

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID SHAW,

Plaintiff,

-against-

STUART SHAW, et al.,

Defendants.
----- x

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04 Civ. 7224 (LAK)

ORDER

LEWIS A. KAPLAN, *District Judge*.

Defendant Stuart Shaw moves to dismiss the action for lack of subject matter jurisdiction and on other grounds.

Facts

This is an intrafamily dispute concerning beneficial ownership of a building located at 9 East 67th Street in Manhattan and formerly owned by the late Margaret Shaw. The plaintiff and defendants Shaw and Denise Schure are children of Margaret Shaw. Defendant Louis Schure is Denise's husband. Complete diversity of citizenship exists.

On November 3, 1993, Margaret executed a deed transferring the building to Stuart.¹ The complaint alleges that the transfer was the result of an agreement among the three children entered into prior to the transfer that "Stuart, Denise and Louis would share the vast majority of the sale proceeds" when the building was sold. It alleges further that Stuart promised David that he would receive an equitable portion of the building's rental income and, upon sale, an approximately equal interest in the sale proceeds.

Margaret died in 2002. Stuart, with the assistance of his sister and brother-in-law, thereupon allegedly sought to cut David out of the alleged deal. David filed this action asserting claims for fraud, breach of contract, and promissory estoppel against Stuart, unjust enrichment against all defendants, and aiding and abetting against Louis and Denise.

¹ The deed was not recorded until April 26, 1996.

Discussion

Stuart's principal argument is that this case falls within the probate exception to diversity jurisdiction and therefore should be dismissed. He is mistaken.

"The probate exception establishes that 'a federal court has no jurisdiction to probate a will or administer an estate.'" *Dulce v. Dulce*, 233 F.3d 143, 145 (2d Cir. 2000) (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946)). "The exception," however, "has been construed rather narrowly." *Dulce*, 233 F.3d at 148. This Circuit applies a two part test in determining its application. "First, is the federal district court sitting in diversity being asked to directly probate a will or administer an estate?" *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002). If, as is the case here, the answer is not, then "the second prong . . . asks whether entertaining the action would cause the federal district court to 'interfere with the probate proceedings or assume general jurisdiction of the probate or control of [the] property in the [custody] of the state court.'" *Moser*, 294 F.3d at 340 (quoting *Markham*, 326 U.S. at 394).

There are no probate proceedings here, as Margaret's will never has been offered for probate. Even if it were, however, it would make no difference.

Stuart's position is that ownership of the building passed to him in 1993, nine years before Margaret's death, and that the property is not part of her estate. All of the other parties agree that legal title, at a minimum, passed prior to Margaret's death. The crux of the case is Stuart's breach of the alleged promises to David, not the distribution of estate property. In consequence, the probate exception has no application here.

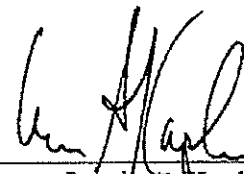
Stuart's motion also asserts that the action should be dismissed for want of indispensable parties – the surviving issue of a deceased fourth sibling, this on the theory that those issue would have an interest if the deed and the will were set aside. The short answer is that no one seeks to set aside the deed or the will.

Conclusion

For the foregoing reasons, the motion (docket item 23) is denied in all respects.

SO ORDERED.

Dated: January 13, 2005



Lewis A. Kaplan
United States District Judge