

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32217
H/prt

_____AD3d_____

Argued - June 16, 2011

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2009-08629

DECISION & ORDER

In the Matter of Grace O'Malley, deceased.
Kathleen O'Malley, also known as Kacey O'Malley,
appellant-respondent; John O'Malley, respondent-
appellant.

(File No. 3604/05)

Sweeney, Gallo, Reich & Bolz, LLP, Rego Park, N.Y. (Gerard J. Sweeney and John
Wolthoff of counsel), for appellant-respondent.

Michael F. Mongelli II, P.C., Flushing, N.Y., for respondent-appellant.

In a probate proceeding in which the administrator c.t.a. petitioned pursuant to SCPA 2103 for the turnover of, inter alia, certain real property, the administrator c.t.a. appeals, as limited by her brief, from so much of a decree of the Surrogate's Court, Queens County (Nahman, S.), dated August 18, 2009, as, upon a jury verdict in favor of John O'Malley and against her, and upon an order of the same court dated July 14, 2009, denying those branches of her motion which were pursuant to CPLR 4404(a) to set aside the jury verdict as contrary to the weight of the evidence and for a new trial on the issue of the transfer of certain real property and, in effect, for leave to reargue the motion of John O'Malley pursuant to CPLR 4401 for judgment as a matter of law dismissing that branch of the petition which asserted a claim for fraud, in effect, denied that branch of the petition which was to vacate a certain deed dated June 7, 2002, and dismissed that branch of the petition which asserted a claim for fraud, and John O'Malley cross-appeals, as limited by his brief, from so much of the same decree as, upon the granting of the motion of the administrator c.t.a. pursuant to CPLR 4401 for judgment as a matter of law on that branch of the petition which was to direct him to return certain cash withdrawals to the estate of Grace O'Malley, after a nonjury trial on the severed issue of whether to impose a constructive trust on the subject property, and upon a decision of the same court dated July 1, 2009, in effect, granted those branches of the petition which were to direct him to return certain cash withdrawals to the estate of Grace O'Malley and to impose a constructive trust on the subject property, and imposed a constructive trust on the subject property.

September 13, 2011

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MATTER OF O'MALLEY, DECEASED

ORDERED that the decree is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

“A trial court’s grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party . . . In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant” (*Robinson v 211-11 N., LLC*, 46 AD3d 657, 658, quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556 [citation omitted]; see *Parlante v Cavallero*, 73 AD3d 1001, 1002). Applying this standard here, the Surrogate’s Court properly granted the motion of John O’Malley (hereinafter the respondent) pursuant to CPLR 4401 for judgment as a matter of law dismissing that branch of the petition which asserted a claim for fraud. Contrary to the contention of the administrator c.t.a., Kathleen O’Malley, also known as Kacey O’Malley (hereinafter the petitioner), the evidence presented at the jury trial, viewed in the light most favorable to her, failed to establish that the respondent misrepresented a material fact to his parents prior to the execution of a deed transferring the subject property to induce them to transfer that property to him (see *Fellion v Darling*, 14 AD3d 904).

Moreover, viewing the evidence in the light most favorable to the respondent, and according him the benefit of every favorable inference (see *Elias v Ferri*, 46 AD3d 743), there was no rational process by which the trier of fact could have found in his favor on the petitioner’s claim for the return of certain cash withdrawals made by the respondent from his parents’ joint bank accounts. The respondent did not satisfy his heavy burden of establishing, with contemporaneous records, the legitimacy of the cash payments he allegedly made on behalf of his parents with the money he withdrew from their joint bank accounts (see *Matter of Gershenoff*, 17 AD3d 243). Accordingly, the Surrogate’s Court properly granted the petitioner’s motion pursuant to CPLR 4401 for judgment as a matter of law on that branch of the petition which was to direct the respondent to return certain cash withdrawals to the decedent’s estate.

Finally, under the particular circumstances of this case, the determination of the Surrogate’s Court, made after a nonjury trial, was not inconsistent with the jury verdict.

The parties’ remaining contentions are without merit.

ANGIOLILLO, J.P., DICKERSON, HALL and ROMAN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court