Dournias v Hrisomallis
2016 NY Slip Op 30653(U)
March 8, 2016
Supreme Court, Queens County
Docket Number: 707952 2015
Judge: Leonard Livote

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE IA Part 33
Justice

x

Athanasios Dourmas
Plaintiff,

- against -

Maria Hrisomallis, Philip V. Bouklas, Esq. and Bouklas 7 Associates PLLC,
Defendants.

x

Index Number 707952 2015

Motion Date November 5, 2015

Motion Cal. Numbers 47 & 48

Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 13 read on this motion by defendant Maria Hrisomallis to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(7), and (a)(2) and 305; and, by separate notice of motion, defendants Philip V. Bouklas, Esq. and Bouklas & Associates PLLC (Bouklas defendants) move to dismiss the complaint pursuant to CPLR 3211(a)(3) and (a)(7).

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1 - 8
Answering Affidavits - Exhibits	9 - 11
Reply Affidavits	12 - 13

Upon the foregoing papers it is ordered that the motions are determined as follows:

This is an action arising out of an agreement to sell real property located at 23-20 29th Street in Queens, New York, which was part of a trust (Trust 1). Plaintiff is the sole beneficiary of Trust 1 and Hrisomallis is the trustee of Trust 1. On July 25, 2013, Hrisomallis, as trustee of Trust 1, executed an "Exercise of Trustee's Power to Invade Principal in Trust for Trust 1" to decant the principal held in Trust 1, including the subject property, to create and fund Trust 2. Hrisomallis, as trustee of Trust 1, then executed a deed conveying the premises to Hrisomallis, as trustee of Trust 2. That same day, plaintiff signed a representation agreement retaining the Bouklas defendants to provide certain legal services, including, among other things, preparation of the agreement creating Trust 2, the decanting document, and the deed to transfer the premises from Trust 1 to Trust 2. On August 5, 2013, Hrisomallis, in her capacity as trustee, executed a contract of sale and rider to the contract

of sale, in which she conveyed to herself an undivided one-half interest in the trust property for the sale price of $467,000.00. The rider to the contract of sale contained a provision stating that Hrisomallis had an option to purchase the remaining interest in the property for $464,766.00 by August 14, 2063. By deed dated August 14, 2013, Hrisomallis, as trustee of Trust 2, conveyed to herself an undivided one-half interest in the premises. On November 4, 2013, the July 25, 2013 and the August 14, 2013 deeds were recorded. On July 14, 2015, plaintiff commenced the within action against defendants, alleging causes of action sounding in breach of fiduciary duty against Hrisomallis and legal malpractice against the Bouklas defendants.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*). Where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted (*see DiGiacomo v Levine*, 76 AD3d 946, 949 [2010]; *Berardino v Ochlan*, 2 AD3d 556, 557 [2003]).

Applying these principles to the case at bar, the court finds that the branches of Hrisomallis' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) are denied. The complaint alleges that Hrisomallis, as a trustee, engaged in self-dealing in breach of her fiduciary duties owed to plaintiff, as beneficiary of the trust, by selling and conveying an undivided one-half interest in the subject property to herself, with a 50-year option to purchase the remaining interest in the property for $464,766.00, and collecting management fees from the trust. Plaintiff further alleges that, as a result of Hrisomallis' breach of her fiduciary duties, the trust estate suffered a loss in value by reason of the sale and division of the property and the granting of the purchase option. To state a claim of breach of fiduciary duty, the plaintiff must allege: (1) the existence of a fiduciary relationship between the plaintiff and the defendant, (2) misconduct by the defendant, and (3) damages (*see Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [2011]). In support of her motion, Hrisomallis primarily argues that the complaint does not allege any breach or wrongdoing committed by her because the purchase option which was contained in paragraph four of the rider to the contract of sale dated August 5, 2013 is not included in the recorded deed and, since, under the merger doctrine, the contract of sale merged with the deed, Hrisomallis cannot be held liable for an alleged breach based upon any of the contract terms which were inconsistent with the deed and, thus, extinguished upon delivery of the deed. However, it is well-settled that a real property sales contract merges with the deed except for those provisions which concern collateral matters, which cannot be performed until after the conveyance, or where the parties have expressed their intention that such provisions shall

survive delivery of the deed (*see Roosa v Campbell*, 291 AD2d 901, 902 [2002]). Contrary to Hrisomallis' contention, the merger doctrine is inapplicable because paragraph nine of the rider to the contract of sale expressly states "[p]aragraphs 4, 5, 6, 7, 8 and 9 of this Rider shall survive Closing." As such, the documentary evidence presented on the motion fails to conclusively dispose of the breach of fiduciary duty claims against Hrisomallis.

That branch of the motion by Hrisomallis to dismiss the complaint for lack of subject matter jurisdiction pursuant to CPLR 3211(a)(2) is also denied. In support of her motion, Hrisomallis argues that the summons is jurisdictionally defective because it lists an incorrect address for plaintiff. Specifically, the summons and complaint indicates that plaintiff resides at 23-20 29th Street, Apt. 2F, in Queens County, New York and that the basis of the venue designated is the county in which plaintiff resides. CPLR 305(a) provides, in pertinent part, that "[a] summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff's address . . . ." A failure to comply with the technical requirements of CPLR 305(a) does not warrant dismissal unless there is a showing of prejudice caused by such defect (*see Francis v Midtown Express, LLC*, 124 AD3d 493 [2015]; *Cruz v New York City Hous. Auth.*, 269 AD2d 108 [2007]). While plaintiff does not dispute that the address indicated on the summons is incorrect, the defect did not result in any prejudice to Hrisomallis as the subject property is located in Queens County and Hrisomallis resides in Queens County. In addition, plaintiff stated in an affidavit that he currently resides at 251-32 51st Avenue in Little Neck, New York.

Next, the court will address the branch of the motion by the Bouklas defendants pursuant to CPLR 3211(a)(3) to dismiss the complaint on the ground that plaintiff lacks standing to commence the instant action. As to plaintiff's claim of breach of fiduciary duty asserted against Hrisomallis, the Bouklas defendants contend that plaintiff lacks standing to bring an action on behalf of the estate without obtaining letters of administration in accordance with SCPA § 702(9). An estate is not deemed a legal entity and, therefore, any action against the estate must be brought by the executor or administrator in a representative capacity (*see Grosso v Estate of Gershenson*, 33 AD3d 587 [2006]). Generally, absent extraordinary circumstances, beneficiaries of an estate or trust do not have a right, either individually or on behalf of the estate or trust, to bring an action seeking to recoup property for the estate since that role belongs to the executor or trustee (*see McQuaide v Perot*, 223 NY 75, 79-80 [1918]; *Lewis v DiMaggio*, 115 AD3d 1042 [2014]). An individual must obtain letters of administration before suing on behalf of the estate (*see Brandon v Columbian Mut. Life Ins. Co.*, 264 AD2d 436 [1997]). However, extraordinary circumstances may be implicated where, as here, the executor or trustee was alleged to be directly involved in purported egregious conduct and self-dealing which negatively impacts the assets of the estate (*see Inman v Inman*, 97 AD2d 322 [1993]). In this case, the complaint alleges that, "[o]n August 5, 2013, Defendant Hrisomallis, as Trustee of Trust 2, executed

a Contract of Sale and Rider . . . . for an undivided one-half interest in the Premises to herself . . . . for the sale price of $467,000.00," and that "[b]y Deed dated August 14, 2013, Defendant Hrisomallis, as Trustee of Trust 2 , conveyed to herself, an undivided fifty percent (50%) interest in the Premises." The complaint further alleges that "[t]he sale and conveyance of a fifty percent (50%) interest in the Premises from Defendant Hrisomallis, as Trustee of Trust 2, to Defendant Hrisomallis, was an act of self-dealing and a breach of Defendant Hrisomallis' fiduciary duty of undivided loyalty to the trust." Plaintiff claims that, as a result of Hrisomallis' self-dealing, "the trust estate has suffered a loss in value by reason of the sale and division of the Premises and the granting of purchase option for the portion of the Premises remaining in the Trust." In addition, plaintiff claims that Hrisomallis breached her fiduciary duties as trustee in engaging in self-dealing by collecting management fees from the trust. Based on the foregoing, this court finds that the allegations of the complaint are sufficient to establish that plaintiff, on behalf of the estate, has standing to bring a cause of action for breach of fiduciary duty against Hrisomallis, without first obtaining letters of administration.

The court also finds that plaintiff has standing to bring a claim for legal malpractice against the Bouklas defendants. It is well-established that a legal malpractice claim requires, in the first instance, the existence of an attorney-client relationship (*see Arnold v Devane*, 123 AD3d 1202, 1203 [2014]). Thus, lack of privity with an estate planning attorney is a bar against a beneficiary's claim of legal malpractice against that attorney, absent fraud, collusion, malicious acts, or other special circumstances (*see Estate of Schneider v Finmann*, 15 NY3d 306, 310 [2010]). Here, the complaint alleges that plaintiff is the beneficiary of Trust 1 and 2 and that, on July 25, 2013, he signed a representation agreement retaining the Bouklas defendants to, among other things, prepare the agreement creating Trust 2, the decanting document, and the deed to transfer the subject premises from Trust 1 to Trust 2. As such, the complaint sufficiently alleges an attorney-client relationship between plaintiff and the Bouklas defendants such that plaintiff has standing to bring a claim for legal malpractice against the Bouklas defendants.

Finally, that branch of the motion by the Bouklas defendants to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action is denied. While the notice of motion seeks dismissal of the complaint pursuant to CPLR 3211(a)(7), the Bouklas defendants did not make any arguments addressing those grounds for dismissal.

Accordingly, the motions are denied.

FILED

MAR 24 2016

COUNTY CLERK
QUEENS COUNTY

Dated: March 8, 2016

J.S.C.