

Ajaero v McKeon

2019 NY Slip Op 30464(U)

February 14, 2019

Supreme Court, New York County

Docket Number: 450156/2018

Judge: Margaret A. Chan

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

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X
ANTHONY AJAERO,

Plaintiff,

INDEX NO. 450156/2018
MOTION DATE N/A
MOTION SEQ. NO. 001

- v -

HON. DOUGLAS McKEON; OSHRIE ZAK; MADISON PORZIO;
DIANA CARNEMOLLA; H. HERSHENHORN; BX PUBLIC ADMIN.
RANDAZZO & THEIR FIRMS, AGENTS & REPRESENTATIVES;
MICHAEL GOLDSTEIN, ESQ.; GAIR, GAIR, CONASON; and
REDDY, LEVY, ZIFFER L.P.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for DISMISSAL

Self-represented plaintiff brings this action for, among other things, a writ of prohibition against defendant Hon. Douglas McKeon, a Supreme Court Justice of the State of New York, Bronx County (now retired), Justice McKeon, through counsel, the Attorney General of the State of New York, now moves pursuant to CPLR 3211(a)(2), (5), (7) and (8) to dismiss plaintiff's petition/ complaint as against him. Co-defendant Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Stegman & Mackauf (Gair), a law firm, joins in support of Hon. McKeon's motion. In response to Hon. McKeon's motion, plaintiff files a cross-motion¹ labeled as "Motion to deny all defendants [sic] motion to dissmis [sic]/ cross motion/Jud. Recusal" (all-caps omitted) seeking various forms of relief, including a request that this court recuse itself from this case. Another law firm, co-defendant Reddy, Irvy & Ziffer, P.C. (Reddy), opposes plaintiff's cross-motion.

Plaintiff commenced this case by Order to Show Cause in New York State Supreme Court, Bronx County. The case was administratively transferred to New York State Supreme Court, New York County, and assigned to Part 33. At the

¹ Plaintiff's cross-motion exceeds the 25-page limit required by Rules of the Supreme Court Justices, New York County, Civil Branch, §14(a) and is not double spaced as required by the Part Rules, §II.G.ii. The parties are directed to comply with the Rules of the Supreme Court Justices, New York County, Civil Branch and Part Rules in all future submissions to Part 33.

outset, plaintiff's recusal request is denied. Plaintiff fails to present any evidence of this court's alleged bias or prejudice in this matter.

BACKGROUND

Plaintiff's father died intestate in December 2010 (NYSCEF # 22 at 2, Decree, Surrogates Court, Bronx County). On May 25, 2011, all of the eligible distributees, including plaintiff, stipulated that plaintiff's father's estate would be administered by the Public Administrator (NYSCEF # 22 at 3, Stipulation). On June 3, 2011, the Public Administrator was granted letters of administration for the estate. On June 28, 2012, the Public Administrator filed a wrongful death action in the Supreme Court, Bronx County, against Montefiore Medical Center and treating physicians, entitled *Office of Public Administrator Bronx County ex rel. Estate of Ajaero v. Knowles et al.* (Index No. 21314/2012), which was assigned to Justice McKeon.

In an order dated December 13, 2015, Justice McKeon approved the settlement in the wrongful death action in the amount of \$1,475,000 and, among other things, directed the Public Administrator to pay \$243,106.98 to Gair and \$53,364.95 to Reddy, representing their respective legal fees in the action (NYSCEF # 25 at 3, Compromise Order). The wrongful death action was marked as disposed.

As relevant herein, plaintiff complains that Justice McKeon acted improperly while presiding over the wrongful death action by: intentionally undervaluing the settlement of the wrongful death action; granting attorney's fees under the Compromise Order; and failing to inform plaintiff of the settlement (NYSCEF #21, ¶¶27, 45, 49, and 54, petition/complaint). Plaintiff also alleges that Justice McKeon improperly filed the Compromise Order without first inquiring about plaintiff's disabilities (*id.*, ¶47). Plaintiff further alleges that Justice McKeon improperly refused to speak with him *ex parte* regarding the settlement (*id.*, ¶63).

Plaintiff includes as relief, a writ of prohibition preventing Justice McKeon from exercising jurisdiction in the now-terminated wrongful death action, including the Compromise Order and Stipulation; reversal of the Compromise Order; judgment in the amount of \$40,000,000; and judgment on behalf of plaintiff's father's next of kin/distributees in the amount of \$20,000,000 (*id.*, ¶ 263[a], [b]).

DISCUSSION

Plaintiff's petition/complaint is dismissed pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction. Plaintiff's opposition does not address the subject matter jurisdiction issue.

One of the relief plaintiff seeks is a writ of prohibition, which is obtained via an article 78 proceeding (CPLR 7801). An article 78 petition against a justice of the supreme court must be commenced in the appellate division in the judicial division

where the action is triable (CPLR 506[b][1]; 7804[b]; *see Nolan v Lungen*, 61 NY2d 788, 790 [1984]). Plaintiff commenced this action seeking a writ of prohibition against Justice McKeon in Supreme Court, Bronx County instead of the Appellate Division, First Department, and thus, this matter must be dismissed as this court lacks subject matter jurisdiction over plaintiff's claim (*Baba v Evans*, 213 AD2d 248 [1st Dept 1995] [affirming dismissal of petition for lack of subject matter jurisdiction where action against Justice of the Supreme Court was not brought in the Appellate Division]). Similarly, this court lacks subject matter jurisdiction to "reverse" Justice McKeon's Compromise Order (petition/complaint, ¶3).

Plaintiff's claim seeking monetary damages against Justice McKeon is also dismissed for want of subject matter jurisdiction. It is well settled that the court of claims has exclusive jurisdiction over actions for money damages against state officials acting in their official capacities in the exercise of governmental functions (Court of Claims Act § 9[4]; *Morell v. Balasubramanian*, 70 NY2d 297 [1987]; *Bertoldi v State*, 275 AD2d 227 [1st Dept 2000]; *Valle v Singh*, Sup Ct NY County, Dec.16, 2011, Mendez, J., index No. 402279/11). Under Public Officers Law § 2, judges and justices of the State Unified Court System are "State Officers." Plaintiff's claims against Justice McKeon acting in his official capacity were brought in the supreme court, when it should have been brought in the court of claims. Accordingly, plaintiff's claim against Justice McKeon for monetary damages is dismissed.

In any event, plaintiff's claim for monetary damages against Justice McKeon is barred by judicial immunity. The doctrine of judicial immunity provides that judges are absolutely immune from civil liability for judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously and corruptly (*see Mosher-Simons v Cty. of Allegany*, 99 NY2d 214, 219 [2002]; *Alvarez v Snyder*, 264 AD2d 27, 34 [1st Dept 2000]). The two exceptions to judicial immunity are when an action is not taken in the judge's judicial capacity, and when the action, though judicial in nature, is taken in the complete absence of jurisdiction (*Alvarez*, 264 AD2d at 34).

Here, Justice McKeon acted in his judicial capacity when he presided over the wrongful death action and when he issued the Compromise Order. In fact, all of plaintiff's allegations consist of Justice McKeon acting in his official capacity as a Justice of the Supreme Court. Further, the supreme court had jurisdiction over the wrongful death action. Plaintiff's argument in opposition that Justice McKeon conducted "all negotiations . . . in his 'closed environment' and 'judge-directed negotiation settlement'" does not change the fact that he acted in his official capacity and that he was within his power to do so (NYSCEF #39, ¶27). Accordingly, plaintiff fails to state a claim against Justice McKeon for monetary damages (CPLR 3211[a][7]).

As the lack of subject matter jurisdiction is sufficient to dismiss the petition/complaint against Justice McKeon, the additional basis cited in the moving papers will not be addressed.

Plaintiff's cross-motion seeks relief for claims not requested in his petition/complaint. Specifically, his requests: 1) for damages in the amount of \$235,575,000, plus pre-judgment interest; 2) to stay the housing court eviction proceedings; 3) to vacate the foreclosures and improper sales of plaintiff's alleged properties; 4) to compel plaintiff's mother, Henrietta, to return \$50,000 she "improperly intercepted" and 5) to "grant the plaintiff a full and final lifetime Order of Protection against Deven Nicole Faulkner" (NYSCEF # 55 at 27) are nowhere mentioned in his petition/complaint. Accordingly, the branch of plaintiff's cross-motion seeking relief addressed for the first time in his cross-motion, is denied.

Finally, the branch of plaintiff's cross-motion for leave amend the petition/complaint to add Surrogate Lee Holzman, Justice Mitchell Danziger and Justice Doris Gonzalez as defendants herein, is denied (*id.*). "[A] motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgement" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]). "[T]o conserve judicial resources, an examination of underlying merits of the proposed causes of action is warranted" (*Megarix Furs, Inc. v Gimble Bros., Inc.*, 172 AD2d 209 [1st Dept 1991]).

Here, plaintiff's amendments are without merit since plaintiff is seeking damages against Surrogate Lee Holzman, Justices Mitchell Danziger and Doris Gonzalez on the basis of their "refusing prior OSC requests . . . as a means to intentionally miscarry justice through two retaliatory foreclosures against plaintiff" (NYSCEF #55 at 1). Plaintiff claims that Justices Mitchell Danziger and Doris Gonzalez refused to permit the transfer of two foreclosure actions involving plaintiff from the Bronx County to New York County (*id.* at 2). Plaintiff does not indicate what damages he is seeking against Justice Mitchell Danziger and Justice Doris Gonzalez, but in that plaintiff is alleging acts by these justices acting in their official capacity as state officers, neither his claim nor the damages he seeks can be entertained by this court, as discussed above. As for Surrogate Lee Holzman, plaintiff fails to submit an affidavit containing any evidence to support his claim that the Surrogate conspired to deprive plaintiff of funds from the wrongful death action from his father's estate (*id.* at 4). Thus, plaintiff's cross-motion to amend the petition/complaint is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Hon. Douglas McKeon's motion pursuant to CPLR 3211(a)(2), (7) to dismiss the petition/complaint of as against him is granted; it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly in favor of Hon. Douglas McKeon, and the action is severed and continues as against remaining defendants; it is further

ORDERED that plaintiff's cross-motion is denied; it is further

ORDERED that counsel for defendant Justice McKeon shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

This constitutes the Decision and Order of the Court.

2/14/2019

DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE