

Badillo v Perez

2019 NY Slip Op 31480(U)

May 24, 2019

Supreme Court, New York County

Docket Number: 150619/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 150619/2017

OLGA BADILLO,

MOTION DATE 02/15/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

SUSAN PEREZ, Personally and as Administratrix of the estate of
Anastacio Perez a/k/a Anastacio Perez Velasquez,

DECISION AND ORDER

Defendant.

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NYSCEF Doc Nos. 26-57 were read on this motion for summary judgment.

Motion pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted.

Plaintiff Olga Badillo commenced the instant action on January 19, 2017, alleging one cause of action for fraudulent misrepresentation against Defendant Susan Perez, Personally and as Administratrix of the Estate of Anastacio Perez a/k/a Anastacio Perez Velasquez. The complaint arises out of a 2010 distribution of monies from the Estate to the seven marital children of Anastacio Perez pursuant to EPTL 4-1.1 and 4-1.2. The complaint alleges that Plaintiff is the nonmarital child of Anastacio Perez. The complaint further alleges that Defendant, Plaintiff's half-sibling, knew or should have known of the relationship between Plaintiff and Anastacio Perez and failed to tell the Surrogate about Plaintiff or to provide Plaintiff with notice of the Surrogate's Court proceeding. The complaint further alleges that Defendant intentionally concealed material facts to mislead the Surrogate in order to obtain a higher share of the distribution for herself and to deprive Plaintiff of her own rightful share. The complaint further alleges that Plaintiff "reasonably relied on, and was prejudiced by, Susan Perez's false representations and concealment of material facts." (Complaint ¶ 31.)

Defendant's answer, dated March 28, 2017, denies the allegations set forth in the complaint and, among other things, asserts that the action is barred by the applicable statute of limitations.

Upon the completion of discovery, Plaintiff filed the note of issue on November 2, 2018.

On December 31, 2018, Defendant filed the instant motion pursuant to CPLR 3212 for summary judgment dismissing the complaint. Defendant argues, in sum and substance, that Plaintiff cannot prove all the necessary elements of fraudulent misrepresentation because, even if Defendant did know about Plaintiff at the time of the Surrogate's Court proceeding, which she did not, the alleged material omission was not made to Plaintiff directly, nor did Plaintiff rely on it, nor is there any legal exception relating to a representation made to a third party that applies here. Defendant further argues that the statute of limitations has run. Specifically, Defendant argues that, if not including Plaintiff among the children of Anastacio Perez in Surrogate's Court

proceedings was a material omission, which it was not, the material omission would have occurred as early as 2000, when the petition for Letters of Administration was filed.

Defendant then strenuously argues that Plaintiff is, in fact, not a child of Anastacio Perez, annexing numerous affidavits from Defendant and other marital children, along with the parties' EBT transcripts and the transcript of the EBT of Jose Perez, a sibling of Defendant and one of the seven marital children who received a distribution from the Estate, all of which contain statements disavowing any knowledge of Plaintiff prior to the commencement of the instant action. As an example, Plaintiff testified that she met with a brother of Defendant named Edwin/Edistrudy Perez, while an annexed affidavit from Edistrudy Perez, who is in fact a sister of Defendant, states that Edistrudy never met Plaintiff, and that Defendant has no brother named Edwin.

Defendant seeks costs and reasonable attorney's fees in connection with what she argues is a frivolous action. Defendant argues that counsel represented the Perez family in the wrongful death action and is now representing Defendant pro bono. Defendant argues the action is frivolous on the facts and the law.

As to whether Plaintiff was in fact a nonmarital child of Anastacio Perez, Plaintiff annexes affidavits of Plaintiff Olga Badillo and Nancy Mendez, allegedly Plaintiff's maternal half-sister. Plaintiff avers that Anastacio Perez did not live with her but visited her several times as a child both in Moca around the age of six or seven and in Brooklyn until the age of 12 or 13. Plaintiff further avers that both her own mother and Ms. Mendez told Plaintiff that Anastacio Perez was her father. Plaintiff further avers that, in late 2016, Ms. Mendez told Plaintiff that Anastacio Perez had died, and the instant matter ensued. Plaintiff makes no reference to Edwin/Edistrudy Perez in her opposition papers.

Ms. Mendez avers that she was born in 1954 and that, on New Year's Eve of 1981, while several of Defendant's siblings and Defendant's mother were present at Defendant's mother's house, Ms. Mendez's now-deceased husband Nazario introduced Ms. Mendez to everyone as Plaintiff's sister and said that Plaintiff was Anastacio Perez's daughter. Ms. Mendez states that she does not know whether Defendant was present. Ms. Mendez does not state whether Plaintiff herself was present. Ms. Mendez states that Nazario told her that he had told Defendant's mother and siblings that Plaintiff was Anastacio's daughter during previous visits there. Ms. Mendez then avers that she believes that Defendant's mother knew that Plaintiff was Anastacio Perez's nonmarital child.

Plaintiff argues in her opposition papers that summary judgment is a drastic remedy and that the nonmoving party should be given the benefit of all favorable inferences. Plaintiff further argues that Defendant is liable in fraud for facts she reasonably should have known. Specifically, Defendant cites to *Eurycleia Partners, LP v Seward & Kissel, LLP* and states that "[t]he elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, *justifiable reliance by the plaintiff* and damages." ((12 NY3d 553, 559 [2009] [emphasis added].) (Wasserman mem of law at 6.) Plaintiff then argues that "[t]he scienter element of common law fraud includes knowledge a defendant reasonably should have known." (*Id.* at 6-7.) Plaintiff then states that "Plaintiff has demonstrated that on

this motion for summary judgment, given the benefit of all favorable inferences, [] defendant's motion must be denied." (*Id.* at 7.)

Plaintiff then argues, in sum and substance, that Defendant is liable to Plaintiff because Defendant fraudulently misrepresented to the Surrogate that Anastacio Perez had no children other than his seven marital children. Specifically, Plaintiff argues that Defendant had a legal obligation to advise the Surrogate of who, in fact, were decedent's next of kin. Plaintiff then states, "[l]isting decedent's alleged distributees to whom funds are to be distributed is clearly a material fact. Only by being advised of these facts [sic] could Olga be aware that funds were to be distributed; she had no other reasonable means of knowing. Olga relied of [sic] Susan's failure to advise her of these material facts [sic] and such reliance resulted in damages to her." (*Id.* at 8.) Plaintiff then argues that relevant case law discussed *infra* allows a misrepresentation to a third party to serve as a basis for a fraud claim where the representation to the third party was intended to be communicated to the plaintiff and for the plaintiff to rely on it.

Plaintiff further argues that the affidavits of Plaintiff and Ms. Mendez demonstrate that Anastacio Perez openly and notoriously acknowledged that he was Plaintiff's father, and that such acknowledgement is enough to defeat summary judgment. Plaintiff annexes two copies of Plaintiff's birth certificate, from the Commonwealth of Puerto Rico, with the more recent copy being dated February 14, 2002, stating that her father's name is Anastacio Perez. (*Id.* exhibit 1.)

Plaintiff further argues that, pursuant to CPLR 213 (8), there is no statute of limitations violation because Plaintiff testified that she was not aware of the death of Anastacio Perez until 2016 and commenced this action timely.

Defendant argues in her reply papers that the affidavits and arguments submitted by Plaintiff are without merit. Defendant reiterates that reliance by a third party on an alleged misrepresentation by a defendant is not actionable fraud. Defendant argues that Plaintiff has failed to raise an issue of fact as to either any communication of an alleged misrepresentation to Plaintiff, directly or indirectly, or any justifiable reliance on the misrepresentation by Plaintiff. Notably, as to the birth certificates submitted, Defendant argues that a birth certificate is evidence of birth, not parentage, and that, in any event, in the Commonwealth of Puerto Rico, all birth certificates issued before July 1, 2010, were rendered null and void by statute due to a prevalence of identity theft and fraud at the time.

Defendant argues that Plaintiff's application is predicated on falsehoods as to, among other things, the existence of an "Edwin" Perez and a potentially falsified set of birth certificates that should carry no weight before this Court. Defendant further argues that the affidavits submitted in opposition, even if accepted as true, fail to allege through any personal knowledge or direct observation that Defendant knew that Plaintiff was a nonmarital child of Anastacio Perez. Defendant further argues that the affidavits do not have probative value as to Defendant's knowledge of Plaintiff. Defendant also argues that neither Defendant nor any of her siblings had ever known of Plaintiff, Nazario, or Ms. Mendez prior to this lawsuit. Defendant then notes that Plaintiff has not argued that this action is not frivolous, nor has Plaintiff opposed Defendant's request for sanctions, attorney's and costs, and asks that the Court grant the request and direct a hearing as to the amount to be paid.

DISCUSSION

As an initial matter, the Court notes that Plaintiff has raised a genuine issue of fact as to any applicable tolling of the statute of limitations based upon her testimony that she first learned of the death of Anastacio Perez and of the Surrogate's Court proceedings in 2016, a matter of months before commencing this action. (*See Lewis v Wells Fargo Bank, N.A.*, 134 AD3d 777, 779 [2d Dept 2015].) As such, the Court will consider Defendant's motion on the merits.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

Plaintiff's complaint alleges one cause of action for fraudulent misrepresentation. "Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011].)

Both parties cite to *Pasternack v Laboratory Corp. of Am. Holdings* as the leading Court of Appeals case on a fraudulent misrepresentation allegedly made to a third party. (27 NY3d 817 [2016].) As argued, Defendant's position is that *Pasternack* is controlling in that no representations made to the Surrogate by Defendant are actionable as to Plaintiff. Plaintiff's position is that Plaintiff justifiably relied on Defendant's material omission to the Surrogate as to her being the nonmarital child of Anastacio Perez to her detriment. As cited by Plaintiff, the Court of Appeals in *Pasternack* (27 NY3d at 827-829 [internal citations and quotations omitted]) stated, in relevant part, as follows:

"The second certified question requires us to decide whether third-party reliance can establish the reliance element of a fraud claim. . . .

"We hold that under New York law, such third-party reliance does not satisfy the reliance element of a fraud claim. The elements of a fraud cause of action consist

of a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. Federal courts applying New York law and the Appellate Division Departments have come to varying conclusions as to whether a plaintiff may state a fraud claim, despite the absence of reliance by the plaintiff on the alleged misrepresentations, where a non-plaintiff third party is alleged to have relied on the misrepresentations in a manner that caused injury to the plaintiff. The Second Circuit has held that allegations of third-party reliance are insufficient to make out a common law fraud claim under New York law. Some district courts have applied the Second Circuit's rule, while others have held that, under New York law, third-party reliance can support a fraud claim.

“Similarly inconsistent is the Appellate Division case law, with the majority of cases declining to recognize third-party reliance and a few outliers adopting the opposite view.

“The cases that recognize third-party reliance cite favorably to *Eaton Cole & Burnham Co. v Avery* (83 NY 31, 35 [1880]). However, as noted by the District Court and Second Circuit here, *Eaton* is distinguishable from this case because in *Eaton* the third party acted as a conduit to relay the false statement to plaintiff, who then relied on the misrepresentation to his detriment. *Eaton* and its progeny stand for the proposition that indirect communication can establish a fraud claim, so long as the statement was made with the intent that it be communicated to the plaintiff and that the plaintiff rely on it. *Eaton* does not support plaintiff's claim here, because Montalvo's statements were not relayed to plaintiff, and he did not rely on them. . . .

“Indeed, this Court has stated on a number of occasions that a fraud claim requires the plaintiff to have relied upon a misrepresentation by a defendant to his or her detriment. This view is both consistent with other rules governing fraud claims (*see e.g. First Natl. State Bank of N.J. v Irving Trust Co.*, 91 AD2d 543, 544 [1st Dept 1982] [“(T)here can be no liability in fraud where the complaining party is, in advance, fully knowledgeable and apprised of those matters as to which the representations are alleged to have deceived”], *affd* 59 NY2d 991 [1983]), and logical insofar as the tort of fraud is intended to protect a party from being induced to act or refrain from acting based on false representations—a situation which does not occur where, as here, the misrepresentations were not communicated to, or relied on, by plaintiff. We, therefore, decline to extend the reliance element of fraud to include a claim based on the reliance of a third party, rather than the plaintiff.”

Here, Plaintiff alleges that she knew that she was the nonmarital child of Anastacio Perez from a young age. The material omission alleged by Plaintiff is that Defendant did not tell the Surrogate that Plaintiff was the nonmarital child of Anastacio Perez. Nevertheless, the Court undertakes to analyze the fraud issue from the perspective of the Plaintiff. The question is

whether the Plaintiff was induced to act or not based on a material omission by Defendant to the Surrogate. As in *First Natl. State Bank of N.J.*, where a plaintiff knows in advance the truth behind a misrepresentation or material omission, there can be no liability in fraud because a plaintiff would not justifiably rely on a misrepresentation that he or she knew was false. Put another way, “one to whom an allegedly false representation is made may not rely thereon if the means of obtaining the truth are available by the exercise of ordinary intelligence.” (*Huron St. Realty Corp. v Lorenzo*, 19 AD3d 450, 452 [2d Dept 2005].) As such, Defendant has shown prima facie that her statement to the Surrogate was not made with the intent that it be communicated to Plaintiff or that Plaintiff would rely on it. Even if it were, the Court finds that Plaintiff cannot justifiably rely on a representation that she is not the daughter of Anastacio Perez because from Plaintiff’s point of view the truth is that she is the daughter of Anastacio Perez. Defendant has further shown prima facie that Defendant had no scienter as to any material omission of Plaintiff to the Surrogate by means of her testimony and the testimony of her siblings submitted in support of the motion.

In opposition, Plaintiff fails to raise a genuine issue of material fact as to Defendant’s scienter, intent to induce Plaintiff to act or not, or any justifiable reliance on the part of Plaintiff. Nothing in the affidavits submitted in opposition indicates that Defendant knew or should have known that Plaintiff was a nonmarital child of Anastacio Perez. Further, contrary to Plaintiff’s contentions, the third-party reliance doctrine is not available here, as Plaintiff does not allege that Defendant’s representations to the Surrogate were made for the purpose of being communicated to Plaintiff or with the intent that such representations would reach and influence her. (*See Bynum v Keber*, 135 AD3d 1066, 1068 [3d Dept 2016].) As the *Eaton* exception is unavailable, and as, applying *Pasternack* to the facts of this case, Plaintiff’s allegations do not fit within any cognizable theory of fraudulent misrepresentation, let alone serve, based upon the opposition submitted, to raise a genuine issue of material fact on this motion for summary judgment, Plaintiff’s action cannot proceed.

The Court has considered Defendant’s other arguments in opposition and they are without merit. The Court does decline to award costs or to otherwise sanction Plaintiff pursuant to 22 NYCRR § 130-1.1. Defendant has failed to show prima facie that Plaintiff’s conduct was “completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” or that “it asserts material factual statements that are false.” (22 NYCRR § 130-1.1 [c] [1] and [3].) As Defendant herself indicated in her papers, *Pasternack* is a “recent” Court of Appeals case, and how lower courts would apply its holding in the context of a proceeding before a Surrogate involving an allegedly undisclosed heir was a matter of first impression. (Affirmation of Davis at 8.) More broadly, although Defendant strenuously denies the allegations in the complaint and strongly disputes the fact of whether Olga Badillo is the nonmarital child of Anastacio Perez, this is a CPLR 3212 motion for summary judgment, and the Court’s role here is issue finding, not issue determination. Issues of credibility are the province of the jury, and it is not for the Court to opine as to whether Anastacio Perez—the same Anastacio Perez who is the father of Defendant and six other marital children and siblings of Defendant—was in fact Plaintiff’s father. While Plaintiff has made other statements during discovery that Defendant alleges are false, such as the existence of Defendant’s brother, Edwin/Edistrudy Perez, those statements were not put before the Court by Plaintiff in the instant motion, and as such do not amount to “conduct” as contemplated in 22 NYCRR § 130-1.1.

CONCLUSION

Accordingly, it is

ORDERED that the instant motion pursuant to CPLR 3212 dismissing the complaint is granted; and it is further

ORDERED that Defendant shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on Plaintiff and on the clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

5/24/2019
DATE

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

Robert D. Kalish

 HON. ROBERT D. KALISH, J.S.C.