

Harris v Harris

2020 NY Slip Op 35641(U)

July 8, 2020

Supreme Court, Bronx County

Docket Number: Index No. 23875/2018E

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
Tamara M. Harris, as Executor of the Estate of
Steve Harris,

Plaintiff,

- against -
Bernice L. Harris and Allison Harris Schifini,

Defendants.
-----X

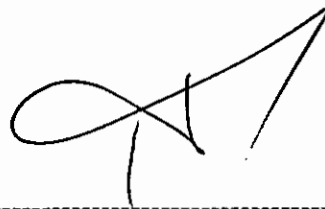
Index No. 23875/2018E

Hon. Howard H. Sherman,
Justice Supreme Court

The following papers numbered ___ to ___ were read on this motion (Seq. No. 2, 3,4)
for noticed on _____ and duly submitted as Nos. on the Motion Calendar of

Sequence	Doc. Nos.
Sequence 2	
Notice of Motion – Exhibits and Affidavits Annexed	17-29
Answering Affidavit and Exhibits, Memorandum of Law	55-59
Reply Affidavit	61, 62
Sequence 3	
Notice of Motion – Exhibits and Affidavits Annexed	30-49
Answering Affidavit and Exhibits, Memorandum of Law	55-59
Reply Affidavit	60, 63-73
Sequence 4	
Notice of Motion – Exhibits and Affidavits Annexed	81-84
Answering Affidavit and Exhibits, Memorandum of Law	
Reply Affidavit	

Upon the foregoing papers, the foregoing motions
are decided in accordance with the annexed decision and order.



- X
1. CHECK ONE.....
 CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS.....
 GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE.....
 SETTLE ORDER SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X	
Tamara M. Harris, as Executor of the Estate of Steven Harris,	Index No. 23875/2018E
Plaintiff,	Decision and Order
- against -	
Bernice L. Harris and Allison Harris Schifini,	
Defendants.	
-----X	

Howard H. Sherman, J.

Upon the foregoing papers, the separate motions of the defendants to dismiss pursuant to CPLR 3211, and the unopposed motion for substitution, are decided as follows:

The plaintiff is a daughter of the deceased Steven Harris (“decedent”). She brings this action as the executor of her father’s estate for wrongful death and other causes of action against defendant Bernice L. Harris (hereinafter, “defendant Harris”), the decedent’s wife, and defendant Allison Harris Schifini (hereinafter, “defendant Schifini”), decedent’s daughter.

The complaint alleges that the decedent was scheduled to have a tumor in his bladder biopsied and surgically removed on April 3, 2017 at New York Presbyterian/Weill Cornell Medical Center. While hospitalized, a health care proxy was executed naming defendant Harris as health care agent, which stated that decedent wanted all lifesaving measures applied including by feeding tube and/or intravenous line. It is alleged that decedent was administered a blood transfusion that was tainted by anaplasma, which caused decedent to become ill, septic, and ultimately incapacitated. The tainted transfusion was not discovered until “just before” decedent’s death.

The complaint further alleges that defendants “did everything in their power to hasten Steven's [decedent’s] death and ensure that he succumbed to a painful and torturous death including, among other things: (i) objecting to the insertion of a feeding tube so that Steven could receive hydration

and nourishment; (ii) blocking the doorway to Steven's hospital room to prevent an ear-nose-throat doctor from examining Steven's throat when he had difficulty swallowing; and (iii) expelling the supplemental, private nursing staff hired by Plaintiff to give paid, around-the-clock care to Steven, her father.”

On April 21, a second health care proxy was issued naming plaintiff as health care agent. On the morning of April 22, 2017, the Honorable Peter H. Moulton of the Supreme Court of the State of New York, New York County, issued an order which, in essence, recognized plaintiff's health care proxy as controlling. Although plaintiff authorized a feeding tube and other lifesaving measures, decedent died April 24, 2017.

The complaint is filed April 4, 2018. The first cause of action alleges wrongful death against all defendants, and the second cause of action alleges “wrongful death – pain and suffering” against all defendants. The third cause of action alleges conversion against defendant Harris only, asserting that she withdrew \$504,000 from a bank account belonging to the decedent “hours before he died,” and, upon information and belief, that she also converted “at least another half a million dollars” from decedent's accounts after his death. The fourth cause of action alleges unjust enrichment against defendant Harris only, based on the alleged removal of money from bank accounts belonging to the decedent.

Defendant Schifini moves to dismiss the complaint CPLR 3211 (a) (1), (3) and (7). Initially, she argues that plaintiff lacks legal capacity under CPLR 3211(a)(3). Plaintiff was issued preliminary letters dated June 21, 2017 which were limited to the authority to commence “a personal injury/wrongful death cause of action [and] the preliminary letters shall allow the marshaling of assets only until September 12, 2017, during such period of time no discovery proceedings may be commenced.” She contends that the plaintiff represented in her application before the Surrogate that she would bring a wrongful death action against the hospital where the

decedent was treated, and that this action is in actuality a breach of fiduciary duty action “mislabeled” as a wrongful death action.

Defendant Schifini additionally argues that she was only named as an alternate health care agent pursuant to Public Health Law 2981 (6) (iii), and that there is no allegation that she was called upon to act as a health care agent at any time. Lastly, defendant argues that dismissal is warranted based on documentary evidence – i.e., the autopsy report, which reflects that decedent died of complete stenosis of his coronary vessels, sepsis, a brain hemorrhage and kidney failure, and that the allegations of the complaint that the defendants caused the decedent’s death or pain and suffering are patently contradicted by the documentary evidence.

Defendant Harris contends, *inter alia*, that the complaint fails to allege how the denial of private medical care caused pain and suffering or death. She maintains that the complaint does not allege that defendant ever blocked or attempted to block an ENT from seeing decedent after plaintiff’s health care proxy was recognized by the Hospital, or how or why defendant Harris’ alleged effort to prevent an ENT from examining decedent contributed to his death. As to a feeding tube, defendant argues that there is no allegation that a feeding tube was medically necessary or recommended by medical professionals, nor does the complaint identify any instance where hospital staff attempted to insert a feeding tube and was prevented from doing so by defendant. The complaint’s wrongful death claims fail, she argues, as plaintiff fails to set forth non-conclusory, non-speculative allegations that establish that defendant Harris engaged in any conduct at any time that proximately caused decedent’s death. She asks this court to take notice of plaintiff’s prior written and oral testimony, along with medical records integral to the complaint’s allegations, during almost all of his hospitalization, decedent made his own health care decisions. It is further argued that the complaint fails to establish that any decisions defendant made on decedent’s behalf that violated the

standards set forth in PHL §2982(2), and its attendant statutory safe harbor of PHL § 2986.¹

As to the conversion and unjust enrichment claims, defendant Harris contends that these claims duplicate claims made in a turnover proceeding brought in the Surrogate's Court, and thus there is another action pending within the meaning of CPLR 3211(a)(4).

Plaintiff argues that the various documents offered by defendants do not constitute documentary evidence within the meaning of CPLR 3211(a)(1), and that the complaint properly pleads each of the alleged causes of action.

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court's role is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated. (*Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 [1995]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true; all reasonable inferences which can be drawn from the complaint and the allegations therein must be resolved in favor of the plaintiff. (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]). When analyzing the complaint in the context of a motion to dismiss, the court must discern whether the facts as alleged fit within any cognizable legal theory. (*Sokoloff v. Harriman Estates Development Corp.*, *supra* at 414; *Leon v. Martinez*, 84 N.Y.2d 83, 88 – 89 [1994].)

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7), the facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]). "At the same time, however, allegations consisting of bare legal conclusions.

¹ PHL § 2986(2) provides "no person acting as agent pursuant to a health care proxy shall be subjected to criminal or civil liability for making a health care decision in good faith pursuant to this article."

are not entitled to any such consideration." (*Simkin v Blank*, 19 N.Y.3d 46, 52, 968 N.E.2d 459, 945 N.Y.S.2d 222 [2012] [internal quotation marks omitted]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141-142, 75 N.E.3d 1159, 1162, 53 N.Y.S.3d 598, 601 [2017].)

"When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." (*Wells Fargo Bank N.A. v. E & G Dev. Corp.*, 138 A.D.3d 986, 986 – 987 [2d Dept. 2016] [citation omitted].)

A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence "utterly refutes" the plaintiff's factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue. (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Rodeo Family Enters., LLC v Matte*, 99 A.D.3d 781, 782 [2d Dept. 2012].) To be considered "documentary evidence" within the meaning of CPLR 3211(a)(1), the evidence must be unambiguous and of undisputed authenticity. Judicial records, as well as documents reflecting out-of-court transactions, such as mortgages, deeds, leases and contracts, which in context are "essentially undeniable," qualify as "documentary evidence" in the proper case. (*Fontanetta v. John Doe 1*, 73 A.D.3d 78 [2d Dept. 2010].)

Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same. (*Mazzei v. Kyriacou*, 2016 NY Slip Op 03722 [2d Dept. 2016]; *DAIJ, Inc. v Roth*, 85 A.D.3d 959 [2d Dept. 2011].) The same legal theories presented in the first action need not be presented in the second action; the “critical element” is that both suits arise out of the same subject matter or series of alleged wrongs. (*Cherico, Cherico & Assoc. v. Midollo*, 67 A.D.3d 622 [2d Dept. 2009]; see also, *Aurora Loan Servs., LLC v. Reid*, 132 A.D.3d 788 [2d Dept. 2015].)

At the outset, the court finds that the complaint is exceedingly vague as to the dates when alleged events occurred, and it is impossible to ascertain whether the alleged acts of the defendants were committed prior to or during the time that the health care proxy was in effect. That having been said, the only facts (as opposed to legal conclusions) which are alleged as to the wrongful death causes of action consist only of (1) defendants’ “objecting to” the insertion of a feeding tube; (2) defendants’ “blocking a doorway” to prevent an ENT from examining the decedent’s throat; and (3) defendants’ expelling private nursing staff. However, there is no allegation that the defendants actually prevented the insertion of a feeding tube. Moreover, there is no allegation of fact that the insertion of a feeding tube was medically necessary. Even if the insertion of a feeding tube was medically warranted, there is no allegation that the decedent died from or suffered from a lack of nutrition.

The plaintiff does not dispute the fact that the decedent had serious, life-threatening conditions. The complaint admits that decedent was administered a blood transfusion that was tainted by anaplasma, which caused decedent to become ill, septic, and ultimately incapacitated. In view of the seriousness of decedent’s condition, the mere conclusory statement that the lack of a feeding

tube contributed to death, absent an allegation that a feeding tube was medically necessary, is insufficient. Further, there are no allegations indicating how the absence of private nursing staff contributed to decedent's death.

To the extent that defendant Harris herein may have taken some of the alleged actions under the exercise of a health care proxy, plaintiff fails to allege "bad faith." While the complaint is replete with hyperbolic accusations that the defendants sought to hasten the decedent's death for their own gain, these accusations are not supported by factual averments. In view of the lack of any allegation that the medical providers sought to insert a feeding tube but were hampered by the defendants, or that private nursing staff was medically necessary, the complaint fails to allege "bad faith" so as to overcome the statutory protections afforded to health care agents.

Plaintiff has not disputed defendant Harris' showing that the causes of action for conversion and unjust enrichment are duplicative of earlier claims made in the Surrogate's Court.

As the Court finds that the complaint fails to state a cause of action as to wrongful death pursuant to CPLR 3211(a)(7), and as the remaining claims are dismissed pursuant to CPLR 3211(a)(4), it is unnecessary to reach the remaining arguments.

Motion Sequence No. 4 seeks to substitute the Public Administrator for the named preliminary Executor on the ground that the Surrogate has now appointed the Public Administrator as the executor of the Estate is denied as academic in view of the dismissal of the complaint.

Accordingly, it is hereby,

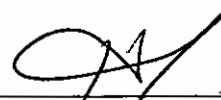
ORDERED that the motions to dismiss are granted, and the complaint is dismissed, and it is further

ORDERED that the Clerk enter judgment in favor of defendants dismissing the complaint, and it is

ORDERED that the motion to substitute the Public Administrator as plaintiff is denied as academic.

This is the Decision and Order of the Court.

Dated: July 6, 2020



Howard H. Sherman
JSC