

Matter of Fagioli

2007 NY Slip Op 31140(U)

April 30, 2007

Surrogate's Court, Nassau County

Docket Number: 0332879/2007

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of FRANCOISE FAGIOLI,
as Executor of the Estate of

File No. 332879

MARIO FAGIOLI,
Deceased,

Dec. No. 113

For Determination of the Validity and Enforceability of the
Claim of Patricia Duryea Against the Estate of said Deceased.

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In this proceeding to determine the validity of a claim, the executor moves for summary judgment dismissing the amended answer of the claimant which now pleads a breach of contract by the estate.

The decedent, Mario Fagioli, died on July 12, 2003. He was survived by his wife, Françoise Fagioli, and a son, Richard Fagioli. The decedent’s will dated July 17, 1987 was admitted to probate and letters testamentary issued to Françoise Fagioli on January 7, 2005. The decedent’s will left his entire estate to his wife.

On January 12, 2005 a notice of claim was served by Patricia Duryea on the executor which alleged that she and the decedent had a “romantic relationship” which commenced in or about 1983. The notice of claim asserts that on October 19, 1989 the decedent bought a cooperative apartment in Montauk, New York, and on June 13, 1990 in a writing executed by the decedent, witnessed by two persons and notarized, he declared his intention that in the event of his death that his interest in the cooperative apartment would be transferred to Patricia Duryea. The claim asserted that the cooperative was to be Duryea’s as a birthday present and as an

expression of his appreciation and gratitude for all her kindness and friendship with him through the years. The document dated June 13, 1990 was attached to the notice of claim. In the claimant's original answer to this petition, she pled causes of action based upon gift, testamentary codicil to the prior will, and the imposition of a constructive trust. The executor originally moved to dismiss the claim and this court granted that motion based upon the causes of action pled. But the court permitted the claimant to amend her answer to assert a cause of action based upon a breach of contract (*see* Decision No. 510, September 28, 2006).

The amended answer asserts that Patricia Duryea and Mario Fagioli were engaged in a relationship for approximately nine years wherein they engaged in sexual relations. Before 1990, Duryea had become pregnant with Fagioli's child on four separate occasions. Each pregnancy was terminated by an abortion allegedly at the behest and demands of Fagioli. Duryea became pregnant a fifth time in the spring of 1990 after Fagioli had purchased the Montauk cooperative apartment. Duryea allegedly wanted to have the child and was concerned with the effects another abortion would have on her own health. According to the answer, Fagioli, in order to convince Duryea to terminate her 1990 pregnancy, promised to give her an interest in the Montauk cooperative. In order to effect this promise, Fagioli executed the June 13, 1990 document notarized by his accountant and witnessed by his two business partners. He presented this document, a copy of the share certificate and a set of keys to the cooperative to Duryea.

The amended answer asserts that Fagioli presented the document in consideration for past and future love and affection between them, in consideration for the past abortions she underwent at his behest and demand and in consideration for Duryea giving Fagioli "the best years of her life." As indicated in the court's previous decision, the document declares and states Mario

Fagioli's intentions concerning the cooperative that in the event of his death, his interest in the lease is to go to Duryea and the stock be transferred to her "at no cost but as an outright gift." The amended answer pleads past and present consideration, including termination of her 1990 pregnancy, in exchange for the interest promised to her, that a valid contract was formed by the parties and that the estate has breached that contract by its failure to transfer the cooperative to Duryea.

The executor has filed a reply to the amended answer which asserts six affirmative defenses and a counterclaim for funds expended by the decedent and the estate to satisfy a loan on the cooperative and for maintenance, utilities, repairs and taxes paid by the executor personally and by the estate.

Executor's Arguments

The executor's first argument in support of dismissal of the amended answer and denial of the claim is that the claimant is now attempting to rewrite the June 1990 document to make what was clearly and unambiguously an expression of an intent to make a gift into a contract supported by consideration. Thus it is asserted that extrinsic evidence cannot be considered and is inadmissible with respect to a clear, complete and unambiguous agreement (*W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157 [1990]).

Secondly, the executor argues that the contention that the document was an enforceable promise to devise the property fails because the document expresses only the intent to make a gift and no adequate consideration. Thirdly, the executor argues that past consideration is not adequate to enforce a contract where it is not set forth in the writing itself (GOL §5-1105). Moreover, the contradictory assertions of the claimant as to when the 1990 abortion took place in

relation to the purported contract, are insufficient as a matter of law to establish the clear and convincing evidence required to prove a claim based upon a contract to make will.

Fourth, to the extent that claimant relies upon some kind of oral promise of the decedent, the statute of frauds bars such a recovery (GOL §5-703[1] & [4]; EPTL 13-2.1) and the claimant cannot demonstrate the partial performance necessary to take any oral agreement out of the statute of frauds. Finally, to the extent that the claimant is contending that the decedent promised to effectuate the transfer of the cooperative in 1990, such a promise is unenforceable because of the six year statute of limitations (CPLR 213).

Claimant's Arguments

Patricia Duryea argues initially that the writing upon which the contract is based is ambiguous, so that extrinsic evidence is needed to supplement its terms. Next, she asserts that the document is based upon proper consideration, the abortion that she underwent in 1990, and thus the contract is supported by more than past consideration. She further argues that a valid oral contract is taken out of the statute of frauds because of the part performance exception. In addition, she asserts that the statute of limitations did not run until the death of Mario Fagioli and therefore, the claim is not time barred. Finally, Duryea asserts that she is entitled to ownership of the cooperative based upon the doctrine of promissory estoppel and because of decedent's alleged ratification of the contract on several occasions.

Reply

The executor in reply first argues that the claimant's papers fail to come forward with evidentiary proof to demonstrate triable issues of fact to defeat summary judgment. Claimant's opposition is supported by the unverified amended answer, her attorney's affirmation, annexed

partial deposition transcripts, and a memorandum of law. In the instant matter, the executor asserts that claimant counsel's affirmation and memorandum of law, wherein he states his own version of the facts, his opinions and his conclusions, does not satisfy the rule that a party opposing summary relief demonstrate by admissible evidence the existence of factual issues (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Also, the executor argues that the claimant has the burden of showing by clear and convincing evidence that the document in question is an executed agreement, that it is ambiguous thus requiring the consideration of extrinsic evidence and that, if a contract to make a conveyance can be ascertained from the document, it must be supported by present consideration or past consideration expressed in the document. It is asserted that claimant has not made such a showing.

Finally, it is the executor's position that there exists no enforceable oral agreement, no such agreement is pled in the amended answer and no evidence is set forth in the claimant's papers to support a theory of oral contract. The executor argues that, in any event, enforcement of such an oral contract is barred by the statute of frauds, not taken out of the statute of frauds by partial performance because the alleged partial performance is insubstantial and not necessarily referable to the purported contract. Moreover, the executor argues that the doctrines of promissory estoppel and ratification are inapplicable to this case.

Court's Determination

In the document dated June 13, 1990, by its own terms, Mario Fagioli stated that "I do hereby declare and state my intentions concerning" the Montauk property and that "in the event of my death, then my interest in the proprietary lease is to go to Patricia Duryea and such stock is

to be transferred to her at no cost but as an outright gift." The court's view of this document is that it is nothing more than an attempt at a gift to take place on the donor's death. As previously held by this court, there was neither intent on the part of the donor to give the cooperative apartment to the claimant during his life nor was delivery made to her. Thus, the document was not a valid gift.

To construe this document as a contract to make a will or devise, the claimant must show that there were competent parties, a definite subject matter, consideration, the agreement was fair and equitable and the terms thereof definite and certain (*Matter of Camac*, 2 Misc 3d 894 [Sur Ct, Bronx County 2004]). Declarations of a testamentary intention do not constitute any element of a contract unless it was communicated to the claimant in order to obtain some consideration and such consideration was given as a consequence of such a promise or declaration (*Matter of Guarino*, 13 Misc 2d 539 [Sur Ct, New York County 1958]); *Matter of Stewart*, 21 Misc 412 [Sur Ct, Cattaraugus County 1897]). A distinction must be made between a promise made and understood as a mere expression of intention and the assumption of a binding obligation in consideration of a promise given by the claimant. Recovery cannot be had based upon disappointed expectations (38 NY Jur 2d, Decedent's Estates §268). Generally, in order to establish such a claim against the decedent, the proof must be clear and convincing (*McKeon v Van Slyck*, 223 NY 392 [1918]).

The document upon which claimant relies falls far short of the clear and convincing evidence that establishes that the terms of the contract are definite and certain or that decedent made a promise to the claimant for the purpose of inducing her to provide him with some consideration. Ordinarily, if there was some basis to interpret this document as a bilateral

contract based upon the exchange of promises, the document would be signed by both parties and it would state with specificity the claimant's contractual obligations. Instead the document was only signed by decedent and states nothing about consideration. Indeed it only refers to a gift, i.e. a promise without consideration. The claim refers to "a birthday present" and expression of his appreciation and gratitude for all of claimant's kindness and friendship through the years. The amended answer refers to decedent's alleged promise as "in consideration for past and future love and affection"; in consideration for past abortions she underwent at his behest and command; in consideration of the termination of her pregnancy of 1990, and in consideration for claimant giving decedent the best years of her life. It is well settled law that love and affection do not constitute consideration (*McRay v Citrin*, 270 AD2d 191 [1st Dept 2000]; *Rose v Elias*, 177 AD2d 415 [1st Dept 1991]; *Matter of Camac*, 2 Misc 3d 894, 898 [Sur Ct, Bronx County 2004]). Moreover, the claimant's confusing deposition testimony concerning when her last abortion of a pregnancy with Mario Fagioli occurred, and its relation to the purchase of the cooperative in October 1989 and the delivery of the June 1990 document is not the clear and convincing evidence required to even raise an issue of consideration and show a valid contract (*Versailles Foundation v Bank of New York*, 202 AD2d 334 [1st Dept 1994]; *Matter of DeLano*, 41 AD2d 880 [3d Dept 1973]).

Furthermore, her counsel's affirmation that Ms. Duryea now believes that her 1990 pregnancy preceded the June 1990 document and the abortion occurred in the summer of 1990 after the document was executed, is inadmissible proof of her claim and cannot be considered by the court (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Considering the failure of the document to set forth any consideration for the decedent's

promise, the ordinary meaning of the words of gifting used in the document and the circumstances concerning its execution, the court finds that the claimant has failed as a matter of law to raise any factual issue that decedent agreed to be contractually bound to bequeath the Montauk cooperative to Patricia Duryea. The document reflects no more than an expression of an intention which was not carried out (*Matter of Camac*, 2 Misc 3d 894, 899 [Sur Ct, Bronx County 2004]).

To the extent that the claimant asserts a contract based upon past consideration, it is not enforceable unless the past consideration, herein the prior abortions, were expressed in the writing itself (GOL §5-1105; *Kreuter v Tsucalles*, 287 AD2d 50 [2d Dept 2001]).

Since the amended answer makes no claim for breach of an enforceable oral agreement, the court does not reach the issues concerning such a claim, whether it would be barred by the statute of frauds and whether part performance takes an oral agreement out of the statute of frauds. Nor is the doctrine of promissory estoppel applicable in these circumstances. A promissory estoppel, when it applies, prevents a party from relying upon the statute of frauds as a defense to the enforceability of an oral agreement. The claimant has not alleged or shown that she was fraudulently misled by the decedent, demonstrated egregious or unconscionable conduct by the decedent as promisor, nor shown reliance by the claimant unequivocally referable to the alleged oral contract which are the elements of a promissory estoppel (*Long Island Pen Corp. v Shatsky Metal Stamping Co.*, 94 AD2d 788 [2d Dept 1983]; Restatement Second, Contracts §90; see e.g. *Phalen v United States Trust Co.*, 186 NY 178 [1906]).

Finally, the evidence presented by the claimant that Mario Fagioli allegedly ratified the document in issue countless times, is inapplicable because a contract must exist and be voidable

in order to be ratified (12 Corbin, Contracts §1215). Thus, a repetition of a mere intention does not make the expression of that intention into a binding obligation (57 NY Jur 2d Estoppel, Ratification and Waiver §87).

For all of the above reasons, the motion by the executor for summary judgment and to dismiss the amended answer is granted.

Settle decree on notice.

Dated: April 30, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court