

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

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BETTY BROWN,	x	Index	
		Number <u>29004</u>	2001
Plaintiff,		Motion	
- against -		Date <u>May 20,</u>	2003
		Motion	
STANTON BROWN, et al.,		Cal. Numbers <u>5 & 6</u>	
Defendants.			
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	x		

The following papers numbered 1 to 24 read on this motion by defendants for summary judgment dismissing the complaint and setting the matter down for a hearing on the issue of defendants' counterclaims and damages, and a separate motion by plaintiff for summary judgment on the first cause of action.

	<u>Papers</u> <u>Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1 - 12
Answering Affidavits - Exhibits.....	13 - 20
Reply Affidavits.....	21 - 22
Other.....	23 - 24

Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of disposition and are determined as follows:

In the first cause of action asserted in the complaint, plaintiff seeks to set aside a prenuptial agreement entered into between her and decedent, Sherman L. Brown, Sr., prior to their marriage on March 9, 1997. The second cause of action is to set aside a deed, dated August 10, 1998, by which decedent transferred certain real property he owned to himself and his three sons, the individual defendants herein, as joint tenants with the right of survivorship. By a last will and testament executed on March 1, 1995, decedent had bequeathed his entire estate equally to his three sons. The prenuptial agreement included a provision waiving and releasing plaintiff's right of election against the will.

Plaintiff's contention that the prenuptial agreement is not effective because it was not acknowledged in the manner required for the recording of a conveyance of real property (Domestic Relations Law § 235[B][3]; EPTL 5-1.1-A) is without merit. The certificate of acknowledgment indorsed upon the agreement demonstrates compliance with the requirements of Real Property Law §§ 292, 298, 303 and 306 for the acknowledgment of a conveyance of real property. Although the subject certificate of acknowledgment is not in the same form as the uniform form of a certificate of acknowledgment set forth in Real Property Law § 309-a, section 309-a was not enacted until July 8, 1997. (L 1997, ch 179, § 2.) Moreover, effective until September 1, 1999, use of the uniform form was not mandatory and a subdivision of the statutory provision (Real Property Law § 309-a[5]) specifically allowed for the use of any other form which met the requirements of the other sections of article 9 of the Real Property Law pertaining to recording instruments affecting real property. (L 1997, ch 179, §§ 3, 4, 5.)

Furthermore, since plaintiff has not demonstrated, nor even alleged, that the nature of the relationship between her and decedent at the time they executed the prenuptial agreement manifested probable undue and unfair advantage (see, Matter of Greiff, 92 NY2d 341, 343), the prenuptial agreement can be invalidated only if plaintiff meets the burden of establishing that her execution of the agreement was procured through decedent's fraud or overreaching. (See, Matter of Greiff, 262 AD2d 320; Lombardi v Lombardi, 235 AD2d 400; Forsberg v Forsberg, 219 AD2d 615.) Plaintiff does not claim that she did not understand the agreement or that decedent concealed or misrepresented his assets. (See, Matter of Greiff, 262 AD2d 320, supra; Forsberg v Forsberg, supra.) While she alleges that she entered into the prenuptial agreement because decedent's sons threatened not to attend the wedding if she did not do so, plaintiff does not claim that she entered into the agreement unwillingly. (See, Matter of Greiff, 262 AD2d 320, supra; Panossian v Panossian, 172 AD2d 811.) In addition, the record is devoid of any evidence of coercion or undue influence on the part of decedent or his attorney. (See, Lombardi v Lombardi, supra; Forsberg v Forsberg, supra.) The lack of separate legal representation for plaintiff, without more, does not constitute overreaching or warrant nullification of the agreement. (See, Forsberg v Forsberg, supra; Panossian v Panossian, supra.) Absent evidence sufficient to raise an issue of fact as to the validity of the prenuptial agreement, plaintiff's motion is denied and defendants are awarded judgment with regard to the first cause of action declaring that the subject prenuptial agreement is valid and enforceable.

Defendants are also entitled to judgment as a matter of law as to the second cause of action to set aside the aforementioned deed transferring title to premises located at 8523 Edgerton Boulevard, Jamaica, New York. It is undisputed that plaintiff never had any right, title or interest in the subject real property. In view of the failure of the first cause of action to set aside the prenuptial agreement, plaintiff's waiver of her right of election against decedent's will is effective and she has no standing to assert a claim to set aside the deed. Moreover, plaintiff did not raise a triable issue of fact concerning the transfer of the deed. (CPLR 3212[b]; see, Kosson v Algaze, 84 NY2d 1019.) Accordingly, defendants are granted summary judgment dismissing the second cause of action.

In all other respects, defendants' motion is denied. To the extent defendants seek partial summary judgment on the issue of liability on their counterclaims, defendants have not submitted evidence in admissible form sufficient to meet their burden of establishing their right to judgment as a matter of law. (CPLR 3213[b]; see, Ayotte v Gervasio, 81 NY2d 1062.) Defendants are not otherwise entitled to have this matter set down for a hearing on their counterclaims and damages. (CPLR §§ 3401-3403.)

Dated: August 11, 2003

J.S.C.