

<b>Scott v Wade</b>
2022 NY Slip Op 33880(U)
November 15, 2022
Surrogate's Court, Bronx County
Docket Number: Supreme Court Index No. 33035/2020
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

November 15, 2022

Lorri Scott, *et al.* v. Kim Wade, individually and  
as Preliminary Executor of the  
Estate of Robert L. Scott, *et al.*

Supreme Court Index No.: 33035/2020  
Bronx Surrogate's Court File No.: 2020-506/D

This action asserts various claims sounding in fraud against, among others, the estate's preliminary executor and a beneficiary under a purported will being offered for probate in a separate estate proceeding. Originally brought in the Supreme Court, Bronx County, the action was subsequently transferred to this court pursuant to CPLR 325 (e).

Two of the defendants, Kim Wade ("Kim") and Robert Wade ("Robert"), now move for an order: (i) dismissing the amended complaint under various provisions of CPLR 3211(a) and (ii) canceling a notice of pendency recorded against the estate's real property located at 942 East 220<sup>th</sup> Street, Bronx, New York. In opposition, the plaintiffs cross-move for an order granting leave to file an amended complaint and denying the defendants' motion.

**BACKGROUND**

The decedent, Robert Scott, died on January 30, 2020, allegedly leaving a Last Will and Testament dated December 21, 2019 (the "Will"). Ostensibly, the Will bears the decedent's signature, was drafted by

an attorney who also supervised its execution, and contains an attestation clause signed by two witnesses. Those witnesses also executed affidavits pursuant to SCPA 1406 which state, inter alia, that the decedent appeared to be of sound mind and free from restraint when he executed the Will.

The decedent's estate consists primarily of real property located at 942 East 220<sup>th</sup> Street, Bronx , New York (the "Realty"), which is encumbered by a substantial mortgage. The Will bequeaths the decedent's entire estate in equal shares to defendants Kim and Erroll Holloway ("Erroll"), who are the decedent's step-children.

Kim is the Will's nominated executor. On June 23, 2020, she filed a petition seeking a decree admitting the Will to probate and awarding her letters testamentary (the "Probate Proceeding," File No. 2020-506/B). By an order dated July 31, 2020, the court issued preliminary letters testamentary to Kim. Those letters, which contain SCPA 805(3) restrictions preventing the sale of the Realty without the court's permission, were extended for an additional six months by an order dated October 19, 2022.

As set forth in the probate petition, the decedent was survived by five distributees: Lorri Scott ("Lorri"), Robin Scott ("Robin"), Elaine Scott-Morton ("Elaine"), Ayanna J. Lee ("Ayanna") and Sierra N.L. ("Sierra"). Lorri, Robin and Elaine, the plaintiffs herein, are the decedent's biological daughters. Ayanna and Sierra are the issue of the decedent's predeceased daughter. As Sierra is an infant, the court appointed a guardian ad litem to protect her interests in the Probate Proceeding. All of the other distributees

have appeared in the Probate Proceeding and are represented by counsel.

On November 3, 2020, the plaintiffs commenced the instant action (the “Supreme Court Action”) against Kim, Robert (who is Kim’s son) and Errol in the Bronx County Supreme Court. Kim and Robert have appeared through counsel. To date, Errol has not been served with process or appeared in the Supreme Court Action.

In conjunction with the Supreme Court Action, the plaintiffs recorded a notice of pendency in the Bronx County Clerk’s office against the Realty. Shortly thereafter, Lorri and Robin filed objections to the Will in the Probate Proceeding alleging, inter alia, that it was the product of fraud, undue influence and a lack of capacity. Consequently, the court issued an SCPA 1411 citation that was served upon Errol, completing jurisdiction in the Probate Proceeding. Errol did not appear on return date of the SCPA 1411 citation, nor has he opposed the relief sought by Kim in the Probate Proceeding to date.

By an order to show cause in the Supreme Court Action dated December 9, 2020, Kim and Robert moved to have the case transferred to the Bronx Surrogate’s Court pursuant to CPLR 325 (e). On January 20, 2021, the Honorable Wilma Guzman issued a Decision and Order: (i) removing the Supreme Court Action and its appurtenant notice of pendency to the Bronx County Surrogate’s Court, and (ii) staying all proceedings in the Supreme Court Action, subject to the further order of the Bronx County Surrogate. On July 21, 2022, this court rendered an order from the bench

lifting the stay.

The parties in the Probate Proceeding are currently conducting discovery. By a written stipulation in the Supreme Court Action dated August 4, 2022, the parties agreed to a briefing schedule for the defendants to file a pre- answer motion to dismiss. The instant motion to dismiss and cross-motion by the plaintiffs were filed in accordance with that stipulation, wherein it was agreed that they would be marked “submitted” on October 13, 2022.

On the submission date, a member of the court’s Law Department met with counsel for the parties in the Supreme Court Action to discuss the motion and cross-motion. During this conference, there were no requests by either counsel to file further papers nor did they voice any objections to the matter being marked submitted for a decision. Additionally, both attorneys stipulated to dismissing all claims against Errol in the Supreme Court Action, without prejudice.

## **DISCUSSION**

### **The Motion To Dismiss**

Initially, the defendants moved to dismiss the original complaint on multiple grounds under CPLR 3211 (a). With their cross-motion, however, the plaintiffs submitted a proposed amended complaint and requested leave to file it pursuant to CPLR 3025 (a) and (b). In reply, the defendants asked the court to apply their dismissal motion to the amended complaint if such leave was granted.

To date, an answer has not been served in the Supreme Court Action. Therefore, the plaintiffs' request to file their proposed amended complaint is granted as a matter of right (see CPLR 3025 [a]). Further, the defendants' application to have their dismissal motion apply to the amended complaint is also granted (see *Sage Realty Corp. v. Proskauer Rose LLP*, 251 AD2d 35 [1<sup>st</sup> Dept. 1998]; *Shalom & Zuckerbrot Realty Corp. V. Coldwell Banker Comm. Group, Inc.*, 138 Misc2d 799 (Sup Ct, Queens County 1988). In the interest of judicial economy, the amended complaint is deemed filed, supplanting the plaintiffs' original pleading, and the defendants' notice of motion is considered to be amended accordingly.

### **The Amended Complaint**

Both the original and the amended complaints contain four causes of action asserting fraud. The gravamen of each claim is the same in both pleadings. The amended complaint, however, contains additional allegations and an expanded prayer for relief which were apparently included to remedy perceived deficiencies in the original complaint.

### **The First Cause of Action**

The first cause of action (the "1<sup>st</sup> COA") is labeled in the amended complaint as a claim for "Fraud/Intentional Misrepresentation." The 1<sup>st</sup> COA alleges that Kim, in her individual capacity, misrepresented her relationship to the decedent to certain third parties and in doing so committed acts tantamount to the federal crimes of mail fraud and wire fraud.

In addition, the 1<sup>st</sup> COA avers that “numerous parties” relied upon Kim’s misrepresentations, causing the plaintiffs “confusion, mental and emotional distress and monetary damages in the amount of one million dollars.”

### **The Second Cause of Action**

The amended complaint’s second cause of action (the “2<sup>nd</sup> COA”) is designated as an action for fraud and identity theft. It alleges, inter alia, that Robert (i) misused an automobile belonging to the estate, causing it to be impounded; (ii) impersonated the decedent and assumed his identity to procure insurance for that vehicle; and (iii) “cleaned out” the decedent’s house and threw everything in the garbage, including the decedent’s Last Will and Testament. The 2<sup>nd</sup> COA also claims that Kim “did nothing to prevent her son from engaging in this reckless behavior” and protect estate assets.

According to 2<sup>nd</sup> COA, the plaintiffs hired counsel to “notify and send documentation to Allstate and other agencies” regarding Robert’s alleged misappropriation of the decedent’s identity. The 2<sup>nd</sup> COA also summarily claims that Robert and Kim have engaged in conduct that prevented them from receiving “their father’s worldly possessions” and caused them to incur damages “in a sum to be calculated and determined by this court.”

### **The Third Cause of Action**

The amended complaint’s third cause of action (the “3<sup>rd</sup> COA”),

alleges, inter alia, that Kim promised the plaintiffs that she would pay the decedent's funeral expenses, but she later changed her mind and refused to do so. The 3<sup>rd</sup> COA claims that after Kim elected not to pay these expenses, one of the plaintiffs, Lorri, paid them.

The 3<sup>rd</sup> COA also includes allegations that Kim "procured one or more insurance policies" on the decedent's life "by actual fraud," and her "false promises and fraudulent actions" caused Lorri and the other plaintiffs to incur monetary damages.

#### **The Fourth Cause of Action**

The fourth cause of action (the "4<sup>th</sup> COA") alleges, inter alia, that the plaintiffs have incurred legal fees and costs "due to [the] numerous misrepresentations, misconduct and other actions" of Kim and Robert, including "filing a fraudulent Last Will and Testament." In addition, the 4<sup>th</sup> COA states that the plaintiffs, "on numerous occasions advised the court that they do not wish to sell the subject premises."

#### **The Relief Sought**

In the amended complaint, the plaintiffs seek, inter alia, monetary damages; restitution; and "leave to inspect the decedent's house for damage, personal property and renovations. The plaintiffs also request a judgment "preventing Kim or her agents from disposing of the subject premises without a further order of this Court or the Surrogate's Court," notwithstanding that the preliminary letters testamentary issued to Kim

already contain such a restriction, pursuant to SCPA 805(3).

### **The Defendants' Arguments**

The defendants argue that the amended complaint must be dismissed under CPLR 3211 (a) (7) because it (i) fails to meet the heightened pleading requirements for fraud under CPLR 3016 (b), and (ii) does not state any cognizable claim against them.

In addition, the defendants assert CPLR 3211 (a) (3) as an independent ground for dismissing the third cause of action because the defendants have no standing or capacity to prosecute a claim regarding the alleged misuse of assets belonging to the decedent's estate. The defendants further allege that the fourth cause of action should be dismissed under CPLR 3211 (a) (4), as it raises issues that should be, or already are, part of the Probate Proceeding.

As for the notice of pendency, the defendants advance three arguments for its cancellation. First, a judgment in the Supreme Court Action would not affect title to, or the possession, use or enjoyment of real property. Second, an amended pleading cannot be the basis for continuing a notice of pendency. Finally, if the amended complaint should be dismissed, the notice of pendency must be cancelled because there would no longer be a potential judgment affecting the Realty.

### **The Plaintiffs' Arguments**

The plaintiffs argue, inter alia, that the amended complaint,

when read together with the papers they submitted in support of their cross-motion, should not be dismissed under CPLR 3211 (a) (7). Additionally, the plaintiffs contend that the court lacks subject matter jurisdiction to vacate the notice of pendency, and that even if such authority existed, the court cannot cancel the notice absent proof that the plaintiffs commenced or prosecuted the Supreme Court Action in bad faith. The plaintiffs further allege that although the original complaint did not demand possession of the Realty, the amended complaint corrects this deficiency.

## **CONCLUSIONS**

### **Dismissal under CPLR 3211 (a) (7) and CPLR 3211 (a) (4)**

To make out a claim for fraud under New York law, a plaintiff must allege: (a) a material misrepresentation of a fact, (b) knowledge of its falsity, (c) an intent to induce reliance, (d) justifiable reliance by the plaintiff, and (e) damages (see *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Each element must be pleaded with particularity under CPLR § 3016(b), which states that "[w]here a cause of action or defense is based upon misrepresentation [or] fraud... the circumstances constituting the wrong shall be stated in detail."

Firm factual pleadings are necessary to support a "reasonable inference" that allegations of fraud are true (see *Eurycleia Partners*, 12 NY3d at 559). To meet CPLR § 3016(b)'s particularity requirement, the plaintiff must allege at a minimum "specific facts with respect to the time, place, or

manner" of the defendant's purported misrepresentations (see *Riverbay Corp. v. Thyssenkrupp N. Elevator Corp.*, 116 AD3d 487, 488 [1<sup>st</sup> Dept 2014]; *Eastman Kodak Co. v. Roopak Enters.*, 202 AD2d 220 [1<sup>st</sup> Dept 1994]). A cause of action for fraud should be dismissed if it fails to allege that the plaintiff justifiably relied on the misrepresentation (see *Olin v. Torf*, 126 AD2d 252 [3<sup>rd</sup> Dept 1987]).

To determine whether the plaintiffs stated a cognizable action that is not subject to the particularity requirements of CPLR 3016, it is well-settled that the court must liberally construe the complaint, accept all of the allegations as true and afford the plaintiffs every favorable reasonable inference (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Widman v. Rosenthal*, 40 AD3d [2<sup>nd</sup> Dept 2007]). In making its determination, the court can consider materials of an evidentiary nature submitted by the plaintiff(s) to remedy defects in the complaint (see *Doe v Ascend Charter Schs.*, 181 AD3d 648 [2<sup>nd</sup> Dept 2020]).

Applying the above standards and according the appropriate weight to the plaintiffs' submissions accompanying their cross-motion, the court finds that the amended complaint does not sufficiently state a claim for fraud. Each cause of action fails to allege at least one essential element of fraud, and nowhere in the amended complaint have the plaintiffs pleaded that they acted to their detriment due to justifiable reliance on a misrepresentation made to them by any of the defendants.

Moreover, it cannot be said that the amended complaint's allegations, when taken together, constitute any basis for granting relief against the defendants in the Supreme Court Action. As such, the amended complaint is dismissed under CPLR 3211 (a) (7) for failure to state a claim, except to the extent that it alleges the Will is invalid. As for that claim, the Probate Proceeding, not the Supreme Court Action, is the proper forum for adjudicating all issues regarding the Will. Therefore, that portion of the amended complaint disputing the Will's validity is dismissed pursuant to CPLR 3211 (a) (4), to be litigated by the plaintiffs in the Probate Proceeding.

**Dismissal under CPLR 3211 (a) (3)**

The defendants correctly argue that the second cause of action should also be dismissed under CPLR 3211 (a) (3). The plaintiffs are not fiduciaries of the decedent's estate. Consequently, they have no capacity to involve themselves in Robert's alleged post-death use of the decedent's automobile or his alleged disposal of the decedent's other personalty. Furthermore, at this time the plaintiffs have no standing to prosecute these claims. They cannot claim they were harmed by the alleged misconduct of Robert and Kim because they are not beneficiaries under the Will and have no present interest in the automobile or the property allegedly discarded (see *In re Estate of Gardiner*, 144 Misc2d 797 [Sur Ct, NY County 1989]); *Silver v. Pataki*, 96 NY2d 532 [2001]). Nonetheless, if the Will is denied admission to probate, the dismissal here would be without prejudice to any

claims regarding the misuse or dissipation of estate assets that are raised by the estate's fiduciary or the distributees in an appropriate proceeding.

### **Reimbursement for the alleged payment of burial expenses**

According to the third cause of action, Lorri paid the decedent's burial/funeral expenses. The court notes that a claim against the estate seeking reimbursement for this purported payment has never been properly presented, nor was such presentment alleged in the amended complaint (see SCPA 1801). As presentment is a necessary condition precedent to asserting a reimbursement claim against the estate, the failure to plead this constitutes a reason for dismissing the third cause of action under CPLR 3211(a)(7). The dismissal, however, is without prejudice to Lorri prosecuting a claim against the decedent's estate as a funeral creditor in accordance with SCPA Article 18.

### **The Notice of Pendency**

The plaintiffs incorrectly posit that the court lacks subject matter jurisdiction to determine the defendants' motion to vacate the notice of pendency filed against the Realty. Judge Guzman's transfer order explicitly removed the notice of pendency to the Surrogate's Court. Furthermore, the issue of the notice's viability is a matter affecting the affairs and assets of the decedent's estate (*see Matter of Piccione*, 57 NY2d 278 [1982]).

The plaintiffs essentially argue that the notice of pendency should not be vacated because the amended complaint (i) alleges that they

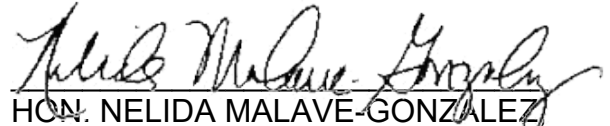
do not want the Realty sold, and (ii) requests a judgment, inter alia, preventing Kim “from disposing of the subject premises without a further order of this Court [*sic*] or the Surrogate’s Court.” An amended complaint, however, cannot be used to remedy a prior pleading’s failure to state a claim that would justify the recording of a notice of pendency (see *5303 Realty Corp. v. O & Y Equity Corp*, 64 NY2d 313 [1984]; *Sealy v. Clifton, LLC*, 68 AD3d 846 [2<sup>nd</sup> Dept 2009]; *Chateau Rive Corp. v. Riverview Partners, LP*, 18 AD3d 492 (2<sup>nd</sup> Dept 2005)). Therefore, as the original complaint did not plead a cause of action directly affecting title to, or possession, use or enjoyment of real property, the plaintiffs’ notice of pendency must be cancelled(see CPLR 6501; *5303 Realty Corp. v. O & Y Equity Corp, Id.*; *In re Estate of Stojanowski*, 28 NYLJ LEXIS 4378 [Sur Ct, Richmond County 2018]; *In re Estate of Sabatino*, 90 Misc2d 56 [Sur Ct, Albany County 1977]).

Accordingly, this decision constitutes the order of the court granting the defendants’ motion and dismissing the amended complaint. This dismissal is without prejudice to (i) plaintiff Lorri Scott bringing a claim against the estate, in accordance with SCPA Article 18, as a funeral creditor; (ii) the objectants’ claims in the Probate Proceeding regarding the validity of the Will; and (iii) any claims that may be subsequently brought in an appropriate proceeding in this court if the Will is denied probate. The Bronx County Clerk is directed to cancel the notice of pendency, dated October 29, 2020, recorded by the plaintiffs’ counsel in this action against real property

located at 942 East 220<sup>th</sup> Street, Bronx, New York 10454, also described  
Block 4960, Lot 62.

Proceed accordingly.

ENTER:

  
HON. NELIDA MALAVE-GONZALEZ  
SURROGATE