

Kunying Zhao v Hirsch
2024 NY Slip Op 35375(U)
October 23, 2024
Supreme Court, Queens County
Docket Number: Index No. 724747/2023
Judge: Robert I. Caloras
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SUPREME COURT OF THE STATE OF NEW YORK QUEENS
COUNTYPRESENT: HON. ROBERT I. CALORAS

PART 36 MOTIONS

Justice

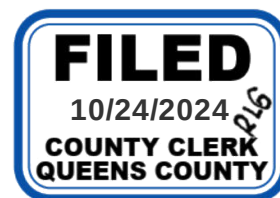
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INDEX NO. 724747/2023**KUNYING ZHAO, individually and as
Administrator of the Estate of ZHIWEN YAN,
deceased,**MOTION SEQ.
NO. 1**Plaintiffs,**

- v -

**DOROTHY HIRSCH, individually and as
Administrator of the Estate of GLENN E HIRSCH,
deceased,****DECISION + ORDER ON
MOTION****Defendants.**

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The following e-filed documents, listed by NYSCEF under the motion as: 5-31 were read on Defendants' motion for an order: (i) pursuant to CPLR § 325(e) to remove Plaintiffs' First, Second, Third, and Fourth Causes Action to Surrogate's Court; and (ii) for an order dismissing the Fifth Cause of Action pursuant to CPLR § 3211(a)(1); or, in the alternative, (iii) for an order pursuant to CPLR § 2201 staying this action pending the resolution of the criminal case against Ms. Hirsch.

Upon the foregoing documents, it is ordered that Defendants' motion is denied for the following reasons:

According to the Complaint, April 30, 2022, Plaintiff's decedent, Zhiwen Yan, was shot and killed by Defendant's decedent, Glenn Hirsch (hereinafter "Glenn"). The Complaint asserts the following causes of action against Dorothy Hirsch as Administrator of the Estate of Glenn: 1) survivorship; 2) wrongful death; 3) battery; and 4) assault. The Complaint also asserts a cause of action against Defendant Dorothy Hirsch for negligent entrustment.

Defendants now move in this pre-answer motion for an order: i) pursuant to CPLR 325(e) to remove Plaintiffs' First, Second, Third, and Fourth Causes Action to Surrogate's Court; and (ii) for an order dismissing the Fifth Cause of Action pursuant to CPLR 3211(a)(1); or, in the alternative, (iii) for an order pursuant to CPLR 2201 staying this action pending the resolution of the criminal case against Ms. Hirsch. The Court will first address the branch of Defendants' motion seeking to dismiss Plaintiffs' fifth cause of action pursuant to CPLR 3211(a)(1). In the fifth cause of action for negligent entrustment against Defendant Ms. Hirsch, Plaintiffs allege, in pertinent part, that Ms. Hirsch "... stored in her home the gun that Glen Hirsch used to shoot Mr. Yan".

Defendants submitted, among other things, the following: affirmation from Mark Bederow, Esq., counsel for Ms. Hirsch in the criminal case entitled *People v. Dorothy Hirsch*, Queens County Ind. No. 72622/2022, along with the following documents annexed thereto: an email from Raymond Valerio, from the Queens District Attorney's Office; Indictment against Ms. Hirsch, and OCME DNA lab reports. According to these submissions, Defendants claim the following: after Glenn was arrested, the police executed a search warrant of Ms. Hirsch's home where the police found eight firearms and assorted ammunition from a cluttered hallway closet that had been used by Glen. The firearms were taken into police custody and analyzed by the OCME. On June 24, 2022, the OCME issued a report concluding that none of the firearms found in Ms. Hirsch's home matched ballistics for the weapon that killed Mr. Yan. Based upon these submissions, Defendants argue that the fifth cause of action for negligent entrustment asserted against Ms. Hirsch should be dismissed because the OCME concluded that none of the guns that were found in Ms. Hirsch's home were related to the alleged homicide.

In opposition, Plaintiffs argue that the documentary evidence Defendants have submitted do not qualify as documentary evidence pursuant to CPLR 3211(a)(1). Plaintiffs further argue that even if the Court considers the documentary evidence submitted by Defendants, these documents fail to utterly refute Plaintiffs' fifth cause of action.

'Dismissal under CPLR 3211 [a] [1] is appropriate when the documentary evidence presented utterly refutes the complaint's factual allegations and conclusively establishes a defense as a matter of law (see Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 NY3d 169, 175 [2021]; Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). Evidence must be undisputedly authentic and unambiguous to constitute documentary evidence (see Maursky v Latham, 219 AD3d 473, 475 [2d Dept 2023]; Jeffrey v Collins, 218 AD3d 451, 453 [2d Dept 2023]; Davis v Henry, 212 AD3d 597, 597 [2d Dept 2023]). "To constitute documentary evidence, the evidence must be unambiguous, authentic, and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable" (Varricchio v. Big Bros. Big Sisters of Am., Inc., 220 AD3d 905, 906 [2d Dept. 2023]). It is well settled that affidavits, deposition testimony, and letters do not constitute documentary evidence (see Maursky, 219 AD3d at 475; Jeffrey, 218 AD3d at 453; Davis, 212 AD3d at 597-98).

Here, Defendants submitted documents which consist of: (1) laboratory reports that purportedly reflect the DNA testing on the weapons recovered from Defendant Ms. Hirsch's apartment in June 2024, more than a month after Mr. Yan's murder, and (2) an email purportedly from an employee of the Queens District Attorney's Office to OCME employees stating that none of the eight firearms found inside Defendant's house matched "ballistics for the homicide". The Court finds that these documents do not qualify as documentary evidence under CPLR 3211(a)(1) because they do not reflect an out-of-court transaction "the contents of which are essentially undeniable" (Varricchio v. Big Bros. Big Sisters of Am., Inc., 220 AD3d 905, 906 [2d Dept. 2023]). Moreover, Mr. Bederow, counsel for Defendant Ms. Hirsch in her criminal action, cannot authenticate records from the OCME and/or the Queens County District Attorney's Office pursuant to CPLR 4518(a).

Even if those records Defendants submitted were properly authenticated and qualified as documentary evidence pursuant to CPLR 3211(a)(1), they fail to utterly refute Plaintiffs' allegations

that defendant “Dorothy stored in her home the gun that Mr. Hirsch used to shoot Mr. Yan”. The OCME document, even if authenticated, does not establish, as a matter of law, that Glenn did not store the alleged murder weapon in Ms. Hirsch’s home before Glenn allegedly murdered Mr. Yan, nor does it establish that Ms. Hirsch never relinquished control of the alleged murder weapon to Glenn. Consequently, the documents Defendants has submitted fail to utterly refute Plaintiffs’ claim that “Dorothy stored in her home the gun that Mr. Hirsch used to shoot Mr. Yan”. Accordingly, the branch of Defendants’ motion seeking to dismiss the fifth cause of action pursuant to CPLR 3211(a)(1) is denied.

In the next branch of the motion, Defendants move for an order transferring those causes of action asserted against Defendant Ms. Hirsch as Administrator of Glenn’s Estate to Surrogate’s Court pursuant to CPLR 325(e), arguing that the Surrogate’s Court has concurrent jurisdiction over these claims and that this would promote judicial economy. Defendants submitted, among other things, the following: an affirmation from Elisabeth St. B. McCarthy, Esq., counsel for Defendant Ms. Hirsch in the Administration Proceeding, Estate of Glenn E. Hirsch, in Surrogate’s Court in Queens County (hereinafter the “Hirsch Proceeding”), along with the following documents annexed thereto: Petition for Letters of Administration in the Hirsch Proceeding filed on September 12, 2022; Verified Claim filed in the Hirsch Proceeding on November 14, 2022 by Kunying Zhao (Plaintiff in the instant action) on behalf of The Estate of Zhiwen Yan, Deceased, against Glenn’s estate; Affidavit Re: No Bond Hearing submitted by Glenn’s brother, Lee J. Hirsch; and an additional claim for investigative services filed against Glenn’s estate. Plaintiff opposes.

CPLR 325(e) provides, in pertinent part, that “[w]here an action pending in the supreme court affects the administration of a decedent’s estate which is within the jurisdiction of the surrogate’s court, the supreme court, upon motion, may remove the action to such surrogate’s court upon the prior order of the surrogate’s court”. The Supreme Court has concurrent jurisdiction with the Surrogate’s Court, but “the interests of judicial economy dictate a strong preference for removal [from Supreme Court to Surrogate’s Court] where the affairs of an estate are involved” (Birnbaum v. Central Trust Co., 1989, 156 AD2d 309 [1st Dept. 1989]; see also *Lawrence v. Miller*, 2007, 48 A.D.3d 1 [1st Dept. 2007]). Further, the Surrogate Court lacks subject matter jurisdiction over wrongful death claims (In re Estate Wallace, 239 AD2d 14 [3rd Dept. 1998]). Consequently, while the Surrogate’s Court has the expertise to oversee the administration of the affairs of decedents, cases involving wrongful death and related claims are often litigated in the Supreme Court. Even though Plaintiff filed a Verified Claim in the matter of Glenn’s estate in Surrogate’s Court, the purpose of this filing is to alert the Surrogate’s Court to the existence of the claim and the instant lawsuit. Significantly, there has been no litigation in Surrogate’s Court regarding the claims Plaintiff asserts herein. The Court also disagrees with Defendants’ claim that the Court should transfer the claims against Glenn’s estate to Surrogate’s Court merely because Surrogate’s Court has jurisdiction over Mr. Yan’s estate.

The Court finds that transferring the first, third and fourth causes of action to Surrogate Court would not promote judicial economy in this matter, particularly since this Court has retained jurisdiction over Plaintiff’s causes of action for wrongful death against Glenn’s Estate and denied Defendants’ request to dismiss Plaintiff’s cause of action for negligent entrustment against Defendant Ms. Hirsch. Splitting these claims between two Courts would, in effect, cause the Court to devote

resources to the same claims in multiple Courts and inconvenience all litigants. Accordingly, the branch of Defendants' motion seeking removal of those claims asserted against the Glenn's Estate to Surrogate's Court is denied.

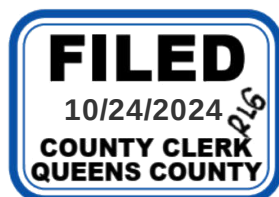
In the remaining branch of the motion, Defendants move for an order pursuant to CPLR 2201 staying this action pending the resolution of the criminal case pending against Ms. Hirsch. Initially, the Court finds that Defendants' claim that a stay should be granted pursuant to EPTL 5.4 is without merit. Turning to Defendants' remaining claim, Defendants argue that this action should be stayed to protect Defendant Ms. Hirsch's Fifth Amendment right against self-incrimination. In opposition, Plaintiffs argue, among other things, that Defendants' request for a stay is premature.

"The law is clear that a court is not required to stay a civil action until a pending related criminal prosecution has been terminated so that a party can avoid the difficulty of choosing between presenting evidence in his or her own behalf and asserting his or her Fifth Amendment rights" (Matter of Campbell v New York City Tr. Auth., 32 A.D.3d 350, 352 [1st Dept. 2006]). "While a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence" (Access Capital v DeCicco, 302 AD2d 48 [1st Dept. 2002]).

Here, the Court finds that Defendants' request for a stay to protect Ms. Hirsch's Fifth Amendment against self-incrimination is premature at this stage in the litigation. Accordingly, Defendants' request to stay this matter pursuant to CPLR 2201 is denied with leave to renew after discovery demands have been served, and it is

ORDERED, that Defendants are directed to file an Answer within twenty (20) days after entry of this order.

DATED: October 23, 2024




ROBERT I. CALORAS, J.S.C.