

Butler v County of Suffolk

2014 NY Slip Op 31888(U)

July 16, 2014

Sup Ct, Suffolk County

Docket Number: 34831/2012

Judge: Jr., Andrew G. Tarantino

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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

-----X
**JANNIE BUTLER, as Administratrix of the Estate of
ARTHUR LEE THOMAS, Deceased,**

Plaintiff(s),

-against-

**THE COUNTY OF SUFFOLK, SUFFOLK
COUNTY SHERIFF'S OFFICE, SUFFOLK
COUNTY DEPARTMENT OF HEALTH
SERVICES,**

Defendant(s).
-----X

ACTION 1

Index No. 34831/2012
Orig. Date: 2/13/2014
Adj. Date: 3/18/2014
Motion Dec. **002: MotD**

**KRISTEN LEONARDO, as Co-administratrix of the
Estate of Arthur Lee Thomas, deceased, and as
property guardian of infant sole distributee of the
decedent, ZAYVION THOMAS,**

Plaintiff(s),

-against-

**THE COUNTY OF SUFFOLK, SUFFOLK
COUNTY SHERIFF'S OFFICE, SUFFOLK
COUNTY DEPARTMENT OF HEALTH
SERVICES,**

Defendant(s).
-----X

ACTION 2

Index No. 1224/2014
Orig. Date: 2/13/2014
Adj. Date: 3/18/2014
Motion Dec. **001: MD**

Orig. Date: 2/13/2014
Adj. Date: 3/18/2014
Motion Dec. **002: XMG**

Upon consideration of the Notice of Motion, dated January 21, 2014 (motion sequence 002), by non-party Kristen Leonardo ["Leonardo"], for an Order, a) pursuant to CLPR §305 and §3025, amending the caption in Action 1 (index number 34831-2012) commenced on November 6, 2012 ["Action 1"], and b) disqualifying Sharon Silver, Esq. and her firm, from representing any party in this matter, the moving affirmation, supporting affidavit and exhibits A through M; the Affirmation in Opposition by Sharon L. Silver, Esq., the attorney for Jannie Butler, as Administratrix of the Estate of Arthur Lee Thomas, Deceased, the affidavits of Jannie Butler, Robert Butler, and Stephen Pearlman in opposition, and exhibits A through E; the Affirmation in Opposition by the County of Suffolk, s/h/a The County of Suffolk, Suffolk County Sheriff's Office, Suffolk County Department of Health Services [hereinafter "the County"], exhibits A through M; Leonardo's Reply to the County's opposition and in further support of the motion and exhibits 1 and 2, and Leonardo's Reply to the opposition of Sharon L. Silver, Esq., the attorney for Jannie Butler, as Administratrix of the Estate of Arthur Lee Thomas, Deceased, the supporting affidavits, and exhibits 1 through 5; and further

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Upon consideration of the Notice of Motion in Action 2 (motion sequence 001) by the plaintiff Kristen Leonardo, as Co-Administratrix of the Estate of Arthur Lee Thomas, Deceased, and as property guardian of infant sole distributee of the decedent, Zayvion Thomas, in an action against defendants County of Suffolk, Suffolk County Sheriff's Office, Suffolk County Department of Health Services commenced on January 17, 2014 (index number 01224-2014), for an order consolidating Action 1 and Action 2, or for joint trials, the affirmation in support, the supporting affidavit, and exhibits A through G; the Affirmation in Opposition by Sharon L. Silver, Esq., the attorney for Jannie Butler, as Administratrix of the Estate of Arthur Lee Thomas, Deceased, in Action 1, the Affidavits in Opposition, and exhibits A through E, the Notice of Cross Motion by the County of Suffolk, s/h/a The County of Suffolk, Suffolk County Sheriff's Office, Suffolk County Department of Health Services [hereinafter "the County"], to dismiss the complaint in Action 2 pursuant to CPLR §3211 (a) (4), the supporting affirmation and exhibits A through H (motion sequence 002 in Action 2); and the reply affirmation in further support of the motion to consolidate Actions 1 and 2, and in opposition to the cross motion to dismiss and exhibits 1 through 5, it is now

ORDERED that motion sequence 002 in Action 1 and motion sequences Nos. 001 and 002 in Action 2 are consolidated for purposes of the determination of these motions; and it is further

ORDERED that so much of the motion by Leonardo for an Order pursuant to CLPR §305 and §3025, amending the caption in Action 1 to substitute Jannie Butler and Kristen Leonardo, as co-administratrices of the Estate of Arthur Lee Thomas, Deceased, Plaintiff, is denied, without prejudice to renew, in accordance with this decision; and it is further

ORDERED that so much of Leonardo's motion in Action 1 seeking an order disqualifying Sharon Silver, Esq. and her firm, from representing any party in this matter is denied; and it is further

ORDERED that so much of Leonardo's motion in Action 2 seeking an order consolidating Action 1 and Action 2, or for joint trials, is denied; and it is further

ORDERED that the County's cross motion to dismiss Action 2 pursuant to CPLR §3211 (a)(4) is granted; and it is further

ORDERED that the attorneys for the parties are directed to appear on **AUGUST 5, 2014, at 2:00 P.M.** on the second floor of One Court Street Annex, Riverhead, for a hearing on the issue of the paternity and DNA testing of Zayvion Dalani Thomas ["Zayvion"]; and it is further

ORDERED that Kenneth Molloy, Esq., with an office address of 320 Carleton Ave, Ste 6200, Central Islip, NY 11722 (631-415-4808), is hereby appointed as Attorney for the Child Zayvion Dalani Thomas and shall also appear on behalf of Zayvion at the hearing scheduled for August 5, 2014 at 2:00 PM on the second floor of One Court Street Annex, Riverhead, New York; and it is further

ORDERED that the Attorney for the Child shall be paid for his services as follows: by the Panel as monitored and processed by the Appellate Division, Second Department, at the Panel rate for the time up to and including whether and if genetic tests are conducted; thereafter, if it is determined that the child is the issue of the Decedent, the Attorney for the Child shall continue to be paid by the Panel up to the conclusion of the action, except that if an award is made to the estate by settlement or otherwise, the estate shall reimburse the Panel for all sums paid to the Attorney for the child, and from the determination that the child is the issue of the Decedent, the estate shall pay to the Attorney for the Child the rate of \$200.00 per hour, less the amount paid to the Attorney for the Child by the Panel for that period; and it is further

ORDERED that all attorneys of record are to immediately forward to the Attorney for the child copies of any and all pleadings and Orders filed-to-date in this action; and it is further

ORDERED that the Attorney for the Child shall immediately be granted access to the child, and no party, parent, relative, or any other person shall present the child to any attorney without first consulting with the Attorney for the Child.

Arthur Lee Thomas [“the Decedent”], died on June 12, 2012, while an inmate at the Riverhead Correctional Facility where he had been incarcerated since April 16, 2012. Unrelated to the incarceration, and due to a prior automobile accident the preceding year, the Decedent had a tracheostomy. Butler and Leonardo each alleged, inter alia, that the Decedent died while incarcerated when his upper airway became completely occluded due to the failure of the jail’s staff to suction the Decedent’s tracheal tube on a daily basis in accordance with instructions from the Decedent’s doctors. The Decedent died intestate.

Jannie Butler [hereinafter “Butler”] is the Decedent’s mother, co-administratrix of his estate, and the plaintiff in Action 1. Letters of Administration were issued to Butler on August 2, 2012. Butler commenced Action 1 against the County on November 6, 2012. Action 1 seeks damages for, inter alia, negligence, pain and suffering, wrongful death, and violation of the Decedent’s civil rights. The County answered the complaint in Action 1 on December 6, 2012, and filed an Amended Answer on or about January 3, 2013. Some discovery has been conducted in Action 1.

Leonardo is the natural, biological mother of Zayvion, an infant who was born on March 2, 2011. Leonardo has maintained that, at all relevant times, Zayvion is the natural son and sole issue of the Decedent. Leonardo and the Decedent were never married.

Butler first received Letters of Guardianship of the property of Zayvion dated July 6, 2012, upon Leonardo’s having signed a Waiver of Process, Renunciation and Consent to the issuance of Letters of Guardianship to Butler. On August 19, 2013, upon the petition of Leonardo, the Surrogate of Suffolk County (Czygier, J.), signed a decree revoking Butler’s letters and appointing Leonardo as successor guardian of the property of Zayvion. The decree referred to a stipulation which the parties (Butler and Leonardo) had filed resolving their dispute.

The stipulation referred to in the Surrogate’s decree provided that 1) the letters of guardianship of the property of Zayvion issued to Butler would be revoked, 2) that successor letters of guardianship would be issued to Leonardo, 3) that Butler and Leonardo would serve as co-administrators of the Decedent’s estate, and 4) that Butler and Leonardo as co-administrators would share one full statutory commission. In a Decision dated September 10, 2013, the Surrogate referenced the parties’ written stipulation of settlement and concluded:

“Accordingly, in light of the settlement, the letters of administration heretofore issued shall be revoked and amended letters of administration shall issue subject to the restrictions noted herein. As to the cause of action for wrongful death set forth in the petition, the authority of the co-administrators is limited and restricted to prosecution and settlement thereof, and the defense of any claim or action arising therefrom....”

By the time Butler and Leonardo were named co-administratrices, Action 1 had already been pending for ten months.

Although it is not entirely clear from the voluminous record before the Court, it appears that some time after the Surrogate proceeding, Leonardo, through her attorneys, initiated attempts to have Butler's attorney, Sharon L. Silver, Esq., ["Silver"], disqualified from representing Butler, as administrator, in Action 1. The Supreme Court (LaSalle, J.) declined to consider Leonardo's application on the basis that Leonardo was a non-party in Action 1 and did not have standing to so move, and that no separate action had been commenced by Leonardo. Leonardo apparently also presented the Appellate Division Second Department an Order to Show Cause to disqualify Silver as the estate's attorney. The outcome of that application is not clear, but it appears no Order was signed granting the application.

On January 17, 2014, Leonardo commenced Action 2, alleging, inter alia, the wrongful death of the Decedent. The plaintiff is "Kristen Leonardo, as Co-Administratrix of the Estate of Arthur Lee Thomas, Deceased, and as property guardian of infant sole distributee of the Decedent, Zayvion Thomas." The named defendants in Action 2 are identical to the named defendants in Action 1.

The Court here considers the following motions: In Action 1, Leonardo moves 1) to amend the caption to read "JANNIE BUTLER *and* KRISTEN LEONARDO, as co-administratrices of the Estate of Arthur Lee Thomas, Deceased, Plaintiff", and 2) for an Order "pursuant to the Judiciary Law and the ethical rules, disqualifying Silver and her firm, from representing any party in this matter..." In Action 2, there are two pending motions. The first motion by Leonardo is to consolidate Action 2 with Action 1, or for joint trials. The second motion is by the County, denominated a "cross motion", seeking to dismiss Action 2 pursuant to CPLR §3211 a (4) upon the grounds that there is another action pending between the same parties for the same cause of action - specifically, Action 1 commenced by Butler.

Clearly, the County's cross-motion to dismiss Action 2 must be granted. The entity standing in place of the Decedent is his estate. Action 1 is the estate versus the county, and Action 2 is the estate versus the County. But for the estate having co-administrators, the claims are identical. Therefore, Action 2 is dismissed. Having granted the County's motion, Leonardo's motion to consolidate the actions is denied as moot.

The disputes in this action are not just those alleged by the Decedent's estate against the County, there is clearly a dispute between the co-administrators. The latter dispute raises issues of conflict of interest. There seems to be no dispute that the wrongful death cause of action is the estate's only asset. Pursuant to Estates Powers and Trust Law §4-1.1 a (3), if a Decedent dies intestate, is survived by issue and no spouse, the entire estate goes to the issue. On one hand, Butler is Decedent's mother who questions whether the child is the Decedent's child. If not, Butler would inherit the Decedent's estate as the surviving parent. On the other hand, Leonardo, the child's mother, seeks to have the child inherit the entirety of Decedent's estate. These polar positions also raise conflicts of interest in representing the child's interests. Accordingly, effective immediately, the child is provided legal counsel with the same legal protections as any other party would have with their attorney. This Court will not engage itself in remedying disputes between co-administrators and the Court may visit appointing a Referee for the estate to represent the estate, in the estate's best interests, before this Court.

As to Leonardo's motion to amend the caption in Action 1, the motion is denied, without prejudice to renew, upon the results of a paternity test confirming that Zayvion is in fact the natural son of the Decedent. The stipulation of settlement in the Surrogate's Court indicates that the parties agreed that both Butler and Leonardo would act in a co-representative capacity for the estate. However, the issue of Zayvion's paternity was not finally determined. Although paternity was raised in the Surrogate proceeding, the agreement by both parties seemingly left for another day the issue of Zayvion's paternity. It can not be said that the issue of Zayvion's paternity was actually litigated in the Surrogate Court proceeding (*Derrick H. v. Martha J.*, 82 A.D.3d 1236, 922 N.Y.S.2d 83 [2d Dept. 2011]).

In any event, the County, in its papers, has articulated its intention to obtain a paternity test in the context of Action 1 and is not barred by collateral estoppel or issue preclusion from doing so. The doctrine of collateral estoppel bars a party from “relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party” (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487; see *Tydings v. Greenfield, Stein & Senior, LLP*, 11 N.Y.3d 195, 199, 868 N.Y.S.2d 563, 897 N.E.2d 1044). “As the consequences of a determination that a party is collaterally estopped from litigating a particular issue are great, strict requirements for application of the doctrine must be satisfied to insure that a party not be precluded from obtaining at least one full hearing on his or her claim” (*Gramatan Home Invs. Corp. v. Lopez*, 46 N.Y.2d 481, 485, 414 N.Y.S.2d 308, 386 N.E.2d 1328). The County was not a party in the Surrogate Court proceeding or stipulation and correctly asserts that it is not bound by collateral estoppel or issue preclusion as to any factual findings therein including Zayvion’s paternity.

Notably, the issue of Zayvion’s paternity was the subject of a separate Family Court proceeding (Docket No. P20080-12), wherein Butler petitioned to vacate an Acknowledgment of Paternity by the Decedent, or alternatively, for visitation with Zayvion. In her petition dated November 9, 2012, Butler attested that the Decedent was led to believe that Zayvion was his son at a time when the Decedent had not yet recovered from serious head injuries as a result of a motor vehicle accident. Butler, as petitioner, attested that she discussed with the Decedent the “strong possibility” that Zayvion was not his son and that the Decedent wanted a paternity test. The Decedent died before a paternity test could be conducted. There is also an indication from the papers that Butler testified at a municipal hearing taken pursuant to General Municipal Law §50-e in this matter that she had “doubts” as to whether Zayvion was the Decedent’s son.

Thus, until the issue of Zayvion’s paternity is finally determined by DNA testing, so much of Leonardo’s motion that seeks to amend the caption in Action 1 to add her name as a representative of the estate along with Butler is denied as premature. Upon the determination of paternity, Leonardo may renew her motion to amend the caption in Action 1 to include her as co-administrator.

The issue of Silver’s disqualification as the estate’s attorney in Action 1 is likewise premature. Leonardo is not a party in Action 1. The estate is the proper party plaintiff of the wrongful death action. Silver does not represent Leonardo in either action and Leonardo has no standing to move to disqualify Silver from her representation of Butler as co-administrator of the estate (see generally *Greene v Greene*, 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 [1979]). The Court declines to make an advance ruling on any disqualification request unless and until it is established by DNA testing that Zayvion is the issue of the Decedent and is the sole distributee of the estate and Leonardo is added as co-administrator of the estate in Action 1.

Dated: July 16, 2014



 ANDREW G. TARANTENO, JR., A.J.S.C.

_ FINAL DISPOSITION

XX NON-FINAL DISPOSITION