

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

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KATHLEEN DeMARCO-McCLUSKEY,			Number <u>25621</u>
2003			
	Plaintiff,		Motion
			Date <u>January 3,</u>
2006			
	-against-		
			Motion
DENNIS DeMARCO,			Cal. Number <u>14</u>
	Defendant.		
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The following papers numbered 1 to 19 read on this motion by defendant Dennis DeMarco for an order granting summary judgment dismissing the complaint. Plaintiff Kathleen DeMarco-McCluskey cross-moves in opposition and seeks an order striking defendant's answer pursuant to CPLR 3126, and precluding him from presenting evidence at trial.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavit	
- Exhibits (A-F)	1-4
Opposing Memorandum of Law	
Notice of Cross Motion - Affirmation	
- Exhibits (A-H)	5-8
Affidavit - Exhibit (A)	9-10
Affidavit - Exhibits (A-G)	11-12
Opposing Affirmation - Exhibits (A-H)	13-15
Opposing Affirmation	16-17
Reply Affirmation	18-19

Upon the foregoing papers it is ordered that these motions are decided as follows:

Plaintiff Kathleen DeMarco-McCluskey and defendant Dennis DeMarco are sister and brother. Plaintiff has resided in

Florida since 1991. The parties' parents owned a three-family home known as 83-48 Langdale Street, New Hyde Park, New York, in which they resided. After their father died in 1992, their mother, Frances DeMarco, continued to reside in the property. In 1996, Frances and Dennis were both injured in an automobile accident, and sustained serious injuries. Some time after this accident, Dennis, who is alleged to suffer from multiple sclerosis, moved into the subject premises. In late 1999, Frances suffered a stroke, and she thereafter transferred ownership of the property to Dennis, pursuant to a deed dated April 14, 2000. The deed was notarized and acknowledged, and was recorded on June 21, 2000. Frances DeMarco sustained a second stroke sometime thereafter and died on August 11, 2002, at the age of 82.

Kathleen DeMarco-McCluskey commenced an action to vacate the April 14, 2000 deed or impose a constructive trust against Dennis DeMarco on September 19, 2002 (Index No. 23794/02) and interposed 14 causes of action. A notice of pendency was filed against the subject property. The court records reveal that a motion for an injunction was marked off the calendar on October 2, 2002 for the failure to appear. There was no other activity in the 2002 action, until April 1, 2005 when a status conference was either scheduled or held. A preliminary conference was either held or adjourned on June 11, 2005. Discovery responses were apparently filed on July 12, 2005, although plaintiff's present counsel asserts that no discovery demands had been served in that action. A compliance conference was held on July 7, 2005, at which time the plaintiff failed to appear. A 90-day notice was thereafter served pursuant to CPLR 3216, demanding that the plaintiff file a note of issue within 90 days of receipt. Plaintiff failed to file a note of issue or seek leave to extend the time in which to file a note of issue. In an order dated October 19, 2005, the Hon. Martin E. Ritholtz, upon his own initiative, dismissed the complaint for failure to prosecute, pursuant to CPLR 3216. Since the 90-day notice was served by the court and not the defendant, the dismissal of the 2002 complaint, the court will not consider this to be a dismissal with prejudice, barring the 2003 action.

While the action commenced under Index No. 23794/02 was pending, Kathleen DeMarco-McCluskey commenced the within action against Dennis DeMarco on October 30, 2002, and filed a second notice of pendency against the subject property. The complaint in the within action is identical, word for word, to the complaint filed in the 2002 action. Plaintiff's present counsel was substituted in this action on March 19, 2004 and defendant's present counsel was substituted in this action on November 17, 2005. A preliminary conference was held on September 7, 2004. Plaintiff was deposed on November 11, 2004. Defendant did not appear for a deposition at that time, as his counsel had not been

served with the bill of particulars until just prior to the commencement of the plaintiff's deposition, and defendant did not want to be present at the same location as his sister. It is apparent that the plaintiff and defendant have a long standing acrimonious relationship. Although defendant's deposition was rescheduled for January 4, 2005, he did not appear. Defendant asserts that his former counsel did not inform him of the date, and that he is ready, willing and able to appear for a deposition. Defendant's former counsel filed a note of issue on March 31, 2005, and a statement of readiness in which it was stated that all discovery was complete, although defendant had not been deposed.

Defendant's order to show cause seeking summary judgment was filed with the court on September 6, 2004, which was more than 120 days after the filing of the note of issue. Defendant's counsel, however, asserts that good cause for the delay exists, in that there was some confusion on the part of defendant's former counsel as to whether the note of issue had been filed in the 2002 or 2003 action. Plaintiff's counsel asserts that no note of issue was filed in the 2002 action, and that the defendant was not served with the summons and complaint in the 2002 action. Plaintiff's counsel asserts that the note of issue had been filed in the 2003 action by defendant's former counsel and that he advised defendant's former counsel that the 2002 action was "dead". Plaintiff's counsel further states that he informed defendant's prior counsel that the defendant had refused to provide responses to plaintiff's discovery demands, that defendant's failure to appear for depositions had resulted in a default judgment against him and that he had a court order precluding the defendant from testifying at trial.

The court finds that although defendant's former counsel filed the note of issue in the 2003 action, and, therefore, could not have been confused as to this filing, plaintiff's failure to properly discontinue the 2002 action created confusion as to whether two identical actions were still pending in this court. At the time the 2002 and 2003 actions were commenced, Ms. DeMarco-McCluskey was represented by the same counsel. Although plaintiff's present counsel now seeks to treat the 2002 action as a nullity, that action was never properly discontinued and the court was never informed that the action had been withdrawn or abandoned. Rather, counsel for Ms. DeMarco-McCluskey permitted the 2002 action to languish until it was dismissed by the court on October 19, 2005, more than a month after the within motion for summary judgment was submitted to the court and served on the plaintiff. Moreover, the information provided by plaintiff's present counsel to defendant's former counsel regarding the legal status of the 2002 action and his claims that a default judgment and an order of preclusion had been obtained in the 2003 action were clearly disingenuous and misleading. Plaintiff never moved

for, nor obtained a default judgment or an order of preclusion against the defendant in the 2003 action. In addition, the statement by plaintiff's counsel that the defendant did not appear at the January 4, 2005 deposition and was "in default", is of no effect and does not constitute a default judgment. The court, therefore, finds that as the statements made by plaintiff's counsel created confusion and were misleading, good cause exists to excuse defendant's late motion for summary judgment.

Plaintiff's first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh and twelfth causes of action are all brought on behalf of the "Estate of Frances DeMarco" and seek to recover damages on behalf of the estate. Plaintiff does not allege in her complaint or moving papers that she has been appointed the executor or administrator of the Estate of Frances DeMarco. Therefore, as plaintiff lacks standing to maintain any action on behalf of the Estate of Frances DeMarco these causes of action are dismissed.

To the extent that plaintiff in her wherefore clause demands a declaration of the legal rights and relations of the parties, and also seeks leave "to return to this Court, upon motion, to seek further declaratory relief in the event that it becomes necessary," such relief is denied, as the complaint fails to set forth a claim for declaratory judgment.

Plaintiff in her seventh and thirteenth causes of action alleges to be a beneficiary of the Estate of Frances DeMarco in a probate or intestate proceeding, and claims that she has been deprived of her right to inherit real and personal property. Plaintiff asserts, in the alternative, that the deed is a forgery, that her mother lacked the mental capacity to sign the deed, and that the defendant exercised undue influence and coercion in order to induce their mother to execute the deed and to obtain her personal property.

Plaintiff has not established that a probate or intestacy proceeding has been commenced in Surrogate's Court. In her deposition testimony and affidavit, plaintiff states that in October 2000, she and her husband discovered that the deed to the subject property had been transferred from Frances to Dennis, when her son, then a law student, conducted an internet search to determine if there were any liens on the subject property. Plaintiff states that in October 2000 she had a telephone conversation with her mother, who denied signing the deed. Michael McCluskey, plaintiff's husband, states in an affidavit that he learned of the transfer of the property in October 2000, and that he listened to his wife's telephone conversation with her mother on an extension phone, in which she denied making the transfer. Plaintiff also testified that after this conversation,

her husband sent her mother a letter and a copy of the deed. Plaintiff, however, did not take any legal action to set aside the deed during her mother's life time. Rather, she waited until three years after learning of the transfer of the property and nearly a year after her mother's death to commence this action, thus precluding the testimony of her mother--the one person who could have possibly testified as to her acts and intentions. However, as defendant has not asserted that affirmative defense of laches, the court is constrained from dismissing the complaint on this ground.

Plaintiff's claim that the deed is a forgery is not supported by admissible evidence. Since the deed was executed, notarized, acknowledged, and recorded, it constitutes prima facie proof of the authenticity of plaintiff'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]). Mrs. DeMarco-McCluskey bases her claim of forgery on her own comparison of her mother's handwriting. Plaintiff is not, however, a qualified expert on handwriting and any supposed comparison of signatures by her does not constitute competent evidence (Seplow v De Camillis, 115 AD2d 393, 394 [1985]; Freeman Check Cashing, Inc. v State, 97 Misc 2d 819, 822 [1979]). Plaintiff has not submitted an affidavit from a handwriting expert, and, therefore, cannot establish that the subject deed is a forgery.

Plaintiff has failed to submit any evidence, beyond conclusory allegations and speculation, that her mother lacked the mental capacity to execute the subject deed. A party'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]). "A person may be old and mentally weak and still be able to understand and comprehend the meaning of a deed or the transfer of property. Moreover, a person who may have physical infirmities to such an extent as to be unable to transact business personally, and may need to have others act for him, may still possess the requisite mind and judgment to transact business" (43 NY Jur 2d, Deeds, § 23). The fact that an individual may have suffered a stroke does, not in itself, establish a lack of capacity. It must be shown that, because of the affliction, the person was incompetent at the time of the transaction (see Matter of Herman, 289 AD2d 239 [2001], appeal denied 97 NY2d 612 [2002]; Matter of Bush, 85 AD2d 887, 888 [1981]). The information set forth in the affidavits, and plaintiff's deposition do not establish that Frances DeMarco was incapable of taking care of her affairs at the time she executed the deed, and that she was "so affected" by her condition "as to render [her] wholly and absolutely incompetent to comprehend and understand the nature of the transaction" (Feiden v

Feiden, 151 AD2d 889, 890 [1989], quoting Aldrich v Bailey, 132 NY 85, 89 [1892]) or "unable to control [her] conduct" (Ortelere v Teachers' Retirement Bd. of City of N.Y., 25 NY2d 196, 203 [1969]; see Whitehead v Town House Equities, Ltd., 8 AD3d 367, 369 [2004]). The fact that Mrs. DeMarco executed the deed after having suffered a stroke does not, by itself, satisfy plaintiff's burden of showing that her mother was incompetent at the time she executed the deed (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 has not submitted an affidavit from any of her mother's physicians or any other medical expert. Rather, plaintiff states that she is a nurse and seeks to rely upon her own interpretation of her mother's unsworn medical records. Plaintiff is an interested party and cannot act as her own expert. Finally, although plaintiff and her husband both assert that Frances denied executing the deed in an October 2000 telephone conversation, this is insufficient to establish that she was incompetent to execute the deed in April 2000, six months earlier.

Plaintiff has also failed to submit any evidence, beyond conclusory allegations and speculation, that the defendant actually exercised undue influence over their mother. 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, such as a mother and son 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 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]; Feiden v Feiden, supra; Daniels v Cummins, 66 Misc 2d 575, 579 [1971]; 43 NY Jur 2d, Deeds, § 230, at 429). Mere motive and opportunity to exercise such influence is insufficient to present a triable issue of fact, without additional evidence that such influence was actually exercised (Matter of Philip, 173 AD2d 543, 543 [1991]; Matter of Walther, 6 NY2d 49; In re Herman, 289 AD2d 239, 240 [2001]; Matter of Posner, 160 AD2d 943, 944 [1990]; In re Estate of Goldberg, 153 Misc 2d 560, 567 [1992]).

Plaintiff asserts that her mother was elderly, in poor health, and that she was housebound and completely dependent upon the defendant for her access to food, shelter, medicine, doctor's appointments, transportation and companionship. She further alleges that defendant controlled his mother's finances, and, therefore, the burden of proof should be shifted to the defendant. This argument is rejected. Here, there was a close familial relationship between Frances DeMarco and her son, Dennis. Dennis moved in with his mother some time after the 1996 accident. After she suffered a stroke in December 1999, he took her to the doctor, paid her doctor's bill, and provided for her meals and cared for her. The court finds that these actions do not serve as to shift plaintiff's burden of proof. Although plaintiff claims that her mother was dependent upon Dennis for companionship, she also

acknowledged that her mother had home health aides and that her mother also communicated with other relatives and family friends. Plaintiff's assertion that her brother attempted to prevent her from talking with her mother is contradicted by her testimony that she spoke to her mother once a week prior to the December 1999 stroke, and subsequently she had several telephone conversations with her mother. She also acknowledged that her mother was increasingly hard of hearing, and that it was difficult to sustain a telephone conversation with her. Plaintiff's assertion that her mother was afraid of the defendant is not supported by the evidence. Plaintiff cites to a single instance when her mother visited Florida and stayed with a cousin, rather than with the plaintiff and her family. Plaintiff claims that her mother was afraid that if she stayed with her, Dennis "would do something." She stated that her mother implied that he would change the locks. Plaintiff, however, also stated that it was more convenient for her mother to stay with her cousin, as her mother did not drive, but that the cousin did. This single implied threat is insufficient to establish that her mother felt threatened by the defendant. The court finds that there is no evidence that defendant exercised undue influence over the parties' mother.

The court further finds that plaintiff's claim that her brother misappropriated \$100,000.00 which their mother received in settlement of her claims arising out of the 1996 accident, is wholly unsubstantiated. Plaintiff has not submitted any evidence which supports her claim that her mother received such a settlement. Rather, her claim is based solely on a telephone conversation she allegedly had with her mother regarding the settlement proceeds. Finally, plaintiff's reliance on a will allegedly executed by Frances DeMarco, and promises she allegedly made to her children as to a different distribution scheme, do not constitute evidence of undue influence, or vitiate the validity of the April 14, 2000, deed.

In view of the foregoing, defendant's motion for summary judgment dismissing the complaint is granted, and plaintiff's cross motion is denied in its entirety.

Dated: February 28, 2006

J.S.C.