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

D36315
T/nl

_____AD3d_____ Submitted - January 17, 2012

MARK C. DILLON, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
PLUMMER E. LOTT, JJ.

2011-05181 DECISION & ORDER ON MOTION

Jane Hauck, et al., appellants, v Lillian Lombardo, etc., respondent, et al., defendant.

(Index No. 6552/09)

Motion by the appellants for leave to reargue an appeal from an order of the Supreme Court, Kings County, dated March 31, 2011, which was determined by decision and order of this Court dated February 7, 2012, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the branch of the motion which is for leave to reargue is granted, and the motion is otherwise denied; and it is further,

ORDERED that, upon reargument, the decision and order of this Court dated February 7, 2012 (*Hauck v Lombardo*, 92 AD3d 638), is recalled and vacated, and the following decision and order is substituted therefor:

Stephen A. Harrison, Brooklyn, N.Y., for appellants.

Alston & Bird, LLP, New York, N.Y. (Michael E. Johnson, Leticia B. Vandehaar, and Jalina J. Hudson of counsel), for respondent.

In an action, inter alia, to recover damages for breach of an agreement, the plaintiffs appeal from so much of an order of the Supreme Court, Kings County (Vaughan, J.), dated March

31, 2011, as, in effect, granted that branch of the motion of the defendant Lillian Lombardo, individually and as executrix of the estate of Sylvester Kuchynskas, which was pursuant to CPLR 3211(a)(7) to dismiss the first cause of action insofar as asserted against her.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The complaint alleged that the decedent, Sylvester Kuchynskas, and the plaintiff Jane Hauck (hereinafter Hauck) entered into an agreement in which the decedent agreed to make a testamentary disposition to Hauck in exchange for certain nursing services performed by the plaintiffs during the decedent's lifetime. The first cause of action sought to recover damages for breach of the agreement.

Contrary to the plaintiffs' contention, the Supreme Court properly, in effect, granted that branch of the motion of the defendant Lillian Lombardo, individually and as executrix of the estate of Sylvester Kuchynskas, which was pursuant to CPLR 3211(a)(7) to dismiss the first cause of action insofar as asserted against her. An agreement to make a testamentary disposition of any kind must be in writing and signed by the party to be charged (*see* EPTL 13-2.1[a][2]). Since the complaint did not allege the existence of an enforceable written agreement between the decedent and Hauck, the plaintiffs failed to state a cause of action (*see* EPTL 13-2.1[a][2]; *Dombrowski v Somers,* 41 NY2d 858, 859; *Matter of Morse,* 1 AD3d 516, 517; *Matter of Urdang,* 304 AD2d 586, 587).

DILLON, J.P., LEVENTHAL, BELEN and LOTT, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court