

Cooper v Klencner

2018 NY Slip Op 30664(U)

April 13, 2018

Surrogate's Court, New York County

Docket Number: 2014-2912/C

Judge: Rita M. Mella

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

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SHERRY COOPER and ALAN HYMAN, as Administrators
of the Estate of SIDNEY COOPER, ROEBLING LIQUORS,
INC., and FIRST KINLON ENTERPRISES, INC.,

APRIL 13, 2018

Plaintiffs

DECISION

-against-

File No.: 2014-2912/C

ANETTA KLEMENS KLENCNER, NORMAN HELLER and
THE HELLER LAW FIRM, P.C.

Defendants
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M E L L A, S.:

The following papers were considered by the court (CPLR 2219[a]) in deciding these
Motions filed pursuant to CPLR 3211(a)(1), (7) and (4)

<u>Papers</u>	<u>Numbered</u>
Notice of Motion to Dismiss (CPLR 3211[a][1] and [7]), Affirmation of Nicole Feder, Esq., in Support with Exhibits A-J and Memorandum of Law in Support	1-3
Notice of Cross-Motion to Dismiss (CPLR 3211[a][4]), Affirmation of Michael P. Ryan, Esq., in Support of Cross-Motion and in Support of Norman Heller's Motion in Chief, with Exhibits A and B, dated August 17, 2017, and Memorandum of Law dated August 17, 2017	4-6
Affirmation of Solomon Antar, Esq., in Opposition to Motion and Cross-Motion with Exhibits A-M, with addendum and Memorandum of Law	7-9
Reply Affirmation of Nicole Feder, Esq., in Further Support with Exhibits K-N and Reply Memorandum of Law	10-11

In these actions transferred from Supreme Court, New York County (CPLR 325[e]),
defendants Norman Heller, Esq., and the Heller Law Firm, move pursuant to CPLR 3211(a)(1)
and (7), to dismiss plaintiffs' verified complaint for failure to state a cause of action and on the

ground that a defense was founded upon documentary evidence. Defendant Annetta Klemens Klencner cross-moved for an order, pursuant to CPLR 3211(a)(4), dismissing the action against her as “duplicative and unnecessary” since there is a turnover proceeding currently pending in this court (File No.: 2014-2912/A), which, she contends, involves “identical facts and circumstances.” By Order dated October 18, 2017, the Honorable Justice Barry R. Ostrager granted, in part, Klencner’s motion to the extent of transferring the action to this court.

On the January 23, 2018 return date of the motions before the court, the parties stipulated that these motions would be decided based on the papers submitted. A brief recital of the factual background is necessary.

Sherry Cooper and Alan Hyman are the co-administrators of the estate of Sidney Cooper, deceased, who died intestate on July 16, 2014, in New York County. In the action transferred from the Supreme Court, they seek monetary damages arising from what they claim was an invalid gift by decedent of his shares in Roebing Liquors, Inc., as well as its assets and liabilities, to Klencner, decedent’s long-time bookkeeper and personal assistant. Defendant Heller prepared the documents related to the transfer of the shares, which is also at the heart of the contested SCPA 2103 proceeding pending in this court. In that proceeding, the co-administrators seek the return of decedent’s interest in Roebing Liquors, Inc., as well as other assets to the estate.

Plaintiffs’ verified complaint asserts several causes of action against Heller including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, aiding and abetting conversion, and Judiciary Law § 487.

The motion and the cross-motion are decided as follows:

Heller's motion to dismiss the breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, aiding and abetting conversion, and Judiciary Law § 487 causes of action asserted against him is denied. The documentary evidence submitted by Heller does not dispose conclusively of plaintiffs' claims (CPLR 3211 [a][1]). The court also concludes that the complaint states a claim for each of the above-mentioned causes of action, including fraud. The facts, as pleaded, are "sufficient to permit a reasonable inference of the alleged [fraudulent] conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). In addition, the relevant facts here are "peculiarly within the knowledge" of Heller, and it may be difficult at the pleading stage for plaintiffs to describe all the circumstances that led to the transfer of decedent's assets to Klencner (*Bibbo v Arvanitakis*, 145 AD3d 657 [2d Dept 2016]).

Klencner's motion to dismiss, pursuant to CPLR 3211(a)(4), on the ground that another action (the turnover proceeding) is pending in this court which involves the same parties and asserts the same causes of action is denied. While there is some overlap, the causes of action asserted in the transferred action are not identical to the claims asserted in the turnover proceeding involving Klencner. Pursuant to the discretion granted by statute, the court consolidates the Supreme Court action with the turnover proceeding pending before this court for all purposes (CPLR 3211[a][4]; *John J. Campagna, Inc. v Dune Alpin Farm Assoc.*, 81 AD2d 633 [2d Dept 1981] [court may order consolidation of the two actions on a motion pursuant to CPLR 3211[a][4] even if neither party has requested such relief]).

Finally, the motion to drop Roebing Liquors, Inc., as a plaintiff is granted.

The parties should inform the court if additional discovery is needed in light of the new allegations made in the complaint.

This decision constitutes the order of the court.

Clerk to notify.

Dated: April 13, 2018



SURROGATE