

Buff v Nemeth
2022 NY Slip Op 32906(U)
August 23, 2022
Supreme Court, New York County
Docket Number: Index No. 651235/2022
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY BANNON

PART

42

Justice

-----X

CAROLYN BUFF,

Plaintiff,

- v -

LENORE NEMETH,

Defendant.

-----X

INDEX NO. 651235/2022MOTION DATE 08/10/2022MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 22, 24, 25, 26, 27, 28, 30

were read on this motion to/for

DISMISS

I. INTRODUCTION

The plaintiff, Carolyn Buff, appearing *pro se*, seeks damages for breach of contract and unjust enrichment regarding assets bequeathed by her late father to the defendant, Lenore Nemeth, his wife. The gravamen of the complaint is that defendant made an oral promise to her husband to provide in her own will that some assets, including a \$1.5 million account at Citibank, would pass to the plaintiff and her brother and that she did so in order to induce him to leave all of his assets to her alone. The defendant moves, pre-answer, (1) pursuant to CPLR 3211(a)(5) to dismiss the complaint on the ground that it is barred by the doctrines of res judicata or collateral estoppel and (2) pursuant to 22 NYCRR 130-1.1(a) to impose sanctions against the plaintiff. The plaintiff opposes the motion. The motion is granted in part.

II. BACKGROUND

The Last Will and Testament of Alfred M. Buff, the plaintiff's father, was the subject of a probate proceeding in the Dutchess County Surrogate's Court (File No. 2018-906), the petition having been brought by Lenore Nemeth and her co-executor James Milstein. The defendant conceded that her deceased husband desired that some assets left to the defendant were to pass, upon her death, into a family trust to benefit the plaintiff and her brother. The defendant argued, however, that she made no binding promise and has no contractual obligation to

dispose of her late husband's estate in any particular manner and is free to devise her own will as she wishes. The plaintiff filed objections to probate alleging, in essence, that her father lacked testamentary capacity when he executed his will shortly before his death in 2018 and that the defendant's promise to pass some of the father's assets down to her and her brother was binding and enforceable. The plaintiff's objections were dismissed by an Order and Decree of the Surrogate (Hayes, J.) dated November 23, 2021. In that order, the Surrogate, in rejecting plaintiff's claim for a constructive trust, expressly stated that "[t]here has been no evidence offered to establish that Ms. Nemeth made any promise or commitment to the decedent concerning non-probate assets, such as the joint account [of decedent and Nemeth] at Citibank." No appeal was taken.

In the meantime, on March 18, 2021, the plaintiff commenced an action in this court against Nemeth, Carolyn Buff v Lenore Nemeth, Index No. 152732/2021 (the "2021 action"). The 2021 complaint included causes of action for fraudulent misrepresentation, breach of fiduciary duty and unjust enrichment. The plaintiff complained that the defendant did not contribute to the marital property shared with her father, including to a \$1.5 million joint account at Citibank, and that, relying on a promise by the defendant to leave assets to his children, left her all of his assets. According to the plaintiff, her father intended, and at some point informed her, that after his death the Citibank funds were to be moved to a family trust account for the benefit of the plaintiff and her brother and that the defendant was to receive from the trust an annual income of \$80,000.00 and a life tenancy in his Manhattan apartment, and that an upstate New York property owned by the father and the defendant was to be sold to fund the trust. The plaintiff also alleged in the 2021 complaint that the defendant exerted undue influence over her father and defrauded him into executing his will. Specifically, in regard to the unjust enrichment claim, the plaintiff alleged that "the defendant received a financial benefit at the expense of her and her brother."

On December 1, 2021, this court (Tisch, J.), granted the defendant's pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(3), lack of capacity to sue, CPLR 3211(a)(4), prior pending action, and CPLR 3211(a)(7), failure to state a cause of action.

In regard to capacity, the court held that the plaintiff lacks capacity to sue on behalf of the estate or her late father and noted that she sued in her individual capacity and sued the defendant in her individual capacity, not as an executor of the estate. The court expressly noted

that some of the plaintiff's allegations in regard to the breach of fiduciary duty claim had already been made in the probate proceeding, which was ongoing at that time, and concluded that the plaintiff "raises nothing separate and apart from the issues before the Surrogate that should be addressed here in Supreme Court instead." In rejecting the plaintiff's claims based on an alleged promise or agreement, the court observed that the plaintiff failed to allege that the defendant owed her a duty of care when she executed her 2013 will, a necessary element of a negligent misrepresentation claim. The court further held that, even if made, any such promise of agreement would be enforceable only upon the death of the promisor since the "plaintiff, 'as a potential beneficiary under the defendant's 2013 will, enjoys only expectancy interests and not vested legal rights' (Brown v Brown, 12 AD3d at 176 (1st Dept. 2004) *quoting* Blackmon v Estate of Battcock, 78 NY2d 735, 739 (1991))."

In regard to the unjust enrichment claim, the court held that all of the plaintiff's other claims were "defective" and "asserting an unjust enrichment claim is not going to remedy those defects." The court further explained that a claim for unjust enrichment "'is not a catchall cause of action to be used when others fail.'" (Corsello v Verizon New York, Inc., 18 NY3d 777, 790 (2012)). No appeal was taken from that order.

The instant action was filed on March 16, 2022, three months after dismissal of the prior complaint. This complaint contains two causes of action - breach of contract and unjust enrichment - based on the same underlying facts as alleged in the 2021 action and the proceedings in the Surrogate's Court, except that this complaint is narrower since it focuses the Citibank account, the non-probate asset referred to by the Surrogate. In this complaint, the plaintiff again alleges that her father established a joint account with the defendant at Citibank with approximately \$1.5 million, to which the defendant contributed no money, and that the defendant failed to honor her father's wishes and her promise to him after his death to pass this asset to the plaintiff and her brother in her will, and that this amounts to a breach of contract. The plaintiff alleges that the defendant invoked the statutory spousal right of election of 1/3 of the estate, or \$2.3 million, and gave no portion to her or her brother.

The plaintiff's unjust enrichment claim in this action is identical to that of the unjust enrichment claim dismissed in the 2021 action, *i.e.*, she again alleges that the defendant received a financial benefit at the expense of her and her brother. The plaintiff further proffers, without support, that she has standing to bring claims against the defendant since the promise

allegedly made by the defendant to plaintiff's father was intended to benefit her and her brother. As a remedy, the plaintiff seeks the imposition of a constructive trust of the \$2.3 million distributed to the defendant from the estate with the plaintiff and her brother named as beneficiaries, limiting the defendant's allowable withdrawals to \$80,000.00 annually. The instant motion ensued.

III. DISCUSSION

A. Motion to Dismiss

The defendant moves pursuant to CPLR 3211(a)(5) to dismiss the complaint on the ground that it is barred by the doctrines of res judicata or collateral estoppel. That branch of the motion is granted.

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 347 (1999); see Matter of Reilly v Reid, 45 NY2d 24 (1978). In order to establish that claim preclusion acts as a valid basis for dismissal of an action, the party invoking claim preclusion must show: "(1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions." Paramount Pictures Corp. v Allianz Risk Transfer AG, 31 NY3d 64, 73 (2018) (citing cases). As a general rule, New York applies a "transactional approach" to analyzing the doctrine of res judicata, so that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." O'Brien v Syracuse, 54 NY2d 353, 357 (1981); see Matter of Hunter, 4 NY3d 260 (2005); Nationwide Mut. Ins. Co., v U.S. Underwrites Ins. Co., 151 AD3d 504 (1st Dept. 2017).

Similarly, the doctrine of collateral estoppel, or issue preclusion, "precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." Kaufman v Eli Lilly & Co., 65 NY2d 449 (1985). Collateral estoppel requires two distinct elements: "that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." Allied Chem. v. Niagara Mohawk Power Corp., 72 NY2d 271 (1988); In re Hofmann, 287 AD2d 119 (1st Dept. 2001).

Applying the above standards to this case makes clear that the instant action is barred under both doctrines. First, the 2021 action concluded in a final judgment on the merits. The complaint was dismissed in its entirety upon the defendant's motion. Second, it cannot be disputed that there is identity of parties in the 2021 action and this action since the two actions bear identical captions. Third, there is an identity of claims in the two actions, as they all arise from the same transaction or series of transactions. See Paramount Pictures Corp. v Allianz Risk Transfer AG, supra. In the 2021 action, the plaintiff maintained that her father made an oral agreement with the defendant to transfer certain assets to her, including a Citibank account containing \$1.5 million, and the right to live in the Manhattan apartment, on the condition that she leave certain assets to the plaintiff and her brother. These allegations are essentially identical to those in the instant action.

Both complaints include the very same unjust enrichment cause of action. While the 2021 complaint also includes claims for fraud and breach of fiduciary duty and the instant action includes a breach of contract cause of action, the various theories propounded are all premised upon the same allegations. Res judicata concerns the substance of the claim asserted, and so bars alternative theories of recovery arising out of a single transaction. See O'Brien v. Syracuse, 54 NY2d 353 (1981). Although the 2021 complaint did not specifically allege "breach of contract", the plaintiff is barred from asserting that claim here because she could have asserted that theory in the prior action. See Matter of Hunter, supra; Aboelnaga v Nat'l. Bank of Canada, 205 AD3d 636 (1st Dept. 2022). The plaintiff has simply repackaged the same allegations as a breach of contract claim here.

In any event, even if not previously litigated, any breach of contract claim would fail on the ground that the plaintiff lacks capacity to assert such a claim. She was not a party to the alleged agreement between her father and the defendant regarding her will and does not otherwise allege any contractual relationship or privity of contract with the defendant. It is well settled that "[p]rivacy between a plaintiff and a defendant is required to support a breach of contract claim." Tutor Perini Bldg. Corp. v Port Auth. of New York and New Jersey, 191 AD3d at 569 (1st Dept. 2021), and that generally, only parties in privity may enforce the terms of the contract. See ComJet Aviation Mgt. v. Aviation Invs. Holdings, 303 AD2d 272 (1st Dept. 2003); Freeford Ltd. v Pendleton, 53 A.D3d 32 38 (1st Dept. 2008). The plaintiff's conclusory assertion that she has standing as an intended beneficiary was rejected in the prior action and does not

save her complaint here. As explained by the court in the order dismissing the prior action, even if any such promise or agreement were made by the defendant to plaintiff's father, the plaintiff, at most, would have "only expectancy interests and not vested legal rights." In that regard, the court notes that the plaintiff's brother, who she claims to also be an intended beneficiary, is not a party to this or the 2021 action. Nor can she represent his interest in any action. And, even prior to the 2021 Supreme Court action, the essence of both of the plaintiff's present claims of breach of contract and unjust enrichment was litigated in the Surrogate's Court, which rejected her arguments and denied her objections to probate. For that reason, dismissal of the prior complaint was based in part on that prior pending action (CPLR 3211[a][4]).

Collateral estoppel is also applicable here as the plaintiff is improperly attempting to relitigate issues already decided against her after she had a fair opportunity to fully litigate those issues. See Kaufman v Eli Lilly & Co., supra. For example, as to her core assertion in this action, that the defendant made some binding promise or agreement in regard to the Citibank account that entitled the plaintiff and her brother to that particular asset of her father, the same assertion was made in both the Surrogate's Court proceeding and in the 2021 Supreme Court action. As previously stated, the Surrogate found that "[t]here has been no evidence offered to establish that Ms. Nemeth made any promise or commitment to the decedent concerning non-probate assets, such as the joint account [of decedent and Nemeth] at Citibank" and declined to impose any constructive trust, and the Supreme Court concluded that the plaintiff "raises nothing separate and apart from the issues before the Surrogate" and dismissed her complaint pursuant to CPLR 3211(a)(3), (a)(4) and (a)(7).

B. Sanctions

The defendant asks the court to impose sanctions against the plaintiff pursuant to 22 NYCRR 130-1.1(a) for commencing this action. That branch of the motion is denied.

22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct ... In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against ... a party to the litigation." Frivolous

conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c).

While the plaintiff's conduct in commencing this action certainly approaches frivolous within the meaning of the 22 NYCRR § 130-1.1, the court declines to impose sanctions at this juncture. However, the plaintiff, who boasts some legal education and experience, is cautioned against frivolous litigation in the future.

Any relief not expressly granted herein is denied.

IV. CONCLUSION

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the defendant's motion is granted to the extent that the complaint is dismissed pursuant to CPLR 3211(a)(5), and the motion is otherwise denied, it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

08/23/2022
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

☒

CASE DISPOSED

GRANTED

☐

DENIED

☒

NON-FINAL DISPOSITION

GRANTED IN PART

☐

OTHER