaintiff]” (NYSCEF Doc No. 1 at ¶ 13). Plaintiff claims that Lenore executed a will providing as such on July 19, 2013 (the 2013 Will).¹

¹ Plaintiff submitted an excerpt of the 2013 Will in opposition to this motion, which is mostly illegible. The Court can only discern the following language: “. . . my husband, ALFRED M. BUFF, has predeceased . . . inherited from my husband, together with all financial investments that I have . . . accounts on which there is the designation ‘Special Account’ or such other wording . . . the asset was inherited from my husband, shall be distributed to my husband’s children, CAROLYN JOAN BUFF and MICHAEL ERIC BUFF, per stirpes” (NYSCEF Doc No. 20).

In April 2018, Alfred was hospitalized and around the same time, he provided Lenore with certain power(s) of attorney. On May 5, 2018, he signed will and trust documents which, according to plaintiff, were incredibly favorable to Lenore, including, e.g., providing Lenore with an annual income of \$80,000 and lifetime occupancy of his apartment in Manhattan. Plaintiff also alleges that Alfred had a certain bank account, which held approximately \$1.5 million dollars and was held jointly between him and Lenore, even though Lenore had never contributed to the account. The trust documents executed on May 5, 2018 failed to transfer that bank account into the newly created trust.

After Alfred's death and during settlement discussions concerning estate proceedings to probate Alfred's will, plaintiff requested that Lenore sign a document to bind her to a specific provision of her 2013 Will. Lenore declined to do so, allegedly stating that she is at liberty to devise her own will as she sees fit and is not contractually obligated to dispose of Alfred's or her own estate in any particular manner. Consequently, due to the pattern of Lenore's broken promises to her father, Lenore's failure to segregate a special account with Alfred's assets, along with allegations of Lenore's self-dealing, the complaint alleges that the 2013 Will (which putatively promised to provide for a remainder of Alfred's estate to plaintiff and her brother after Lenore's passing), was executed by Lenore solely to induce Alfred to execute the favorable will and trust documents in May of 2018. Plaintiff further claims that Lenore had no intention of keeping the alleged promise(s) made to Alfred that she would either create a special account to segregate Alfred's estate and/or pass along Alfred's estate to plaintiff and her brother upon her passing.

Although the probate proceeding in Dutchess County is ongoing, plaintiff commenced the instant action on March 18, 2021 against defendant² asserting fraud and four related fraud claims, negligent misrepresentation, unjust enrichment and breach of fiduciary duty. The first five claims are premised upon the allegations that defendant made a promise to Alfred that she never intended to keep, and induced Alfred to sign the will and trust documents that were favorable to defendant and leaving her name on the joint bank account (see NYSCEF Doc No. 1 at ¶¶ 43-69). In the cause of action for unjust enrichment, plaintiff claims that defendant received a financial benefit at the expense of her and her brother (*id.* at ¶¶ 70-72). Finally, the breach of fiduciary duty cause of action is premised upon the allegations that defendant engaged in self-dealing while serving in a fiduciary capacity to Alfred prior to his death and, thereafter, as a co-executor of Alfred's estate and co-trustee of the marital and family trusts (*id.* at ¶¶ 73-75).

Defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a) (7), arguing that, inter alia, plaintiff cannot maintain a claim seeking to enforce a promise to not revoke a will or make a specific testamentary bequest. Defendant further argues for dismissal pursuant to subdivision (3) of CPLR 3211 (a) in that plaintiff is without capacity to assert claims on behalf of Alfred and pursuant to subdivision (4) as the Surrogate's Court proceeding constitutes a prior pending action.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and

² Given plaintiff's pro se status, the Court liberally reads the complaint as if Lenore is sued in her individual capacity, as well as in her capacities as an executor of Alfred's estate and/or trustee of the trust, even though it is not specifically designated as such in the caption (see generally *Aponte v Estate of Aponte*, 172 AD3d 970, 972-73 [2d Dept 2019] [discussing in individual's status as an estate fiduciary with respect to res judicata principles in a post-probate action]).

determine only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88; see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). However, “claims consisting of bare legal conclusions with no factual specificity” are not entitled to such consideration and “are insufficient to survive a motion to dismiss” (Godfrey v Spano, 13 NY3d 358, 373 [2009]).

“To state a cause of action sounding in fraud, a plaintiff must allege that ‘(1) the defendant made a representation or a material omission of fact which was false and the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury’” (McDonnell v Bradley, 109 AD3d 592, 592-93 [2d Dept 2013], quoting Selechnik v Law Off. of Howard R. Birnbach, 82 AD3d 1077, 1078 [2d Dept 2011]).

“A party who commits intentional fraud is liable to any person who is intended to rely upon the misrepresentation or omission and who does in fact so rely to his detriment” (John Blair Communications v Reliance Capital Group, 157 AD2d 490, 492 [1st Dept 1990]). A specific relationship or privity between a plaintiff and defendant is not an element to fraud and the alleged misrepresentation does not need to have been made directly to the plaintiff (*see, e.g., id.* [plaintiff, as purchaser of defendant’s business, sufficiently stated a fraud claim against defendant’s accounting firm, for the accounting firm’s false financial information, relied upon by plaintiff in making the purchase]; Tindle v Birkett, 171 NY 520, 523-24 [1902] [defendant could be liable for providing false information to a credit rating agency regarding the financial viability of their business, “intending that it should be published to the business community and taken as true,” and plaintiff relied upon the books of the agency]; Eaton Cole & Burnham Co. v Avery, 83 NY 31, 35 [1880]). “[I]ndirect communication can establish a fraud claim, so long as the

statement was made with the intent that it be communicated to the plaintiff and that the plaintiff rely on it” (Pasternack v Laboratory Corp. of Am. Holdings, 27 NY3d 817, 828 [2016]).

Assuming, arguendo, that defendant’s alleged promise to Alfred via her 2013 Will was supposed to be known or communicated to plaintiff, with the intent that plaintiff rely on it (cf. Pasternack, 27 NY3d at 829), plaintiff failed to allege that she relied on the misrepresentation to her detriment. “[T]he tort of fraud is intended to protect a party from being induced to act or refrain from acting based on false representations” (id.), but the complaint does not contain allegations of plaintiff’s action or inaction, i.e., what she did or would have done but for the fraud (see Vandashield Ltd. v Isaacson, 146 AD3d 552, 553 [1st Dept 2017] [noting a fraud claim requires both transactional causation and loss or pecuniary causation in relation to the injury]). Moreover, the alleged misrepresentations were, “at most, promises of future intent rather than misrepresentations of existing fact made to induce action or inaction on her part” (Satler v Merlis, 252 AD2d 551, 552 [2d Dept 1998]; see Connaughton v Chipotle Mexican Grill, Inc., 135 AD3d 535, 537-38 [1st Dept 2016], affd 29 NY3d 137 [2017] [fraud claim not actionable where “the allegations at best suggest that” “plaintiff might suffer injury” “depending on the future actions of [defendants]”). Indeed, plaintiff, as a potential beneficiary under defendant’s 2013 Will, enjoys only “only expectancy interests and not vested legal rights” (Brown v Brown, 12 AD3d 176, 176 [1st Dept 2004], quoting Blackmon v Estate of Battcock, 78 NY2d 735, 739 [1991] [internal quotations omitted]).³

³ There is one paragraph in the complaint alleging that defendant promised to “segregate assets and create a special account *upon [plaintiff’s] father’s death*” (NYSCEF Doc No. 1 at ¶ 13). While it could be argued that the event of Alfred’s death triggers plaintiff’s ability to seek to enforce the promise or agreement (rather than seeking to enforce a promise that defendant make certain testamentary dispositions upon her own death), the Court notes that practically all the other allegations infer that the complaint is related to what defendant promised in her 2013 Will (see NYSCEF Doc No. 1 at ¶ 19; NYSCEF Doc No. 17, plaintiff’s opposition at ¶ 25 [“It is my understanding and belief that the Defendant has never segregated assets that she received from my father from her own assets as she said she would do in her Will”]), which, as the parties know, is an untenable claim (see Tretter v Tretter, 150 AD3d 1039, 1041 [2d Dept 2017] [“During the defendant’s lifetime, the plaintiff is precluded from maintaining an action

A negligent misrepresentation claim requires a plaintiff to show “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information” (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 180 [2011], quoting J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 [2007], rearg denied 8 NY3d 939 [2007] [internal quotation marks omitted]). Plaintiff’s complaint fails to allege that defendant owed her a duty of care (as opposed to Alfred) at the time of executing the 2013 Will and, “[i]n the absence of a duty, as a matter of law, there can be no liability” (Pasternack, 27 NY3d at 825).

To state a claim for unjust enrichment, “[a] plaintiff must show ‘that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011], quoting Citibank, N.A. v Walker, 12 AD3d 480, 481 [2d Dept 2004] [internal quotation marks omitted]). “The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in “equity and good conscience” should be paid to the plaintiff” (Corsello v Verizon New York, Inc., 18 NY3d 777, 790 [2012]; Mandarin Trading, 16 NY3d at 182). However, it “is not a catchall cause of action to be used when others fail” and “is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (Corsello, 18 NY3d at 790-91). Here, the Court finds that plaintiff’s claims are defective and asserting an unjust enrichment claim is not going to remedy those defects.

predicated upon a breach of the agreement as it relates to the defendant’s promise not to revoke or modify her will or execute a new will”]; Brown v Brown, 12 AD3d 176, 176-77 [1st Dept 2004] [“an agreement to make a will generally is enforceable only after the death of the promisor”]. Additionally, the excerpt of the 2013 Will submitted by plaintiff in opposition does not show any independent obligation apart from the claimed promise of the 2013 Will itself and/or would otherwise change the analysis.

In opposition, plaintiff points to her allegations in the complaint that defendant had certain power(s) of attorney over Alfred and, as such, reaffirms that the grounds for many of the claims are premised upon defendant's obligation to Alfred — i.e., all the fraud claims are premised upon defendant's alleged misrepresentation to Alfred and his justifiable reliance upon the same; that defendant negligently misrepresented certain facts when she had an obligation to provide correct information; that defendant was unjustly enriched by obtaining Alfred's property to which she is not entitled; and defendant breached her fiduciary obligations to Alfred. Such allegations may be cognizable claims if they were brought by Alfred's estate because the claims are personal to him (see SCPA 702). But because plaintiff is not suing on behalf of the estate, she is without capacity to bring those claims on his behalf (see Greene v Kevin D. Greene, LLC, 188 AD3d 1012, 1014 [2d Dept 2020] ["Legal proceedings for . . . an estate may only be prosecuted by . . . a personal representative of the estate, in a representative capacity"]; see also Rodriguez v River Val. Care Ctr., Inc., 175 AD3d 432, 433 [1st Dept 2019]).

As for the remainder of the breach of fiduciary claim, insofar as asserted by plaintiff individually against defendant in her status as a co-trustee of the marital and family trusts and co-executor of the estate, the Court finds that nearly all of the allegations plaintiff asserts about the defendant as a fiduciary to her were already raised and could continue to be raised in the active Surrogate's Court proceeding,⁴ where appropriate remedies could be employed (see, e.g., Matter of Billmyer, 142 AD3d 1000, 1001-02 [2d Dept 2016]). Plaintiff raises nothing separate and apart from the issues before the Surrogate that should be addressed here in Supreme Court instead (cf. Aponte v Estate of Aponte, 172 AD3d 970 [2d Dept 2019] [where res judicata did

⁴ A number of allegations in the complaint appear to have been raised before the Surrogate already (see generally, NYSCEF Doc No. 7), including those related to the Dutchess County home (NYSCEF Doc No. 1 at ¶¶ 32-33), the Manhattan apartment (id. at ¶ 35), use of the Red Hook and Manhattan apartments (id. at ¶¶ 36-49), inadequate recordkeeping, general unresponsiveness, and incurring attorneys fees charged to the estate (id. at ¶¶ 35, 41).

not apply to bar fraud and related claims concerning the acquisition of a particular property as the operative facts were separate and distinct from anything having to do with the estate]).

Accordingly, it is hereby ORDERED that the motion is granted and the complaint is dismissed.

This constitutes the decision and order of the Court.

12/1/2021

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

ALEXANDER TISCH, J.S.C.