

Walburg v Scheiner

2007 NY Slip Op 30068(U)

March 12, 2007

Supreme Court, New York County

Docket Number: 0109051

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

JUDITH ANN WALBURG and BARBARA HARRIS,

Plaintiffs,

INDEX NO. 109051/06

-against-

MARK SCHEINER and MARJORIE R. MCNEIL,

Defendants.

MOTION SEQ. NO. 002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Plaintiff Judith Ann Walburg, who was born in 1948, has resided her entire life at premises located at 284 Convent Avenue in Manhattan. This is an action to quiet title to this property. The defendant Mark Scheiner is, according to his own description, in the business of locating assets for people who would not otherwise be aware of such assets. In 2003, he contacted the surviving sister (Marjorie R. McNeil) of plaintiff's deceased step-mother (Marie R. Walburg) after he determined that she had an interest in the property. He advised her that he had located property in which he believed she had an interest and, while refusing to identify the location of the property, asked her to sign an agreement in which she would agree to execute a quitclaim deed conveying her right, title and interest in the unidentified property to Scheiner and herself jointly and would agree that Scheiner would receive 75% and she would receive 25% of any monies he may collect by their assertion of title to the property. Marjorie agreed to sign the papers Scheiner presented to her and the quitclaim deed and the agreement were executed the same day, October 24, 2003. However, according to Marjorie's daughter, Odette McNeil, who previously submitted an affidavit to this court in connection with a motion by the plaintiffs for a preliminary injunction, her mother was 89 years old and suffering from dementia at the time that these documents were executed.

In the meantime, on August 8, 2003, plaintiff Walburg conveyed title to the premises to herself and plaintiff Barbara Harris as tenants in common and recorded the deed with the City Register on August 13, 2003. She did so based on the fact that her parents, Charles and Florence Walburg, who had owned the property in question as tenants by the entirety, had agreed in their divorce proceedings in 1961 that upon either of their deaths, the survivor would, within a reasonable time thereafter, convey the property to plaintiff. Plaintiff's mother died first, in 1991. Charles, who was then married to Marie R. Walburg, never actually conveyed the property to plaintiff. When he died in 1994, his will, which bequeathed the property entirely to plaintiff and bequeathed the remainder of his estate to Marie, was not offered for probate. Plaintiff thereafter continued to reside at the Convent Avenue premises and Marie took title to a cooperative apartment where she and Charles had lived on Johnson Avenue in the Bronx. Upon Marie's death in January, 1997, letters of administration were granted to Marjorie and Odette. In their application for Letters of Administration, they failed to list the Convent Avenue property as part of Marie's estate.

In their complaint, plaintiffs seek a judgment declaring Scheiner and McNeil's deed to be null and void and declaring their deed to be valid. They also seek to have a constructive trust impressed upon the premises pending the City Register's recording of the judgment requested herein. In his answer, Scheiner has asserted three counterclaims in which he seeks declaratory relief and a constructive trust in his favor. By decision and order dated October 31, 2006, the court granted plaintiff's motion for a preliminary injunction restraining the defendants from transferring, leasing or otherwise encumbering the premises

during the pendency of this action. In its decision, the court noted that Scheiner's claim to the Convent Avenue property is based on his assertion that, under the laws of intestacy, Marie Walburg inherited an interest in the property upon her husband's death and that, upon Marie's death, her interest devolved to her two sisters, one of whom is Marjorie McNeil. In granting plaintiffs' application, the court found that Scheiner was unlikely to succeed on the merits of this claim.

Discussion

The plaintiffs have now moved for summary judgment granting them the relief sought in their complaint. The motion must be granted since there is nothing in Scheiner's papers which persuade the court that his claim to the property has any merit.

First, the record indicates that Marie Walburg relinquished any claim she may have had to the Convent Avenue property. After the death of her husband, she never asserted any such right to the property and, consistent with her husband's intentions, resided in the Johnson Avenue coop he had left her while his daughter continued to reside at the Convent Avenue property and pay taxes and all other expenses reflecting ownership. Second, under the laws of intestacy, Marie's acquisition of title to the Johnson Avenue apartment more than satisfied her spousal rights to \$50,000, plus one-half of the residue of her husband's estate, since at the time of Charles's death, the apartment was valued at \$250,000 and the Convent Avenue property at \$150,000. *See* EPTL § 4.1.1(a)(1). Third, Odette McNeil has stated that she and her mother, as co-administrators of Marie's estate back in 1997, were aware of the Convent Avenue property and decided that the estate should not assert an interest in the property. By consequently omitting the property in their application for Letters of Administration, Marie's estate clearly waived any right to assert such an interest.

In reaching this decision, the court does not even address the doubtful validity of the agreement between Scheiner and Marjorie McNeil. Not only was Marjorie 86 years old and suffering from dementia at the time of its execution, but an essential element of the agreement, the identity of the property, was withheld from her. Moreover, the court notes that, according to her daughter, Marjorie does not even wish to assert a claim against the Convent Avenue property.

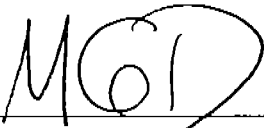
In any event, since Marie and her estate have previously waived any right to assert an interest against the Convent Avenue property, Marjorie did have any interest in the property to share with Scheiner. In the absence of any such interest, Scheiner lacks standing to challenge the validity of the deed which the plaintiffs executed and recorded or to assert a defense based on the statute of limitations or the statute of wills.

Accordingly, the plaintiffs' motion for summary judgment is granted in its entirety. Other than an award of attorney's fees, the plaintiffs are entitled to all of the relief sought on their motion. As to attorney's fees, in the absence of an applicable statutory or contractual provision authorizing such an award, or a motion for sanctions against Scheiner and/or his attorney pursuant to 20 NYCRR §130-1.1(d), this relief is unavailable to a litigant. *See Rahabi v. Morrison*, 81 AD2d 434, 437 (2nd Dept 1981).

Settle judgment.

Dated: 3/12/07

Check one: FINAL DISPOSITION



MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION