

<b>Padilla v Estate of James Clayton Larmett</b>
2022 NY Slip Op 31601(U)
May 13, 2022
Supreme Court, New York County
Docket Number: Index No. 158905/2021
Judge: Alexander Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

-----X

INDEX NO. 158905/2021

JOSE PADILLA

MOTION DATE 11/18/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE ESTATE OF JAMES CLAYTON LARMETT,

DECISION + ORDER ON MOTION

Defendant.

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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, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISS

Upon the foregoing documents, defendant moves to dismiss the complaint pursuant to CPLR 3211 (a) (7) or, in the alternative, removing the action to the Surrogate's Court, New York County, pursuant to CPLR 325 (e).

Plaintiff is employed as a doorman in a residential building where James Clayton Larmett (decedent) and his late wife Linda lived. Plaintiff alleges that he knew the couple for approximately twenty-eight years and became close with them through, inter alia, regularly assisting them with day-to-day affairs and caring for their pets (NYSCEF Doc No 1, complaint at ¶ 5). After Linda Larmett passed away in 2016, plaintiff alleges that he cared for the decedent, would sleep over in his apartment, assist in finding appropriate aid to care for him, was designated as the decedent's health care proxy and was given a power of attorney to better help the decedent with his needs (id. at ¶ 6-7).

Plaintiff's complaint alleges that on May 1, 2020, the decedent said he would leave plaintiff one-fourth of his estate "in consideration for all the help [plaintiff] had given him over the past twenty-eight years" and that on January 25, 2021, the decedent "promised to change his will and leave [plaintiff] one-third of his estate" (id. at ¶¶ 8,10). The decedent passed on February 15, 2021 without changing his will

(id. at ¶¶ 2, 11). Shortly thereafter, the decedent's will that was executed in 2016 was offered for probate in New York County Surrogate's Court under file number 2021-1152 (id. at ¶ 3; see NYSCEF Doc No 9). On July 26, 2021, plaintiff submitted a notice of claim to one-third of the estate to the executor, which was rejected by written notice dated August 6, 2021 (see complaint at ¶¶ 12-13; NYSCEF Doc Nos 10-11). Plaintiff then commenced the instant action on September 29, 2021 asserting a single claim for breach of contract for the decedent's failure to change his will, and demanding an accounting to determine the value of the estate and a judgment equal to one-third of the estate (see complaint at ¶¶ 14 and "wherefore" clauses).

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction. The facts as alleged in the [complaint] are accepted as true [and] the plaintiff is accorded the benefit of every possible favorable inference" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). "[T]he court's function is to determine only whether the facts as alleged fit within any cognizable legal theory" (id.) and not "[w]hether a plaintiff can ultimately establish its allegations" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

As defendant correctly noted, breach of an alleged oral promise to make a will or testamentary provision is not a viable cause of action, as it would be barred by the statute of frauds (see Matter of Hannel, 29 NY3d 487, 492-93 [2017], citing EPTL § 13-2.1 [a][2] and General Obligations Law § 5-701 [a][1]). In opposition, plaintiff submitted an affidavit annexing two "will questionnaires": one dated 4/5/2020, which infers that the decedent wanted to give plaintiff one-fourth of his estate; and another dated 1/29/2021, giving plaintiff one-third of his estate (see NYSCEF Doc No 14, plaintiff's affidavit at ¶ 2; NYSCEF Doc Nos 15-16). Plaintiff claims the two will questionnaires were signed by the decedent and submitted to "'Legal Shield' a pre-paid legal service that . . . employed the services of [a] law firm . . . to prepare and supervise execution of a client's last will and testament" but that the wills were not

prepared and executed in accordance with those will questionnaires “[d]ue to illness along with the advent of Covid-19 restrictions (plaintiff’s affidavit at ¶¶ 2-3).

Even if the statute of frauds defect was remedied by plaintiff’s evidence in opposition (see Nonnon v City of New York, 9 NY3d 825, 827 [2007] [“affidavits may be considered . . . to remedy pleading defects and not to offer evidentiary support for properly pleaded claims”]), the claim would be dismissed if the writings failed to “evince ‘a clear and unambiguous manifestation of the testator’s intention to renounce the future power of testamentary disposition’” (Aaron v Aaron, 64 AD3d 1103, 1104 [3d Dept 2009], quoting Matter of Lubins, 250 AD2d 850, 852 [2d Dept 1998]; see Matter of American Comm. for Weizmann Inst. of Science v Dunn, 10 NY3d 82, 91-94 [2008]). “[I]f those writings are unclear as to [decedent’s] intent, parol evidence should be taken to resolve any ambiguity” (*id.* at 92). Here, plaintiff submits that the writings are unambiguous with the decedent’s intent but defendant argues in reply that the writings were not necessarily unequivocal. Specifically, defendant claims that, because wills are ambulatory in nature, any agreement purporting to surrender the power of revocation “requires a threshold showing of clear and unambiguous evidence to give effect to this surrender of rights,” which has not been met. This is not a question that the Court may resolve on a motion to dismiss; therefore that branch of the motion must be denied (see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977] [“unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate”]).

Alternatively, defendant argues that the matter should be removed to the Surrogate’s Court pursuant to CPLR 325 (e), which states: “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.”

“It is true that the Supreme Court and Surrogate's Court have concurrent jurisdiction in matters involving decedents' estates” (Matter of Tabler's Will, 55 AD2d 207, 210 [3d Dept 1976]; see Cipo v Van Blerkom, 28 AD3d 602, 602-03 [2d Dept 2006]). “However, ‘[w]herever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court” (Cipo, 28 AD3d at 602; Nichols v Kruger, 113 AD2d 878, 878-879 [2d Dept 1985]).

Here, although the plaintiff is entitled to commence this action in Supreme Court pursuant to SCPA § 1810, the relief requested — namely, an accounting of the estate and a determination that plaintiff is entitled to one-third of the estate — may be obtained in the Surrogate's Court (see SCPA § 1808 [“whenever a fiduciary rejects a claim in whole or in part all issues relating to the validity and enforceability of the claim shall be tried and determined upon the judicial settlement of his account”]). Accordingly, in such a situation “the Supreme Court ordinarily refrains from exercising its concurrent jurisdiction and the court first assuming jurisdiction should retain it to the exclusion of the other” (Matter of Tabler's Will, 55 AD2d at 210). Additionally, contrary to plaintiff's contentions, the Court finds that the instant litigation would clearly affect the administration of the estate and that the Surrogate's Court, which is the Court that first retained jurisdiction, is better suited to adjudicate the matter.

Accordingly, it is hereby ORDERED that the branch of the motion to dismiss the complaint for failing to state a cause of action is denied; and it is further

ORDERED that the branch of the motion seeking to remove the matter to the Surrogate's Court, New York County, pursuant to CPLR 325 (e) is granted; and it is further

ORDERED that, within 30 days from entry of this order, counsel for the defendant herein shall serve a copy of this order with notice of entry upon the Clerk of this Court (60 Centre Street, Room 141B) and shall contact the staff of the Clerk to arrange for the effectuation of the transfer in an efficient manner; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (see section J);<sup>1</sup> and it is further

ORDERED that the Clerk shall transfer this action and all documents filed herein to said Court; and it is further

ORDERED that the Clerk of this Court and the Clerk of the Surrogate’s Court shall coordinate the transfer of the documents in the file in this case so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to documents that may be in digital format.

This constitutes the decision and order of the Court.



5/13/2022  
DATE

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ALEXANDER TISCH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

<sup>1</sup> The *Protocol* is accessible at the “E-Filing” page on the court’s website: [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh).