

**Simone v Simone**

2007 NY Slip Op 30958(U)

March 26, 2007

Supreme Court, Queens County

Docket Number: 0002933/2006

Judge: Patricia P. Satterfield

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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VICTORIA SIMONE, a/k/a  
VICTORIA TYAN,  
Plaintiff,

Index No: 2933/2006  
Motion Date: 1/24/07  
Motion Cal. No: 28

-against-

DANIEL SIMONE, JR.,

Defendant.

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The following papers numbered 1 to 12 read on this motion for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Affirmation in Opposition-Exhibits .....	7 - 9
Affirmation in Reply.....	10 - 12 <sup>1</sup>

Upon the foregoing papers, it is ordered that the motion is resolved as follows:

This action was commenced by Victoria Simone (“plaintiff”) to, inter alia, set aside, on the ground of fraudulent conveyance, a deed executed by Ruth M. Simone (“decedent”) on July 18, 2004, that conveyed property located at 72-14 44<sup>th</sup> Avenue, Woodside, New York, to Daniel Simone, Jr. (“defendant”), plaintiff’s brother and decedent’s son; and to set aside the transfer by decedent of a joint tenancy in various bank accounts to defendant, contending that decedent lacked capacity, and that defendant exercised undue influence. Plaintiff also seeks, on her third cause of action, compensatory, exemplary and punitive damages based upon defendant’s alleged conversion of the Queens property and the bank accounts. In her last Will and Testament dated October 13, 1995, decedent, who died on January 4, 2005, leaving plaintiff and defendant as her next of kin, made

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<sup>1</sup>By letter dated February 22, 2007, counsel for defendant objected to the submission by plaintiff’s counsel of a letter from Madeline Ornstein. This letter, which has not been seen by the Court, was not considered in determining this motion.

specific bequests to plaintiff and her grandchildren, and bequeathed “all the rest, residue and remainder of my property and my estate, whether real or personal, and of whatever kind and nature...” to plaintiff and defendant, who resided at the subject property. Defendant now moves for summary judgment dismissing each of plaintiff’s three causes of action

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a motion for summary judgment ““must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers’ ( Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986] [citations omitted].” JMD Holding Corp. v. Congress Financial Corp., 4 N.Y.3d 373 (2005). See, also, Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2d Dept.2006). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

At issue is whether defendant had the capacity to transfer the real estate and bank accounts at issue, and whether defendant exercised undue influence in decedent’s decision to transfer the property to him. Defendant, in support of his summary judgment motion on those issues, submits the affirmation of his attorney, Laine A. Armstrong; defendant’s affidavit; and those of Reverend William D. Galer, Jr., decedent’s minister until his retirement in April 2005; and Ellie Noviello, who grew up with plaintiff and defendant and whose mother was a close friend of decedent that assisted with decedent’s care. Defendant, in his affidavit, attests to his having lived in the residence, a two family home, all of his life until his recent relocation to Arizona with his wife. He stated that he and his wife moved into the second floor apartment when they married 21 years ago; that his sister, plaintiff, moved out of the residence approximately 35 years ago, and that he and his wife cared for his now deceased father and deceased mother during their respective illnesses, and maintained the premises when their parents not longer were able to do so, including all necessary repairs, which included his expenditure of approximately \$210,000.00 in renovations. He further stated that his mother was “lucid, coherent and fully aware of the import of her actions when she made [him] a signatory on the Bank Accounts in 2000 and when she conveyed the Queens Residence to [him] in 2004.” He stated that the naming of him as a signatory on several bank accounts in 2000 was to facilitate the payment of bills, “such as mortgage payments, electrical, water, heat and other expenses, as well as other expenses for [his] mother.” He denied using undue influence.

Reverend Galer, in his affidavit, set forth that decedent was a parishioner of Saint James Church, and that he was her minister and knew decedent very well. He stated that, based upon his observations of her during his regular visitations when she became homebound, including the month before she died, decedent “was aware and of sound mind, and was able to understand the implication of her actions.” He described decedent as “a strong-willed individual with very definite opinions. She had the fire of her convictions.” He concluded that he believed that decedent “was fully capable of understanding and appreciating the nature and consequences of her decisions and actions, and acted with a definite purpose, at least through December 24 when [he] last saw her.” Similar opinions were shared by Ellie Noviello, who was a friend and neighbor of decedent for 49 years, whose mother helped defendant and his wife care for decedent, and who bathed decedent, cleaned the house and did grocery shopping. Ms. Noviello state that she visited decedent regularly, approximately once a week, until her death, and spent much time “chatting.” She stated that during the conversations, she was in a position to observe decedent’s mental abilities and also conclude that decedent was “coherent, aware and able to understand the implication of her actions.”

Defendant also submits, in support of his application, documentary evidence, including a durable power of attorney, executed by decedent in February 2002, appointing defendant to act as her attorney-in-fact in all matters; the deed of conveyance dated July 18, 2004, transferring the Queens property to defendant, and her Last Will and Testament, dated October 13, 1995, annexed to which was the statement of the attesting witnesses that decedent, “at the time of the Last Will and Testament. . . appeared to them to be of full age, over twenty-one (21) years, of sound and disposing mind and memory and understanding, not under any restraint, not blind and able to read and write the English language and competent in every respect to make a Will.” Defendant’s evidence is sufficient to meet his burden of showing that plaintiff’s claims are lacking in merit from a factual perspective, as well as a legal perspective. These facts also establish, prima facie, that each of the causes of action fail to establish a claim for relief.

Here, in opposition to defendant’s prima facie showing of entitlement to judgment as a matter of law, plaintiff raised no triable issue of fact either as to whether the transfer of the real estate or bank accounts was the result of lack of capacity or undue influence. See, In re Greenberg, 34 A.D.3d 806 (2d Dept. 2006). The only submission in opposition was the affidavit of plaintiff’s husband, Douglas J. Tyan, consisting of conclusory statements and hearsay. Since plaintiff offered no evidence other than hearsay to support her claims of lack of capacity and undue influence, she failed to present admissible evidence sufficient to raise a triable issue of fact, and summary judgment should be granted to defendant. See, Rodriguez v. Sixth President, Inc., 4 A.D.3d 406 (2d Dept. 2004); Iurato v. City of New York, 9 A.D.3d 301 (1<sup>st</sup> Dept. 2004).

With respect to the claim of lack of capacity, “[a] party's competence is presumed and the party asserting incapacity bears the burden of proving incompetence.” Whitehead v. Town House Equities, Ltd., 8 A.D.3d 367 (2d Dept. 2004). Indeed, plaintiff’s allegation that decedent lacked the capacity to effectuate the transfer of the bank accounts and the Queens property is belied by her

subsequent execution of her Last Will and Testament; “the self-executing affidavit of the attesting witnesses created ‘a presumption that the will was duly executed’ and also constituted ‘prima facie evidence of the facts therein attested to by the witnesses’ (citations omitted).” In re James, 17 A.D.3d 366 (2d Dept. 2005). See, also, Crown v. Sayah, 31 A.D.3d 367 (2d Dept. 2006); Matter of Johnson, 6 A.D.3d 859, 860 (2d Dept. 2004); Matter of Leach, 3 A.D.3d 763, 765 (2d Dept. 2004). See, also, Matter of Fiumara's Estate, 47 N.Y.2d 845 847 (1979)[“record reveals that the attesting witnesses all testified that, despite his physical infirmity, the testator was lucid and rational on that occasion.”] Plaintiff failed to raise a triable issue with respect to decedent’s alleged lack of mental capacity by the submission of admissible evidence.

Defendant also demonstrated, prima facie, that the Will was not the product of undue influence. In opposition to that branch of defendant’s motion which was for summary judgment dismissing the complaint based on allegations of undue influence, plaintiff failed to raise a triable issue of fact. “A mere showing of opportunity and even of a motive to exercise undue influence does not justify a submission of that issue to the jury, unless there is in addition evidence that such influence was actually utilized.” Matter of Walther, 6 N.Y.2d 49 (1959); In re Herman, 289 A.D.2d 239 (2d Dept. 200); Matter of Burke, 82 A.D.2d 260, 268-269 (1981); see, also, In re McGuire, 34 A.D.3d 589 (2d Dept. 2006); Matter of Fiumara's Estate, *supra*. Beyond conclusory allegations, speculation and hearsay, plaintiff has also failed to submit any evidence, that defendant actually exercised undue influence over their mother. It is well settled that in order to establish undue influence, it must be shown that defendant exercised “‘moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [decedent] to do that which was against h[er] free will” (Matter of Walther, 6 N.Y.2d 49, 53, 188 N.Y.S.2d 168, 159 N.E.2d 665, quoting Children's Aid Socy. v. Loveridge, 70 N.Y. 387, 394). Estate of Kumstar. 66 N.Y.2d 691 (1985).

Inasmuch as plaintiff’s third cause of action based upon conversion are predicated upon the claims that defendant wrongfully took decedent’s real and personal property and converted that property, and as those two causes of action are being dismissed based upon the grant to defendant of summary judgment in his favor, the third cause of action likewise must fall. Accordingly, defendant’s motion for summary judgment dismissing the complaint is granted, and the complaint hereby is dismissed.

Dated: March 26, 2007

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J.S.C.