

**Balistreri v Sherman**

2025 NY Slip Op 34555(U)

November 25, 2025

Supreme Court, Kings County

Docket Number: Index No. 512996/25

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25<sup>th</sup> day of November, 2025.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.  
-----X

MARK BALISTRERI AND SALOVATORE  
BALISTRERI,  
Plaintiffs,

Index No.: 512996/25  
**MS # 1**  
**DECISION AND ORDER**

-against-

JODY SHERMAN,  
Defendant.  
-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	2-4
Opposing Affidavits (Affirmations) _____	9
Affidavits/ Affirmations in Reply _____	26

Upon the foregoing papers, defendant Jody Sherman (defendant) moves (Seq. 01) for an order, pursuant to CPLR §§ 3211 [a] (8) and 327, dismissing the complaint of plaintiffs Mark Balistreri (Mark) and Salvatore Balistreri (Salvatore).<sup>1</sup> Plaintiffs oppose the motion.

<sup>1</sup> Salvatore is named in the summons as Salovatore.

### Background

This action relates to the Last Will and Testament (Will) of Lucille Cohen a/k/a Lucille Goldschmidt (Lucille), who died on February 13, 2025. The Will was drafted by nonparty Charles Balistreri (Charles) and executed by Lucille on January 12, 2016. Among the provisions of the Will was the bequest of a cooperative unit owned by Lucille at 651 Vanderbilt Avenue in Brooklyn (Vanderbilt Co-op) to Mark, Lucille's cousin, and a Fort Lee, New Jersey condominium (Fort Lee Condo) to defendant, Lucille's niece, along with their contents. The residuary estate, after certain cash gifts, was bequeathed to Salvatore, another cousin of Lucille, and to defendant in equal shares. Salvatore and defendant were also named as co-executors of Lucille's estate.

From 2021 until her death, Lucille resided in a senior living facility in Cresskill, New Jersey. On March 26, 2021, Lucille executed a Power of Attorney (POA) granting defendant the authority to act as Lucille's attorney-in-fact for all purposes, including entering into real estate transactions. On or about July 18, 2022, the Vanderbilt Co-op was sold to a third-party, with defendant signing the applicable sale documents pursuant to the POA. The proceeds from the sale were deposited into a bank account held by Lucille and under which defendant was named as the POD (payable on death) beneficiary. Defendant also sold the Fort Lee Condo as Lucille's attorney-in-fact.

In early April 2025, following Lucille's death, plaintiffs' attorney sent letters to defendant demanding, among other things, the proceeds from the sale of the Vanderbilt Co-op and an accounting. Plaintiffs subsequently commenced the instant action on April 18, 2025. In the complaint, plaintiffs set forth causes of action sounding in breach of

fiduciary duty, conversion, tortious interference with inheritance, violation of General Obligations Law (GOL) § 1505, constructive trust, accounting and infliction of emotional distress. Plaintiffs' attorney also instructed Charles to refuse production of the Will to defendant, who requested same for admission to probate in New Jersey. On May 15, 2025, defendant commenced a probate proceeding in New Jersey Superior Court, Chancery Division, Bergen County and moved, by order to show cause, for an order compelling plaintiffs to turn over the Will so that it may be admitted to probate with the Bergen County Surrogate.

On or about June 16, 2025, Mark and Salvatore filed an answer with counterclaims in the New Jersey proceeding. In their answer, Mark and Salvatore state that "[defendant] has admitted that moving [Lucille] to Sunrise of Cresskill was done out of convenience for her and [Lucille's] stepson and that [Lucille] 'always intended Brooklyn, New York to be [Lucille's] domicile, as [Lucille] resided there for over fifty (50) years'" (*see* Plaintiffs' New Jersey Answer and Counterclaim, NYSCEF Doc. No. 28, ¶ 39).

### **The Parties' Contentions**

On June 2, 2025, defendant brought the instant motion to dismiss the complaint for lack of personal jurisdiction, arguing that she is a North Carolina resident without sufficient ties to New York so as to confer long-arm jurisdiction over her under CPLR § 302, and on the ground of "forum non-conveniens" pursuant to CPLR § 327, contending that the Bergen County Probate Court is the proper forum to litigate the claims relating to the Will. On June 8, 2025, plaintiffs submitted opposition to the motion, arguing, in sum

and substance, that this action is a tort action and not a will contest, and that Kings County is the proper forum since the events giving rise to the tort claims arose in New York.

### Discussion

“The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that ‘in the interest of substantial justice the action should be heard in another forum’” (*National Bank & Trust Co. of N. Am. v Banco De Vizcaya*, 72 NY2d 1005, 1007 [1988], quoting CPLR § 327; see also *Xiu Zhang Yin v Bennett*, 78 AD3d 936, 937 [2d Dept 2010]). “Among the factors the court must weigh are the residency of the parties, the potential hardship to proposed witnesses including, especially, nonparty witnesses, the availability of an alternative forum, the situs of the underlying actionable events, the location of evidence, and the burden that retention of the case will impose upon the New York courts” (*Turay v Beam Bros. Trucking, Inc.*, 61 AD3d 964, 966 [2d Dept 2009]). “In general, a decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to a court’s discretion” (*Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137 [2014] [citation omitted]). “The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action” (CPLR 327 [a]).

Here, plaintiffs concede that Bergen County, New Jersey is the proper venue for the probate of Lucille’s will (see NYSCEF Doc No 28, ¶ 39). Further, the counterclaims interposed by plaintiffs in the New Jersey proceeding include identical or substantially

similar claims as those alleged against defendant herein. Considering these, and all other relevant factors and circumstances, this Court finds that the instant action is properly subject to dismissal on the ground of forum non conveniens. Of particular significance is the availability of the alternative New Jersey forum for plaintiffs to assert their claims, which they have done in their responsive pleading to the probate proceeding.<sup>2</sup> Plaintiffs likewise have consented to have the Will probated in New Jersey. Retention of this matter would only pose an unnecessary burden on the court and present the risk of inconsistent rulings.

Moreover, the gravamen of plaintiffs' claims is that defendant wrongfully sold a property and asserted control over funds that either belong to Mark as a beneficiary or that must be made part of the residuary estate. The court notes the settled law that individual beneficiaries of an estate have no independent right to maintain an independent cause of action for the recovery of estate property and, thus, lack standing to bring an action to recover and preserve an asset wrongfully diverted from a decedent's estate prior to his or her death. The right to bring such an action belongs instead to the personal representative of the decedent's estate (*McQuaide v Perot*, 223 NY 75, 79 [1918]; *Levy v Levy*; 215 AD3d 742, 743 [2d Dept 2023]); *Stallsworth v Stallsworth*, 138 AD3d 1102, 1103 [2d Dept 2016]). While not expressly raised by defendant in her motion as a ground for dismissal, plaintiffs' lack of standing further demonstrates the propriety of having plaintiffs' claims addressed in the New Jersey probate proceeding.

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<sup>2</sup> “[A]vailability of another suitable forum is a most important factor to be considered in ruling on a motion to dismiss [on the ground of forum non conveniens]” (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 481 [1984]).

**Conclusion**

Accordingly, it is hereby

**ORDERED**, that defendant Jody Sherman's motion (Seq. 01) for an order, pursuant to CPLR §§ 3211 [a] [8] and 327, dismissing the complaint of plaintiffs Mark Balistreri and Salvatore Balistreri, is granted. The complaint is hereby dismissed pursuant to CPLR § 327.

The forgoing constitutes the decision, order and judgment of the Court.

ENTER

  
\_\_\_\_\_  
J. S. C.

**HON. WAVNY TOUSSAINT**  
**J. S. C.**

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KINGS COUNTY CLERK