

Matter of Shiah

2023 NY Slip Op 31724(U)

May 23, 2023

Surrogate's Court, New York County

Docket Number: File No.: 2019-4554/C

Judge: Hilary Gingold

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNT OF NEW YORK

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In the Matter of the Application to Compel Delivery
Of Property By the Fiduciaries of the Estate of

File No.: 2019-4554/C

EUGENIA S. SHIAH,
aka EUGENIA SHIAH,

Deceased.

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G I N G O L D, S .

Petitioner, Alpine Capital Bank (hereinafter, "petitioner"), seeks an order pursuant to CPLR 3212, granting summary judgment on its petition, filed pursuant to SCPA 2105, to compel the assignment of both the proprietary lease for the 8th floor of 635 Park Avenue and Stock Certificate No. 4, representing 550 shares of 635 Park Avenue Corporation; and further, pursuant to CPLR 3211[b], for an order dismissing the fiduciaries' affirmative defenses. Elizabeth Shiah-Forte and Vivien R. Shiah, as preliminary executors of the will of the decedent (hereinafter, "respondents"), cross-move, seeking an order, pursuant to CPLR 3212, granting summary judgment, dismissing the petition, and further, for an order pursuant to CPLR 3025, granting leave to amend their answer, and further, for an order pursuant to CPLR 3212[f], granting a "continuance" for additional discovery essential to justify opposition.

The following papers numbered 1 through 15 were read:

	<u>Papers Numbered</u>
Notice of Motion – Affirmation – Exhibits	1-3
Memorandum of Law	4
Affidavits of Service	5

Cross-Motion	6
Amended Answer and Counterclaims - Exhibits.	7
Memorandum in Opposition to Motion for Summary Judgment and in Support of Cross-Motion	8
Affidavit In Support of Motion for Summary Judgment	9
Memorandum of Law in Further Support Compelling Delivery and In Opposition to Cross-Motion	10
Verified Petition to Compel Delivery – Affidavit - Exhibits .	11– 13
Affirmations of Service and Proofs of Delivery	14
Answer/Objection.	15

On November 5, 2007, Eugenia S. Shiah, a/k/a Eugenia Shiah (hereinafter, “decedent”), executed a grid promissory note in favor of petitioner in the amount of \$4,000,000 (hereinafter, “note”). The decedent also signed a negative pledge agreement (hereinafter, “pledge”) restricting her interest in the proprietary lease to floor 8, 635 Park Avenue, New York, New York (hereinafter, “lease”) and Stock Certificate No. 04 representing 550 shares (hereinafter, “shares”) of 635 Park Avenue Corporation (hereinafter, “cooperative”). The note and pledge agreement were subsequently extended, modified, and amended by decedent and, after she was deemed incapacitated in 2014, by co-guardians of her person and property, her children Vivian Shiah and Thomas Shiah (hereinafter, “guardians”). The fifth and last amendment and restatement of the note and pledge occurred on May 1, 2019. At the time of decedent’s death, on June 30, 2019, the principal due on the note was \$7,547,847.22, with interest due monthly, and further, the remaining principal due in its entirety, as of May 1, 2022. After the decedent died, her estate made at least one payment on the note, but thereafter defaulted, and by June 29, 2020, the amount due on the note, excluding collection costs, was \$8,215,852.33.

On February 21, 2020, respondents were appointed the preliminary executors of decedent's will. On May 28, 2020, petitioner served respondents with a verified claim for full payment of the note, plus interest, late fees, and collection fees. On July 20, 2020, petitioner filed a petition to compel delivery of the cooperative and its respective shares. Respondents filed an answer to the petition on December 7, 2020. On January 29, 2021, petitioner filed the instant motion for summary judgment, opposed by respondents herein. Respondents contend that neither decedent nor her guardians ever entered into a security agreement with petitioner, despite the fact that petitioner has been, and remains in, possession of the lease and shares, and recorded a UCC-1 Financing Statement with Cooperative Addendum with the New York County Clerk on October 24, 2019. Therefore, respondents assert, petitioner does not have a security interest in the cooperative that would entitle it to a turnover of the related assets.

In their March 1, 2021, cross-motion, respondents request leave to amend their December 7, 2020, answer. CPLR 3025[b] requires that the movants attach their proposed amended pleading to their cross-motion. However, the respondents failed to properly attach the proposed amended pleadings to their moving papers, and instead, filed it with the court, after the motion was made on March 3, 2021, but before it was marked fully submitted on March 15, 2021. Nonetheless, petitioner properly opposed the amended answer in its reply papers to their original motion.

Although it is in the court's discretion whether to allow an amendment pursuant to CPLR 3025[b], leave should be freely given absent prejudice or surprise resulting directly from the delay provided that the proposed amendment is not "patently devoid of merit" (*Greene v Esplanade Partnership*, 36 NY3d 513, 526 [2021]). Failure to submit papers pursuant to the requirements of CPLR 3025[b] is not, by itself, necessarily grounds to deny leave (*see id*; *see also Liberty Mutual Ins. Co. v Davis*, 2022 NY Slip Op 31455(U) [Sup Ct, NY County 2022]).

Respondents' March 3, 2021 "Verified Amended Answer and Counterclaims" repeats, virtually verbatim, the six "affirmative defenses" set forth in the original answer, alleging that petitioner perpetrated a fraud, breached its fiduciary duties, and had unclean hands (1) regarding investment advice given to both the respondents and decedent concerning investments in Fairview Associates, Kennedy Boulevard Associates, Palmer Square Associates, and (2) in its representations of the value of their respective interests in Palmer Square. Essentially, respondents' proposed amended answer adds the same alleged "defenses" concerning another investment, Summer Associates, as well as alleging two new "causes of action" for fraud and breach of fiduciary duty owed to them individually by Mr. Oded Aboodi, president of petitioner. The proposed amended answer removes the affirmative defense that the court lacks *in personam* jurisdiction over respondents, and further, seeks damages. Finally, both respondents' original answer as well as the proposed amended answer allege the affirmative defense of "statute of frauds" without any further particularity.

But for the affirmative defense of statute of frauds, respondents' alleged "causes of action" and "affirmative defenses" are, in fact, counterclaims pursuant to CPLR 3019. Additionally, as to those counterclaims, the court has the discretion to sever them from petitioner's original motion for summary judgment pursuant to CPLR 603. However, a counterclaim must assert a cause of action against the plaintiff and not as against a non-party (*see* CPLR 3211[a][6]; *Mutual Benefits Offshore Fund v Zeltser*, 140 AD3d 444, 445 [1st Dept 2016]).

As petitioner notes in its reply and in opposition to respondents' application for leave to file an amended answer, "the proposed amended pleading is substantially identical to the prior pleading." Petitioner, having received and responded to the proposed amendment, has not raised any issue of fact as to whether it was surprised or prejudiced despite the proposal being submitted

after its own motion was marked fully submitted. In this instance, “[p]rejudice, of course, is not found in the mere exposure of the [petitioners] to greater liability. Instead, there must be some indication that the [petitioners have] been hindered in the preparation of [their] case or [have] been prevented from taking some measure in support of [their] position”(Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23[1981]; see Kimso Apts., LLC v Gandhi, 24 NY3d 403, 411[2014] [Appellate Division, Second Department found to have abused its discretion in failing to permit amendment of pleadings after “record established that the opposing party suffered ‘no operative prejudice’ as a result of the mere omission to plead a defense”]).

Moreover, respondents’ amended answer provides statements “sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause or defense” as required by CPLR 3013 and states the circumstances constituting alleged frauds perpetrated by petitioner pursuant to CPLR 3016[b]. At this time, respondents’ counterclaims cannot be said to be “without merit” and are premised on the same legal theories and factual basis as in the original answer (see CPLR 3025; McCaskey, Davies and Associates, Inc. v New York City Health & Hosps. Corp., 59 NY2d 755,756 [1983]; NYAHS Services, Inc v People Care, Inc, 156 AD3d 99 [3d Dept 2017]; Bueno v 526 West 174th Equities, LLC, 2023 WL 2993267 [NY Sup Ct, NY County, Apr. 13, 2023, Index No. 160597/2018]; Hoyos v Riverside Premier Rehabilitation, 2023 NY Slip Op. 30446[U] [Sup Ct, NY County 2023]).

Nonetheless, respondents’ proposed amended answer also alleges counterclaims between living people and adds Mr. Aboodi as a party. Mr. Aboodi, as president of petitioner, clearly was aware of respondents’ original answer and proposed amendment. In fact, on March 12, 2021, Mr. Aboodi submitted a sworn affidavit in opposition to the proposed amendment (see SCPA 203).

However, Mr. Aboodi is not a petitioner and respondents cannot assert a counterclaim against him as an individual non-party (*see Mutual Benefits Offshore Fund*, 140 AD3d at 445; *M&M Environmental v Myrick*, 2021 NY Slip Op 30121(U) [Sup Ct, NY County 2021]). Moreover, as to any counterclaims that Elizabeth Shiah-Forte, Vivien Shiah, or Thomas Shiah allege in their individual capacity seeking relief against either petitioner or Mr. Aboodi, this court lacks jurisdiction (*see* CPLR 3019[d]; SCPA 201; *Matter of O'Connell*, 98 AD3d 673, 674 [2d Dept 2012]; *Matter of Estate of Walls*, 77 Misc.3d 879 [Sur Ct, Monroe County 2022] ["It is well-settled that the Surrogate's court has no jurisdiction over disputes between living persons," citing *Matter of O'Connell*, 98 AD3d at 674]; *Linzer v Bal*, 184 Misc.2d 132, 136-137 [2000][counterclaim asserted solely against a nonparty was held improper and thus, was dismissed]).

Where, as here, the respondents seek relief as against individual nonparties, the appropriate "procedure requires that a summons and an answer containing the counterclaim[s] be filed, with the appropriate fee paid, and be served upon the putative additional [respondents] in accordance with CPLR 308 through 312-a, as appropriate" (*BSDC NRP I Ltd. Partnership v Tower Ins. Co. of New York*, 32 Misc.3d 1215 (A) [Kings County 2011]; *see* CPLR 3019[d]; *State of New York v International Asset Recovery Corp.*, 56 AD3d 849, 854 [3d Dept 2008][counterclaim asserted against nonparties rightfully dismissed for failure to serve a summons along with the answer]; *Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuworth, LLC v Comprehensive Mental Assessment & Med. Care., P.C .*, — Misc.3d —, 2011 N.Y. Slip Op 31385(U), * 6 [Sup Ct, Nassau County 2011]; *Wylar v Wylar*, 5 Misc.3d 1031(A)[Sup Ct, Nassau County 2004]; *Linzer*, 184 Misc2d 136-37). Consequently, to the extent that the proposed amended answer alleges counterclaims by respondents in their role as preliminary executors against petitioner, leave is granted and the March 3, 2021 proposed amended answer shall be deemed

served and filed (*see Postler v Hassan*, 278 AD2d 467 [2d Dept 2000]; *see e.g., In re Salon Ignazia, Inc.*, 34 AD3d 821 [2d Dept 2006]; *Site Safety, LLC v Gunnala*, 71 Misc.3d 1218 (A)[Sup Ct, New York County 2021]).

Turning to petitioner's motion for summary judgment, the movant 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" (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the movant succeeds in doing so, the burden shifts to the opposing party to submit proof that there exists a material issue of fact and that a trial is therefore necessary (*see Id.*). "[I]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility" (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990], *appeal dismissed* 77 NY2d 939 [1991]).

Petitioner claims to be a secured party seeking to enforce its security interest in the cooperative. For a security interest to attach, the creditor must give value, the debtor must have rights in the collateral, and there must be a security agreement or other action indicating an intent to convey a security interest (*see UCC 9-203; Matter of Honeedew Investing LLC v JP Morgan Chase Bank, N.A.*, 214 AD3d 595, 595-596 [1st Dept 2023][court found the defendant's security interest had been perfected upon the filing of the financial statement pursuant to UCC 9-310[d]]). Once the security interest is attached it must be perfected to give the creditor a priority over other creditors. A cooperative is personal property and enforcement of a security interest in a cooperative pledged as collateral is governed by NY UCC Art 9 (*see Fundex Capital Corp v Reichard*, 172 AD2d 420 [1st Dept 1991]). New York Uniform Commercial Code defines a secured party as "a person [or entity] in whose favor a security interest is created or provided for under a security

agreement” (NY UCC 9-102[a][73][A]; *see 1380 Hous. Dev. Fund v Carlin*, 138 AD3d 613, 613 [1st Dept 2016]).

Pursuant to NY UCC 9-310[d] “a security interest in a cooperative interest may be perfected only by filing a financing statement.” However, filing a UCC-1 financing statement will not create a security interest that has not already been granted by the debtor by a security agreement (*see In re Modafferi*, 45 BR 370 [1985]). Pursuant to NY UCC 9-102[a][74] a security agreement is an agreement “that creates or provides for a security interest” (*Id.*; *see Stavinsky v Prof-2013-S3 Legal Title Trust*, 60 Misc3d 410, 417 [Sup Ct, NY County 2018]). Pursuant to NY UCC 9-203[b][3] a security interest can only attach and thus be enforceable against the debtor if the security agreement “provides a description of the collateral” (*Id.*; *see In re Bucala*, 464 BR 626, 629-31 [SD NY 2012]). Moreover, NY UCC 9-108 requires that the description of personal property must “reasonably identify what is described” (*Id.*; *see NRT N.Y. LLC v Middlegate Funding LLC*, 2020 NY Slip Op 34297(U) 10-12 [Sup Ct, NY County 2020]). Thus, the primary purpose of a security agreement is to show to an objective observer that the debtor intended to transfer an interest in specific personal property as security to a creditor.

Here, petitioner has possession of the shares and lease and has filed a UCC-1 financing statement with the New York County Clerk. There is no required form or format for a security agreement and a court may look to multiple documents and the surrounding circumstances in determining whether a valid and enforceable security agreement exists (*see In re Bucala*, 464 BR at 626; *Micalden Invs. S.A. v Rostropovich*, 535 F Supp 2d 433, 435-36 [SD NY 2008]). Though a formal security agreement is not required, there must be some signed writing reflecting the debtor’s intent to grant a security interest contained within the documents offered to establish a

security agreement (*see In re Bollinger Corp.*, 614 F2d 924 [3^d Cir 1980]; *see also 1380 Hous. Dev. Fund*, 138 AD3d at 614).

In this case, petitioner offers the note and the pledge, each executed by decedent and then by her guardians, as evidence of a security agreement. The note states that decedent “grants [petitioner] a first prior lien on and a security interest in all deposits, credits, or other property of the [decedent] now, or at any time hereafter, delivered to or left in the possession of the [petitioner].” The pledge states that decedent “hereby grants [petitioner] possession” of the shares and lease.

The description of collateral in the note, “other property of the [decedent] now, or at any time hereafter, delivered to or left in the possession of the [petitioner]” standing alone is not a sufficient description under NY UCC 9-203[b][3] to include the shares and lease as collateral in a security agreement (*see Cantrade Private Bank Lausanne v Torresy*, 876 F Supp 564, 574 [SD NY 1995]). In this instance, the pledge agreement sufficiently describes the shares and lease as “Shares and/or Lease (herein defined) appurtenant to the cooperative apartment on the 8th floor of 635 Park Avenue, New York, New York 10021.” The pledge grants petitioner possession of the shares and lease but does not grant petitioner any actual interest in them (*see In re Coffee Cupboard, Inc.*, 33 BR 668, 672 [ED NY 1983]). However, taken together, the note and the pledge, referencing one another, create a clear nexus and co-relation between the two documents (*see In re Modafferi*, 45 BR 370 [SD NY 1985]). Reading the two documents in conjunction, the logical conclusion is that the intent was to create a security interest in the shares and appurtenant lease (*see In re Numeric Corp.*, 485 F2d 1328 [1st Cir 1973]; *King v Tuxedo Enterprises, Inc.*, 975 F Supp 448 [ED NY 1997]). Thus, given the note and pledge, both exercised by decedent and then her by guardians, petitioner’s actual possession of the shares and lease, and the filing of the UCC-1, the court finds

that the petitioner is a secured creditor with a perfected security interest in the shares and lease (*see Brief v 120 Owners Corp.*, 157 AD2d 515 [1st Dept 1990]; *Berkshire Bank v Kelly*, 109 UCC RepServ2d 1037 [Sup Ct, VT 2023]).

Respondents' contention that the terms of the pledge forbade decedent from granting a security interest to petitioner, the only other party to the pledge, is without merit. Moreover, the fact that the building is, itself, a "no pledge" building, bears no relevancy to petitioner's security interest. 635 Park Avenue Corporation as a party to the turnover proceeding has appeared by counsel but has neither objected to the turnover proceeding nor moved to enforce any rights that it may have regarding the shares of stock and/or the leasehold interest in the cooperative. Based on the foregoing determination, respondents' affirmative defense of statute of frauds is dismissed as petitioner's security interest is based on the written and signed pledge and note (*see Balzano v Lublin*, 162 AD2d 252, 253 [1st Dept 1990]; *Moloney v Weingarten*, 118 AD2d 836, 837 [2d Dept 1986]).

Similarly, given that respondents' counterclaims are independent from the instant application, they can still be brought in a separate proceeding, and therefore, respondents are not prejudiced by the granting of petitioner's motion for summary judgment (*see Robert Stigwood Organization, Inc v Devon Co*, 44 NY2d 922, 924 [1978]). Respondents' counterclaims, made in their capacity as preliminary executors of their mother's will, as against petitioner and Mr. Aboodi, are not based on facts interwoven with petitioner's claim of a security interest in the cooperative, and therefore, to the extent they are not denied, they are hereby severed (*see Hussey v Joseph N. Leggio Agency, Inc*, 290 AD2d 690 [3d Dept 2002][no prejudice where plaintiff was granted summary judgment before resolution of defendant's counterclaims]).

Accordingly, respondents' request for a "continuance" of petitioner's motion for summary judgement, pursuant to CPLR 3212[f], as to outstanding discovery demands relating to the severed counterclaims, is denied.

Accordingly, based on the foregoing, it is

ORDERED that, respondents' request for leave to file an amended answer is granted to the extent that respondents' proposed amended affirmative defenses and causes of action are counterclaims of respondents in their capacity as preliminary executors of the will against petitioner; and it is further

ORDERED that, respondents' proposed amended answer is deemed filed and served, and it is further,

ORDERED that, petitioner's motion to dismiss respondents' affirmative defenses and causes of action in the amended answer is granted to the extent that respondents' ninth affirmative defense of Statute of Frauds is dismissed; and it is further,

ORDERED that, respondents' first through eighth affirmative defenses are deemed to be additional counterclaims, and thus, all counterclaims in their amended answer are hereby severed; and it is further

ORDERED that, the petition to compel the assignment of both the proprietary lease for the 8th floor of 635 Park Avenue and Stock Certificate No. 4, representing 550 shares of 635 Park Avenue Corporation is granted; and it further

ORDERED that, respondent deliver assignments of the Proprietary Lease for the 8th Floor of 635 Park Avenue, New York, New York and Stock Certificate No. 4, representing 550 shares of the 635 Park Avenue Corporation, to petitioner within ten days of the date of this order; and it is further

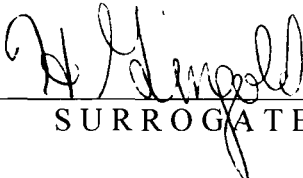
ORDERED that, the branch of respondents' cross-motion seeking to dismiss the petition and for a "continuance" for additional discovery are denied; and it is further

ORDERED that, petitioner has 45 days from the date of this order to file answers to the surviving counterclaims; and it is further

ORDERED that, counsel are directed to appear, in person, on July 19, 2023, at 11:00 a.m. in Courtroom 509, located at New York County Surrogate's Court, 31 Chambers Street, New York, New York 10007, for a scheduling order as it relates to respondents' surviving counterclaims.

The court clerk shall serve a copy of this order to all parties in this proceeding by email.

Dated: May 23, 2023



SURROGATE

To:

Brandon C. Sherman, Esq.
bsherman@pavialaw.com

James G. McCarney, Esq.
jmccarney@mccarneylaw.com