

Bush v Danalis

2005 NY Slip Op 30565(U)

June 23, 2005

Supreme Court, New York County

Docket Number: 101978-05

Judge: Rosalyn H. Richter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

VIRGINIA CASEY BUSH, as Guardian of
IRVING T. BUSH, pursuant to Article 81 of
the Mental Hygiene Law,

Plaintiff,

-against-

IOANNIS DANALIS,

Defendant.

DECISION AND ORDER
Index No. 101978-05
Motion Sequence Nos. 1, 2, 3

JUN 29 2005
NEW YORK
COUNTY CLERK'S OFFICE

Richter, J.:

On October 26, 2004, plaintiff Virginia Casey Bush ("Virginia") was appointed Guardian for Irving T. Bush ("Irving") after he was judicially declared incapacitated. In February 2005, Virginia, in her capacity as Irving's Guardian, initiated this action against defendant Ioannis Danalis ("Danalis"). According to the verified complaint, after being appointed Guardian and in accordance with the Guardianship order, Virginia began to investigate Irving's financial and business transactions, including those which took place before Irving was declared incompetent. Virginia maintains that during her investigation, she became aware of a number of improprieties which led her to filing the instant action.

The verified complaint alleges that, while Irving was mentally incapacitated and suffering from Alzheimer's disease, Danalis improperly caused Irving to execute various contracts and make conveyances of real property to Danalis and his various corporations, for little or no consideration. The complaint alleges that Danalis committed these acts by fraud and undue influence upon Irving, and in breach of Danalis's confidential relationship with and fiduciary duty owed to Irving. In this action, Virginia seeks a judgment setting aside and voiding all transfers of ownership in real properties or corporations made by Irving to Danalis where there was inadequate or no consideration.

In addition, Virginia seeks compensatory and punitive damages purportedly caused by Danalis's actions.

In Motion Sequence No. 2, Danalis cross-moves to dismiss the complaint for failure to state a cause of action. Danalis's cross-motion is denied. The Court concludes that, viewing the complaint in a light most favorable to Virginia, and accepting all factual averments therein as true, the complaint states causes of action founded in breach of confidential relationship and fiduciary duty and undue influence. The complaint contains numerous allegations that Danalis, over the course of several years, increased his ownership interest in the subject buildings and corporations at Irving's expense, and improperly caused Irving to transfer properties for inadequate consideration. For example, the complaint alleges that Danalis caused Irving to execute a contract wherein Irving transferred his interest in 78 Bank Street in exchange for a mere promise by Danalis to pay Irving, a man in his 90s, over the course of fifteen years, with no interest. Likewise, the complaint alleges that Danalis caused Irving to execute another contract wherein Irving transferred his interest in 245 West 4th Street in exchange for a similar promise by Danalis to pay Irving over the course of many years. The complaint maintains that these agreements were drafted by Danalis at a time while Irving was incapable of consenting due to lack of understanding.

The complaint also alleges that Danalis caused Irving, while he was incapacitated, to execute mortgages on the various properties in which Irving had an interest so that Danalis could use the money realized from the mortgages, for his sole benefit, in buying out other partners' interests in the properties. The complaint further contends that Danalis would then use income realized from the operation of the properties to pay off these mortgages, without compensating Irving. Under all of these circumstances, the Court concludes that the complaint states a cause of action. *See, e.g.*,

Sepulveda v. Aviles, 308 A.D.2d 1 (1st Dept. 2003)(claim that the defendant, aware of the decedent's infirmities, induced the decedent to sell property to the defendant for inadequate consideration); *Ressis v. Mactye*, 108 A.D.2d 960 (3d Dept. 1985)(cause of action for undue influence requires a showing that the tortfeasor coerced the plaintiff in order to obtain some advantage); *Jenkins v. Stephenson*, 293 A.D.2d 612 (2d Dept. 2002)(proceeding to set aside transfer of real property by incapacitated person for no consideration); *Jordan v. Clinton*, ___ A.D.3d ___, 2005 N.Y. Slip Op. 04370, 2005 WL 1279697 (2d Dept. May 31, 2005)(action to set aside transfer of property made by person of unsound mind); *see also Real Property Law* § 11.

Danalis's cross-motion to dismiss the complaint based on documentary evidence is also denied. Such a motion should be granted only where the documentary evidence resolves all factual issues as a matter of law. *Goldman v. Metropolitan Life Insurance Company*, 13 A.D.3d 289 (1st Dept. 2004). Here, the documents submitted with the cross-motion do not conclusively resolve the core issues of Irving's capacity to enter into the contracts and conveyances in dispute, and thus dismissal is inappropriate. *See Coop. Centrale Raiffeisen-Boerenleenbank B.A. v. Royal Bank of Canada*, 306 A.D.2d 216 (1st Dept. 2003)(contract causes of action are not subject to dismissal based on documentary evidence since the documents submitted by the defendant do not flatly contradict plaintiff's allegations). Finally, the Court finds that the complaint sufficiently sets forth detailed factual allegations so as to avoid dismissal under C.P.L.R. § 3016.

In Motion Sequence No. 1, Virginia seeks a preliminary injunction restraining Danalis from transferring or encumbering (i) any property or interest in property owned by Irving; and (ii) any property of any partnership, corporation or entity in which Irving owns or has an interest. Virginia also seeks an order enjoining Danalis from transferring any funds from the bank accounts of four

corporations that own and/or manage the properties in question. The verified complaint, along with the papers submitted with these motions, set forth a *prima facie* case of breach of fiduciary duty and undue influence on Danalis's part. Although Danalis maintains that Irving was of sound mind when the agreements and transfers were made, and that all of the transactions were legitimate, he has not convinced the Court, as he must, that the transfers were fair and free of undue influence. See *Sepulveda v. Aviles*, 308 A.D.2d at 1 (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).

The circumstances surrounding the transactions are highly suspect, particularly in light of the sale of the two properties described above, in which Irving, a man in his 90s, sold his interest for a mere promise by Danalis to pay over fifteen years. It appears to this Court that Danalis has, over the course of a number of years, significantly increased his interests in the subject properties and entities to Irving's detriment, at a time when, it is alleged, Irving was of unsound mind. Virginia has satisfied the Court that a preliminary injunction is necessary to prevent any further dissipation of Irving's interest in the properties and entities that own the properties. Nevertheless, in light of Danalis's claims that he is owed money from Irving for various improvements he has made to the properties, and upon balancing the equities, the Court grants Danalis's cross-motion to modify the injunction so as to also provide that Virginia is prohibited from transferring or encumbering the subject properties and entities that own the properties. Such an injunction restraining both parties will serve to maintain the *status quo* during the pendency of this litigation.

The Court continues the injunction restraining Danalis from transferring any funds from the bank accounts of the four corporations that own and/or manage the properties in question, except for payment of necessary operating expenses and taxes for the buildings and partner distributions made

in the ordinary course, as set forth in this Court's February 23, 2005 interim order. In addition, in light of Danalis's claims, the Court extends this aspect of the injunction to cover Virginia as well.

In Motion Sequence No. 2, Virginia seeks an order requiring that any proceeds received by Danalis as a result of satisfying a purchase money mortgage for the sale of 122 Waverly Place be placed in escrow during the pendency of this action. In Motion Sequence No. 3, Danalis opposes such an order and asks that in the event the Court is inclined to grant the relief requested, that Virginia be similarly restrained. The Court issued a temporary restraining order against Danalis and required that his share of the proceeds, approximately \$500,000, be placed in escrow, but declined to restrain use of the proceeds of the transaction realized by Virginia and Irving.¹ The Court now lifts the restraint upon Danalis solely as to these funds and orders that the escrowed money be returned to him. Upon balancing the equities, the Court believes that it would be inequitable to allow Virginia and Irving to realize nearly \$1.5 million dollars from the transaction, yet restrain Danalis from use of funds due him. The Court notes that, in effect, Virginia is seeking a pre-judgment attachment of Danalis's funds, yet she has not made the requisite evidentiary showing necessary for an attachment to issue. To the extent that Virginia is claiming that Danalis may be receiving more than he is rightly entitled to, such issues are properly left for ultimate resolution at trial, and no showing has been made that monetary damages are not sufficient to compensate Virginia for the loss of these particular funds.

Virginia also seeks an order appointing a temporary receiver to manage all properties in which Irving has an interest. Under C.P.L.R. § 6401, a court may appoint a temporary receiver of property where there is a danger that the property will be materially injured or destroyed. Appointment of a temporary receiver is a "drastic remedy." *Armienti v. Brooks*, 309 A.D.2d 659 (1st

¹ The Court subsequently permitted Danalis to withdraw the sum of \$100,000 Euros to complete an unrelated transaction in Greece.

Dept. 2003). “There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established”. *DiBona v. General Rayfin Ltd.*, 45 A.D.2d 696 (1st Dept. 1974), quoting *Laber v. Laber*, 181 App Div 733, 735 (2d Dept. 1918). Furthermore, the appointment of a temporary receiver “requires a detailed evidentiary showing”. *Trepper v. Goldbetter*, 205 A.D.2d 363 (1st Dept. 1994).

Virginia has failed to meet this heavy burden and has failed to set forth sufficient facts to show that the properties in question are in any danger of being materially injured. Nor has Virginia convinced this Court that any essential bills or mortgages are not being paid or that the properties are being ill-maintained. In essence, Virginia argues that a receiver is necessary because Danalis has allegedly cheated Irving out of his interest in the properties. However, the fact that Danalis may have obtained the properties by improper means in the past does not mean that the properties are currently in danger of being materially injured. Indeed, it appears from the evidence submitted by Danalis, including numerous affidavits from the properties’ tenants, that the buildings are being managed efficiently. Nor does the fact that Danalis may have taken improper tax deductions based on improvements made to the properties warrant the drastic remedy sought here. Finally, the need for a receiver is obviated by the Court’s grant of preliminary injunctive relief, which addresses Virginia’s ongoing concerns about future injury to the properties.

Virginia’s cross-motion to disqualify defense counsel is denied. First, Virginia’s counsel asserts, without explaining his basis, that defense counsel previously served as general counsel to the corporations at issue in this litigation, and also represented Irving at various real estate closings. Defense counsel submits an affidavit stating that he was never general counsel to any of the entities

in which the parties have an interest, and never represented Irving at any closing or other real estate transactions. In light of defense counsel's affirmation, and the lack of any substantiating documents in support of Virginia's allegations, the motion to disqualify on these grounds is denied.

Virginia also maintains that defense counsel's representation of Irving in a 1999 proceeding in Nassau County warrants his disqualification. The Nassau matter, entitled *Lagin v. Bush*, was a proceeding brought by some of Irving's former partners seeking dissolution and an accounting, although the complaint here does not contain any more detail about the *Lagin* matter. Danalis's current defense counsel admits that he represented Irving in that proceeding. Virginia asserts that disqualification is required because the 1999 proceeding involved issues of Irving's competence, and because it related to one of the properties that is the subject of this litigation. However, Virginia has failed to show, as she must, that the underlying issues in the two actions are substantially related. Nor has Virginia convinced this Court that defense counsel had access to confidential material substantially related to this lawsuit. Indeed, Virginia has provided the Court with very little information and documentation about the 1999 matter so as to enable the Court to determine whether the issues in the two cases are substantially related.

From the sparse information provided, including defense counsel's explanation of his role in the 1999 matter, it does not appear to this Court that the issues involved in the two proceedings are sufficiently related so as to require disqualification. Nor has any showing been made at this time that defense counsel's testimony would be required at trial such that disqualification is necessary. Although there is some question as to whether defense counsel's involvement in helping to settle the accounting proceeding might relate to one of the many issues in this action, the Court is not prepared, at this stage, to impose the drastic remedy of disqualification, especially since Virginia has failed to

meet her burden on this motion. The Court's decision is without prejudice to Virginia's right to bring this motion again should further information become available in discovery as to the exact nature of defense counsel's role such that it would refute the factual position he took in this motion.

Defense counsel's cross-motion to quash Virginia's subpoenas seeking his testimony is granted, given the absence of any showing that his testimony is required at this early stage. To the extent that the subpoenas seek documents in defense counsel's possession relating to counsel's representation of Irving in the 1999 matter, such issues will be addressed at the preliminary conference. Likewise, Virginia's motion for production of other documents pertaining to Irving's property will be discussed at the conference.

Danalis's motion for sanctions is denied. Although it appears that Virginia's counsel has done a less than thorough investigation into Irving's financial transactions, the Court is not convinced that his failure to conduct a more complete investigation rises to the level of misconduct warranting sanctions. Finally, Virginia's motions to amend the caption and for a trial preference based on Irving's age are granted without opposition. Accordingly, it is

ORDERED that Virginia's motion for a temporary receiver is denied, her motion to disqualify defense counsel is denied, her motion for production of documents is denied and reserved for the preliminary conference, her motion for a trial preference is granted, and her motion for a preliminary injunction is granted to the extent indicated above (Motion Sequence No. 1); and it is further

ORDERED that Virginia's motion for an order requiring that any proceeds received by Danalis as a result of satisfying a purchase money mortgage for the sale of 122 Waverly Place be placed in escrow during the pendency of this action is denied, and her motion to amend the caption

is granted, and she shall serve a copy of the amended caption upon Danalis and the Trial Support Office (Motion Sequence No. 2); and it is further

ORDERED that Danalis's cross-motion to dismiss the complaint is denied, his cross-motion to quash the subpoena seeking his testimony is granted, and his cross-motion for a preliminary injunction is granted to the extent indicated above (Motion Sequence No. 2); and it is further

ORDERED that Danalis's motion to vacate the Court's March 4, 2005 temporary restraining order is granted, and the temporary restraining order is hereby lifted, and his motion for sanctions is denied (Motion Sequence No. 3); and it is further

ORDERED that the parties shall either agree on the amount of the undertakings to be posted by each of them, including whether Virginia's existing undertaking is adequate to protect Danalis's interests, or if they can not agree, they shall contact the Court within one week to set a date for a hearing on the undertakings; and it is further

ORDERED that Danalis shall answer the complaint by July 19, 2005, and the parties are directed to appear at a preliminary conference in Part 24 on August 3, 2005 at 10:00 a.m.

This constitutes the decision and order of the Court.

June 23, 2005



Justice Rosalyn Richter