

Citibank, N.A. v Wahrlich Group, LLC

2020 NY Slip Op 33151(U)

September 21, 2020

Supreme Court, New York County

Docket Number: 651527/2017

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

(“Citibank”) pursuant to a so-ordered stipulation and proposed order for substitution and discovery dated March 7, 2019.¹ The Estate now moves the court seeking leave to amend the complaint to add causes of action.

The Estate asserts it was named in this action because prior co-executor of the Estate Michael Wahl unlawfully executed documents in connection with the subject loans including a hypothecation agreement and an assignment of collateral with Citibank.² The Estate alleges other instances of misconduct by the Wahls, specifically that monies loaned to the Wahlrich Group by Citibank were drawn and distributed directly to Judith Wahl. As such, the Estate seeks to file an amended complaint to include claims of fraudulent conveyance, unjust enrichment, and a claim for contribution pursuant to CPLR § 1403. The Estate asserts that the facts surrounding these transfers to Judith Wahl were not known prior to discovery.

The Estate also seeks leave to amend the caption to reflect that the current co-executors are plaintiffs; that Citibank is no longer a party; and that Howard International Corp. is no longer a defendant. The Estate argues that there is no prejudice to the proposed amendments as both the misappropriation of the loan and Citibank’s (now the Estate’s) right to recover is undeniable as during their respective depositions, Michael and Judith Wahl conceded to undocumented, no term, no interest loans were made to Judith Wahl.

Wahlrich Group, Michael Wahl, Eric Wahl, and Judith Wahl (collectively “Wahlrich”) oppose the Estate’s motion and cross-move for dismissal. Wahlrich argues that the Citibank

¹ See *NYSCEF Doc Nos. 107 & 126*.

² Prior to this action, the parties were involved in Surrogate Court proceedings involving Fred Howard, owner of Howard International Corp., whose net worth was in excess of \$80,000,000.00. Fred Howard bequeathed the bulk of his estate to the Fridolin Charitable Trust (the Trust). Michael Wahl, then co-executor, was accused of improperly transferring over \$5,000,000.00 from the Howard Estate to the Wahlrich Group. The Surrogate’s matter was settled as to the dispute between the Howard Estate and Michael Wahl. Pursuant to that agreement, a portion of Michael Wahl’s life insurance policy would be bequeathed to the Trust, along with a portion of the proceeds of the sale of a cooperative apartment owned by his wife Judith Wahl, postmortem. In the interim, the Estate agreed to pay a portion of Michael Wahl’s insurance premiums.

complaint contains a fraudulent conveyance claim against Judith Wahl with respect to a cooperative apartment which was owned by both Michael and Judith Wahl but was later transferred solely to Judith in 2011, and that there were no claims asserted against Judith Wahl as it pertains to the Citibank loans in contention here. Wahlrich further argues that the proposed amendment to include fraudulent conveyance claims regarding monies transferred to Judith are both without merit and barred from this action. Wahlrich contends that Judith entered into loan agreements with the Wahlrich Group and that monies transferred to her from the Wahlrich Group were repayments of the money she loaned it, pursuant to various loan agreements. (See *Wahlrich Exhibit 6, Loan Agreements and Quickbooks entries.*) Wahlrich further asserts that as the proposed claims were not advanced by Citibank in its complaint, such claims cannot now be raised. In support of this contention, Wahlrich points to the terms of the settlement agreement between Citibank and the Estate wherein the Estate was transferred and assigned claims raised by Citibank. On this point, Wahlrich further avers that the proposed contribution claims should also be denied as any right to contribution from the Estate was released in the settlement agreement executed in Surrogate's court and no contribution claims have been assigned by Citibank to the Estate.

Finally, Wahlrich cross-moves for dismissal on the ground that the Estate failed to obtain the consent of the Attorney General to its settlement agreement with Citibank pursuant to Estates Powers and Trust Law 8-1.1. Wahlrich argues that EPTL 8-1.1 which governs the disposition of property for charitable purposes, requires the Attorney General to represent the beneficiaries of such dispositions. Thus, Wahlrich contends that inasmuch as the settlement agreement reached in Surrogate's court was not signed by the Attorney General, the transfer and assignments purportedly made to the Estate are invalid and the Estate has no standing to pursue the claims.

Defendant Andrew Wahl joins in the Wahlrich's cross-motion seeking dismissal on the grounds that the settlement between Citibank and the Estate failed to include the consent of the Attorney General.

In reply, the Estate argues that the fraudulent conveyance claims surrounding monies transferred to Judith Wahl have merit given that the documents produced by Wahlrich asserting loan agreements between Wahlrich Group and Judith Wahl were produced after document production and depositions wherein Michael Wahl testified that his wife did not have any money to lend him and Judith testified that she never received money from the Wahlrich Group. As to the contribution claims, the Estate cites to Court of Appeals decision *Bay Ridge v State*, 44 NY 2d 49 (1978) wherein the court held that a claim for contribution arises when "payment is made by the party seeking apportionment." The Estate argues that as it did not make its payment to Citibank until December 2018, said claims were not released in 2010 when the loans were initially issued, nor were they included in the release contained in the 2017 settlement agreement.³

Finally, plaintiffs argue that Wahlrich's interpretation of EPTL 8-1.1 is flawed and that its purpose is to protect charitable gifts and donor intentions when faced with an issue such as a lack of a trustee or beneficiary, thus the express consent of the Attorney General is not required in every instance. In further support of this argument, the Estate annexes the affirmation of Helen Gavaris, Esq., special counsel to the Estate who contacted Assistant Attorney General Lisa M. Barbieri, who represented and appeared for the Attorney General in the Surrogate court proceedings involving the parties. Ms. Gavaris attests that she was informed by Assistant

³ In the event that the Wahlrich Guarantors assert that the Estate's recovery should be reduced by the sum paid to Citibank by the Estate, the Estate seeks leave to add a contribution claim against the Wahlrich Guarantors to ensure they are liable for contribution towards the sum paid by the Estate to Citibank. This claim would be rendered moot if the Wahlrich Guarantors do not seek to reduce the Estate's recovery by the amount the Estate paid to Citibank.

Attorney General Barbieri that the consent of the Attorney General was not required in this matter. (See *Gavaris Affirmation*, NYSCEF Doc. 153).

Pursuant to CPLR § 3025(b), a party may amend a pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Absent prejudice or unfair surprise leave to amend should be granted. See *Mallory Factor, Inc. v Schwartz*, 146 AD2d 465 [1st Dept 1989] citing, *Great E. Mall, Inc. v Condon*, 36 NY2d 544 [1975]; *Daigle v Texas Intl. Co.*, 109 AD2d 648 [1st Dept 1985].

After careful consideration of the arguments advanced, the Estate's motion to amend is granted and Wahlrich's cross-motion to dismiss is denied. While Wahlrich argues that the proposed amendment to add an additional fraudulent conveyance claim to address monies transferred from Wahlrich Group to Judith is impermissible as it was not included in the original complaint filed by Citibank, Wahlrich failed to proffer legal authority in support of this contention. The record is devoid of any argument or authority to support the contention that an assignee of a claim who has been substituted as plaintiff is not afforded the right of a plaintiff to amend its complaint. Furthermore, this court finds Wahlrich's argument that the proposed fraudulent conveyance claim lacks merit unavailing as it is undisputed that monies were transferred to Judith Wahl from Wahlrich Group, despite conflicting deposition testimony. Whether or not those transfers were repayments or fraudulent conveyances will be born out in discovery and/or trial.

With respect to the contribution claim, the court finds Wahlrich's avowal that said claims were abandoned or released misguided as the claim for contribution could not have accrued until the Estate paid Citibank. Furthermore, the viability of this claim rests with Wahlrich's decision

to seek that recovery in this action be reduced by the amount paid by the Estate to Citibank. Nonetheless, the arguments raised against the contribution claim are erroneous.

Inasmuch as there is no opposition to the branch of the motion seeking to amend the caption to reflect the co-executors as plaintiffs in the stead of Citibank, and remove Howard International Corp, as a defendant, these amendments are granted, without opposition.

As to Wahlrich's cross-motion to dismiss, this court concurs with the movants that pursuant to EPTL 8-1.1 the Attorney General's consent is only required under specific circumstances, such as an unidentifiable beneficiary, an issue not present in this action. Furthermore, the court credits the affirmation of Helen Gavaris, Esq. who attests, as an officer of the court, that the Assistant Attorney General assigned to the matters involving the Estate has confirmed that no consent was required for the settlement between Citibank and the Estate. Based upon the foregoing, it is hereby

ORDERED, that defendants Wahlrich Group, Michael Wahl, Eric Wahl, and Judith Wahl's cross-motion to dismiss is denied; and it is further

ORDERED that movants Bonnie Kaye and Herbert Kozlov's, as the current co-executors of the Estate, motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that in light of the death of co-defendant Michael Wahl, defendants shall serve an answer to the amended complaint or otherwise respond thereto within thirty days from the date of substitution for the Estate of Michael Wahl pursuant to CPLR § 1015; and it is further

ORDERED that as the movants are substituted as plaintiffs and Howard International Corp. is no longer a party, this action shall bear the following caption:

-----X
 BONNIE KAYE AND HERBERT KOZLOV as
 Co-Executors of the
 ESTATE OF FRED HOWARD,
 Plaintiff,

Index No. 651527/2017

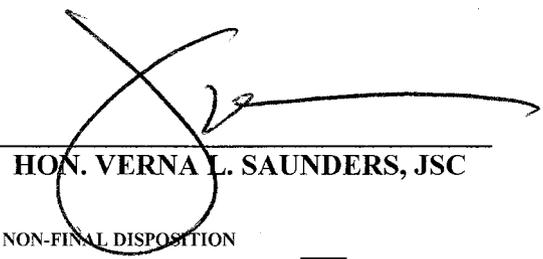
-against-

WALHRICH GROUP, LLC, MICHAEL WAHL
 a/k/a MIKE WAHL, ERIC WAHL, ANDREW
 WAHL and JUDITH WAHL,
 Defendants.

-----X;
 and it is further

ORDERED that counsel are scheduled for a status conference on January 13, 2021 to
 discuss the status of the Wahl substitution.

September 21, 2020



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE