

Estate of Guy v Hernandez
2023 NY Slip Op 35302(U)
August 21, 2023
Supreme Court, Queens County
Docket Number: Index No. 728519/2021
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. PHILLIP HOM PART 14*Justice*

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ESTATE OF EFFIE A. GUY AND JAMES GUY,

Plaintiffs,

- v -

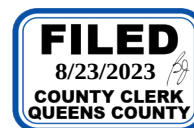
CHRISTIAN HERNANDEZ, TROP SPINDLER, LLP,
TAYLOR M MERENDINO, ESTATE OF JOHN R. GUY,
JAMES MASTRONARDI, JAMES ROE, JAMES DOE,
DONNA ROE, THE LAST THREE NAMES ARE
FICTITIOUS AND UNKNOWN, HELEN CONFORTI GUY,
AND DAVID G. COTTON,

Defendants.

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INDEX NO. 728519/2021MOTION DATE 09/22/2022,
09/22/2022,MOTION SEQ. NO. 002, 004

DECISION + ORDER ON MOTION



The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 31, 51
were read on this motion (Seq. No. 2) to/for DEFAULT JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42,
43, 44, 45, 49, 50, 52, 53, 54
were read on this motion (Seq. No. 4) to/for DISMISS.

Upon the foregoing documents, it is ordered that this motion (Seq. No. 2) by Plaintiffs, this
motion (Seq. No. 4) by Defendants Christian Hernandez and Trop Spindler, LLP, are determined
as follows:

On December 28, 2021, Plaintiffs, the Estate of Effie A. Guy and James Guy (collectively
“Plaintiffs”) commenced this action by filing a summons with notice (EF Doc 1). Plaintiffs allege,
among other things, that the transfer of real property known as 67 Malba Drive, Whitestone, NY
(the “Premises”) between Effie A. Guy, now deceased, and John Guy, now deceased, was obtained
through fraud.

On May 25, 2022, Plaintiffs filed this motion for default judgment against Defendant
Taylor M. Merendino (“Merendino”) (Seq. No. 2). On May 25, 2022, Plaintiffs filed a motion to
extend their time to serve the complaint upon James Mastronardi (“Mastronardi”); however, same
was withdrawn (Seq. No. 3).

On May 26, 2022, Defendants Merendino and Mastronardi filed a pre-answer motion to
dismiss; however, same was withdrawn (Seq. No. 1). On June 17, 2022, Plaintiffs filed a complaint
(EF Doc 35) in response to the demands for the complaint (EF Doc 2, 4, 28). On July 7, 2022,

Defendants Merendino, Mastronardi, Helen Conforti Guy (“Conforti”), and David G. Cotton interposed an answer (EF Doc 36).

On July 7, 2022, Defendants Christian Hernandez and Trop Spindler, LLP, now operating as Trop Law Group (“Hernandez-Defendants”) filed this pre-answer motion to dismiss *with prejudice* (Seq. No. 4). Hernandez-Defendants argue that the complaint should be dismissed on the basis that, among other things, Plaintiffs lack standing, under CPLR 3211 (a) (3), and under CPLR 3211 (a) (4), i.e., there is another action pending between the same parties for the same cause of action in the Supreme Court, Queens County, bearing Index No. 710198/2021 (“Action No. 1”).

As a preliminary note, this Court will first consider Plaintiffs’ opposed motion for a default judgment against Merendino (Seq. No. 2), and then Hernandez-Defendants’ opposed motion to dismiss (Seq. No. 4).

Plaintiffs’ Motion for Default Judgment (Seq. No. 2)

When a defendant fails to appear or answer, a plaintiff may seek a default judgment against that defendant (*see* CPLR 3215 [a]). “On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party’s default in answering or appearing” (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011]; *see* CPLR 3215 [f]; *Deutsche Bank Natl. Trust Co. v Pezzola*, 199 AD3d 877, 878 [2d Dept 2021]).

Here, Plaintiffs fails to submit, among other things, an affidavit of merit and the complaint. Regardless, the complaint is merely verified by Plaintiffs’ attorney and not by Plaintiffs themselves. Therefore, Plaintiffs’ motion for a default judgment is denied (*see* CPLR 3215 [f]; CPLR 105 [u]; *Solano v Castro*, 72 AD3d 932, 933 [2d Dept 2010]).

Hernandez-Defendants’ Motion to Dismiss (Seq. No. 4)

CPLR 3211 (a) (3)

“Where a CPLR 3211 (a) (3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, *prima facie*, the plaintiff’s lack of standing as a matter of law” (*Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 89-90 [2d Dep 2021]). The summary judgment standard under CPLR 3212 is applied to CPLR 3211 (a) motions where standing is the basis for dismissal (*see Matamoro*, 200 AD3d at 90). The plaintiff does not have the burden of establishing its standing as a matter of law but must merely raise a question of fact as to standing to defeat such a motion (*id.*).

“An estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her legal capacity” (*Grosso v Estate of Gershenson*, 33 AD3d 587, 587 [2d Dept 2006] [internal quotation marks and citation omitted]).

EPTL § 11-3.1 provides the following: “Any action, other than an action for injury to person or property, may be maintained by and against a personal representative in all cases and in such manner as such action might have been maintained by or against his decedent.”

EPTL § 1-2.13 provides the following: “A personal representative is a person who has received letters to administer the estate of a decedent. The term does not include an assignee for the benefit of creditors, or a committee, conservator, curator, custodian, guardian, trustee or donee of a power during minority.”

Here, it is undisputed that no executor or administrator has been appointed for the Estate of Effie A. Guy. Therefore, the Estate of Effie A. Guy, which is not a legal entity, lacks standing to maintain this action (*see Grosso*, 33 AD3d at 587). Furthermore, it is undisputed that Plaintiff James Guy has not received letters of administration. Thus, Plaintiff James Guy lacks standing to bring this action on behalf of the Estate of Effie A. Guy (*see* EPTL §§ 11-3.1 and 1-2.3; *Brandon v Columbian Mut. Life Ins. Co.*, 264 AD2d 436, 436 [2d Dept 1999]). Additionally, Plaintiff James Guy lacks standing to maintain this action in his individual capacity (*id.*; *see generally Matter of Marini*, 119 AD3d 584 [2d Dept 2014]; *Gaentner v Benkovich*, 18 AD3d 424 [2d Dept 2005]). Therefore, it is incumbent upon Plaintiffs to raise a triable as to standing to defeat this motion (*see Matamoro*, 200 AD3d at 90).

In opposition, Plaintiffs submit an affidavit of Plaintiff James Guy (EF Doc 53). James Guy attests that his now deceased brother John R. Guy was aware of the purported reciprocal wills that their father, Henry Guy, M.D., now deceased and mother, Effie A. Guy, now deceased (collectively “Parents”) executed. According to James Guy, their Parents executed reciprocal wills, which “provided that the survivor will take everything owned including tenancy by the entirety/jointly owned real property; and, upon the survivor’s death, all real property, personal property, mixed and any other property, will be equally divided amongst Peter, John [R. Guy] and [James Guy,] provided [they], each survive the survivor of [their] Parents; and there shall be no lifetime transfers by the Survivor to any one of us.” James Guy states that Henry Guy, M.D. predeceased his mother Effie A. Guy; thus, the latter became the sole owner of the Premises. James Guy avers that John R. Guy, prior to his death, fraudulently obtained a power of attorney over Effie A. Guy and the deed that transferred the Premises from Effie A. Guy to John R. Guy.

The Court finds that Plaintiffs fail to raise a question of fact as to standing to defeat Hernandez-Defendants’ motion to dismiss (*id.*; *see generally Matter of Marini*, 119 AD3d 584; *Gaentner v Benkovich*, 18 AD3d 424). Therefore, the complaint is dismissed without prejudice (*see Brown v Lutheran Med. Ctr.*, 107 AD3d 837, 838 [2d Dept 2013]).

CPLR 3211 (a) (4)

“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” (*Feldman v Harari*, 183 AD3d 629, 630 [2d Dept 2020], quoting *Jadron v 10 Leonard St., LLC*, 124 AD3d 842, 843 [2d Dept 2015]).

After this motion was marked submitted, Action No. 1, which was “sufficiently similar” to this action, was dismissed in an order (Livote, J.), dated December 22, 2022, and entered January 5, 2023. The court (Livote, J.) granted Conforti’s summary judgment motion on the basis that James Guy lacked standing. Thus, this branch of Hernandez-Defendants’ motion is rendered moot.

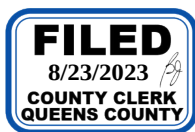
In accordance with the foregoing, it is **ORDERED** that Plaintiffs’ motion (Seq. No. 2) for a default judgment is denied; and it is further

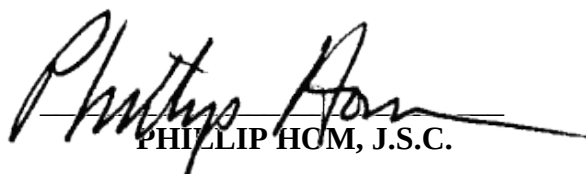
ORDERED that this pre-answer motion (Seq. No. 4) by Defendants Christian Hernandez and Trop Spindler, LLP, now operating as Trop Law Group, is granted to the extent that Plaintiffs’ complaint is dismissed *without prejudice*; and it is further

ORDERED that Defendants Christian Hernandez and Trop Spindler, LLP, now operating as Trop Law Group, shall serve, via NYSCEF, a copy of this Order with Notice of Entry on Plaintiffs and Co-Defendants, within ten (10) days from the date of entry.

This constitutes the Decision and Order of this Court.

Dated: August 21, 2023




PHILLIP HCM, J.S.C.