

Buff v Pierro
2022 NY Slip Op 32470(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 153373/2022
Judge: Lori Sattler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LORI SATTLER PART 02TR

Justice

-----X

CAROLYN BUFF,

Plaintiff,

- v -

LOUIS PIERRO,

Defendant.

-----X

INDEX NO. 153373/2022

MOTION DATE 06/30/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 21

were read on this motion to/for DISMISSAL.

Defendant Louis Pierro (“Defendant”) moves for an Order dismissing Plaintiff Carolyn Buff’s (“Plaintiff”) Verified Complaint in its entirety as premature due to a purportedly identical action previously commenced in Dutchess County Supreme Court and/or dismissing the Verified Complaint pursuant to the doctrines of res judicata or collateral estoppel. Plaintiff opposes the motion. That branch of the motion seeking dismissal due to the then-pending Dutchess County Supreme Court action is moot as Plaintiff has withdrawn that action.

Plaintiff served a Summons and Verified Complaint in this action asserting attorney misconduct pursuant to Judiciary Law § 487. She claims that Defendant was the attorney retained by her now deceased father Alfred Buff (“Buff”) to assist with his estate planning. Ultimately, the will that he prepared was offered for probate by Buff’s second wife Lenore Nemeth and nephew James Millstein. She points to an affidavit submitted by Defendant in the probate action in Dutchess County Surrogate’s Court in which he states that Buff was of “sound mind, memory and understanding” and that Buff was “not suffering from any defect of sight,

hearing or speech, or from any other physical [sic] or physical impairment” that would impact his testamentary capacity. Defendant was also deposed in that action.

After discovery in the Surrogate’s Court proceeding, Ms. Nemeth and Mr. Millstein moved for summary judgment. Plaintiff filed objections in the proceeding with one objection asserting that Buff purportedly lacked testamentary capacity. In a Decision, Order and Decree filed and entered on November 23, 2021 (Hon. Michael G. Hayes, S.C.J.) (“November 23, 2021 Decision”) (NYSCEF Doc. No. 9), the Surrogate found that Buff understood the nature and consequences of his will. He further found that the testimony of Defendant in that action satisfied as an examination of testamentary capacity and that Buff understood who would be the “natural objects of his bounty,” but that he wanted to provide for his second wife after his death. After her passing or remarriage, Buff chose to provide for his children. He points to the testimony of the long relationship between Defendant and Buff as part of which Defendant stated that Buff “carefully considered the roles of his family members as fiduciaries and beneficiaries” before executing the documents that carried out his intent.

The November 23, 2021 Decision notes that Buff’s son acknowledged that he was aware of his father’s estate plan which prioritized support for his second wife. The Surrogate also points to the testimony of Mr. Millstein, in which he stated that Buff was aware of his assets and of his real property in Red Hook, New York and in New York City. He further stated that Buff displayed an understanding of his brokerage accounts at Raymond James, as well as accounts at Citibank and Chase. Mr. Millstein further indicated that Buff was aware that an account that he had at Citibank would pass directly to his wife as a non-probate asset. In reviewing all of the evidence and noting the lack of admissible evidence presented by Plaintiff, the Surrogate

rendered a decision finding that Buff possessed the requisite testamentary capacity on May 5, 2018 to dispose of his estate by will.

Plaintiff appears to raise the same issues in this action as she did in the objections she interposed in the Surrogate's Court proceeding. She indicates that she has appealed the November 23, 2021 Decision, which she contends relied exclusively on Defendant's "impugned affidavit." She further asserts that the "evidence will reveal" that her father did not have the capacity to understand his will and the trusts that he set up. She further contends that Defendant provided no admissible independent support for his assertion in his affidavit with respect to testamentary capacity and that he cannot refute certain recording and medical documentation which cast doubt on his affidavit. The recordings and the medical records were found to be inadmissible in the November 23, 2021 Decision. Lastly, she appears to contend that she was damaged because the November 23, 2021 Decision was based "almost entirely" on Defendant's affidavit.

On a motion to dismiss, courts must accept as true the facts as alleged in the complaint and grant plaintiffs every possible inference (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). Although favorable inferences are presumed to be true, they "may be properly negated by affidavits and documentary evidence" (*Whilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

An attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" is guilty of a misdemeanor under Judiciary Law § 487. A plaintiff must "allege the elements of a cause of action under the statute, i.e., intentional deceit and damages proximately caused by the deceit" (*Nehmadi v Claude Castro*

& Assoc. PLLC, 204 AD3d 544 [1st Dept 2022]). Allegations regarding an act of deceit or an intent to deceive must be stated with particularity (*Facebook Inc. v DLA Piper LLP*, 134 AD3d 610, 613 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]).

After reviewing the Verified Complaint and granting Plaintiff every possible inference, the Court finds that this action must be dismissed pursuant to CPLR 3211(a)(1), (5), and (7). Plaintiff's only cause of action alleges that Defendant submitted an affidavit and provided deposition testimony that was false or untruthful in the face of documents and recordings submitted in the Surrogate's Court proceeding which she claims shows that his affidavit was incorrect. The Verified Complaint does not plead with specificity the allegations of fraud and deceit. Further, Defendant's affidavit filed in support of the motion to dismiss this action, which he states that he believes Buff had the requisite capacity and understood his estate plan, negates a claim of intentional deceit. Similarly, the November 23, 2021 Decision clearly indicates, contrary to Plaintiff's assertions, that Defendant's affidavit and testimony were not the sole basis for the Surrogate's determination as to Buff's testamentary capacity. The November 23, 2021 Decision also refers to statements made by Buff's son (Plaintiff's brother) as well as his nephew that supported his finding of capacity.

Even were this Court to determine that Plaintiff sets forth a valid cause of action, the action would be dismissed under the doctrine of collateral estoppel. "Collateral estoppel has been described as applying where the issue in the first proceeding is the point actually to be determined in the second action or proceeding such that a different judgment in the second would destroy or impair rights or interests established by the first" (*BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556, 560 [1st Dept 2010], *citing Ryan v New York Tel. Co.*, 62 NY2d 494, 501 [1984] [internal quotation marks omitted]).

In the November 23, 2021 Decision, the Surrogate found that Buff possessed testamentary capacity at the time he executed his estate planning documents crediting the testimony and affidavit of Defendant in addition to other evidence. A finding that Defendant violated Judiciary Law § 487 would undermine that decision and would destroy and impair the interests established in the Surrogate Court proceeding.

For the reasons set forth above, Defendant’s motion is granted, and it is hereby:

ORDERED that Defendant’s motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of Defendant dismissing this action, together with costs and disbursements to Defendant, as taxed by the Clerk upon presentation of a bill of costs.

7/22/2022
DATE


LORI SATTLER, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE