

Stevens v Wheeler

2022 NY Slip Op 31699(U)

April 27, 2022

Supreme Court, New York County

Docket Number: Index No. 151129/2021

Judge: David B. Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 151129/2021

HARDIE M. STEVENS, CO-EXECUTOR and ESSEX SAVINGS BANK, CO-EXECUTOR OF THE ESTATE OF JAMES W. STEVENS, DECEASED,

MOTION SEQ. NO. 001

Plaintiff,

- v -

ALFRED WHEELER, THE LAW FIRM OF MCELROY DEUTSCH MULVANEY & CARPENTER, LLP,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISSAL.

Defendants Alfred Wheeler and the Law Firm of McElroy, Deutsch, Mulvaney & Carpenter, LLP (“MDMC”) move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the Complaint in this action for professional malpractice. Plaintiffs Hardie M. Stevens, Co-Executor and Essex Savings Bank, Co-Executor of the Estate (“the Estate”) of James W. Stevens (the “decedent”), oppose the motion and cross-move, pursuant to 22 NYCRR 130-1.1, for the imposition of sanctions against defendants.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, co-executors of the Last Will and Testament (“the Will”) of the decedent, commenced this action seeking to recover damages from defendants, an attorney and his law firm, for, among other things, their alleged negligence in the probate of the decedent’s Will (*see* Complaint, NYSCEF Doc No. 1). Defendants represented the decedent, a former investment

banker, on a variety of matters including the drafting of the Will, which was dated August 20, 2010. (*id.*).

The Will, among other things, provided for certain bequests to specific family members and organizations, and bequeathed the residuary estate to Mary K. Stevens, the decedent's wife, and to Hardie M. Stevens and Mark W. Stevens, the decedent's sons (Will, NYSCEF Doc. No.

6). Specifically, Article Seventh of the Will stated, in relevant part, that:

“If my wife, MARY K. STEVENS, and/or children of mine shall survive me, then but not otherwise, the rest, residue and remainder of my property of whatever kind and wherever situated (herein referred to as my ‘residuary estate’) shall be divided into equal shares in such number that there shall be one share for my wife, MARY K. STEVENS, and one such share to my sons HARDIE M. STEVENS and MARK W. STEVENS, who shall survive me, and I give, devise and bequeath one such share to each of my said wife MARY K. STEVENS, and each of my said sons HARDIE M. STEVENS and MARK W. STEVENS”

(*id.*). The Will also appointed Anson Beard, Jr. and Northern Trust Bank, FSB as executors, and provided for the substitution of Hardie M. Stevens as executor if Anson Beard, Jr. declined the appointment (*id.*). The Will did not include any provision for the replacement of Northern Trust Bank, FSB (*see id.*).

James W. Stevens executed Codicils to the Will (NYSCEF Doc. No. 7) on January 30, 2013 (“First Codicil”), February 4, 2015 (“Second Codicil”), and January 22, 2016 (“Third Codicil”). Article Second of the Third Codicil states, in part:

“I hereby amend ARTICLE SEVENTH of my Last Will and Testament by adding a new Paragraph E at the end thereof, to read as follows:

‘E. Notwithstanding anything contained herein to the contrary, any shares of my residuary estate given, devised, and bequeathed to HARDIE STEVENS, his surviving spouse, or his children LINDSAY A. STEVENS, and

JAMES M. STEVENS, as set forth above in this ARTICLE SEVENTH or below in ARTICLE EIGHTH, shall be paid and distributed by my Executors to the Trustees or Trustee or Trustees then acting under the Agreement of Trust dated the 22nd day of January, 2016, made by me, JAMES W. STEVENS as grantor, and my son HARDIE M. STEVENS as Trustee, to be held and disposed of as an integral part of the principal of the Trustee, to be held and disposed of as an integral part of the principal of the Trust established thereunder, and in accordance with the provisions thereof.”

(*id.*). The Will and Codicils did not contain a choice of law provision (*see* NYSCEF Doc. Nos. 6, 7, *supra*).

James W. Stevens died in Rhode Island on June 30, 2019 (*see* Certificate of Death, NYSCEF Doc. No. 8). MDMC reportedly counseled the Estate to probate the Will in Rhode Island since James W. Stevens was a resident and domiciliary there at the time of his death (*see* Complaint, *supra*). Both Anson Beard, Jr. and National Trust Bank, FSB declined to serve as co-executors of the Estate (*see* Declination Notices, NYSCEF Doc. No. 10).

Hardie M. Stevens, a resident of Rhode Island, retained a Rhode Island attorney to represent the Estate, and filed a Petition for Probate of the Will in Rhode Island on February 3, 2020 (*see* NYSCEF Doc. No. 11). By order entered April 1, 2020, the Probate Court, among other things, appointed Hardie M. Stevens as “Custodian and Appraiser of the Estate ... with bond set at \$60,000,000 without corporate surety” (Order, NYSCEF Doc. No. 12).

On April 29, 2020, Mary K. Stevens filed an Objection to Petition for Probate and Appointment of Executor (“the Objection”) which, among other things, opposed the appointment of Hardie M. Stevens as the sole executor (*see* Objection, NYSCEF Doc. No. 13). The Objection stated, in pertinent part, that:

“Prior to the Testator’s death, [Hardie M. Stevens] relocated the Testator from his primary residence in New York City to the Testator’s second home in Westerly, Rhode Island, and

he restricted visits between the Testator and [Mary K. Stevens]...

The intent of the Testator is clear and unambiguous from the language of Article Tenth. The Testator appointed two executors – an individual and a corporate executor. With respect to the appointment of the individual executor, the Testator appointed [Hardie M. Stevens] to serve only as successor to Anson Beard, Jr., but not as a successor to Northern Trust Bank, FSB”

(NYSCEF Doc. No. 13).

Mary K. Stevens requested, among other things, that “the Court appoint a corporate co-executor to serve with [Hardie M. Stevens]” (*id.*).

On June 29, 2020, the Estate’s Rhode Island attorney withdrew his appearance (*see* Withdrawal of Appearance, NYSCEF Doc. No. 15). Another Rhode Island attorney submitted an Entry of Appearance for Hardie M. Stevens regarding his interest in the Estate (*see* Entry of Appearance, NYSCEF Doc. 16).

On July 31, 2020, Hardie M. Stevens, Mark W. Stevens, and Mary K. Stevens agreed to the entry of a Stipulated Order which, among other things, appointed Hardie M. Stevens and Essex Savings Bank as co-executors and co-appraisers of the Estate, and provided for the distribution of the residuary estate as follows:

- a. First, all (i) debts of the decedent, (ii) funeral expenses ... and (iii) expenses of administration of the estate ... shall be paid from the residue of the probate estate;
- b. Next, an amount equal to one-third of the balance after payment of debts and expenses paid pursuant to paragraph (a) above shall be distributed to Mary K. Stevens without taking into account any federal and state estate, inheritance or death taxes and GST taxes payable by the estate, such amount being equal to the amount left to Mary K. Stevens under the decedent’s will;
- c. Next, an additional amount shall be distributed to Mary K. Stevens, which amount shall be equal to one-half of the difference between (i) that to which Mary K. Stevens would

be entitled pursuant to R.I.G.L §§33-1-5, -6 and -10 in the event that the decedent died intestate and (ii) the amount described in paragraph (b) above;

d. Finally, the remaining balance, less any federal and state estate, inheritance or death taxes payable by the estate, shall be distributed, in equal shares, to Hardie M. Stevens and Mark W. Stevens; and

e. In consideration of the foregoing, Mary K. Stevens shall execute a written instrument, in a form acceptable to the co-executors, waiving any and all rights she may have as surviving spouse to elect a life estate and/or any other share of the decedent's probate estate pursuant to R.I.G.L §33-22-1, et. seq., R.I.G.L. §33-28-1, et. seq., and under the laws of any other jurisdiction”

(Stipulated Order, NYSCEF Doc. No. 17).

Pursuant to the Stipulated Order, Mary K. Stevens and Hardie M. Stevens executed an Agreement stating, in part, that:

“Following the complete administration of the Estate and the distribution of specific bequests as provided in ARTICLES FOURTH, FIFTH and SIXTH of the Will, the residuary assets of the probate estate shall be distributed as follows:

a. First, all (i) debts of the decedent, (ii) funeral expenses ... and (iii) expenses of administration of the estate ... shall be paid from the residue of the estate;

b. Next, an amount equal to one-third of the balance after payment of debts and expenses paid pursuant to paragraph (a) above shall be distributed to [Mary K. Stevens] without taking into account any federal and state estate, inheritance or death taxes and GST taxes payable by the estate, such amount being the amount to which [Mary K. Stevens] is entitled under the decedent's will;

c. Next, an additional amount shall be distributed to [Mary K. Stevens], which amount shall be equal to one-half of the difference between (i) that to which [Mary K. Stevens] would be entitled pursuant to R.I.G.L §§33-1-5, -6 and -10 in the event that the decedent died intestate and (ii) the amount described in paragraph (b) above, with such amount described in (I) being calculated as follows:

I. One-half of the decedent's personal estate after payment of such amounts described in paragraph (a) above, such amount representing a surviving spouse's

share of the personal estate of an intestate pursuant to R.I.G.L. §33-1-10; plus

II. An amount equal to 4.862% of the fair market value of Rhode Island real estate that is part of the estate, such fair market value being (A) the value, as determined for federal estate tax return, the net proceeds from such sale, such amount representing the value of [Mary K. Stevens'] life estate interest pursuant to R.I.G.L. §33-1-5 in such real estate based on her age as of the date of this Agreement.

d. Finally, the remaining balance, less any federal and state estate, inheritance or death taxes payable by the estate, shall be distributed, in equal shares, to Hardie [M. Stevens] and Mark [W. Stevens].

e. [Mary K. Stevens'] interest in and to the real estate located in New York and owned by [Mary K. Stevens] and the decedent as joint tenants with rights of survivorship shall be unaffected by the foregoing.

f. The value of [Mary K. Stevens'] life estate interest shall not include the statutory allowance which may be awarded to the surviving spouse, in the discretion of the Court, pursuant to R.E.G.L. §33-1-6 ...”

(Stipulated Order, NYSCEF Doc. No. 17, Exh. D).

In this action, plaintiffs claim that defendants were negligent in advising that the Will should be probated in Rhode Island, rather than in New York, thereby resulting in an improper distribution of the residuary estate. They maintain that James W. Stevens specifically intended to bequeath his residuary estate equally among Mary K. Stevens, Hardie Stevens, and Mark W. Stevens (*see* Complaint, *supra*). They also assert that defendants submitted invoices for time spent reviewing the Will and Codicils, and counseling the Estate on legal and tax matters, including whether to probate the Will in Rhode Island or New York, and that the invoices were paid in full (*id.*). They further state that New York law (EPTL 5-1.1A) generally provides a surviving spouse's right of election that is equal to one-third of the net estate, whereas Rhode Island law (Rhode Island General Law §33-28-1) provides a right of election that is approximately one-half of the net estate (*id.*). They contend that the probate of the Will in

Rhode Island, and the application of Rhode Island law, resulted in Mary K. Stevens obtaining a larger portion of the residuary estate, and Hardie M. Stevens obtaining a lesser portion, than was contemplated by the Will and Codicils (*id.*). Thus, they claim that defendants' negligent representation gave Mary K. Stevens a right of election that was directly in conflict with James W. Stevens' intended testamentary scheme (*id.*).

Plaintiffs also assert that defendants' negligence stems, in part, from their erroneous conclusion that James W. Stevens was a resident and domiciliary of Rhode Island (*id.*). They note that he executed the Will in New York, and that the Will expressly states that he is "of the City, County and State of New York" (*id.*). They further assert that defendants knew that he and his wife owned a condominium in New York and a vacation home in Rhode Island.; that he had a New York State driver's license; that he was registered to vote in New York; and that he maintained an office in New York (*id.*). Additionally, they maintain that James W. Stevens and his wife had an adversarial relationship prior to his death (*id.*).

As a first cause of action, plaintiffs allege that defendants were negligent in representing James W. Stevens and the Estate, thereby resulting in damages. Plaintiffs also allege that defendants' representation of James W. Stevens and the Estate constituted malpractice (second cause of action), gross negligence (third cause of action), and wanton and reckless conduct (fourth cause of action). In the fifth cause of action, plaintiffs allege that defendants breached their agreement with James W. Stevens and the Estate by, among other things, (i) failing to include in the Will a provision that New York law should govern, and (ii) failing to counsel the Estate about James W. Stevens' intended testamentary scheme and his domicile in New York, resulting in damages to the Estate.

As a sixth cause of action, plaintiffs seek to recover legal fees, accounting fees, and costs allegedly incurred as a result of defendants' negligence, malpractice, gross negligence, wantonly reckless conduct, and breach of their agreement with James W. Stevens and the Estate. In the seventh cause of action, plaintiffs seek a refund of all moneys that James W. Stevens and the Estate paid to defendants from January 1, 2002 to October 31, 2019 for legal, accounting, and tax services in connection with James W. Stevens' legal, estate planning, income tax, estate tax, and gift matters. The remaining causes of action reiterate claims for malpractice (eighth cause of action), gross negligence (ninth cause of action), and wantonly reckless conduct (tenth cause of action) against defendants.

Defendants seek to dismiss the Complaint, pursuant to CPLR 3211(a)(1) and (7), submitting documentary evidence to support their motion. Plaintiffs oppose the motion to dismiss and cross-move seeking the imposition of sanctions against defendants.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleadings are to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, supra*).

Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*). In addressing a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id., quoting*

Guggenheimer v Ginsburg, 43 NY2d 268, 275 [1977]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

Preliminarily, defendants’ assertion that plaintiffs lack standing to bring this action because they are not in privity with defendants is without merit. “[P]rivacy, or a relationship approaching privity, exists between the personal representative of the estate planning attorney” (*Estate of Schneider v Finmann*, 15 NY3d 306, 309 [2010]). The estate stands in the shoes of the decedent and, therefore, has the capacity to maintain a malpractice claim on behalf of the estate (*id.*). The personal representative of the estate should not be prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate (*id.*). As such, plaintiffs, executors of the decedent’s estate, may properly pursue claims against defendants for improper estate planning, resulting in damages to the estate (*see id.*). “Moreover, such a result comports with EPTL 11-3.2(b), ... which generally permits the personal representative of a decedent to maintain an action for ‘injury to person or property’ after that person’s death” (*id.*).

Here, plaintiffs claim that defendants, by counseling that the Will should be probated in Rhode Island under Rhode Island law, rather than in New York under New York law, acted contrary to James W. Stevens’ intended testamentary scheme of bequeathing his residuary estate equally among Mary K. Stevens, Hardie Stevens, and Mark W. Stevens, thus resulting in Mary K. Stevens exercising an alleged right of election under Rhode Island law and obtaining a larger portion of the residuary estate, and Hardie M. Stevens obtaining a lesser portion, than was contemplated by the Will and Codicils. Applying the established standard, this Court concludes

that, to the extent that the Complaint alleges that James W. Stevens and the Estate sustained damages as a result of defendants' actions, plaintiffs, as co-executors, may properly bring an action on behalf of the Estate (*see id.*).

As noted above, plaintiffs assert claims for negligence; legal malpractice; gross negligence; wanton and reckless conduct; breach of contract; attorneys' fees and costs; and a refund of all fees paid to defendants for legal, accounting, and tax services on behalf of James W. Stevens and the Estate from January 1, 2002 until October 31, 2019. Defendants argue that the Complaint fails to set forth a valid claim for damages; that plaintiffs base their allegations on an erroneous reading of Rhode Island law; that plaintiffs speculate as to whether they would have received a more favorable outcome if the Will had been probated in New York; and that plaintiffs fail to show that defendants' alleged acts or omissions proximately caused them injury.

In order to state a viable cause of action for negligence, plaintiffs must allege that defendants owed them a duty of care, and that defendants breached that duty, resulting in damages (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). Plaintiffs insist that defendants breached a duty to them by counseling the Estate to probate the Will in Rhode Island, under Rhode Island law, even though James W. Stevens was a resident and domiciliary of New York, and the Will was executed in New York, thereby affording Mary K. Stevens an alleged right of election to obtain a portion of the residuary estate greater than the amount contemplated by the Will.

Defendants would be entitled to dismissal pursuant to CPLR 3211(a)(1) if they could establish by documentary evidence that they did not breach any duty to plaintiffs, resulting in damages to James W. Stevens or the Estate (*see Shaya B. Pacific v Wilson, Elser, Moskowitz, Edelman & Dicker, supra*). They would also be entitled to dismissal pursuant to CPLR

3211(a)(7) if they could establish either that, as a matter of law, they owed no duty to plaintiffs or, alternatively, that any negligence on their part did not cause any injury to James W. Stevens or the Estate (*id.*).

As discussed previously, the Will and Codicils do not contain any choice of law provisions, and James W. Stevens died in Rhode Island, where he owns a home. Plaintiffs maintain that defendants' advice that the Will should be probated in Rhode Island under Rhode Island law constituted a breach of their duty to represent James W. Stevens and the Estate since, under Rhode Island law, Mary K. Stevens is entitled to waive her bequests under the Will and elect to take a statutorily prescribed share in an amount generally equal to one-half of James W. Stevens' personal property. Plaintiffs assert that the election resulted in Mary K. Stevens obtaining a portion of the residuary estate greater than the amount provided to her in the Will.

However, a review of the plain language of the Rhode Island statutory scheme undermines plaintiffs' position. Rhode Island General Law §33-28-1(a) provides that the surviving spouse of a decedent who dies domiciled in this state has a right of election to take an elective share equal to "(1) [t]he life estate and allowance in an intestate's real estate titled in the name of the decedent individually at the time of the decedent's death pursuant to §§33-1-5 and 33-1-6" and "(2) [t]he share of the decedent's personal estate subject to probate pursuant to §33-1-10. The elective share may be taken in kind or the value thereof." Sections 33-1-5 and 33-1-6 are inapplicable here since James W. Stevens did not die intestate. Similarly, §33-1-10 does not apply since it concerns "[s]urplus personalty not bequeathed," not an expressly devised residuary estate. "If the language is clear on its face, then the plain meaning of the statute must be given effect" (*Gilbane v Poulas*, 576 A2d 1195, 1196 [R.I. 1990]). Thus, §33-28-1 does not provide

Mary K. Stevens with a right of election to obtain a larger portion of the residuary estate than that contemplated by the Will.

Moreover, defendants establish by documentary evidence that they did not breach any duty of care owed to plaintiffs, and that the Estate was not damaged by the probate of the Will in Rhode Island. The Stipulated Order and ensuing Agreement entered into between Mary K. Stevens and Hardie M. Stevens, which resolved the Objection filed by Mary K. Stevens, set forth the portion of the residuary estate that she was to receive. The decision to resolve the Objection was the sole basis for the amendment to Mary K. Stevens' share of the residuary estate. The plaintiffs do not allege that decision to resolve the Objection was compelled by Rhode Island law. Rather, Hardie M. Stevens acknowledges that he entered into the Agreement with Mary K. Stevens to amend and restate the residuary shares under the Will (*see* Stevens Affid., NYSCEF Doc. No. 28). It is undisputed that defendants did not represent Hardie M. Stevens in connection with the decision to enter into the Stipulated Order and Agreement. Thus, defendants are entitled to dismissal of the negligence claim.

The claims for malpractice, gross negligence, wanton and reckless conduct in the second, third, fourth, eighth, ninth, and tenth causes of action are dismissed as duplicative of the negligence claim since they are predicated on the same allegations (*see Alphas v Smith*, 147 AD3d 557, 558 [1st Dept 2017]).

The fifth cause of action, alleging breach of contract, is also dismissed. "The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of [its] contractual obligations, and damages resulting from the breach" (*Dee v Rakower*, 112 AD3d 204, 208 [2d Dept 2013]). Here, plaintiffs' breach of contract claim, based upon

defendants' purported "fail[ure] to exercise due care" in the performance of their agreement with James W. Stevens and the Estate, is merely a redundant pleading of the negligence cause of action (*see, Between the Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Veiner*, 290 AD2d 380 [1st Dept 2002]).

The sixth cause of action, seeking legal fees, accounting fees, and costs based on defendants' negligence, malpractice, gross negligence, wanton and reckless conduct, and breach of contract, and the seventh cause of action, seeking a refund of fees paid to defendants, must also be dismissed since they do not involve facts different from those alleged in the underlying causes of action, and do not allege distinct damages (*see Iannucci v Krucker & Bruh, LLP*, 42 AD3d 436, 437 [2d Dept 2007]). Thus, the Complaint is dismissed in its entirety.

The cross motion for the imposition of sanctions against defendants is denied (*see* 22 NYCRR 130-1.1).

Accordingly, it is hereby:

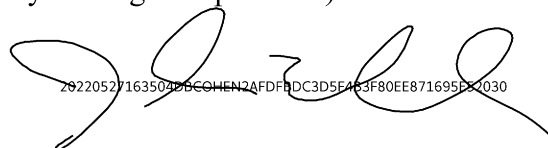
ORDERED that the motion by defendants Alfred Wheeler and the Law Firm of McElroy, Deutsch, Mulvaney & Carpenter, LLP ("MDMC") is granted and the Complaint is dismissed, with costs and disbursements to said defendants, as taxed by the Clerk upon the submission of the appropriate bill of costs; and it is further

ORDERED that the cross motion by plaintiffs Hardie M. Stevens and Essex Savings Bank, as Co-Executors of the Estate of James W. Stevens, is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for the defendants shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office 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).



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4/27/2022

DATE

DAVID B. COHEN, 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