SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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SHAFFKA ELDER,

Plaintiff,

-against-

DAVID ELDER and JOHN PALANCA,

Defendants.

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CIVIL TERM, PART 11

DECISION AND ORDER

Index No. 29065/1999

PRESENT:
HON. RANDOLPH JACKSON

May 17, 2002

THE FOLLOWING PAPERS NUMBERED 1 TO 33 READ ON THIS MOTION:

NO. _____ ON CALENDAR OF April 30, 2002 PAPERS NUMBERED

NOTICE OF MOTION - ORDER TO SHOW CAUSE - AFFIDAVIT(S)

AFFIRMATION(S) - PETITION - EXHIBITS ANNEXED 1-11, 12-26

ANSWERING AFFIDAVIT(S) - AFFIRMATION(S) - EXHIBITS 27, 28, 29-32

REPLY AFFIDAVIT(S) - AFFIRMATION(S) 33

AFFIDAVIT(S) - AFFIRMATION(S) _____

EXHIBITS AND OTHER PAPERS _____

After oral argument and upon the foregoing papers:

Plaintiff moves to restore this action to the trial calendar, and for a stay of all proceedings by defendant, JOHN PALANCA ("PALANCA"), with regard to certain real property located at 15 East 2nd Street, Brooklyn, New York. Presumably, this request for a stay includes a stay against enforcement of a judgment obtained by PALANCA in

the action of JOHN PALANCA v. DAVID ELDER, Supreme Court, Kings County, Index No. 14619/1999.

Apparently because of the non-appearance of both sides at a conference on September 28, 2001, the case was marked disposed, prior to the filing of a Note of Issue (see movant's Exhibit "F"). Since no Note of Issue was filed, since the case was not dismissed, and since there was no 90-day notice, this matter is herewith restored to active status, and the motion to restore is granted to that extent (see, Lopez v. Imperial Delivery Service, 282 AD2d 190 [2nd Dept., 2001]; London v. Ilaeve, 288 AD2d 355 [2nd Dept., 2001]).

Defendant, PALANCA, cross-moves for summary judgment of dismissal and for a cancellation of a notice of pendency filed in this action by plaintiff.

This is an action for a judgment "Declaring that Plaintiff is the rightful owner of the property located at 15 East 1nd Street, Brooklyn, New York" (Complaint, at plaintiff's Exhibit "A"). The complaint also seeks a money judgment from defendant, DAVID ELDER.

Approximately eighteen (18) years ago, in March 1984, a deed was executed, notarized and filed purportedly conveying the above real property from plaintiff to defendant, DAVID ELDER. The notary public was attorney Marvin J. Weinroth (plaintiff's Exhibit "G").

On September 22, 1998, defendant, DAVID ELDER, contracted with defendant, PALANCA, to sell the property to PALANCA. On May 3, 1999, PALANCA commenced an action, under Supreme Court, Kings County, Index No. 14619/1999 (the "PALANCA action"), against defendant DAVID ELDER for specific performance under the contract. The PALANCA action was defended by defendant, DAVID ELDER. PALANCA moved for summary judgment

and defendant, DAVID ELDER, cross-moved to dismiss for lack of personal service. On October 10, 2000, this Court referred the matter to a Judicial Hearing Officer for a traverse and the Judicial Hearing Officer found that service was proper. Therefore, the defendant's cross-motion was denied and, on February 1, 2002, the Court granted summary judgment to PALANCA, and ordered specific performance of the contract.

Meanwhile, and without the knowledge of either PALANCA or this Court, this plaintiff, SHAFFKA ELDER, commenced this action against her son, DAVID ELDER, for a declaratory judgment (the "ELDER action").

It is noted that although DAVID ELDER defended the "PALANCA action", he inexplicably defaulted on the "ELDER action" brought by his mother and, on January 11, 2000, Justice Mason granted "Shaffka Elder's motion for a default judgment".

Moreover, after summary judgment for specific performance had been granted to PALANCA in the "PALANCA action", defendant, DAVID ELDER, on March 3, 2001, deeded the property to this plaintiff, his mother, SHAFFKA ELDER (plaintiff's Exhibit "B" in her opposition to PALANCA's cross-motion). Consequently, although this Court, in the PALANCA action, granted PALANCA's contempt motion against DAVID ELDER (with the opportunity to purge by specifically performing the terms of the agreement), it now appears that it may be impossible for DAVID ELDER to convey marketable title given the present state of affairs.

In the present action brought by SHAFFKA ELDER, this plaintiff has moved for a stay of enforcement proceedings in the PALANCA action, and PALANCA, as defendant and intervenor (who secured an order vacating the default judgment) cross-moves for summary judgment of dismissal.

Plaintiff, SHAFFKA ELDER, states in her motion papers (paragraph 6, plaintiff's affidavit):

> I am a senior citizen who speaks Arabic. I have limited writing skills. I cannot speak English.

She goes on to claim that she is the owner of record and that the contract of sale was entered into without her consent, and that "any transfer that was done was done by fraud and misrepresentation" (paragraph 8), and that she intends "to prove that I am the owner of the property" (paragraph 10).

Defendant, DAVID ELDER, although he is a defendant in the ELDER ACTION and would of course indirectly benefit from a dismissal, has nevertheless submitted his own affidavit in opposition to PALANCA's cross-motion for summary judgment. DAVID ELDER now alleges in his opposition that the 1984 deed was "arranged" by the lawyer Marvin J. Weinroth to provide money for a restaurant venture for DAVID ELDER's brothers. Nevertheless, DAVID ELDER claims he was not present when plaintiff allegedly executed the deed and, therefore, cannot contribute any direct evidence as to whether this plaintiff's signature is a forgery, although his actions have been consistent with the assumption that he is the record owner. Not only did he sign a contract of sale, but he swears that his brothers "said not to bother to transfer the property back to my mother after the restaurant did not materialize" (paragraph 5).

Attorney Marvin J. Weinroth has submitted his own affirmation completely disavowing any "arrangement" as claimed by DAVID ELDER, and states (paragraph 5):

> The only contact I had with the Elders concerning the execution of this deed was when one or more of the members of the Elder family appeared in my office with Shaffka Elder to execute the deed that I had been requested to prepare.

Here, there was a deed executed, notarized and recorded eighteen (18) years ago. This deed, together with its acknowledgment and the affidavit of attorney Weinroth constitutes prima facie proof of the authenticity of plaintiff's signature (see, C.P.L.R. §4538; Hoffman v. Kraus, 260 AD2d 435, 436 [2nd Dept., 1999]). Such proof requires credible evidence for its rebuttal. Layford v. Cameron, 73 AD2d 1001, 1002 (3rd Dept., 1980).

The defendant, DAVID ELDER's, affidavit is not probative of whether or not his mother actually signed the deed, in that he states he was not present when it was executed. The "brothers" who were supposedly implicated in this are not before the Court, and no affidavit of any brother is produced.

Moreover, although plaintiff, SHAFFKA ELDER, by her own admission does not speak English, there is no statement anywhere in her affidavits or verified complaint that the contents of her statements had been read to her. Plaintiff makes the claim that the deed is a forgery in her affirmation in opposition to the motion for summary judgment dated April 22, 2002. This affirmation is affirmed under penalty of perjury, but nowhere in this paper is it stated that it has been read or explained to her in her native language, although she states elsewhere that she does not speak English.

While defendant, PALANCA, objects that this violates C.P.L.R. §2101(b), this is not the case since the document submitted to the Court is not itself in a foreign language. Indeed, this situation is the

converse of that described n C.P.L.R. §2101(b), since there is no indication that the plaintiff is fully aware of the import and meaning of the affirmation, in English, which she has signed. This, it seems to the Court, provides insulation for her from the penalties of perjury.

Penal Law §210(5) defines "swear falsely" as, in part, when a person "makes a false statement which he does not believe to be true ...".

As the Court said in Byrnes v. Byrnes, 102 NY 4, 9-10 (1886):

> According to the plaintiff's own evidence, he swore to that affidavit without actually knowing its contents or understanding the force of the language therein contained. The defendant's counsel requested the court to charge that if the plaintiff did not know the contents of the affidavit to which he swore he was guilty of perjury, but the court declined to so charge, and defendant's counsel excepted. It is now claimed that there was error in this refusal. While it is undoubtedly perjury for one knowingly and willfully to swear to a fact as true about which he knows nothing, yet is it not necessarily perjury for one to swear to an affidavit of which he did not know the contents. He may have thought he did know, and he may honestly have believed that he knew. This plaintiff could not read or write, and he was bound to rely upon others as to the contents of the affidavit. He might honestly have believed that the affidavit contained matter which it did not contain and have supposed that he knew its contents; and hence he was not necessarily guilty of perjury, although in fact he did not know the contents. In order to fasten upon him the guilt of perjury, he must have known, at the time he verified the affidavit, that he did not know its contents, and he must have willfully made the affidavit, knowing that he knew nothing about its contents or the facts alleged. The facts contained in this request, therefore, even if sustained by the evidence, did not necessarily show that the plaintiff was guilty of perjury. (Citations omitted.)

Even assuming that the plaintiff, SHAFFKA ELDER, speaks English and fully understands the papers she has signed in this action (which assumption is contrary to her claim), the allegation that her signature in the 1984 deed is a forgery is somewhat elliptical.

In her complaint (at paragraphs 5-7), the plaintiff alleges that in 1984 the property was transferred to DAVID ELDER "without the permission or consent of the plaintiff ..." and that she "never consented to the transfer of my property ... that the transfer was done by fraud and misrepresentation" (paragraph 7).

Thus, while plaintiff alleges some form of fraud in her complaint, she does not, in her complaint, directly state her signature was a forgery.

In her affirmation (in English) in support of her motion for a stay, she states she is the "owner of record" (paragraph 3) of the property, and states (paragraphs 8-10):

> 8. I traveled extensively back and forth to my homeland and trusted my son to follow through with my wishes. However, unbeknown to me, my son entered into a contract of sale for the property without my consent. I never signed any papers to transfer the property. Any transfer that was done was done by fraud and misrepresentation.
>
> 9. David Elder had no right to sell my house, he did not pay even a dollar for the house. The house is mine and I want the opportunity to prove that in a court of law. This is my family home and my grandchildren and other relatives call it home. I have been victimized and my rights trampled on. I would like the opportunity to prove my case.
>
> 10. This so called contract of sale was based on fraud because I never signed any transfer papers and as such I intend to prove that I am the true owner of the property.

Again, there is no direct statement that her signature on the deed is a forgery, and the language in the affidavit seems to center on

other types of fraud and an assertion of equitable ownership of the property.

In her complaint (paragraph 4), she claims she gave her son a "power of attorney" without setting forth a copy of that power of attorney.

Finally, in her opposition to the cross-motion for summary judgment, she says the fact that she never signed the deed is clear from a comparison of her signatures on the 1984 deed with her printed signature on the very recent deed, which purports to transfer the property back to her from her son, DAVID ELDER (paragraph 5). Plaintiff has not produced any affidavit of any handwriting expert on this issue, and no specimens of plaintiff's handwriting at about the time of the 1984 deed, have been produced.

Plaintiff's attorney, in her affirmation dated April 22, 2002, states (paragraphs 7-8) that:

> 7. The plaintiff insists that she did not transfer the property to co-defendant Elder in 1984. Plaintiff contends that the signature appearing on the March 1984 deed is not her own ...
>
> 8. The plaintiff however, does acknowledge signing the March 3, 2001 deed, ..., the signature is a match to the signature contained in her passport.

Yet, the passport is not produced, and no expert has given evidence that the signatures are the same. Moreover, the date of the passport signature is not given.

In her opposition papers to PALANCA's motion for summary judgment, plaintiff, SHAFFKA ELDER, states (affidavit of April 22, 2002, paragraph 5):

> I therefore urge the court to look at the signatures on both deeds and it is clear that I never signed the deed transferring my house to my son David. That is certainly a triable issue of

> fact, because the signature on the deed is a forgery.
>
> She further claims (paragraph 9):
>
> > Another issue of fact that I would like to raise is that I was not even in the united states [sic] on the day that I supposedly signed the transfer of title papers. My lawyer is working to verify and obtain those records. There are certainly issues of material fact that warrant that the court grant my motion to restore the case to the calendar so that I can prove that I am the true owner of the property in question.

Plaintiff, SHAFFKA ELDER, claims she was not in the United States on the day she "supposedly signed the transfer of title papers ...." in 1984. Although she says her lawyer is attempting to "verify and obtain those records ..", this action was commenced almost three years ago, and no such proof has been presented.

It is well-established that a movant for summary judgment must make a prima facie showing that, as a matter of law, there are no material issues of fact, and that movant is entitled to judgment. Alvarez v. Prospect Hospital, 68 NY2d 320. A movant has the initial burden of showing a defense or cause of action has no merit, and the burden shifts to the party opposing the motion when this initial burden has been satisfied. Zuckerman v. City of New York, 49 NY2d 557.

Respondent has not offered sufficient proof in admissible form which would contradict the proof made by movant and which would show that there exists a triable issue of fact. Such proof is required to defeat a motion for summary judgment. Alvarez v. Prospect Hospital, 64 NY2d 774.

Moreover, the statements made in plaintiff's opposing affidavit lack credibility. Not only has plaintiff failed to make any showing that she was not in the country at the time of the execution of

the deed, but this deed was executed and recorded 18 years ago. Moreover, she has insulated herself, as aforesaid, from the consequences of perjury, and has completely failed to offer expert evidence of a forgery.

Generally, although an issue concerning credibility usually requires denial of summary judgment, there are "instances where credibility is properly determined as a matter of law ... this case also presents one of those instances of credibility ..." Home Mutual Insurance co. v. Lapi, 192 AD2d 927, 929-930 (3rd Dept., 1993). (See also, Rickert v. Traveler's Insurance Co., 159 AD2d 758 (3rd Dept., 1990).

"It is well recognized that a 'shadowy semblance of an issue is not enough to defeat [summary judgment]'; nor is a court required to shut its eyes to the patent falsity of a defense." MRI Broadway Rental, Inc. v. United States Mineral Products Company, 242 AD2d 440, 443 (1st Dept., 1997).

In Electronic Services International, Inc. v. Silvers, 233 AD2d 361, 363 (2nd Dept., 1996), the Court said:

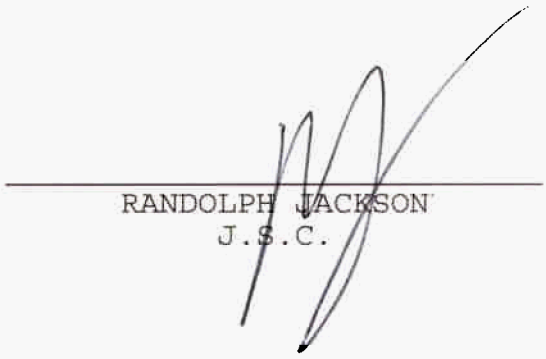
> ... a hearing or trial would be superfluous under the circumstances, because Lon Silvers' behavior in never mentioning or otherwise pursuing the notice of claim he purportedly mailed to FFIC in May 1990 has negated his credibility as a matter of law (citations omitted) ...

Consequently, the motion by defendant-intervenor PALANCA for summary judgment of dismissal is granted to the extent that the action for a declaratory judgment is dismissed, as is the claim that the deed executed in 1984 is a forgery; and all of plaintiff's claims with respect to the title of the real property in question are dismissed. Any cause of action plaintiff may have against defendant, DAVID ELDER, for money damages shall survive this judgment, and plaintiff shall have

the right to serve an amended complaint as against DAVID ELDER for money damages only, within twenty (20) days from the service of this Decision, Order and Judgment.

Plaintiff's motion for a stay is denied in its entirety.

This shall constitute the decision, order and judgment of the Court.



RANDOLPH JACKSON
J.S.C.