

Vlahakis v Vlahakis

2022 NY Slip Op 32413(U)

July 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 506913/2020

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

**DONNA VLAHAKIS, on her own behalf, and
derivatively on behalf of 1729 67 Street, LLC,
1601 65th Realty, LLC, 1729 Realty Corp.
and 1601 Management Corp.,**

Plaintiff,

- against -

DECISION/ORDER

Index No. 506913/2020

Motion Seq. No. 5

Date Submitted: 7/7/2022

DMITRI VLAHAKIS,

Defendant.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>90-118</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>119-146</u>
Reply Affirmation.....	<u>147</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This action is a dispute between siblings over their deceased parents' real estate. Their father's name was Theodore Vlahakis, and he passed away in 2014. When he died, he left as distributees his wife and his two children, the plaintiff and the defendant herein. He left a will, executed in 1967, which was probated in Surrogate's Court, Kings County, File 2015-2837. He left his entire estate to his wife and named her Executrix. She was granted Letters in 2016. These documents are in Doc 257 of the related action described in the next paragraph.

Before this action was commenced, the parties' mother commenced a suit against both of her children, and against plaintiff's husband and law partner Derrick Hanna, titled, *Zenovia Vlahakis Individually and derivatively as a member, and on behalf of, 1601 6TH*

REALTY, LLC, and 1729 67TH ST., LLC v Donna Vlahakis, et al, 523904/2019. Their mother subsequently passed away on December 19, 2021, and has been substituted by her Executor, Pamela Zaremba, by order of another Justice, dated June 21, 2022. The siblings are represented by the same attorneys in both actions. Counsel for plaintiff Donna Vlahakis herein, is her law partner and spouse Derrick Hanna, who is a defendant in the earlier action. He is apparently representing himself in the other action. However, their mother's estate is represented by a firm not involved in this action at all. Although both actions involve the real property identified as 1601 65th Street and 1729 67th Street in Brooklyn, NY, the related action involves additional property.

In plaintiff's amended complaint, dated July 21, 2020 [Doc 113], after this court dismissed two of the causes of action in an order dated October 20, 2020, she alleges that defendant, her brother, breached the contract with regard to management of the two buildings, that he breached his fiduciary duty to her, and she demands an accounting. Defendant answered the amended complaint [Doc 115] and asserted counterclaims for conversion and unjust enrichment, for an accounting, and for a declaratory judgment that plaintiff improperly transferred the two Brooklyn properties from two LLCs [the ones in the caption] to two corporations [the ones in the caption], and for an injunction "prohibiting the plaintiff from transferring, selling, mortgaging, etc." Plaintiff replied to the counterclaims [Doc 116].

In the related action, the injunction requested in defendant's counterclaim was issued as against all parties in that action, by order dated February 26, 2020 on Motion Seq. #3. In the related action which was commenced by their mother before she passed away, she was represented by a different attorney than is now representing her Executor. Mrs. Vlahakis avers in the complaint that she was eighty-five years old, and that she was

living on the rental income from the properties until her daughter (plaintiff here) wronged her. She states that Donna Vlahakis [¶2] “(i) secretly, wrongfully and without authority transferred two of the properties owned or co-owned by Mrs. Vlahakis to a corporation owned by Donna, (ii) converted to her own use and benefit rents from three of the properties owned or co-owned by Mrs. Vlahakis and (iii) withheld from Mrs. Vlahakis proceeds in the sum of approximately \$150,000 from the sale of a fourth property in Howell Township, New Jersey owned or co-owned by her. Neither Donna nor any of the other defendants herein (other than Dimitri) have any legal entitlement to any of those properties, proceeds or rents.” There are no claims in the complaint against Dimitri, and decedent states that he would not join her as a plaintiff and sue his sister, so [¶22] “Dimitri is named as a defendant herein as he owns an interest, through the LLCs, in one or more of the properties in which Mrs. Vlahakis has an interest.” The court notes that this related action includes the two buildings which are the subject of the 2020 action, plus additional assets.

In this motion, filed while the related case was stayed due to their mother’s death, and submitted less than two weeks after the stay was lifted and the Executor substituted, plaintiff Donna Vlahakis seeks summary judgment against her brother. Without any notice to the Executor of her mother’s estate, or her attorney. The basis for plaintiff’s alleged entitlement to summary judgment, her attorney/spouse avers in his affirmation in support, is that “documentary evidence makes a prima facie showing of entitlement as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact.”

Plaintiff provides an affidavit in support, as is required when a party is an attorney, in which she states that these two buildings were owned by two LLC’s when her father was alive, the two LLCs in the caption, and that between them, there are 100 apartments. She

then states that [Doc 93 ¶5] “In May, 2012, my father gave ownership of those companies to me as an *inter vivos* gift. My father asked me to go to his office because he wanted to give me ownership of two apartment buildings. My father told me that he wanted me to own 1601 65th Street and 1729 67th Street. He opened a large safe in his office and presented me with the limited liability company books and certificates and asked me to sign them and make them mine. He told me to put the certificates in my name and make myself the sole member/partner of the LLCs. I accepted the gift and did what my father instructed. I signed the certificates for the two LLC's; for 1601 65th Realty, LLC and 1729 67 Street., LLC as per his request.” She references the certificates as Exhibit 2 [Doc 96]. They are certificates signed by her alone. As are the alleged LLC “operating agreements” at Doc 97.

The purported statements of her father violate the Dead Man's Statute¹, and in any event, are hearsay. She next provides a copy of an agreement she alleges is between herself and her brother, the defendant, which is both witnessed and notarized by her husband. None of these items constitutes “documentary evidence” as defined by the law in New York. Further, motions based on documentary evidence are ordinarily motions to dismiss pursuant to CPLR 3211(a)(1), not motions for summary judgment (*Garcia v Shah*, ___AD3d___, 2022 NY Slip Op 03501 [2022]). Plaintiff does not say which cause of action she seeks summary judgment on, and in any event, she could only seek summary judgment on the request for an accounting, as breach of fiduciary duty and breach of contract could only result in summary judgment on the issue of liability and would still require a damages trial. But she does not make a prima facie case on any of the causes of action.

Documentary evidence, as discussed with regard to motions to dismiss, must “utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a

¹ CPLR 4519.

matter of law” (see *Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 106; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *Leon v Martinez*, 84 NY2d 83, 88; *Bonavita v Govt. Empls. Ins. Co.*, 185 AD3d 892). "To be considered documentary, evidence must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable" (*Bath & Twenty, LLC v Federal Sav. Bank*, 198 AD3d 855, 855-856; see *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v*

City of New York, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also

Benetatos v Comerford, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

In opposition to the motion, defendant's attorney submits an affidavit from defendant, which refutes all of plaintiff's claims, an attorney's affirmation and a number of inadmissible documents for the purpose of refuting plaintiff's claims. For example, he provides a copy of the Operating Agreement for 1601 65th Realty, LLC, which says at Article V that the names and addresses of the Members are as stated on Schedule A. Schedule A lists defendant Dimitri Vlahakis and the parents, but not plaintiff. If this document is authenticated, it establishes that Theodore Vlahakis had a 25% interest, and that is all he could have transferred to his daughter, if in fact there was a transfer. While the documents are not in admissible form, the court need not read defendant's papers in opposition at all, as plaintiff has failed to make a prima facie case for summary judgment. (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017].)

Accordingly, it is **ORDERED** that the motion is denied.

IT IS FURTHER **ORDERED** that this matter is hereby transferred to Part COMM 12, to proceed to joint discovery with *Zaremba as Executor v Vlahakis, et al*, Kings County Index 523904/2019. It is suggested that one of the parties make a motion for a joint trial or submit a stipulation to be so-ordered for a joint trial.

This constitutes the decision and order of the court.

Dated: July 22, 2022

ENTER:


Hon. Debra Silber, J.S.C.