

Hearst v Hearst

2007 NY Slip Op 30481(U)

February 28, 2007

Supreme Court, Suffolk County

Docket Number: 0001959/2006

Judge: Edward D. Burke

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SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : 09/22/06
Adj. Date : 02/07/07
Mot Seq # : 003 MG
SETTLE JUDGMENT

JOHN RANDOLPH HEARST, JR.,

Plaintiff(s),

- against -

BARBARA W. HEARST, LEONARD ACKERMAN,
ACKERMAN & WAINWRIGHT, LLP,
ACKERMAN & O'BRIEN, LLP, THE JOHN R.
HEARST JR. IRREVOCABLE TRUST and GENTA
HAWKINS HOLMES, as Trustee,

Defendant(s).

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Upon the following papers numbered 1 to 7 read on this motion by defendants Hearst & Homes for dismissal of plaintiff's complaint; Notice of Motion/Order to Show Cause and supporting papers 1 to 4; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 5 to 8; Replying Affidavits and supporting papers; Other SFO dated Nov 15, 2006; and evidentiary submissions by the movants 9-10 and by the plaintiff 11-13; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#003) by defendants, Barbara Hearst and Genta Hawkins Holmes in her capacity as Trustee of the John R. Hearst, Jr. Irrevocable Trust, for an accelerated judgment dismissing the complaint served and filed in this action by the plaintiff is decided as follows:

Plaintiff commenced this action to recover money damages and for a judgment awarding various forms of equitable relief, including the vacatur and/or rescision of various documents and deeds, the existence of which, the plaintiff attributes to the purportedly fraudulent acts and other tortious conduct on the part of defendant Hearst and others that deprived the plaintiff of income and assets titled in his name. In September of 2006, defendants Hearst and Holmes interposed the instant motion pursuant to, inter alia, CPLR 3211(a)(5) and 3211(a)(7) for dismissal of the plaintiff's complaint. By prior order of this court dated November 15, 2006, said motion was converted into one for summary judgment and adjourned to January 17, 2007 to afford the moving defendants and

the plaintiff time to assemble and submit evidentiary materials in support of their respective positions. After an adjournment requested by the parties was granted by the court, the instant motion (#003) was marked submitted to this court on February 7, 2007.

The provisions of the complaint served and filed in this action that are relevant to determination of this motion charge the defendant, Barbara Hearst, the wife of the plaintiff, and defendant Ackerman, with fraudulent, deceptive and coercive acts, including fraud in the execution of documents and conversion of income, which deprived the plaintiff of title to and the use of certain of his assets and income. Money damages and rescission are remedies demanded by the plaintiff with respect to the execution of the following documents: the November 2, 1990 deed conveying 122 Lopers Path to defendant Hearst; the November 16, 1995 deed conveying 142 Loper's Path to Lopers Path LLC; the Lopers Path Operating agreement dated November 16, 1995; the John R. Hearst, Jr. Irrevocable Trust Agreement dated December 13, 2002; the power of attorney dated July 12, 1990, to defendant Hearst and the limited power of attorney dated March 7, 1995 to defendant Leonard Ackerman; the December 13, 2002 Ratification of Prior Gifts; and the April 27, 2004 Waiver of Right of Election. Plaintiff further demands money damages from defendant Hearst and the imposition of a constructive trust over three parcels of real property situated in South Carolina and one in Sag Harbor New York, several investment and/or security accounts and a life insurance policy all of which are alleged to have been acquired by defendant Hearst by reason of her purported breach of fiduciary duties and conversion of income belonging to the plaintiff.

All of the documents for which rescission is demanded bear the signature of the plaintiff and all of the signatures of the plaintiff appearing thereon are duly acknowledged by a notary public except the Lopers Path Operating agreement dated November 16, 1995 and the three (3) amendments thereto. There are no allegations that the plaintiff did not sign the aforesaid documents or that the documents signed were different in kind and nature than that represented. Rather, the plaintiff's demands for relief are predicated upon claims that poor health and the physical and mental limitations that afflicted the plaintiff since 1989, when he suffered a significantly debilitating stroke, left the plaintiff incapacitated and without the ability to understand the nature and import of the aforesaid documents and without the ability to resist executing same at the behest defendant Hearst and defendant Ackerman. Lacking the sufficient physical abilities, mental acuity and the legal capacity to understand the nature and effect of said documents, the plaintiff claims to have been fraudulently induced, forced and/or coerced by the defendants into executing said documents. The purportedly fraudulent and deceptive acts committed by the defendants are further alleged to have allowed defendant Hearst to convert, to her own use, an unidentified portion of the annual trust distributions the plaintiff derives from an inheritance. Plaintiff further claims that his physical and mental limitations left him without the ability to resist and discover the purportedly wrongful conduct engaged in by the defendants, which conduct is alleged to have continued over a period of fourteen years, commencing in 1990 and ending in 2004.

The plaintiff attributes his want of understanding and diminished mental capabilities to the stroke he suffered in 1989. The plaintiff's physical and mental condition purportedly worsened over the relevant fourteen year period that commenced in 1990 and ended in the first half of 2004. Only after the defendant's commencement of a matrimonial action against the plaintiff in July of 2004, did

the plaintiff allegedly discover the defendants' purportedly wrongful conduct. Specifically, the plaintiff alleges that he first discovered the purported conversion of his assets and income in October of 2004, when the plaintiff reviewed with his matrimonial counsel, the affidavit of net worth filed by the defendant in the divorce action. By virtue of these circumstances, plaintiff contends that the deeds, trust indentures and other documents executed by him and/or by others empowered by him during the course of the aforesaid fourteen year period, during which, the defendants allegedly duped the plaintiff into executing said documents so as to effect the challenged transfers, gifts and/or waivers of the plaintiff's rights and legal interests, are invalid thus entitling the plaintiff to a judicial vacatur and/or rescission thereof. Plaintiff also seeks to recapture all lost income and assets attributable to the defendants' purportedly wrongful conversion of the plaintiff's annual income by awards of equitable relief and the recovery of punitive and compensatory money damages.

To sustain a cause of action sounding in fraud, a party must demonstrate the following: a misrepresentation or material omission of fact which was false and known to be false by the speaker and made for the purpose of inducing the other party to rely upon it; and justifiable reliance of the other party on the misrepresentation or material omission and injury to the reliant party (*Cayuga Partners v 150 Grand*, 305 AD2d 527, 759 NYS2d 347). Cognizable claims for fraud in the execution, as alleged here with respect to the documents for which rescission is demanded, arise where a party is either induced into signing a document other than the one the signor believed he or she was signing or where the signor was unaware, through no fault of his or her own, but rather, by reason of a physical condition and/or mental disability, of the true nature of its contents (*Fleming v Ponziani*, 24 NY2d 105, 299 NYS2d 134; *Whitehead v Town House Equities*, 8 AD3d 367, 780 NYS2d 15). Only the second prong of the forgoing rule is implicated here, as there are no claims that the documents executed by the plaintiff were different in nature than that represented.

Claims of undue influence, which are a species of fraud, may cause the annulment of a transaction only where it is established that the influence exercised by the defendant amounted to a moral coercion which restrained independent action and destroyed free agency, or which, by importunity, could not be resisted and compelled the subject action to be undertaken by the plaintiff who was unable to refuse or to weak to resist same (*In re Walther's Will*, 6 NY2d 49, 188 NYS2d 168; *In re Chiurazzi*, 296 AD2d 406, 744 NYS2d 507). A mere showing of opportunity and even a motive to exercise undue influence does not raise a question of fact absent evidence that such influence was actually utilized (*Matter of Fiumara*, 47 NY2d 845, 418 NYS2d 579; *In re Estate of Herman*, 289 AD2d 239, 734 NYS2d 194).

Where a confidential relationship between the parties exists, transactions between the parties are scrutinized more closely and an inference of undue influence may arise which shifts the burden of establishing that the transaction was freely and voluntarily undertaken by the plaintiff from such plaintiff to the defendant (*Matter of Will of Smith*, 95 NY 516; *In re Rogers' Will*, 258 AD 26, 293 NYS 626). The mere existence of a family relationship between the parties, while raising the spectra of constructive fraud, does not, per se, give rise to an inference that the party benefitting by the document at issue unduly influenced its execution; rather there must be evidence of other facts and circumstances showing genuine inequality or a dominate, controlling influence (*In re Marcus Trusts*, 297 Ad2d 683, 747 NYS2d 187). Close family ties may negate any presumption of undue

influence that might otherwise arise from a confidential or fiduciary relationship (*In re Walther's Will, supra*). Where a familial relationship exists, it will only be viewed as confidential under the constructive fraud branch of the undue influence doctrine where there is evidence of other compelling factors such as where the plaintiff's physical and/or mental condition is such as to make him or her completely dependent upon the defendant for the management of his or her affairs and wholly unaware of the legal consequences of the transaction (*In re Estate of Swain*, 125 Ad2d 574, 509 NYS2d 643). An inference of undue influence cannot be reasonably drawn from circumstances that are consistent with a contrary inference (*In re Walther's Will, supra*).

To establish a cause of action for breach of a fiduciary duty with respect to the execution of a contract or other agreement, the plaintiff must establish the existence of a fiduciary relationship, misconduct by the defendant and that such misconduct induced the plaintiff to engage in the transaction in question directly causing the loss about which the plaintiff complains (*Colello v Colello*, 9 AD3d 855, 780 NYS2d 450). While spouses owe fiduciary relationships to each other, the mere titling of property in the name of one spouse during the course of the marriage does not give rise to presumption of fraud or undue influence as transfers between spouse are entirely consistent with a contrary inference (*see, In re Walther's Will, supra*).

The remedy of conversion lies only where it is shown that the plaintiff had legal title or an immediate, superior right to the possession of property, over which, the defendant exercised unauthorized dominion and control to the exclusion of the plaintiff's rights (*El-Khoury v Karasik*, 265 Ad2d 372, 697 NYS2d 299). A claim for conversion does not lie for the withholding of indefinite, intangible and incorporeal species of property (*Matzan v Eastman Kodak, Co.*, 134 AD2d 863, 521 NYS2d 917). Money may only be the subject of an action for conversion only when it can be segregated and identified (*Manufacturer's Hanover Trust, Co. v Chemical Bank*, 160 AD2d 113, 559 NYS2d 704; *Payne v White*, 101 AD2d 975, 477 NYS2d 456).

A party's competence is presumed and the party asserting incapacity bears the burden of proving incompetence (*Crawn v Saya*, 31 AD3d 367, 819 NYS2d 61; *Feiden v Feiden*, 151 AD2d 889 542 NYS2d 860). Contractual capacity is lacking where the contracting party is wholly and absolutely incompetent to comprehend and the nature of the transaction (*Aldrich v Bailey*, 132 NY 85 30 NE 264). The critical inquiry is whether the party was capable of making a rational judgment concerning the particular transaction and to control his or her conduct (*Oterelere v Teachers' Retirement Bd. Of City of New York*, 25 NY2d 196, 303 NYS2d 362). Persons suffering from diseases of the mind such as Alzheimers or those who have suffered strokes prior to the execution of *inter vivos* or testamentary documents are not presumed to be incompetent and thus lacking the capacity to contract or to make testamentary dispositions (*Matter of Herman*, 289 AD2d 239, 734 NYS2d 194; *Feiden v Feiden, supra*; *In re Ford's Estate*, 279 Ad2d 152, 108 NYS2d 122, *aff'd* 304 NY 598). Moreover, the signer of a deed or other instrument expressive of a jural act is conclusively bound thereby. That the signer's mind never gave assent to the terms expressed therein is immaterial. So long as the signer could read the instrument, not to have read it was gross negligence; and if he or she could not read it, not to procure a reading thereof was equally negligent. In either case, the writing binds the signer (*Pimpinello v Swift*, 253 NY 159, 170 NE 530; *Hart v New York Life Insurance Company*, 59 NY2d 140).

Upon due consideration of the moving papers and evidentiary submissions of the movants and the opposing papers and evidentiary material submitted by the plaintiff in opposition to the instant motion, the court awards the moving defendants' summary judgment dismissing the plaintiff's complaint on the grounds that the plaintiff has no meritorious claims for the recovery of money damages or the equitable relief demanded by him from the moving defendants. The moving defendants' evidentiary submissions established, *prima facie*, that none of the plaintiff's claims for relief are meritorious as the existence of facts necessary for the possession of cognizable claims for a judicial vacatur or rescission of the documents at issue, the recovery of money damages due to the defendants' purported fraud, breaches of fiduciary duties and conversion or for the recovery of lost income and assets under equitable remedies such as constructive trust and/or unjust enrichment have been shown to be non-existent.

It was thus incumbent upon the plaintiff to demonstrate, by due proof in admissible form, that genuine questions of fact exist with respect to the plaintiff's possession of legally cognizable claims of the type asserted by him in his complaint. Review of the papers submitted by the plaintiff in opposition to the defendants' motion indicates, however, that the plaintiff failed to satisfy this burden.

As indicated above, the plaintiff's demands for relief and his assertion that the all of his claims are timely interposed herein, are predicated upon his claims that due to the physical and mental conditions afflicting him since his 1989 stroke, he lacked the capacity to understand the nature and import of the documents he executed at the defendants' insistence which effected or authorized the challenged transfers and the legal capacity to execute same and/or lacked the capacity to resist the defendants' misrepresentations and coercive acts with respect thereto and with respect to the wrongful diversion of plaintiff's income. Nevertheless, the evidentiary material submitted by the plaintiff on this converted motion for summary judgment failed to include proof in admissible form sufficient to establish that the plaintiff's diminished physical and metal conditions left him without the requisite legal capacity to understand and knowingly participate in the challenged transfers by his execution of the various documents that are the subject of this action or to resist the defendants' other acts of fraud and deception which purportedly led to the wrongful conversion of plaintiff's assets and/or income.

The excerpted transcripts of the trial testimony of a nurse who attended to the plaintiff's physical disabilities following the 1989 stroke, which was given during the course of the parties' divorce proceedings in New York County State Supreme Court in June of 2005, and the excerpted transcripts of the trial testimony given in the aforesaid matrimonial litigation by one Dr. Raia, a physician who treated the plaintiff in 1991 and thereafter, failed to establish that, by reason of physical and mental disabilities afflicting the plaintiff, he lacked the ability to understand the nature and import of the documents he executed and to resist and/or discover the purportedly fraudulent and deceptive acts of the defendants which are the subject of this action. In addition, the letter of Dr. Kaplan, M.D., dated April 12, 2004, and attached as exhibit D to the plaintiff's evidentiary submissions, is not in evidentiary form and, thus, is insufficient to support the plaintiff's claims. The excerpted portion of the deposition testimony given by defendant Barbara Hearst during the course of the parties' matrimonial action submitted by the plaintiff likewise failed to establish the existence

of facts necessary and material to the plaintiff's claims, from which, genuine issues of fact regarding the plaintiff's possession of legally cognizable claims sounding in fraud, breach of fiduciary duties, conversion, constructive trust and unjust enrichment may be discerned by the court.

The only other evidentiary material submitted by the plaintiff in opposition to the moving defendants' motion is an affidavit by the plaintiff. Review thereof indicates that the same fails to raise genuine questions of fact necessary to preclude the granting of the moving defendants' motion with respect to the purported fraudulent acts and other tortious conduct allegedly committed by defendant, Barbara Hearst. In said affidavit, the plaintiff purports to incorporate by reference various factual assertions regarding the defendants' fraudulent acts and misrepresentations that are contained in his counsel's supporting affirmation and in the complaint served and filed herein which was verified by counsel rather than the plaintiff himself. Clearly, the plaintiff may not rely upon allegations of material facts asserted by his attorney who makes no claim of having personal knowledge of such facts to establish the existence of facts essential to the plaintiff's possession of viable causes of action sounding in fraud, breach of fiduciary duty, conversion and the like against defendant, Barbara Hearst and/or others.

To the extent that the plaintiff's affidavit purports to establish that the plaintiff has cognizable claims sounding in fraud in the execution against the moving defendants because the plaintiff suffered from a want of understanding and/or lack of legal capacity to execute the various challenged documents bearing his signature or to resist the defendants' purportedly coercive and deceptive acts with respect to plaintiff's execution of said documents, the same is rejected as legally insufficient. The plaintiff's vague and conclusory allegations of a lack of legal capacity or want of understanding by reason of physical limitations and mental disability are not supported by any evidence in the record. In addition, the plaintiff's physical and mental disabilities which purportedly left him with a want of understanding and lack legal capacity are alleged to have originated from the stroke he suffered in 1989. Nevertheless, the plaintiff married defendant Hearst in 1990, an act which requires the legal capacity to contract.

Plaintiff's further claim that it wasn't until October of 2004, that he first became aware of his execution of subject documents, their nature and import and of the purportedly wrongful conversion of the plaintiff's income by defendant Hearst over the subject fourteen year period are contradicted by the plaintiff's own deposition testimony, given in the parties' divorce action. Therein, the plaintiff testified that he was contemporaneously aware of the purchases of the Sag Harbor property and of the transfer of the 142 Loper's Path property to the Loper's Path LLC . Additionally, plaintiff's claims that he first became aware in the fall of 2004 of his execution of subject documents, their nature and import and of the purportedly wrongful conversion of the plaintiff's income by defendant Hearst, are asserted without evidence that the plaintiff's physical and mental condition changed positively and improved to such an extent that he was then capable of understanding that which he could not comprehend or resist during the course of that fourteen year period. While the plaintiff and his counsel assert that plaintiff's condition has not improved, the plaintiff was apparently well enough by the latter half of 2004 to retain independent counsel and to appear by said counsel in the 2004 matrimonial action and in two others commenced by or against the plaintiff

thereafter, including this one. The retention of counsel and the appearance of the client by such counsel in a civil action are rights and privileges afforded only to adult, competent parties, as they alone possess the requisite legal capacity to contract for the retention of legal services (*see*, CPLR 321, CPLR 1201). There being no allegations of a positive change in the plaintiff's physical and mental condition prior to or during the course of the 2004 divorce action, the plaintiff's conduct in retaining counsel and appearing by said counsel in that action and others subsequently commenced, is inconsistent with and belie the claims of want of understanding and lack of legal capacity asserted by the plaintiff in this action.

To the extent that the plaintiff's affidavit purports to establish that the plaintiff has cognizable claims for rescission of said documents and the recapture of his income purportedly converted by defendant Hearst under principles of fraud, undue influence and/or breach of fiduciary duties, the same is rejected. There are no allegations, let alone proof in evidentiary form, that the plaintiff's physical and/or mental condition left him wholly unaware of the legal consequences of the transactions at issue and rendered him completely dependent upon the defendants for the management of his or her affairs and too weak to resist the defendant's influences with respect thereto (*In re Estate of Swain*, 125 AD2d 574, 509 NYS2d 643). Indeed, the record adduced on the instant motion is to the contrary, as it contains evidence that the plaintiff was attended to by various medical physicians and nurses, the latter who provided round the clock nursing skills to assure the plaintiff's daily needs were met and that the plaintiff maintained his relationships with other professionals, such as, Robert Litman, Esq., the plaintiff's long time friend and tax attorney. There is also evidence that the plaintiff retained the services of a private investigator to monitor the defendant's activities prior to her commencement of the 2004 divorce proceeding. These circumstances are indicative of the plaintiff's ability to act independently of the defendants and that any influences asserted by them was not undue nor actionable under theories of constructive fraud or breach of fiduciary duties.

To the extent that the plaintiff's affidavit purports to establish that the plaintiff's execution of the deeds, trust indenture and other challenged documents are void *ab initio* due to a lack of due execution of said documents, the same is deficient. The plaintiff's affidavit contains only vague and conclusory allegations unsupported by any evidence in the record regarding the invalidity of the documents for which vacatur and/or rescission is demanded due to a lack of due execution thereof by the plaintiff. As indicated above, a party's competence is presumed and the party asserting incapacity bears the burden of proving incompetence or legal disability (*Crawn v Saya*, 31 AD3d 367, 819 NYS2d 61, *supra*). The unsupported testimony of an interested witness is legally insufficient to rebut the presumption of due execution of documents that are duly acknowledged and/or witnessed (*see, Osborne v Zornberg*, 16 AD3d 643, 792 NYS2d 183, *and the cases cited therein*). Moreover, where as here, there is legally insufficient proof that the plaintiff lacked the capacity to understand the nature of the documents presented to him and/or to resist the execution of same at the behest of the defendants, the documents are valid as any failure to assent to the terms thereof is chargeable to the signer's gross negligence in failing to read them, or to procure, a reading of same (*Pimpinello v Swift*, 253 NY 159, 170 NE 530, *supra*).

Finally, there was no evidence adduced to support the plaintiff's claims of conversion, unjust enrichment or actual fraud against defendant Barbara Hearst. The titling of assets in the name of

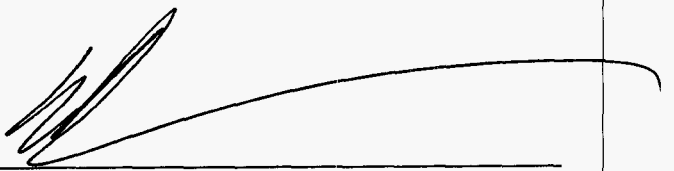
defendant Hearst is not inconsistent with an inference that the subject transactions were not the product of overreaching, undue influence, conversion and/or a breach of fiduciary duties on the part of defendant Hearst. By statute, marriage is considered an economic partnership and the sharing of assets and income is not in itself suspicious. The transfer of title to assets between spouses during the course of the marriage is consistent with legitimate objectives such as the reduction of tax liabilities and estate planning.

The court has considered the remaining contentions of the parties and finds all of them to be unavailing and/or moot.

In view of the foregoing, the instant motion (#003) by defendants Hearst and Holmes for summary judgment dismissing the plaintiff's complaint is granted. The claims upon which summary judgment have been awarded are severed from all other claims and the movants shall settle a judgment, upon a copy of this order, *providing for the severance herein directed* and the award of summary judgment granted herein to the movants.

Settle judgment.

Dated: February 28, 2007.


EDWARD D. BURKE, A.J.S.C.