

Lileika v Estate of DeRosa
2019 NY Slip Op 33992(U)
December 11, 2019
Supreme Court, Nassau County
Docket Number: 600778-17
Judge: Jerome C. Murphy
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

LAIMA LILEIKA,

Plaintiff,

- against -

TRIAL/IAS PART 13

Index No.: 600778-17

Motion Date: 10/3/19

Sequence Nos.: 005, 006

MD, MD

DECISION AND ORDER

**ESTATE OF PATRICK J. DEROSA, JUNE C.
DEROSA, CRISTINA E. MARTINO and ANDREW
DeROSA, co-executors, and JOHN and JANE
DOES,**

Defendants.

The following papers were read on this motion:

Sequence No. 005:

Notice of Motion, Affirmation and Exhibits..... 1

Sequence No. 006:

Defendants Notice of Cross-Motion 1

Affidavit in Support of Cross-Motion and Exhibits..... 2

Rule 19-a Statement of Material Facts by Defendants Attorneys..... 3

Defendants Memorandum of Law in Support..... 4

Plaintiffs Memorandum of Law in Opposition 5

Reply Memorandum of Law 6

Attorney Affirmation in Further Support of Cross-Motion 7

PRELIMINARY STATEMENT

In Sequence No. 005, Plaintiff, Laima Lileika brings this application for an Order removing the designation “disposed” from this action and restoring it for filing of a Note of Issue, and granting such other and further relief as may be deemed just and proper.

In Sequence No. 006, Defendants brings this application for an Order awarding summary judgment to defendants, pursuant to CPLR § 3212, together with such other and further relief as this Court deems just and proper. Opposition and reply have been submitted.

BACKGROUND

This action seeks damages in the amount of \$153,416 based upon a Demand Note dated March 26, 2009. It is claimed to have been executed by the decedent Patrick J. DeRosa in favor of plaintiff on that date. Plaintiff commenced this action by filing a Summons and Complaint on January 27, 2017. Defendants moved for summary judgment based upon the applicable statute of limitations. Plaintiff Cross-moved for leave to amend their Complaint, in which they alleged that the statute of limitation was tolled. This Court, by Decision and Order dated November 3, 2017, and entered in the Office of the Nassau County Clerk on November 27, 2017, granted, the cross-motion by plaintiff to serve the Amended Complaint and denied, as moot, the motion by plaintiffs for summary judgment (Exh “C” to Cross-motion).

In plaintiff’s original motion, plaintiff alleged that no payments had been made on account of the note. In her Verified Amended Complaint (Exh. “D”), plaintiff claims that after the execution of the Promissory Note, she continued to provide tax and accounting services to decedent and defendants, and that she “received payments for additional services performed and interest on the promissory note until at least the end of 2011.”

When plaintiff sought to file a Note of Issue, the Note of Issue was returned to counsel, as the matter had been marked “disposed”. Plaintiff now moves to place the matter on the calendar, and for leave to re-file the Note of Issue. Defendants now again cross-move for summary judgment dismissing the Complaint on the ground that it is barred by the statute of limitations.

DISCUSSION

The subject Demand Note (Exh. “A” to Exh. “B” to Cross-motion) is dated March 26, 2009, has no due date (although the prior complaint said it was due in five years). It calls for interest at the rate of 8% per annum in monthly payments of \$1,022.77. Pursuant to CPLR § 213(2), the applicable six-year statute of limitations began to run from the date of execution of the Note. The statute of limitations may be tolled by an acknowledgment or promise contained in a writing signed by the party

to be charged (General Obligations Law § 17-101) but there is no such written acknowledgment or promise to pay within six years of the commencement of the action. The statute of limitations may also be revived by partial payments on the promissory note if made by the debtor, or on his behalf by an agent (*Skaneateles Savings Bank v. Modi Associates*, 239 A.D.2d 40 [4th Dept. 1998]; *Pomaro v. Quality Sheet Metal, Inc.*, 295 A.D.2d 416 [2d Dept. 2002]).

When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be “material issue of fact” it “must be genuine, bona fide and substantial to require a trial.” (*Leumi Financial Corp. v. Richter*, 24 A.D.2d 855 [1st Dept. 1965]).

But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation with appended material in admissible form. The failure to do so may lead the Court to believe that there is no triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

In this case, plaintiff has come forward with sufficient evidence that the statute of limitations was tolled by partial payment. She submits a copy of her TD Bank Statement for the period December 21, 2011 through January 20, 2012 (Exh. “A” to Memorandum of Law in Opposition to Cross-motion), in which she in her affidavit identifies a \$1,000.00 check as payment by Dr. DeRosa for accounting services, and another in the amount of \$1,114.29 as interest on the Demand Note.

In their Reply Memorandum, defendants identify this check 3692 as being from DeRosa Orthopedic Services, PC, not from Patrick J. DeRosa, the maker of the Note, and claim that it is not

for the amount representing the monthly interest of \$1,022.77. This check paying the money, appears to be signed by Patrick J. Derosa, M.D. In order for a partial payment to reset the statute of limitations, it must be made under circumstances amounting to an absolute and unqualified acknowledgment by the debtor. Here the debtor signed the check. In arguing that this was not for partial payment, the defendants' affidavit does not explain, with personal knowledge, what this payment was for and it appears that the defendants can not say what it was for.

The Court finds that the plaintiff has presented sufficient evidence to raise a question of fact as to whether the statute of limitations was tolled or reset by partial payment. Thus the plaintiff has met its burden to raise a question of fact that there are questions of fact concerning a tolling of the statute of limitations in late December of 2011, such that the filing of this action in January of 2017 maybe timely and within the statutory six (6) year statute of limitations. Accordingly, these tolling issues will have to be decided at a trial and cannot be resolved by this motion.

Plaintiff's assertions with respect to improper transfers of title to a home in Amagansett to June C. DeRosa, and a sale of a home in Garden City are without merit. The Amagansett home was conveyed to Mrs. DeRosa in connection with a distribution of marital assets in 2003, six years before the Demand Note, and the Closing Statement for the Garden City Home reflects that it was encumbered by mortgages and judgments, including unpaid tax liens, which, after payment of Administration and debts, resulted in a total of \$2,409.44 in the Estate of Patrick J. DeRosa.

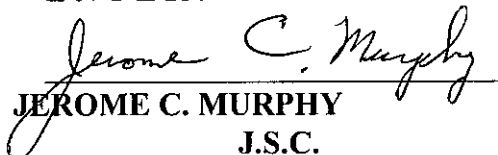
Defendants' cross-motion for summary judgment dismissing the Complaint for failure to commence the action within the statute of limitations is denied. Plaintiff's motion to place the matter on the calendar and permit the filing of a Note of Issue is denied. This matter is now set down for a final discovery conference on January 16, 2020 at 9:30 a.m.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 11, 2019

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

DEC 16 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE