

Desia v Couture

2007 NY Slip Op 34526(U)

October 26, 2007

Supreme Court, New York County

Docket Number: 119131/06

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

AM

PRESENT: DEBRA A. JAMES
Justice

PART 59

ROSE DESIA, TRUSTEE OF THE BARBARA BESS TRUST, f/b/o JULIUS SOLOMON,
Plaintiff,

Index No.: 119131/06

Motion Date: 06/12/07

Motion Seq. No.: 01

- v -

CHRISTOPHER COUTURE, EDWARD S. SAVIANO, JAMES B. STEWART, and A.G. EDWARDS & SONS, INC.,
Defendants.

Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3

4

FILED

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NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall deny the motion to dismiss of defendants Christopher Couture, James B. Stewart, and A.G. Edwards & Sons, Inc., (Motion Sequence No. 1) and for the same reasons shall deny the separate motion to dismiss of defendant Edward S. Saviano.

At the threshold, the court holds that this action is timely under CPLR 205 (a). An action captioned Solomon v Couture (Index No. 103732/2005) was previously timely commenced upon the same transactions sued upon here. The defendants in the Solomon

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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action are identical to the defendants in this action and the plaintiff in the Solomon action is the alleged beneficiary of the plaintiff Trust in this action. By Order dated June 13, 2006, (Index No. 103732/2005, Mot. Seq. No. 1, Gammerman, JHO) ¹ a Judicial Hearing Officer of this Court dismissed the Solomon action without prejudice stating in pertinent part (citations omitted, emphasis added)

Under these circumstances, plaintiff has no standing to proceed with this lawsuit . . . The claims against all defendants must be dismissed. . . Plaintiff has no authority to proceed in this case, and therefore, he cannot move to amend an unauthorized and jurisdictionally defective complaint. Accordingly, it is ORDERED that the motions of all of the defendants to dismiss the complaint are granted, and the complaint is dismissed, without prejudice.

Contrary to defendants' arguments, plaintiff satisfies the requirements of CPLR 205 (a). There is no dispute that the Solomon action was timely commenced and that the claims raised in this action are identical to that prior action. Rather, defendants argue that a lack of identity between the Trustee here and the beneficiary in the prior suit bar the application of the saving statute. However, appellate authority is contrary to defendants' argument. In Lambert v Sklar (30 AD3d 564, 565 [2d Dept 2006]) the Court considered a case in which the decedent's widow commenced an action for fraud, conversion and unjust

¹ In the interest of economy the court adopts the factual recitation set forth in the June 13, 2006, Order.

enrichment on behalf of her deceased husband's estate. The Court previously affirmed the dismissal of that action on the grounds that the widow did not have standing to sue on behalf of the estate (see Rovello v Klein, 7 AD3d 604 [2d Dept 2004]).

Subsequently, the estate brought an action based upon the same allegations and the Court found the action timely under CPLR 205 (a) holding that

Under the facts of this case, the fundamental purpose of the statute was served. Even though the widow and the appellant are two different plaintiffs, it is clear that the real party in interest, the estate, was the same in both actions. In addition, it is undisputed that the respondents were given timely notice of the causes of action asserted by or on behalf of the estate by the proper service of the summons and complaint in the widow's action. Therefore, the "error" relating to the identity of the named plaintiff in the first action did not bar recommencement of the action pursuant to CPLR 205 (a). Accordingly, the appellant's cause of action to recover damages for fraud, which is governed by a six-year statute of limitations (see CPLR 213), was not time-barred since this same claim was timely asserted in the prior action.

Lambert v Sklar, supra, 30 AD3d 564, 566 (2d Dept 2006).

Cf. Reliance Insurance Company v Polyvision Corporation, __ NY3d __, 2207 WL 2947396, 2007 Slip Op 07500.

Similar reasoning applies in this case. The dismissal of the Solomon action was without prejudice to the recommencement of the suit by the proper party. The sole reason for the court's dismissal was the lack of capacity of the beneficiary to sue for wrongs committed upon the plaintiff Trust. As in Lambert, the fundamental purpose of CPLR 205 (a) is served because in both

cases the real party in interest, the Trust, is the same.

Therefore, the court holds that this action is timely commenced.

The court shall also deny defendants' motion to dismiss the complaint on the grounds of prior action pending (CPLR 3211 [a] [4]). As argued by the plaintiff and not contested by the defendants, plaintiff would not be able to obtain relief in the pending federal action (Desia v GE Life, US Dist Ct, Conn, 05 Civ 1395 [JCH]) against the individual defendants because the applicable statute of limitations in that forum has expired. Thus, while the individual defendants here may be third-party defendants in the federal action, plaintiff would not be able to obtain relief from or jurisdiction over them in that forum. Furthermore, the Solomon action which placed all parties on notice of the claims that would be asserted in this forum was begun prior to the federal action and therefore it is appropriate that those claims have priority in this forum.

Finally, the court finds that the plaintiff has sufficiently plead causes of action for fraud and misrepresentation. As stated by the First Department

CPLR 3013 provides: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

CPLR 3016, which deals with particularity required in specific actions, provides, in subdivision (b), with respect to a cause of action for fraud: "Where a cause of action or defense is based upon misrepresentation, fraud,

mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

These provisions, read together, mandate only that the complaint allege the misconduct complained of in sufficient detail to inform the defendants of the substance of the claims. As the Court of Appeals has noted with respect to CPLR 3016 (b): "This provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud' (Jered Contr. Corp. v New York City Tr. Auth., 22 NY2d 187, 194)." (Lanzi v Brooks, 43 NY2d 778, 780.)

. . . Under the circumstances, where the facts were "peculiarly within the knowledge of the party against whom the [fraud] is being asserted" (Jered Contr. Corp. v New York City Tr. Auth., *supra*, at 194), the misconduct complained of was set forth in sufficient detail to apprise defendants of the alleged wrongs. Given that the allegations must be given their most favorable intendment (Arrington v New York Times Co., 55 NY2d 433, 442, *cert denied* 459 US 1146), "it would be impossible for the plaintiff to state the circumstances in more detail because, if the allegations are true, only the defendants would have knowledge of the details" (Grumman Aerospace Corp. v Rice, 196 AD2d 572, 573).

Bernstein v Kelso & Co., Inc., 231 AD2d 314, 320-321 (1st Dept 1997).

Plaintiff adequately alleges that defendants knowingly made false statements to the plaintiff regarding "an inadvertent mistake" as to the beneficiary designation. This factual assertion is sufficient to place the defendants on notice of the conduct complained of as a matter of pleading. Therefore, defendants' motion to dismiss shall also be denied.

Accordingly, it is

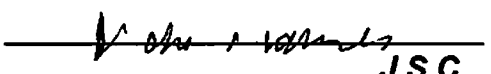
ORDERED that defendants' motion to dismiss is DENIED for the foregoing reasons; and it is further

ORDERED that the parties are directed to attend a preliminary conference on November 20, 2007, at 9:30 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: October 26, 2007

ENTER:


J.S.C.
DEBRA A. JAMES
J.S.C.

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