

Donnelly v Neumann
2022 NY Slip Op 30204(U)
January 24, 2022
Supreme Court, New York County
Docket Number: Index No. 155464/2021
Judge: Sabrina B. Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

BELINDA DONNELLY

Plaintiff,

- v -

HUBERT NEUMANN,

Defendant.

-----X

INDEX NO. 155464/2021

MOTION DATE 11/29/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion for dismissal or alternatively seeking to remove this action to Surrogate's Court is denied.

BACKGROUND

Plaintiff commenced this action seeking \$50,000.00 in damages, based on the claim that her father fraudulently collected insurance proceeds for the damage of a sculpture that was owned by her and her two sisters.

The complaint asserts four causes action: fraudulent concealment; breach of fiduciary duty; conversion and unjust enrichment. In addition to the compensatory damages, the complaint seeks punitive damages.

ALLEGED FACTS

This dispute is focused on a sculpture by George Herms entitled *The Poet*. Plaintiff alleges that the sculpture was owned by herself and her two sisters. In 2011, defendant lent the piece to the Getty Museum for an exhibition. The piece was damaged and insured for

\$150,000.00. Plaintiff asserts that defendant improperly collected the insurance proceeds and failed to distribute to her the \$50,000.00 she is entitled to receive.

THE PENDING MOTION

On August 6, 2021, defendant moved for an order dismissing this action, pursuant to CPLR § 3211(a)(4) and CPLR § 3211(a)(10), or alternatively for an order removing this action to New York County Surrogate's Court pursuant to CPLR §325(e).

For the reasons stated below, the motion is denied in its entirety.

The Motion to Dismiss Pursuant to CPLR § 3211 (a)(4) is Denied

CPLR § 3211(a)(4) provides that a party may move for dismissal if “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.” [N.Y. C.P.L.R. 3211 (McKinney)].

In order to prevail on a CPLR §3211(a)(4) motion, a movant must demonstrate that (a) there is a ‘sufficient identity’ of parties in the prior action and the later action which the defendant seeks to dismiss, and (b) both actions seek “to recover for the same alleged harm based on the same underlying events.” [*Syncora Guarantee Inc. v. J.P. Morgan Securities LLC*, 110 A.D.3d 87, 96 (1st Dep’t 2013) (*Quoting White Light Productions v. On the Scene Productions*, 231 A.D.2d 90, 93 (1st Dep’t 1997))].

The parties to this action are involved in multiple lawsuits in Surrogate's Court and Supreme Court. While the factual issues raised herein are also raised in some of the other cases, none of them seeks the specific and limited relief sought in this action. Additionally, the purpose of the other two cases differs from the claim for damages in the case at bar.

There is an action for an accounting pending in New York County Surrogate's Court (File Number 2018-2362) which is alleged to concern the disposition of sixty artworks, including the Sculpture at issue herein. Defendant argues that the proper disposition of the insurance proceeds from the sculpture depends on the resolution of that case.

There is also an action in Bronx County Surrogate's Court in which plaintiff is seeking to remove defendant as Trustee of the Arthur Neumann's Descendants' Trust. Factual allegations asserted in the complaint herein are also asserted in that action, but the relief sought therein differs.

Plaintiff alleges that the sculpture herein was owned outright by herself and her sisters and was no longer part of any family trust as of September 30, 2009. Plaintiff is suing defendant here in his individual capacity for damages she allegedly suffered as an individual by reasons of his non-trustee conduct.

As the court finds that this action does not seek the same relief as the other pending actions and differs in nature from the prior pending cases, the court declines to dismiss the action pursuant to CPLR §3211(a)(4).

The Motion to Dismiss Pursuant to CPLR §3211(a)(10) is Denied

CPLR § 3211(a)(10) provides for dismissal where there is a failure to name a necessary party. Defendant argues that plaintiff's two other sisters, Kristina and Melissa are necessary parties. As noted above, each would be entitled to a 1/3 share of the insurance proceeds under plaintiff's theory of recovery.

Under CPLR §1001(a), a necessary party is one whose nonjoinder will jeopardize the outcome of the action in either of two ways: (1) complete relief cannot be accorded the existing

parties to the action; or (2) the absentee may be inequitably affected by the judgment. [N.Y. C.P.L.R. 1001 (McKinney)].

The court finds that while plaintiff's sisters may be proper parties, they are not necessary parties. The relief that plaintiff seeks can be provided without their joinder, and they would not be inequitably affected by any judgment awarded herein, in fact a judgment herein would inure to their benefit as it would be a precedent for their own recovery against defendant.

They would not be properly added as defendants, as plaintiff seeks no relief against them, and if they do not want to join in their sister's suit against their father for the proceeds, they should not be forced to do so. Moreover, they presumably are aware of this action, and could, if so inclined, seek to intervene pursuant to CPLR § 1013.

Based on the foregoing, defendant's motion to dismiss pursuant to CPLR § 3211(a)(10) is denied.

Defendant's Motion to Remove This Action to Surrogate's Court Is Denied

CPLR § 325(e) provides for removal of an action from Supreme Court to Surrogate's Court "where decedent's estate affected. Where an action pending in the supreme court affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court, the supreme court, upon motion, may remove the action to such surrogate's court upon the prior order of the surrogate's court." [N.Y. C.P.L.R. 325 (McKinney)].

In this action there has been no prior order of the Surrogate's Court directing the removal of the action. The motion is denied without prejudice to renewal should defendant obtain such an order from Surrogate's Court.

CONCLUSION

Based on the foregoing, it is hereby:

ORDERED that the branch of defendant’s motion for an order for dismissing the complaint pursuant to CPLR § 3211(a)(4) and CPLR§ 3211(a)(10) is denied; and it is further

ORDERED that the branch of defendant's motion for an order for removing this action to Surrogate’s Court pursuant to CPLR § 325(e) is denied without prejudice to renewal upon an order from Surrogate’s Court directing same; and it is further

ORDERED that defendant shall serve and file his answer within 30 days of the date of this order; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on March 22, 2022, at 11:00 am, said appearance to be virtual and for which a link for MS Teams will be forwarded to the parties by the Part Clerk; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh);].

1/24/2022

DATE

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SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE