Kanes v Kanes
2021 NY Slip Op 34316(U)
August 20, 2021
Supreme Court, Nassau County
Docket Number: Index No. 608982-20
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ANNA KANES, AS EXECUTRIX OF THE ESTATE OF GEORGE KANES A/K/A GEORGE E. KANES and SHAREHOLDER OF KOUMBAR REALTY LTD. and LEFTOM FOODS LTD.,	**TRIAL/IAS PART: 6** **NASSAU COUNTY**
Plaintiff,	**Index No: 608982-20** **Motion Seq. No. 2** **Submission Date: 7/7/21**
-against-	
PETER KANES, THEONE KANES, PATRICIA KANES and MARIA KANES, PERSONALLY AND IN THEIR CAPACITIES AS SHAREHOLDERS OF KOUMBAR REALTY LTD. and LEFTOM FOODS LTD.,	
Defendants.	

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Papers Read on these Motions:

Perna-Plank Affm. in Support with Exhibits.....x
Memorandum of Law in Support.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law.....x
Plaintiff's Supplemental Memorandum of Law.....x
Defendants' Supplemental Memorandum of Law in Opposition.....x

Presently pending before the Court is plaintiff Anna Kanes' ("Anna" or "Plaintiff") motion to dismiss the first amended counterclaim asserted by defendants Theone Kanes ("Theone"), Patricia Kanes ("Patricia"), and Maria Kanes ("Maria").[1] For the following reasons, Plaintiff's motion is granted.

<u>The parties are reminded of the conference scheduled for September 27, 2021 at 9:30 a.m.</u>

[1] Defendant Peter Kanes ("Peter") is represented by separate counsel and takes no position on Plaintiff's motion. For ease of reference, the Court will refer to Theone, Patricia, and Maria collectively as Defendants.

BACKGROUND

A. Factual Background

The Complaint, *see* Perna-Plank Affm. at Exh. A, alleges, in relevant part, as follows:

Ernest Kanes ("Ernest") was the father of George Kanes a/k/a George E. Kanes ("George") and his siblings, Peter, Theone, and Patricia. Ernest formed various businesses, including a diner ("Diner") located at 44-15 College Point Boulevard, Flushing, New York (the "Property"). The Diner was owned and operated by one of the Kanes family businesses, Leftom Foods Ltd. ("Leftom"). The Property was owned by another Kanes family business, Koumbar Realty Ltd. ("Koumbar"), which was formed strictly for the purposes of holding real estate. George dedicated his career to running the Diner alongside his father and, after Ernest's death, principally by himself. In September 2008, Ernest transferred his 20% interest in Koumbar and his 20% interest in Leftom to George. Later in 2008, Ernest passed away. From the time of Ernest's death until early 2018, George ran and operated the Diner.

In the spring of 2018, George was unable to work full-time due to his declining health and Theone and Patricia came to New York to run the Diner. Shortly after Theone and Patricia began operating the Diner, the business ceased giving money to George or his family. During the time that Theone and Patricia operated the Diner, a check for health insurance premiums bounced, suppliers went unpaid, and a federal wage and hour litigation against the Diner and its shareholders ensued. On several occasions, Theone and Patricia left the Diner unattended and vacationed when they were supposed to be managing the Diner. As a result, a decision was made to close the Diner and list the Property for sale. The Property was sold to East West Plaza LLC in or about July 2019 for a purchase price of $13,600,000.

Due to the mismanagement of the Diner by Theone and Patricia, Leftom was forced to pay several operating bills from the sale proceeds. Additionally, a separate escrow from the sale proceeds was set aside in the amount of approximately $1,398,247 to pay any judgment or settlement from pending wage and hour litigation. The remaining net proceeds of the sale are being held in escrow pursuant to the terms of the Agreement of Certain Shareholders of Koumbar dated in or around April 2019 ("Shareholder Agreement").

When the Diner closed on or about May 1, 2019 and the Property sold in or about July 2019, the ownership interests in Koumbar were, and are, as follows: George holds 51%, Peter holds 9%, Theone holds 13.33%, Patricia holds 13.33%, and Maria holds 13.34%. Family disputes regarding the distribution of the net proceeds of the sale of the Property began before George's death, when Theone, Patricia, and Maria began making unsubstantiated claims and refused to release the net proceeds in accordance with the parties' respective ownership interests.

In their Amended Counterclaims, *see* Perna-Plank Affm. at Exh. N, Defendants allege, in relevant part, as follows:

Maria and Ernest married in 1962 and lived together until his death in November 2008. For several years prior to his demise, Ernest's physical and mental condition deteriorated. By 2008, Ernest had been hospitalized several times and was suffering from schizophrenia, depression, and other physical and mental conditions. Ernest was under the regular care of a psychiatrist and was heavily medicated. At the time of Ernest's death, neither Maria, Theone, nor Patricia were aware of a Will or any transfers of Ernest's shares in the family businesses.

In 2018, George became seriously ill with cancer and Theone and Patricia took over the day-to-day operations of the Diner. That same year, the family began to discuss selling the family businesses. Shortly after George became ill, Theone and Patricia discovered that George 1) failed to pay significant obligations of the Diner, 2) borrowed funds secured by the Diner and other properties for his personal use, 3) used corporate funds to pay his credit card expenses and other personal expenses, and 4) otherwise used the property and assets of the business for his own benefit.

During that time, George, for the first time, claimed that he alone was entitled to Ernest's previously held shares in the family businesses. In late 2018, and only after the parties engaged independent counsel, George disclosed for the first time that Ernest purportedly signed a Will just two months before his death. The Will purported to, among other things, bequeath Ernest's shares in the family businesses and other businesses to George. Maria, Theone, and Patricia vehemently objected to the validity of any such bequest for several reasons, including Ernest's obvious lack of capacity and lack of any stated intent to make the bequest. To permit a sale of Koumbar to proceed, it was agreed that all proceeds would be held in escrow until the issues regarding the disposition of Ernest's interests and accounting issues could be resolved by settlement agreement or, if necessary, by order of a court.

Plaintiff moved to dismiss Defendants' prior counterclaims on November 13, 2020 and attached purported irrevocable stock powers signed by Ernest transferring his shares in the family businesses to George ("Stock Powers"). The Stock Powers were dated four days after the date the Will was purportedly signed. Ernest passed away within weeks of allegedly signing the Stock Powers. The filing of the motion to dismiss by Plaintiff was the first time that Defendants learned that the Stock Powers existed.

Defendants assert a first amended counterclaim to set aside or otherwise declare void *ab initio* the transfer purportedly effectuated by the Stock Powers and bequeathed under the Will. Defendants allege that George did not probate Ernest's Will in the years before his death to preclude Maria from exercising her right of election against the estate. Ernest was not proficient in reading documents in English. At the time Ernest allegedly signed the Will and Stock Powers, he was not only physically limited, but also lacked the mental, donative, and testamentary capacity to understand such documents.

When Ernest allegedly signed the Will and Stock Powers, he was susceptible to undue influence. George took Ernest to attorneys who allegedly drafted the Will and Stock Powers when they had been arrested with respect to a $25 million fraud. Shortly thereafter, the attorneys were convicted and disbarred. These attorneys acted in concert with George to deprive Maria and the other children of their interests in Ernest's estate. Any alleged transfer of assets from Ernest to George was the result of coercion and overreaching. The Will effectuated a bequest of Ernest's shares in the family businesses and there was no reason for Ernest to sign Stock Powers effectuating the same transfer days later. The Will purported to make bequests that were nonsensical, and the Will and Stock Powers were contrary to Ernest's previously expressed donative and testamentary intent. Ernest and Maria always concurred that the Diner and all investment properties should be divided among all of the children.

B. Procedural History

Plaintiff commenced this action on August 27, 2020. On October 9, 2020, Defendants filed an Answer with Counterclaims that included a first counterclaim to declare the alleged transfer of property by Ernest to George in or about 2008 or pursuant to an alleged Will invalid and void *ab initio*. On November 13, 2020, Plaintiff moved to dismiss Defendants' counterclaims.

On February 18, 2021, the Court granted Plaintiff's motion on the record ("February 2021 Decision"). *See* Perna-Plank Affm. at Exh. M. The Court held, in relevant part:

> With respect to the first counterclaim seeking to set aside Ernest's transfer of assets to George, the Court concludes that that cause of action should be dismissed because it is barred by the statute of limitations. There is no question that Ernest

> transferred his assets in the corporation to George on September 23rd of 2008 and the allegation that that transfer was based on undue influence does not, in the Court's view, invoke the discovery rule that would otherwise apply to extend the statute of limitations to fraud claims. Put another way, fraud is not pleaded here and so there is no basis for applying any extension to the statute of limitations that would otherwise exist to the claim.

Id. at 4:18-5:6.

On March 24, 2021, Defendants filed their Amended Counterclaims. Plaintiff subsequently filed the instant motion to dismiss the first amended counterclaim. On June 4, 2021, the Court held oral argument and invited supplemental briefing.

RULING OF THE COURT

Plaintiff's motion to dismiss the first amended counterclaim is granted. Defendants' first amended counterclaim seeks to declare the 2008 transfer of property from Ernest to George void *ab initio* and amplifies their prior first counterclaim based on the same legal theory. The Court, however, has already determined that the statute of limitations bars Defendants' counterclaim. Indeed, Defendants posited the same equitable estoppel argument in opposition to Plaintiff's motion to dismiss the initial counterclaims. While the Court did not expressly address equitable estoppel in its February 2021 Decision, it considered all of Defendants' submissions and arguments in finding that the statute of limitations barred the first counterclaim. Accordingly, Defendants' attempt to relitigate this issue is precluded by the doctrine of the law of the case. *See Strujan v. Glencord Bldg. Corp.*, 137 A.D.3d 1252, 1253 (2d Dept. 2016) ("the law of the case operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law"), quoting *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809, 809 (2d Dept. 2007).

Additionally, Defendants' first amended counterclaim does not establish that Plaintiff should be equitably estopped from relying on her statute of limitations defense. "The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense." *Zumpano v. Quinn*, 6 N.Y.3d 666, 673 (2006). Concealment of wrongdoing is generally insufficient but may support the invocation of equitable estoppel where a fiduciary relationship obligates the disclosure of the underlying claim. *Marincovich v. Dunes Hotels & Casinos, Inc.*, 41 A.D.3d 1006, 1010 (3d Dept. 2007). The party seeking the application of the doctrine bears the burden of establishing that he or she was diligent in commencing the action "within a reasonable time after the facts giving rise to the estoppel have ceased to be operational." *Id.*, quoting *Simcuski v. Saeli*, 44 N.Y.2d 442, 450 (1978).

In opposition to Plaintiff's prior motion to dismiss the counterclaims, Maria, Patricia, and Theone each submitted affidavits. Maria affirmed that she was not aware of Ernest's Will "until 2018 when my daughters told me George claimed Ernest had left him most of his property," and stated that "[i]t was only in 2018 when George wanted to sell one of the properties that I became aware of the fact that he claimed he had been left my husband's interest in the diner and all of the commercial property." *See* Perna-Plank Affm. at Exh. H, ¶¶ 6, 12. Similarly, Theone alleged that in 2018 "George, for the first time, claimed that my father had left his interest in the diner and real estate to George to the exclusion of my mother, brother, sister and me," *see id.* at Exh. J, ¶ 7, and Patricia confirmed that "the first time we learned of the alleged transfer or taking by our brother George Kanes of the interest of our father in Leftom Foods Ltd. and Koumbar Realty Ltd. was in 2018 . . . when we had discussed selling these properties and George alleged that he alone was entitled to my father's interest," *see id.* at Exh. I, ¶ 2.

Defendants now allege that 1) George owed them a fiduciary duty, and 2) when George "blurted out that he alone was entitled to Ernest's shares" no one knew what was meant by that comment, and only George knew about the Stock Powers, *see* Defs. Memo of Law at 5. While Defendants each allege that they did not know about the Stock Powers until Plaintiff filed her first motion to dismiss, it is incontrovertible that in 2018, each of the Defendants was aware that George held Ernest's interests in the Diner and Property. The Court finds that Defendants' failure to assert any claim until they filed their Answer with Counterclaims on October 9, 2020 is unreasonable.

Moreover, the Court questions whether Defendants have pled undue influence with the requisite particularity. *See generally Kotick v. Shvachko*, 130 A.D.3d 472, 472 (1st Dept. 2015). *See also* CPLR § 3016(b) ("[w]here a cause of action is based upon . . . undue influence, the circumstances constituting the wrong shall be stated in detail). In any event, the allegations in the Defendants' first amended counterclaim may well be vigorously asserted in the Surrogate's Court or equivalent court in Florida.[2]

[2] Ernest passed away in Florida. *See* Perna-Plank Affm. at Exh. P.

CONCLUSION

Plaintiff's motion to dismiss the first amended counterclaim is granted. The parties are reminded of the conference scheduled for September 27, 2021 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
August 20, 2021

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
Aug 23 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE