Damiano v DiSisto
2025 NY Slip Op 35495(U)
January 10, 2025
Supreme Court, Westchester County
Docket Number: Index No. 56483/2023
Judge: Alexandra D. Murphy
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To commence the statutory time period for appeals as of right (CPLR 5s13 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY

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DANIEL DAMIANO, As Assignee of the ASSET MANAGEMENT, LLC PENSION PLAN, UNDER AGREEMENT DATED 01/01/1999, and the ASSET MANAGEMENT LLC PENSION PLAN, UNDER AGREEMENT DATED O1/01/1999,

Plaintiffs,

-against-

STEVE DiSISTO and LIBBY DiSISTO,

Defendants.

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Index No. 56483/2023

DECISION & ORDER

Motion Seq. No. 4

In this breach of contract action, defendants Steve and Libby DiSisto move for an order granting summary judgment pursuant to CPLR 3212 and dismissing the complaint pursuant to CPLR 3211(a)(3) on the ground that the plaintiffs have no legal capacity to sue.

Papers Considered **NYSCEF Doc. Nos. 73-96**

1. Notice of Motion/Affirmation in Support of Mark K. Stanton, Esq./Exhibits C-E/ Statement of Material Facts/Memorandum of Law in Support;
2. Affidavit of Daniel Damiano/Exhibits 1-8;
3. Memorandum of Law in Opposition of Matthew J. Keating, Esq./Response to Statement of Material Facts;
4. Affirmation in Reply of Mark K. Stanton, Esq./Exhibits A-E.

Factual and Procedural Background

The plaintiffs Daniel Damiano, as Assignee ("Damiano"), and Asset Management LLC Pension Plan under Agreement dated 01/01/1999 ("Pension Plan") commenced this action on February 7, 2023, alleging that the defendants defaulted on two promissory notes executed in 2009 by the Pension Plan and then later assigned to Damiano

(NYSCEF Doc. No. 1). On June 8, 2023, the defendants filed an answer asserting, among other things, the affirmative defense of lack of capacity to sue (NYSCEF Doc. No. 11).

In support of the motion, the defendants argue that the plaintiffs have failed to proffer any evidence of the Pension Plan's formation in 1999 or its existence as a legal entity at the time this action was commenced in 2023, as would be required to bring and maintain this suit. To support this contention, the defendants submit the plaintiffs' responses to discovery demands and Damiano's deposition transcript (NYSCEF Doc. Nos. 75-77). In their responses, the plaintiffs admit that they do not have a copy of the Pension Plan agreement dated January 1, 1999. At his deposition, Damiano testified that he had no knowledge of the Pension Plan's date of formation and acknowledged that the Pension Plan was no longer in existence, having been dissolved "years ago" (NYSCEF Doc. No. 77 at 13, line 6). The plaintiffs were also unable to provide any documentation demonstrating that Damiano was elected, appointed, or otherwise granted authority to act as trustee of the Pension Plan. Damiano further testified that he had no knowledge of ever having served in any capacity on behalf of the Pension Plan, which contradicts the complaint's assertion that Damiano was the Pension Plan's sole trustee.

The defendants further contend that the plaintiffs have failed to provide evidence that Damiano became the holder or assignee of the promissory notes prior to the Pension Plan's dissolution and therefore, Damiano lacks the legal capacity to enforce the notes. In support of their argument, the defendants submit copies of the two promissory notes which contain no assignments or indorsements in blank, but rather, demonstrate that the dissolved Pension Plan is the only holder of the notes (NYSCEF Doc. No. 2). The defendants also rely on Damiano's testimony that he personally handled the assignment of the loans from the Pension Plan to himself, but could not recall how or when this was done. In addition, the plaintiffs stated in response to discovery demands that they had no closing statements, proceed checks, or receipts from the funding of the loans, and no general ledger or other records that might demonstrate, among other things, that the loans were ever assigned to Damiano.

In opposition, the plaintiffs argue that the Pension Plan, which they repeatedly refer to as a "trust," is a valid entity with legal capacity to sue because it has never been dissolved or terminated. The plaintiffs claim that their inability to produce the formation documents is of no consequence because a valid trust can still exist in the absence of an executed trust instrument. The plaintiffs further contend that Damiano also has the requisite standing and legal capacity to enforce the promissory notes because, after the filing of this motion, Damiano indorsed and assigned the notes from the Pension Plan to himself pursuant to his authority as trustee. The plaintiffs argue that because the original notes are now properly indorsed, the defendants' challenge to the plaintiffs' standing and capacity is moot. Furthermore, if the action were dismissed, it would be a waste of judicial resources because the plaintiffs could simply commence a new action utilizing the properly indorsed assignments.

In support of their opposition, the plaintiffs submit an affidavit from Damiano, who is 85 years old and has a special trial preference order (NYSCEF Doc. No. 80). Damiano explains that he and his wife, for whom he is the full-time caregiver, had to travel from Florida to New York for his deposition and that Damiano was tired, distracted, confused, and had difficulty concentrating and understanding the context of the questions posed to him at the deposition. Damiano attests that after the deposition, he was admitted to Northern Westchester Hospital where he was diagnosed with extreme anemia from internal bleeding and underwent surgery one week later. According to Damiano, his medical condition impaired his responses at the deposition. Damiano further attests that the Pension Plan does in fact exist and when he testified that it was dissolved, he merely meant that the Plan has been inactive for several years. In addition, Damiano states that he was confused by questions related to his role in the Pension Plan and did not understand that being the trustee meant he was serving in "a capacity" on behalf of the Pension Plan. As to the inability to provide certain documents in response to the defendants' discovery demands, Damiano attests that the investment firm where he established the Pension Plan no longer has copies of the Plan documents because it was created more than fifteen years ago. Lastly, Damiano avers that he has always had the original notes in his possession and, on October 3, 2024, he indorsed each of the original of the promissory notes and assigned them to himself, individually, effective as of December 1, 2009. The plaintiffs have since served the defendants with copies of the newly indorsed notes (NYSCEF Doc. Nos. 84-85).

In reply, the defendants take issue with the plaintiffs' attempt to change Damiano's deposition testimony and re-classify plaintiff as a trust, as well as the plaintiffs' alteration of original documents after the close of discovery and the filing of a note of issue. The defendants submit copies of the Pension Plan's Form 5500-SF Annual Return/Report of Small Employee Benefit Plan for the years 2009 through 2013 to show that the plaintiffs have made false statements (NYSCEF Doc. Nos. 92-96). First, the returns show that the plaintiff was a Pension Plan and not a trust, as the plaintiffs now argue in opposition to the motion. Second, the returns show that the Plan had several administrators and five participants over the years. Thus, Damiano was not the sole trustee and beneficiary of the Plan, as alleged in the complaint. In addition, the Plan's last 5500-SF annual return was filed in 2013 and expressly states that a resolution to terminate the Plan was adopted and all Plan assets were either distributed, transferred, or brought under the control of the Pension Benefit Guaranty Corporation ("PBGC").[1] As to the newly indorsed promissory notes, the defendants argue that the plaintiffs are attempting to defraud the court by introducing purported assignments of the notes dated October 3, 2024, which is well after the dissolution of the Pension Plan and the commencement of this action. The defendants further contend that Damiano should be sanctioned with the costs of this motion.

Discussion

A party moving for summary judgment pursuant to CPLR 3212 must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

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[1] PBGC is a federal agency that protects pension benefits in single and multiemployer private sector pension plans. If a pension plan is terminated without sufficient funds, PBGC's insurance programs pay the pension plan benefits up to certain limits set by law (https://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc).

to demonstrate that there is no genuine dispute as to any material fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In assessing the record to determine whether there are material issues of fact for trial, the court must view the facts in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY 3d 824 [2014]). Issue finding, as opposed to issue determination, is the key to summary judgment (*Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252, 261 [2d Dept 1984]).

A defendant may move to dismiss a complaint on the ground that "the party asserting the cause of action has not legal capacity to sue" (CPLR 3211[a][3]). Capacity "concerns a litigant's power to appear and bring its grievance before the court" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148 [1994]). The "concept of capacity is often confused with the concept of standing, but the two legal doctrines are not interchangeable" (*id.*). "Capacity, or the lack thereof, sometimes depends purely upon a litigant's status" (*id.*). An objection to a party's status as a non-existent corporation "is properly understood as questioning legal capacity, not standing" (*Security Pacific National Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]).

Here, the defendants have demonstrated their prima facie entitlement to summary judgment and dismissal of the complaint through the submission of the plaintiffs' discovery responses, Damiano's deposition transcript, and the Pension Plan's 2009 through 2013 annual returns. The evidence shows that the Pension Plan, which is not a trust, was dissolved prior to the commencement of this action and therefore, did not exist at the time the action was commenced. And, because there was no valid assignment of the promissory notes to Damiano prior to dissolution of the Pension Plan, Damiano lacks the legal capacity to enforce the notes.[2]

In opposition, the plaintiffs have failed to raise a triable issue of fact. Damiano's attestation that his health prevented him from properly testifying at his deposition is not supported by any competent medical evidence, and rings hollow when only raised for the first time in opposition to this motion. Moreover, Damiano's original testimony that the Pension Plan was dissolved years ago is buttressed by the Plan's final 2013 annual return showing that a resolution to terminate the Plan was adopted and all plan assets were distributed, transferred, or brought under the control of the PBGC. In addition, the fact

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[2] The plaintiffs emphasize the significance of the defendants' failure to raise the defense of standing in their answer or a pre-answer motion to dismiss, but the issue of standing is irrelevant. Because the notes were never assigned to Damiano prior to the Pension Plan's dissolution, the question before the court is whether the law recognizes Damiano as the "proper bearer of the lawsuit" (i.e. having the legal capacity to sue), and not whether Damiano "suffered an injury or was otherwise harmed by the defendants' alleged conduct" (i.e. having the standing to commence the action) (Hon. Mark C. Dillon, 2024 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:12).

that Damiano indorsed and assigned the notes to himself just this past year, in October 2024, demonstrates that there was no valid indorsement prior to the Pension Plan's dissolution.

Finally, given the plaintiffs' recent alteration of the original promissory notes, the court has serious concerns with the veracity of the plaintiffs' evidence. The court has considered and rejects the plaintiffs' argument that dismissal of the complaint would be a waste of judicial resources because the plaintiffs could merely institute a new action based on the recently indorsed promissory notes. The plaintiffs are cautioned that in the event a new action is commenced based on the same underlying facts and transactions, the complaint must explicitly reference the instant action.

Accordingly, it is hereby

ORDERED that the defendants' motion seeking summary judgment and dismissal of the complaint is **GRANTED**.

The Clerk of the Court shall mark his records accordingly.

Dated: White Plains, New York
January 10, 2025

HON. ALEXANDRA D. MURPHY, J.S.C.