

SUPREME COURT : QUEENS COUNTY  
IA PART 33

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X  
PETER PRESVELIS,  
  
Plaintiff(s)

INDEX NO. 15521/05  
BY: JAMES J. GOLIA, JSC  
DATED: March 14, 2008

- against -

GEORGE FORELLA,  
  
Defendant(s)  
\_\_\_\_\_X

**DECISION AND ORDER**

Plaintiff Peter Presvelis commenced this action to set aside a deed to the real property known as 149-39 6<sup>th</sup> Avenue Whitestone New York, for injunctive relief and to impose a constructive trust. Defendant George Forella, has counterclaimed for abuse of process based upon a Housing Court proceeding; for abuse of process arising out of plaintiff's filing of a notice of pendency in this action; for the intentional infliction of emotional distress and for tortious interference with contract. A non-jury trial was held on August 9, 10, 13, 16, and 17, 2007, and the parties thereafter submitted post-trial memoranda of law.

FINDINGS OF FACT:

The subject real property known as 149-39 6<sup>th</sup> Avenue Whitestone New York, is a one family house which was owned by Lawrence Forella Sr. and his wife Priscilla Forella. The Forellas raised their three children, Lawrence Jr., George and Richard, in this house. Lawrence Forella Sr., died in 1988, at which time his

wife Priscilla become the sole owner of the property. Richard Forella continued to reside in said house with his mother Priscilla, who died in 1998. Lawrence Forella Jr. is disabled, and presently resides in a Veteran's Hospital. George Forella moved out of the family home in mid-1974 and presently resides in Holbrook, New York. Richard Forella inherited the subject house under the terms of his mother's will and in November 2004, was appointed the Administrator c.t.a. of the Estate of Priscilla Forella. The deed to this property was never transferred to Richard Forella, individually, during his lifetime.

In 1990, plaintiff Peter Presvelis purchased the house next door to the Forella property, where he resides with his wife and four children. Mr. Presvelis has been employed by the N.Y.C. Transit Authority since April 9, 1990. Peter Presvelis became friends with Richard Forella.

George Forella testified that although he and his brother Richard did not have a close relationship, they were not totally estranged. Richard Forella had been a drug dealer and had a long history of substance abuse. After their mother died, Richard Forella continued to reside in the family home, but lacked the financial resources to maintain it and it rapidly deteriorated. Sometime in 1998 or 1999, all of his utility services, except water, were shut off, although there was an extension cord running from through the side door to the Presvelis house, which was

presumably used to provide power for the lights and television. Sometime in 2001 or 2002, Richard Forella was arrested and sent to a residential drug rehabilitation facility in Brooklyn operated by J-CAP, for a period of 18 months. George Forella visited Richard Forella at home following his release, at which time the subject premises had become even more dilapidated. George Forella stated that he had asked his brother to transfer the property to himself or his daughter two or three times, on several occasions, but Richard Forella declined to do so.

Richard Forella was hospitalized on several occasions in 2002, 2003, and again in 2005. Richard Forella became paralyzed in 2002 during his hospitalization at New York Hospital Center, Queens, and became a resident of the Franklin Nursing Home in January 2003. In 2005 Richard Forella was hospitalized for a urinary infection and a broken leg for several weeks at New York Hospital Center, Queens. George Forella stated that Richard Forella's attorney, Martin T. O'Shea, notified him to come to the hospital on May 11, 2005. George Forella met Mr. O'Shea in Richard Forella's hospital room, at which time O'Shea read aloud a document entitled "Constructive Trust Agreement." George Forella stated that he made no changes to this agreement, and that he and Richard Forella both signed this document. George Forella stated that after leaving the hospital, he received a telephone call from Mr. O'Shea's office, requesting that he return to the hospital the

next day to sign some other papers. On May 12, 2005, George Forella went to the hospital, at which time Mr. O'Shea presented him with another copy of the "Constructive Trust Agreement" which he and Richard Forella signed, as well as a deed transferring the subject real property from Richard Forella as Administrator c.t.a. of the Estate of Priscilla Forella to George Forella. He stated that he obtained the deed after Richard Forella signed it, and believed that he was now the owner of the property. George Forella stated that two or three days later he went to the property, showed the deed to Mr. Presvelis, explained that he was the owner of the house, and obtained a set of keys to the house from Mr. Presvelis.

Plaintiff and defendant each admitted into evidence the "Constructive Trust Agreement" which names George S. Forella, as the "Constructive Trustee" and Richard Paul Forella as the Non-Titled Party Beneficiary." This agreement states as follows:

"WHEREAS both parties herein are residents of the State of New York and have close and confidential relationship to each other, to wit: they are brothers.

WHEREAS the premises known as 149-39 6<sup>th</sup> Avenue, Whitestone, New York is the parties' family home, that title "is presently vested of record in the name of their late mother, Prescilla Forella, deceased.

WHEREAS said real property is in a state of substantial disrepair and requires total repair and renovation in order to make same habitable. Additionally, said property is also subject to a number of liens.

WHEREAS Richard Paul Forella is both the duly

appointed Executor of the Estate of Priscilla Forella, and the sole legatee to said real property under paragraph "SECOND" OF her Will dated August 11, 1988.

WHEREAS it has been determined that it is inadvisable to transfer title to said real property to Richard Paul Forella because he lacks the financial wherewithall to either satisfy the existing liens on the property or to perform the necessary repairs and renovations.

NOW THEREFORE, in consideration of their mutual promises and obligation set forth herein, it is covenanted and agreed as follows:

1. Richard Paul Forella in his capacity as Executor of the Estate of Priscilla Forella, deceased, will deliver an Executor's Deed and all required supporting documents to transfer title of the premises 149-39 6<sup>th</sup> Avenue, Whitestone, New York to George S. Forella.

2. George S. Forella agrees to hold title to said premises as Constructive Trustee for the benefit of Richard Paul Forella.

3. George S. Forella further agrees to refinance the premises and to use the proceeds thereof to payoff all existing liens and perform the repairs and renovations necessary to make the premises habitable.

4. Thereafter the premises will be rented to third parties and the net rents after payment of mortgage, taxes, water and sewer charges, insurance and ongoing maintenance and or repair costs will be divided between the parties as follows:

Richard Paul Forella	50%
George S. Forella	50%

5. In the event that at some time in the future Richard Paul Forella should both

1. Have the financial ability to reimburse George S. Forella for any of his own funds expended in connection with this matter; pay off the then outstanding mortgage; and to manage the future maintenance of the premises; and

2. desires to reside in the premises:  
Then and in such event George S. Forella agrees to transfer the title to said premises to Richard Paul Forella.

6. In the event that Richard Paul Forella should die, while this Constructive Trust is still in existence, then title to these premises shall vest absolutely in George S. Forella, his heir, executors or assigns."

This agreement is acknowledged by Martin T. O'Shea, on May 12, 2005, using a New York State acknowledgment form.

George Forella stated that after these documents were signed, he went to a mortgage broker recommended by Mr. O'Shea, and filled out an application. George Forella described the condition of the subject property to the broker and was told that no one would issue a mortgage for the property in its current condition, and that instead he should apply for a mortgage on his own home. George Forella stated that he then filled out another form for a mortgage on his home, and that he began to look for contractors to renovate the property. George Forella stated that on June 2, 2005, he was notified that by the Franklin Nursing Home that his brother Richard Forella had died, and that he made arrangements with a funeral director to have his brother's remains cremated. He

stated on cross-examination that at the time he saw his brother on May 11 and May 12, 2005, he did not expect his brother to die within a short time later. He stated that after his brother died, he cancelled the mortgage application and sought to obtain a buyer for the subject property. George Forella stated that Mr. O'Shea recommended several prospective purchasers, including Mark Alexopolous, and prepared a contract of sale between himself and Mr. Alexopolous, with a purchase price of \$525,500.00, which was executed in June 2005. George Forella testified that after he obtained the deed to the premises, he retained Mr. O'Shea to represent him in connection with the property, although he did not sign a retainer agreement and was unable to state the terms of any oral agreement, including Mr. O'Shea's fees. He stated that he believed that once the house was sold, Mr. O'Shea would be paid for his services, whatever they were.

Mr. Presvelis testified that he became friendly with Richard Forella when he moved directly next door to him in 1990. He stated that he had met Priscilla Forella, and had also met Richard Forella at least once in the late 1990s. He stated that after Priscilla Forella died, in mid to late 1999, the electricity, gas and telephone services had been shut off in the Forella home, and that only water was being provided to the premises. As regards the interior of the house, Mr. Presvelis stated that the paint was peeling a bit, that the roof leaked, and that as the house was

built in 1943, it needed "attention." He stated that he paid some bills to restore services to the Forella property, including some real estate taxes, water bills, telephone bills, Con Edison, and a cable television bill. Mr. Presvelis submitted into evidence copies of the face of 11 checks: four are dated October 5, 2000, and are payable to Direct TV (\$45.24), N.Y.C. Dept of Finance (\$3,245.00), N.Y.C. Water Board (\$92.78) and Verizon (\$86.19); two are dated October 15, 2000 and are payable to Con Edison (\$1,048.48), Dept. of Finance (\$115.00); and five dated December 5, 2000 are payable to N.Y.C. Water Board (\$48.36); Verizon (\$34.30), N.Y.C. Dept. of Finance (\$1,543.79), Direct T.V. (\$57.79) and Con Edison (\$215.01). Mr. Presvelis stated that these checks were written by his wife, and that the notations of "Richard Forella," "R Forella," and the telephone or account numbers are in either his wife's or his handwriting. He also testified that on two of the checks his wife wrote the word "loan," although only the check dated December 5, 2000 payable to the N.Y.C. Dept. of Finance contains the notation "loan to Richard Forella." Mr. Presvelis stated that he made some repairs to the Forella house, which included patching the roof, and when the roof continued to leak he set up a drip tarp which diverted the water outside the window. He stated that he also cut the grass, removed snow, and made sidewalk patches. He stated that although he paid some of Richard Forella's bills in 2000, he did not thereafter pay other expenses, other

than for food and dog food, and that he took care of Richard Forella's dog, which continued to reside inside the Forella house, during the time Richard Forella was in the JCAP facility and the nursing home. He stated that the last time he saw the dog was about six months before Richard Forella died.

Mr. Presvelis stated that on October 6, 2003 Richard Forella had asked him to meet him at the office of Karen Yost, an attorney in order to prepare a will. A copy of the will Richard Forella executed on October 6, 2003 was admitted into evidence, as the original had been submitted to the Surrogate's Court. In this will, Richard Forella named Peter Presvelis his executor, directed that his debts, funeral and testamentary expenses be paid and left the remainder of his property to Peter Presvelis. The will refers to Peter Presvelis as Richard Forella's "friend." Mr. Presvelis stated that when he and Richard Forella left the attorney's office he took possession Richard Forella's copy, at Richard Forella's request.

Mr. Presvelis stated that in April 2005 he received in the mail an agreement that Mr. O'Shea had written for Richard Forella, which required him do something to make the house accessible for Richard Forella, and in exchange he would give him 50% of the house. Defendant submitted into evidence a copy of a letter from Mr. O'Shea dated April 4, 2005 which states that Richard Forella had reached an agreement with Peter Presvelis,

whereby Peter Presvelis would pay the delinquent real estate taxes, and water and sewer charges, renovate the house so Richard Forella could live there and pay the cost of maintaining the house until Richard Forella receives a malpractice settlement or award, and in exchange he would give Peter a 50% interest in the house. An unsigned copy of the proposed agreement was admitted into evidence. Mr. Presvelis stated that he signed the agreement and returned it to Mr. O'Shea, but that he did not hear from Mr. O'Shea again. He stated that he did not retain a copy of said agreement, and took no steps to repair and renovate the Forella house, or pay the outstanding liens during Richard Forella's lifetime.

Mr. Presvelis stated that he visited Richard Forella on a weekly basis at the Franklin Nursing Home and also visited him two times when he was in New York Hospital Center, Queens in 2005, and that he last saw him two days before he died. On cross-examination Mr. Presvelis stated that he had signed a sworn petition, dated July 21, 2005 in support of an order to show cause, and appeared in Landlord Tenant court on July 28, 2005, and had stated to that court that he was a person who had been locked out of the subject premises, and that he had been a tenant there since 1999. Mr. Presvelis admitted that he had never resided in the subject premises, but stated that he had Richard Forella's permission to use the Forella property where he stored his belongings. He stated that in May 2005 George Forella told him

that he was the owner of the premises and directed him to remove his property from the garage and house. He admitted that he told George Forella that he needed a bit of time to remove these items, but that he would do so. He stated that before Richard Forella died, he "loaned," rather than gave, George Forella the keys to the house and that as George Forella did not return the keys, he changed the locks to the Forella house, and that someone changed the locks again. He stated that he believed that he was the owner of the subject premises under Richard 's will, and he contacted his attorney as soon as he learned that the house was for sale.

Barbara Werley testified on behalf of the plaintiff. Ms. Werley presently resides in Indiana, and is married. She stated that had met Richard Forella in 1982, that they dated when she was 17 years old and Richard Forella was 28 years old, and that during this time Richard Forella was a drug dealer and user. In 1987 Ms. Werley moved to another state. She stated that she and Richard Forella talked to one another on and off over the years, and that in March 2005, she contacted George Forella in order to obtain Richard Forella 's telephone number. She stated that she did not know George Forella or his wife, and that he informed her that Richard Forella was paralyzed and living in a nursing home. She stated that she made one telephone call to Richard Forella, and thereafter communicated by email. Ms. Werley testified as to two emails which she identified as copies of emails she had received

from Richard Forella on March 19, 2005 and March 21, 2005. Ms. Werley did not print these emails and did not know who printed them. These emails state on their face that they were printed on August 16, 2005. Ms. Werley stated that there were approximately 40 emails exchanged, but that she had deleted them about a year prior to the trial. Neither Ms. Werley nor the plaintiff was able to produce any emails from Richard Forella which were contemporaneous with the May 11 and 12, 2005 deed and agreement. Ms. Werley stated that Richard Forella only emailed her when he was in the nursing home, that she did not receive emails when he was in the hospital, and that he never mentioned Mr. Presvelis in his emails. She stated that Richard Forella told her that he had renal failure, and wanted to have the house refurbished so that he could live at home.

Defendant admitted into evidence a copy of the deed dated May 12, 2005, between "Richard Paul Forella, as administrator, c.t.a. of the last will and testament of Priscilla Forella, late of 149-39 6<sup>th</sup> Avenue, Whitestone, Queens County, NY who died on the 17<sup>th</sup> day of May, 1998" and "George S. Forella residing at 11 Namroff Lane, Holbrook ,NY 11741" whereby ownership of the subject property was deeded in fee simple to George Forella, for no consideration. The deed does not name George Forella as a trustee and makes no reference whatsoever to the "Constructive Trust Agreement." The deed is executed by Richard Paul Forella, "both individually and as

Administrator, c.t.a. Estate of Priscilla Forella," and is notarized by Mr. O'Shea. The deed was recorded on June 23, 2005.

Martin T. O'Shea, an attorney, testified on behalf of the defendant. Mr. O'Shea stated that he is a general practitioner, and deals mostly with real estate, and trust and estate work. He stated that in March 2004, he was contacted by his former partner James McCarthy, a personal injury lawyer, regarding McCarthy's client, Richard Forella who wanted to probate his mother's will. Mr. Forella entered into a retainer agreement dated May 20, 2004, with Mr. O'Shea, and commenced a probate proceeding in the Surrogate's Court, Queens County. In November 2004, Richard Forella was appointed the Administrator c.t.a. of his mother's estate. Mr. O'Shea stated that he was not paid for these services by Richard Forella, that he sent a bill to Mr. Presvelis in 2006, as Mr. Presvelis was appointed the Executor of the Estate of Richard Forella, and has not been paid to date. Mr. O'Shea stated that after Richard Forella had been appointed the Administrator c.t.a., Richard Forella told him that he had an agreement with Mr. Presvelis to renovate the house and make it possible for him to live there. He stated that he went to view the house in November 2004, in order to see if it was possible for Richard Forella to refinance the house so that it could be made livable and handicapped accessible, and also pay off his Medicaid lien. He stated that he observed that the house was in terrible condition,

it was damp and moldy, that there was a huge hole in the living room ceiling, that there was a tarp set up to catch the water and divert it out the window and that there were hundreds of gallons of water collected in the tarp. He stated that it wasn't possible for Richard Forella to finance the renovations, and that in March 2005 he received a notice regarding a real estate tax lien on the property. He stated that after receiving this notice he went to see Richard at the nursing home, and advised him to either renovate the house or sell it to a speculator, given its condition and Richard Forella's financial situation. He stated that Richard Forella wanted to renovate the house and return home. Mr. O'Shea stated that Richard Forella provided him with the details of the agreement with Mr. Presvelis, and that he then drafted an agreement, and returned to the nursing home a few days later to go over it with him. The agreement and a cover letter were mailed to Mr. Presvelis on April 4, 2005, by regular mail. Mr. O'Shea stated that at all times Richard Forella was alert, able to communicate, to discuss his wishes and desires, and was aware of what was going on. He stated that he did not receive a response from Mr. Presvelis, and that on May 10, 2005 he received a telephone call from Richard Forella, who told him that he was in New York Hospital Center, Queens (which Mr. O'Shea referred to as the former Booth Memorial) and that he wanted him to come see him and discuss the house. He stated that he went to the hospital that afternoon

and spent about 45 minutes to an hour with Richard Forella, at which time he appeared to be alert, able to communicate and aware of what was going on. He stated that he told Richard Forella that he had not heard from Mr. Presvelis and that Richard Forella told him that it didn't matter, that he had talked with his brother George Forella, and that he was ecstatic about "re-igniting" his relationship with his brother, who was going to help him. He told him that due to his present kidney infection, he didn't think he could return home until his medical malpractice action was resolved and he would have money for home care, and therefore he proposed different terms for the agreement with George Forella. Mr. O'Shea stated that Richard Forella told him that he was going to give the house to George Forella, who would refinance it and renovate it, and that they would rent it out until Richard Forella had the financial and physical resources to move back in. Richard Forella called George Forella on Mr. O'Shea's cell phone and they made an appointment to meet at the hospital the following day. Mr. O'Shea then went to his office and drafted an agreement, and also ordered a title report. He stated that he went to the hospital on May 11, 2005 and discussed the agreement, which he called a "constructive trust agreement" with Richard Forella, and that when George Forella arrived he explained the agreement to him and that they executed the agreement. He stated that he hand wrote the 50-50 split of the rent at that time, as Richard Forella had not previously said what

the percentage was. Following the execution of the agreement they made an appointment to meet again the next day in order to execute the deed to the subject premises. At the May 12, 2005 meeting in Richard Forella's hospital room, Mr. O'Shea presented an amended agreement which properly referred to Richard Forella as the Administrator of his mother's estate, rather than the Executor, and also had the 50-50 share of the rent proceeds typed in. He stated that Richard Forella was alert, aware of what was going on, able to communicate and in good spirits. Mr. O'Shea stated that in his presence Richard Forella executed the deed, as Administrator c.t.a., transferring the property to his brother George Forella; a city and state real estate transfer tax return form; an affidavit stating that the premises was not a multiple dwelling; a form pertaining to a smoke alarm; an a equalization form; and that Richard Forella and George Forella both signed the amended "constructive trust agreement." He stated that in his opinion the deed transferred ownership of the subject property to George Forella and that this was his intention, as well as Richard Forella's intention. Mr. O'Shea stated that he referred George Forella to Brown & Flaherty Mortgage Brokers in Little Neck, and that they determined that based upon the condition of the house and the fact that it wasn't George Forella's residence, that if he could find a mortgage it would be at a distressed rate and thus recommended that he refinance his own home instead. Mr. O'Shea

stated that he did not redraft the agreement between Richard Forella and George Forella, and that George Forella applied for a mortgage on his own home. He stated that when Richard Forella suddenly died, there was no need to preserve the house for Richard Forella and that George Forella decided to sell the property. Mr. O'Shea stated that at George Forella's request, he gave him the names of six people he thought likely to be interested in purchasing the property. He stated that in mid-July 2005 he drafted the contract of sale between George Forella and Mr. Alexopoulos and that he received a down payment of \$49,000.00. He stated that due to the pendency of this action, a portion of the down payment was returned and a portion remains in escrow, as Mr. Alexopoulos is still interested in purchasing the property.

On cross examination Mr. O'Shea stated that after the Richard Forella's death, he was retained by George Forella in 2006 after this action was commenced, to represent him in the refinancing of his house. He stated that they did not enter into a written retainer agreement, and that he orally agreed to represent him at a "refinance" for a nominal sum of \$500.00 or \$600.00. He stated that he did not have a fixed agreement with George Forella to represent him as regards the prospective sale of the subject property, and probably would have charged him his regular fee of \$1,500. Mr. O'Shea stated that he had not prepared an agreement like the "constructive trust agreement" before, that

"it was not meant to be a trust, that it was meant to be evidence in case George didn't follow through with his agreement with Richard"(T 1119). As regards the deed, Mr. O'Shea stated that it was "a gift transfer without consideration"(T 1121). Mr. O'Shea stated that he guessed that Richard Forella "owed" Medicaid about \$200,000.00, but that there was no actual lien attached to the property as the deed was not in Richard Forella's name. He stated that the transfer of the house to George Forella was not intended to avoid the lien, but to defer it. He stated that it was anticipated that Richard Forella would receive a substantial award or settlement from his personal injury/malpractice action, which would be used to pay the Medicaid debt. He also stated that if the house was rehabilitated and Richard Forella was able to live there prior to the conclusion of the malpractice action, the Medicaid debt would have been smaller.

Daniella Forella, George Forella's daughter testified on behalf of the defendant. She stated that on June 11, 2005 she and her father went to the subject property, that Peter Presvelis was sitting outside of his home and that he asked her father if he was selling the house, and if so he was interested in buying it. She stated that she had previously been at the house when her father asked Mr. Presvelis to remove all of the construction materials and things in the house, that a trailer was blocking the driveway, that the house was very run down, and that there was construction

materials and debris in two of the rooms.

Peter Presvelis was called as a witness by the defendant. He testified that on or about May 16, 2005, George Forella told him he was now the owner of the property and asked him to remove items from inside the property, he did not agree to do so. He stated that he provided George Forella with the keys to the front door, and retained a key to the side door, that the garage door opened electronically, was controlled from his home and that he retained exclusive control over the garage. He stated that during the period of May to July 2005 he changed the locks on the Forella house once, and that he once placed glue in the lock or locks to the premises, as he was under the impression that George Forella was not the owner and had not returned the keys. Mr. Presvelis stated that after Richard Forella died, he knew that buyers were looking at the house, but that he did not know that property was no longer being shown at the time he commenced this action.

CONCLUSIONS OF LAW:

I find that the testimony of the parties and the witnesses, on the whole, to be credible. However, contrary to plaintiff's assertions, the nature of each party's relationship, or degree of friendship, with Richard Forella is not a determinative factor here. I find that neither Mr. Presvelis nor Ms. Werley's testimony is sufficient to establish Richard Forella's intentions

regarding the subject real property during the critical period of May 10-12, 2005. Moreover, plaintiff's claim that Richard Forella did not intend to deed the subject real property to his brother George Forella is not supported by the evidence. Richard Forella's intentions can be determined from an examination of the deed and "constructive trust agreement," as well as the testimony of Mr. O'Shea.

The checks submitted by Mr. Presvelis, which he claims to have been written on behalf of Richard Forella for a brief period in 2000, were not accompanied by any bills that were sent to Richard Forella. At the most, these checks are evidence of their friendship, but are irrelevant to the plaintiff's claims.

PLAINTIFF'S FIRST CAUSE OF ACTION:

Plaintiff Peter Presvelis, in the first cause of action, seeks to set aside the deed on the grounds of fraud or duress; that it was a conditional conveyance and was invalidated upon the death of Richard Forella; that Richard Forella lacked the intent to convey the property due to his physical and mental condition; that the deed was not executed by Richard Forella; that the defendant coerced and deceived Richard Forella into executing the deed; and that the deed was void and invalid to legally convey the property to George Forella. I find that the evidence presented at trial fails to establish any of these claims.

To sustain a cause of action sounding in fraud, a party must show "a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Cayuga Partners v 150 Grand, 305 AD2d 527, 528 [2003]; see Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc., 88 AD2d 461 [1982]). Fraud in the execution, as alleged by the plaintiff in this action, arises where a party did not know the nature or the contents of the document being signed, or the consequences of signing it, and was nonetheless misled into doing so (see Fleming v Ponziani, 24 NY2d 105, 111 [1969]; Gilbert v Rothschild, 280 NY 66, 71-72 [1939]; National Bank of N. Am. v Around the Clock Truck Serv., 58 Misc 2d 660 [1968]). Here, the evidence establishes that no misrepresentations were made to Richard Forella, that he understood the nature and consequences of the document he signed, and that he did not intend that he receive consideration for the conveyance of the premises. Plaintiff's conclusory claims that Richard Forella was somehow tricked into executing the deed have no evidentiary support.

Plaintiff has failed to submit any evidence, beyond conclusory allegations and speculation, that Richard Forella lacked the mental capacity to execute the subject deed. A person's competence is presumed and the party asserting incapacity bears the

burden of proving incompetence (see Smith v Comas, 173 AD2d 535 [1991]; Matter of Gebauer, 79 Misc 2d 715, 719 [1974], affd 51 AD2d 643 [1976]). It must be established that the party did not understand the nature of the transaction at the time of the conveyance as a result of his or her mental disability (see Crawn v Sayah, 31 AD3d 367 [2006]; Whitehead v Town House Equities, Ltd., 8 AD3d 367 [2004]; Feiden v Feiden, 151 AD2d 889 [1989]; Lopresto v Brizzolara, 91 AD2d 952, [1983]). Although plaintiff claims that Richard Forella was taking pain medications which affected his mental abilities, he failed to call as a witness Richard Forella's treating physician or a medical expert. Rather, I find that the evidence establishes that on May 11 and 12, 2005, Richard Forella was alert and aware of his surroundings, that he was aware of his physical condition, was aware of the fact that he lacked the financial resources to rehabilitate the premises and would need home care if he were to eventually live at home, and was capable of making a rational decision at the time he executed the deed, and in control his conduct (see Ortelere v Teachers' Retirement Bd. of City N.Y., 25 NY2d 196, 202-205 [1969]; Whitehead v Town House Equities, Ltd., supra at 369; Call v Ellenville Natl. Bank, 5 AD3d 521 [2004]; Lukaszuk v Lukaszuk, 304 AD2d 625 [2003]; Matter of Lee, 294 AD2d 366, 367 [2002]; Gala v Magarinos, 245 AD2d 336, [1997]).

Plaintiff's claim that the deed is a forgery is not

supported by the evidence. Since the deed was executed, notarized, acknowledged, and recorded, it constitutes prima facie proof of the authenticity of the Richard Forella's signature (see CPLR § 4538; Hoffman v Kraus, 260 AD2d 435, 436 [1999]). Such proof requires credible evidence for its rebuttal (Langford v Cameron, 73 AD2d 1001, 1002, [1980]). Plaintiff did not call a handwriting expert, and, therefore, cannot establish that the subject deed was a forgery at the time it was executed (see Harrison v Grobe, 790 F Supp. 443, 447-448 [1992], affd 984 F2d 594 [1993], citing, inter alia, Feiden v Feiden, supra, and Matter of Ford , 279 AD 152 [1951], affd 304 NY 598 [1952]).

Plaintiff also failed to establish, beyond conclusory allegations and speculation, that the defendant actually exercised undue influence over his brother Richard Forella. It is well settled that in order to establish undue influence: "It must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted constrained the [donor] to do that which was against his [or her] free will and desire, but which he [or she] was unable to refuse or too weak to resist. It must not be the prompting of affection; the desire of gratifying the wishes of another; the ties of attachment from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent resistless power

which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear . . . lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of [property], and if allowed to influence a [donor], cannot be regarded as illegitimate or as furnishing cause for legal condemnation" (Matter of Walther, 6 NY2d 49, 53-54 [1959], quoting Children's Aid Soc. v Loveridge, 70 NY 387, 394-395 [1877]). Normally, the burden of proving such influence rests with the party asserting its existence (Allen v La Vaud, 213 NY 322 [1915]). However, if a confidential relationship exists, the burden is shifted to the beneficiary of the transaction to prove the transaction fair and free from undue influence (see Matter of Gordon v Bialystoker Center & Bikur Cholim, 45 NY2d 692, 699 [1978]; Matter of Connelly, 193 AD2d 602, 602-603 [1993], lv denied 82 NY2d 656 [1993]; Howland v Smith, 9 AD2d 197, 199 [1961], affd 10 NY2d 754 [1961]). However, the inference of undue influence, requiring an explanation of a gift, does not generally arise from the confidential relationship between close family members, since "[the] sense of family duty is inexplicably intertwined in this relationship which, under the circumstances, counterbalances any contrary legal presumption" (Matter of Swain, 125 AD2d 574, 575 [1986], quoting Matter of Walther, supra at 56). Thus, close family ties, such as those of

brothers may negate the presumption of undue influence that would otherwise arise from a confidential or fiduciary relationship (see Matter of Walther, *supra*; Matter of Swain, *supra*). Where a familial relationship exists, it may only be viewed as a confidential or fiduciary relationship sufficient to shift the burden of establishing that the transaction was not the product of undue influence if coupled with other factors, such as where the donor is in a physical or mental condition such that he or she is completely dependent upon the defendant-donee for the management of his or her affairs and/or is unaware of the legal consequences of the transaction (see Peters v Nicotera, 248 AD2d 969, 970 [1998]; Matter of Connelly, 193 AD2d at 603; Loiacono v Loiacono, 187 AD2d 414, 414 [1992]; Hennessey v Ecker, 170 AD2d 650 [1991]; Matter of Kurtz, 144 AD2d 468, 469 [1988]). However, the existence of a family relationship does not, *per se*, create a presumption of undue influence. Rather, there must be evidence of other facts or circumstances showing inequality or controlling influence (see In re Dolleck, 11 AD3d 307, 308 [2004]; In re Marcus Trusts, 297 AD2d 683, 684 [2002]; DeMarco-McCluskey v DeMarco, 11 Misc 3d 1058A [2006]; Feiden v Feiden, *supra*; Daniels v Cummins, 66 Misc 2d 575, 579 [1971]; 43 NY Jur 2d, Deeds, § 230, at 429). Here, the evidence presented is insufficient to shift the burden of proof to the defendant, as there is no evidence that George Forella ever managed Richard Forella's day to day affairs, or had any other

control over Richard Forella. Rather, the evidence establishes that they saw each other infrequently and did not communicate with one another on a regular basis, and that George Forella was unaware of Richard Forella's desire to transfer the property to him prior to May 2005. I find that there is no evidence that defendant exercised undue influence over his brother Richard Forella.

Title to the real property, which was specifically devised to Richard Forella by his mother Priscilla Forella, vested in him at the moment of his mother's death (see Waxson Realty Corp. v Rothschild, 255 NY 332, 336, 174 NE 700 [1931]; Matter of Torricini, 249 AD2d 401, 671 NYS2d 115 [1998]; DiSanto v Wellcraft Mar. Corp., 149 AD2d 560, 562, 540 NYS2d 260; 1989 v Wellcraft Mar. Corp., 149 AD2d 560, 562, 540 NYS2d 260 [1989]). Therefore, neither the fact that the deed to the property was not transferred to Richard Forella, nor his failure to be appointed Administrator c.t.a. until November 2004, would have necessarily prevented the Department of Social Services (DSS) from imposing a Medicaid lien on the subject property. At trial, no evidence was presented regarding the actual amount of Medicaid payments Richard Forella received prior to his death on June 2, 2005. In addition, no evidence was presented as to whether the Department of Social Services filed a notice of lien under Social Services Law § 369. Therefore, plaintiff's claim that the deed transfer was illegal, is rejected. It is noted that there is no private right of action to

enforce a Medicaid debt or lien, and that Peter Presvelis neither asserted, nor established, that he is a creditor of Richard Forella. Therefore, plaintiff's attempt to set aside the deed based upon the provisions of the Debtor Creditor Law is also rejected.

I further find that plaintiff's claims that the deed was the product of duress, coercion or deceit on the part of the defendant, or that the defendant and Mr. O'Shea concocted a scheme to obtain title to the real property, are not supported by the evidence presented at trial.

PLAINTIFF'S SECOND CAUSE OF ACTION:

Plaintiff's second cause of action to permanently enjoin the defendant from selling, transferring, mortgaging, leasing or otherwise enjoining the subject real property, is not supported by the evidence presented at trial. Plaintiff is not entitled to permanent injunctive relief, as the evidence presented at trial fails to establish that plaintiff is the owner of the subject property. Plaintiff's claim to the real property is based upon Richard Forella 's last will and testament, dated October 6, 2003. However, as Richard Forella had deeded the property to his brother George on May 12, 2005, prior to his death, it was not a part of his estate at the time of his death(see EPTL §§ 3-3.1, 3-4.3).

PLAINTIFF'S THIRD CAUSE OF ACTION TO IMPOSE A  
CONSTRUCTIVE TRUST ON THE SUBJECT REAL PROPERTY:

Plaintiff's third cause of action seeks to impose a constructive trust on any monies defendant realizes from the sale, mortgage, lease or encumbrance of the property, is not supported by the evidence presented at trial. A constructive trust may be imposed when "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (Sharp v Kosmalski, 40 NY2d 119, 121 [1976]). In such cases, equity converts the legal holder into a trustee (Simonds v Simonds, 45 NY2d 233, 242 [1978]). In order to establish the right to a construction trust, the plaintiff must offer evidence of (1) a confidential or fiduciary relationship between the holder of the property and the party claiming ownership, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (see Simonds v Simonds, supra; Sharp v Kosmalski, supra). I find that plaintiff failed to establish any of the elements of a claim for the imposition of a constructive trust, and therefore is not entitled to receive any money arising out of the sale or other disposition of the real property.

THE "CONSTRUCTIVE TRUST AGREEMENT":

Plaintiff in his complaint does not seek to set aside, or

have the court construe the "constructive trust agreement." However, this agreement is clearly related to the deed and the parties both introduced it into evidence in support of their respective claims. I find that upon examination of the agreement and the testimony of Mr. O'Shea who drafted the agreement, that it was not intended to create a trust. This agreement, when considered with the deed, does not meet the essential elements for a trust (see 106 NY Jur 2d, Trusts § 58). Although the agreement names a beneficiary and a "constructive trustee," and designates the real property as the res, title to the property was delivered by Richard Forella as Administrator c.t.a. of the Estate of Priscilla Forella to George Forella. George Forella is not named as a trustee, and no reference is made in the deed to the "constructive trust agreement." Rather, as the deed transfers the real property to George Forella individually, no trust was created (see 106 NY Jur2d Trusts § 101).

Clearly, Mr. O'Shea's use of the term "constructive trust" in drafting the agreement was a misnomer, as parties to an agreement cannot not create a constructive trust. Rather, a constructive trust may only be imposed by a court (see Sharp v Kosmalski, supra; Simonds v Simonds, supra). I find that the May 12, 2005 agreement between Richard Forella and George Forella was intended to memorialize the parties' understanding regarding the subject real property. The evidence presented at trial

establishes that this agreement was executed by Richard Forella, initially on May 11, 2005 and again on May 12, 2005, when it was amended to correct certain terms, and that Richard Forella had the mental capacity to enter into said agreement. This agreement evidences Richard Forella's intention to convey the real property to George Forella, who would hold it for his benefit, that George Forella would utilize his credit to obtain a mortgage that would be used to pay off Richard Forella's liens and rehabilitate the property, and that George Forella would then rent it out to a third party, with the net rent proceeds spilt between the brothers. It was Richard Forella and George Forella's intention that in the event that Richard Forella obtained the financial means to reimburse his brother and pay off the mortgage, and if he desired to reside in the premises, George Forella would reconvey it to him. Under this scenario, if George Forella refused to re-convey the property, Richard Forella could seek to impose a constructive trust and rely upon said agreement as evidence of the parties' intentions. It is noted that the courts have not been hesitant to impose a constructive trust where title to property was taken in the name of a family member in order to qualify for a mortgage upon showing a promise to reconvey (see Vincent v Vincent, 80 AD2d 582 [1981]; Djamoos v Djamoos, 153 AD2d 871 [1989]; Palma v Palma, 17 Misc 2d 153 [1959]). The agreement also evidences Richard Forella's intention that in the event that the property was not

reconveyed and Richard Forella died, George Forella would retain his ownership of the real property. George Forella, in compliance with the agreement, began the application process for obtaining mortgage. However, Richard unexpectedly died only 22 days after he executed the deed and subject agreement, obviating the need to rehabilitate the property on Richard's behalf.

DEFENDANT'S COUNTERCLAIMS:

Defendant's first counterclaim for abuse of process is based upon the commencement of Housing Court proceeding by Peter Presvelis against George Forella on July 21, 2005. In the order to show cause in that proceeding, Peter Presvelis claimed to be a tenant of the subject premises since 1999, pursuant to an agreement with Richard Forella, and asserted that he was locked out of the house, that George Forella claimed to be the owner and that he had changed the locks and did not give Mr. Presvelis access to his possessions. The court therein, in a decision and order dated July 28, 2005, denied the petition "as per decision on the record due to the lack of jurisdiction" (Defendant's Exhibit J). The second counterclaim for abuse of process is based upon the filing of notice of pendency on July 5, 2005, in connection with this action to set aside the deed.

Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal (2) an

intent to harm without excuse or justification and (3) use of process in a perverted manner to obtain a collateral objective (see Curiano v Suozzi, 63 NY2d 113 [1984]; Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn. Local 1889, AFT AFL-CIO, 38 NY2d 397, 403 [1975]). Here, the second and third requirements have not been satisfied. The mere institution of the Housing Court action by an order to show cause and petition is not legally considered process capable of being abused (see Curiano v Suozzi, 63 NY2d 113, 116 [1984]). At trial, defendant failed to establish any actual misuse of either the Housing Court proceeding or the notice of pendency to obtain an end outside its proper scope (see generally Hornstein v Wolf, 67 NY2d 721, 723 [1986];, Mago LLC v Singh, \_\_\_ AD3d \_\_\_, 2008 NY Slip Op 461; 2008 N.Y. App. Div. LEXIS 438 [January 22, 2008]; Panish v Steinberg, 32 AD3d 383 [2006]).

Defendant's third counterclaim for intentional infliction of emotional distress is based upon the filing of the notice of pendency. In order to recover on such a claim, a plaintiff must establish (1) extreme and outrageous conduct, (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (3) a causal connection between the conduct and injury and (4) severe emotional distress (Howell v New York Post Co., 81 NY2d 115 [1993]). The filing of a notice of pendency in connection with this action does not rise to the level of conduct

which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (Murphy v American Home Prods. Corp., 58 NY2d 293, 303 [1983]; see Howell v New York Post Co., 81 NY2d 115, 122 [1993]), and defendant failed to present any evidence at trial in support of this counterclaim.

Defendant's fourth counterclaim purports to be one for tortious interference with contractual relations. Such a claim requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages (Foster v Churchill, 87 NY2d 744 [1996]). Although Mr. Presvelis testified that he knew that the subject property was for sale following Richard Forella's death, this is insufficient to establish that he was aware of the actual contract between George Forella and Mr. Alexopoulos, that he intentionally breached that contract and that George Forella sustained damages as a result of the breach. Rather, the evidence presented establishes that said contract is still in existence, and that although a portion of Mr. Alexopolous' down payment was returned, the remainder remains in escrow, as he is still interested in purchasing the property.

VERDICT

Based upon the testimony of the parties and the witnesses, and the documentary evidence presented at trial, I find that pursuant to the May 12, 2005 deed and the May 12, 2005 "constructive trust agreement" George Forella is the owner of the subject real property and that the plaintiff has failed to establish any of his claims. I further find that defendant George Forella has failed to establish any of his counterclaims. The clerk of the court is directed is directed to enter a verdict in favor of the defendant dismissing plaintiff' s complaint in its entirety, and canceling the notice of pendency, and is further directed to enter a verdict in favor of the plaintiff dismissing the defendant' s counterclaims in their entirety.

This constitutes the decision and order of the court.

Dated:

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J.S.C.