

<b>Palamara v Palamara</b>
20€1 NY Slip Op 3€€JJ(U)
May 15, 20€1
Supreme Court, Kings County
Docket Number: 42224/00
Judge: Edward M. Rappaport
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At an IAS Term, Part 32 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15<sup>th</sup> day of May, 2001

P R E S E N T:

HON. EDWARD M. RAPPAPORT,  
Justice.

-----X  
JOHN J. PALAMARA and  
ANGELINA RHEINGOLD,

Plaintiffs,

- against -

Index No. 42224/00

ROBERT PALAMARA,

Defendant.

-----X

The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1, 2, 3, 4
Opposing Affidavits (Affirmations)_____	5, 6
Reply Affidavits (Affirmations)_____	_____
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers in this action to declare a real estate deed null and void pursuant to RPAPL 1521(1), defendant Robert Palamara moves for an order granting the following relief: (1) pursuant to CPLR 3211(a) and 3212 dismissing the complaint; (2) a default judgment on defendant's counterclaims; (3) canceling the notice of pendency

encumbering 315 Avenue M, Brooklyn, New York (the “premises”), and alternatively, (4) striking plaintiffs’ (John J. Palamara and Angelina Rheingold) complaint for their alleged failure to comply with discovery demands. In their cross motion, plaintiffs move for an order placing this case on the “suspense calendar,” pending the outcome of a proceeding for the appointment of a guardian for plaintiff John Palamara pursuant to Article 81 of the Mental Hygiene Law.

This action arose when plaintiff John Palamara, in his Last Will and Testament dated July 30, 1999, bequeathed the premises to his son Robert Palamara, defendant herein, to the exclusion of John’s daughter, plaintiff Angelina Rheingold and then, on August 15, 1999, transferred title to the property by deed to Robert.

The complaint alleges that defendant, by fraud and breach of his fiduciary relationship with his father, induced his father to transfer the premises solely to him. The complaint further alleges that defendant wants to charge Angelina rent to live in the premises and then sell the premises, evicting plaintiffs therefrom.

In support of his motion, defendant states that all the parties to this action had prior to the father’s entry into a nursing home, resided at the premises. In the 1980s defendant’s father suffered minor strokes which apparently affected his ability to move around the house, although he was competent and generally able to care for himself. Defendant further alleges that he and his wife assisted with some of the household chores and cared for the father’s needs. According to defendant, his sister (Angelina) did not provide care for her father, as

defendant did. As a result, in the summer of 1999, defendant's father, as a reward to defendant, allegedly told defendant that he wanted to change his 1993 will, in which he bequeathed the property jointly to defendant and plaintiff Rheingold, and leave the premises solely to defendant. In order to do this, the father purportedly asked defendant to contact a lawyer to prepare a new will. Defendant states that he recommended an attorney and that the attorney drew a new will, dated July 30, 1999, naming defendant the sole heir of the property. This 1999 will was allegedly signed by plaintiff John Palamara and his signature was witnessed by three people. Defendant further alleges that one or two weeks thereafter, his father decided that he did not want to wait until his death to give defendant the property, so on August 15, 1999, plaintiff Palamara executed a bargain and sale deed transferring the premises to defendant. Defendant denies exerting undue influence or defrauding his father into executing these documents.

Defendant further states that his father suffered a severe stroke in 2000, necessitating his being placed in a nursing home. The father's ability to communicate was allegedly so weakened as to make any allegation that the father retained counsel to invalidate the deed incredulous.

Also submitted in support of defendant's motion is the affidavit of his attorney, Donald Pearce. Pearce states that he prepared John Palamara's Last Will and Testament after being told by defendant that John wanted to retain an attorney to draw a new will. After preparing the draft of the new will, Pearce gave the draft to defendant to take home

to show to his father. Defendant purportedly told Pearce that his father approved the draft of the will and arrangements were made for the will's final execution in Pearce's office. Pearce indicates that on July 30, 1999, John Palamara came to Pearce's office accompanied by defendant and defendant's wife. Pearce spoke to defendant's father in private and questioned him as to whether he wanted to exclude his daughter (Angelina Rheingold) from the new will. Defendant's father, who was allegedly able to communicate with counsel at that time, stated that the draft will reflected his wishes and that he did not want to bequeath anything to his daughter. Pearce states that after being satisfied that plaintiff was executing the will voluntarily, he proceeded to supervise the formal execution thereof. Pearce also states that the execution of the deed two weeks later, was also done voluntarily by defendant's father.

Defendant submits, as exhibits, letters purportedly from his sister, plaintiff herein, and from her daughter. However, these letters are unsworn and there is no indication, other than defendant's contention, that they are from the people defendant indicates. The documents are not in admissible form and therefore cannot be considered by the court on this motion (Zuckerman v City of New York, 49 NY2d 557, 562).

In opposition to defendant's motion and in support of plaintiffs' cross motion, plaintiffs submit the affirmation of their purported attorney, John J. Palmeri. Palmeri states that as defendant has raised the issue of whether Palmeri was authorized by plaintiff John Palamara to represent him, this lawsuit cannot go forward until that issue is resolved.

Palmeri further states that he advised plaintiff Angelina Rheingold that the better course of action is to bring a proceeding pursuant to Article 81 of the Mental Hygiene Law in order to determine plaintiff John Palamara's capacity to prosecute this action. If plaintiff is found not to be competent, the court should, according to Palmeri, appoint a guardian to represent him. An order to show cause for this relief was submitted to the court, but rejected by the Clerk for insufficiency. There is no indication that a new request for relief under Article 81 has been resubmitted by plaintiff Rheingold.

Angelina Rheingold submits her affidavit in which she denies her brother's allegations. Rheingold also states that her father, plaintiff herein, although ill, is capable of understanding what is said to him. Plaintiff allegedly spoke to her father about the deed. The father purportedly told his daughter that he did not remember signing the deed and did not want to disinherit her or transfer sole title to the property to her brother, the defendant herein.

An action pursuant to RPAPL 1501 may be maintained by a person who is claiming "an estate or interest in real property." In the case at bar, however, Angelina Rheingold has not shown by competent proof that her father was not competent to execute the deed and the 1999 will. Rheingold has also failed to establish that these documents were executed as the result of undue influence or coercion exerted by her brother, the defendant herein.

Moreover, defendant alleges that he recently visited his father at the nursing home and that his father denied instituting this lawsuit or retaining the lawyers who claim to

represent him. Indeed, plaintiff's own attorney has stated that "[T]his litigation cannot go forward until such time as the issue of [his law] firm's representation [of John Palamara] is established." Therefore, without documentation from plaintiff Palamara (i.e. retainer agreement), or a sworn statement from someone who can confirm that plaintiff intended to institute this lawsuit, the lawsuit cannot continue. Further, plaintiffs' cross motion requesting that this case be placed on a "suspense calendar" to await the outcome of Article 81 Mental Hygiene proceeding for the appointment of a guardian for Palamara must be denied since there is concededly no such proceeding pending. It is therefore

ORDERED that defendant's motion is granted and the complaint is dismissed without prejudice to renew, and the lis pendens is vacated. It is further

ORDERED that plaintiffs' cross motion is denied.

E N T E R,



J. S. C.

**Hon. Edward M. Rappaport**  
**Justice, Supreme Court**