

Malandruccolo v Parisi

2023 NY Slip Op 33497(U)

September 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 531124/2022

Judge: Karen B. Rothenberg

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
PRUDY MALANDRUCCOLO,

Plaintiff,

Index No: 531124/2022

-against-

DECISION AND ORDER

PATRICK A. PARISI, HOPE C. LIPSCHICK, as
Trustees for the Parisi 2017 Family Trust dated on the
6th of June 2017,

Defendants,

X

Recitation as required by CPLR 2219(a), of the papers considered in defendants’
motion to dismiss or to cancel the notice of pendency.

Papers	Motion papers.
Order to Show Cause/Motion and Affidavits Annexed.	3-13
Cross-motion and Affidavits annexed.....	
Answering Affidavits.....	16-20
Reply Papers.....	21-23

Upon the foregoing cited papers, the Decision/Order on these motions:

In this action, inter alia, for a declaration that a certain family trust is invalid and for a partition and sale of real property, the defendants move to dismiss the action pursuant to CPLR 3211(a)(4) and (7), or alternatively, to cancel plaintiff’s notice of pendency pursuant to CPLR 6514. Defendants also seek sanctions and an award of costs pursuant to CPLR 6514(c) and/or 22 NYCRR 130-1.1.

The parties are siblings and the children of the decedents Pauline Parisi and Frank Parisi. In 2017, the decedents established the Parisi 2017 Family Trust [the Trust], naming defendants as trustees. It is alleged that once the Trust was formed, the decedents transferred the home that they owned located at 2230 Ocean Parkway, Brooklyn, to the Trust, changing the ownership interest in the premises as follows: 45% owned by defendant Parisi, 45% owned by defendant Lipschik, and 10% owned by plaintiff. Plaintiff commenced this action against the defendants seeking to invalidate the Trust, alleging that the decedents created the Trust while under defendants’ undue influence. Plaintiff asserts that decedent Frank Parisi suffered from Parkinson disease and Macular degeneration and the decedent Pauline Parisi suffered from a heart condition and was

deaf in one ear. Plaintiff further asserts that the both the decedents suffered from cancer and had diminished mental capacity.

In her first cause of action plaintiff seeks a declaration that the Trust is invalid and that she and her siblings each own and possess an undivided 1/3 interest in the subject premises. In the second cause of action plaintiff seeks a partition of the premises pursuant to RPAPL article 9. In the third cause of action the plaintiff seeks an accounting. The fourth cause of action seeks essentially to invalidate the Trust based on undue influence. Finally, the fifth cause of action seeks damages from the defendants for blocking her access to her personal property at the premises. A Notice of Pendency was filed against the subject premises at the time of commencement of this action.

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Aviaev v Nissan Infiniti LT*, 150 AD3d 807, 807-808 [2d Dept 2017]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Everett v Eastchester Police Dept.*, 127 AD3d 1131, 1132 [2d Dept 2015] [internal citations omitted]).

“Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail” (*Ramirez v Donado Law Firm, PC*, 169 AD3d 940, 942 [2d Dept 2019]; see CPLR 3016[b]). To establish undue influence, it must be demonstrated that the defendants’ influence “amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [decedent] to do that which was against his [or her] free will and desire, but which he [or she] was unable to refuse or too weak to resist” (*Bazigos v Krukar*, 140 AD3d 811, 813 [2d Dept 2016]). In the context of a pre-answer motion to dismiss, the complaint must at least allege “facts and circumstances from which the exercise of such undue influence can fairly and necessarily be inferred” (*Constantine v Lutz*, 204 AD3d 1328, 1330 [2d Dept 2022] [internal quotation marks and citations omitted]).

Here, even when liberally construed and with every reasonable inference accorded to plaintiff, the complaint fails to plead a claim sounding in undue influence (see generally *American Committee for the Weizmann Institute of Science v Dunn*, 36 AD3d 419 [2d Dept 2007]). The complaint fails to set forth any details as to when, where, and how defendants’ influence was actually exerted. As such, there are no facts or circumstances alleged in the complaint from which it can be inferred that the defendants exercised undue influence over the decedents. Therefore, defendants establish their entitlement to dismiss the plaintiff’s fourth cause of action to invalidate the Trust

pursuant to CPLR 3211(a)(7). Further, as the plaintiff's first cause of action for a declaratory judgment is based on the same insufficient allegations of undue influence, the defendants also establish their entitlement to dismiss the plaintiff's first cause of action as well.

With respect to the second cause of action in the complaint for a partition, the defendants fail to establish prima facie that the plaintiff fails to state a cause of action herein. It is undisputed that plaintiff is a Trust beneficiary. There is nothing in the moving papers to suggest that by reason of the terms of the Trust, that the plaintiff is not entitled to immediate possession of her interest in the premises (*cf. O'Hara v Tewes*, 234 AD 293 [2d Dept 1931]). As such, defendants are not entitled to dismissal of the plaintiff's second cause of action for partition.

Moreover, defendants fail to establish prima facie that plaintiff third cause of action for an accounting fails to state a cause of action. An accounting is a "necessary incident" of a partition action (*Tedesco v Tedesco*, 269 AD2d 660, 661 [3d Dept 2000]), and works to ensure that the "parties' rights are fixed in such manner that a decree may work full and complete justice between [them]" (*Grossman v Baker*, 182 AD2d 1119, 1119 [4th Dept 1992]). Therefore, defendants are not entitled to dismissal of the plaintiff's third cause of action for an accounting.

With respect to the fifth cause of action seeking to recover damages with respect to plaintiff's personal belongings, the defendants argue that the claim is barred as there was a prior action brought in the Kings County, Civil Court for this claim. Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action. A court may dismiss an action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same (*see Jardon v 10 Leonard Street, LLC*, 124 AD3d 842, 843 [2d Dept 2105]). Here, the prior civil court proceeding was dismissed based on plaintiff suing Patrick A. Parisi instead of the Trust which owns the premises where the alleged personal property is located. As such, dismissal pursuant to CPLR 3211(a)(4) is not warranted. It is noted that although defendants argue in a footnote in their reply papers that the cause of action is time barred in that the plaintiff moved out of the premises in 2016, defendants did not move for dismissal based on statute of limitation grounds, and the court will not entertain any such application for dismissal made in a footnote in the reply papers.

Finally, the defendants' fail to establish that the Notice of Pendency filed in this action should be cancelled (*see Deutsch v Grunwald*, 63 AD3d 872 [2d Dept 2009]).

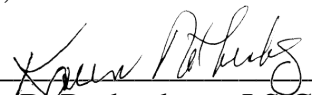
Accordingly, the defendants' motion is granted to the extent of dismissing the plaintiff's first cause for a declaratory judgment and fourth cause of action to invalidate

the Trust based on undue influence pursuant to CPLR 3211(a)(7). The remainder of the defendants' motion including the portion seeking costs and sanctions is denied.

This constitutes the decision/order of the Court

Dated: September 28, 2023

Enter,



Karen B. Rothenberg, J.S.C.