

Randall v McGrath

2007 NY Slip Op 31565(U)

June 8, 2007

Supreme Court, Rensselaer County

Docket Number: 0210931/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

CHRISTINE RANDALL,

Plaintiff,

-against-

Index No.: 210931
RJI No.: 41-0691-2006

AUSTIN McGRATH,

Defendant.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

THE POLLOCK LAW FIRM
Attorneys for Plaintiff
(David J. Pollock, Esq. of Counsel)
PO Box 3585
Albany, New York 12203

THE WILCOX FIRM
Attorneys for Defendant
(Charles J. Wilcox, Esq. of Counsel)
P.O. Box 1260
Troy, New York 12181-1260

DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery of possession of an aging John Deere track loader, a piece of heavy equipment similar to a bulldozer. Defendant contends that plaintiff's husband gave him the track loader in August, 2002 before he died and has asserted a counterclaim seeking the value of the many repairs he performed on the subject equipment in the event the plaintiff is awarded possession. Plaintiff has

moved for summary judgment on the grounds that at the time of the alleged gift, her husband was suffering from Alzheimer's disease and was not competent to make the gift, and further, that as there were no keys or paperwork for the track loader or any other physical delivery symbolizing the gift, no gift was effected. Defendant has cross-moved for summary judgment declaring that he is the owner of the equipment or, in the alternative, awarding him \$20,000 on the counterclaim

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). “[T]he proponent of a summary judgment motion 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” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

Plaintiff has shown that she had been married to the decedent since 1949. She and her husband acquired the track loader as joint marital property. As defendant concedes, there is no paperwork or documentation indicating an intent that the track loader be the separate property of the decedent (see Cadle Co. v Satrap, 302 AD2d 381 [2d Dept 2003]; Sloan v Starbare II Partners, 256 AD2d 104 [1st Dept 1998]). As such, there is no merit to defendant's conclusory, unsupported contention that plaintiff does not have any ownership interest in the equipment.

Plaintiff contends that there was no valid gift of the track loader.

"The requisites for a valid gift inter vivos are simple: there must be an intent on the part of a donor to give; there must be a delivery of the property given pursuant to such intent; and there must be acceptance on the part of the donee (Matter of Van Alstyne, 207 NY 298)". (Matter of Szabo, 10 NY2d 94, 98 [1961]).

Plaintiff asserts that the decedent was incompetent and could not have formed the requisite intent. Plaintiff has submitted medical proof with respect to her late husband's medical condition in general during the relevant time period. An affidavit from the decedent's primary care physician states

"In August of 2002, Mr. Randall suffered from confusion, lack of memory, and delusions. At that time, Mr. Randall had both 'good and bad days', when the noticeable effects of his Alzheimer's disease were sometimes limited and sometimes very obvious. His memory was very poor. His mental incapacity was advanced to the point that he was not capable of consistently comprehending and understanding the nature of his statements and actions. He was not mentally competent."

Plaintiff has also submitted an affidavit from a physician opining that Mr. Randall was incapable of making competent business decisions in August of 2002. Such doctor does

not state that he ever treated the decedent or the dates, times or occasions upon which he observed the decedent during the month of August, or any time reasonably close to such month. Since such affidavit fails to set forth the factual basis for the stated opinion it is without probative value (see Romano v Stanley, 90 NY2d 444, 451 [1997]; M & E Mfg. Co. v Frank H. Reis Inc., 258 AD2d 9, 13 [3d Dept 1999]).

“A party's competence is presumed and the party asserting incapacity bears the burden of proving incompetence (see, Matter of Gebauer, 79 Misc.2d 715, 719, affd. 51 AD2d 643). Persons suffering from a disease such as Alzheimer's are not presumed incompetent and may execute a valid deed (see, 43 NY Jur 2d, Deeds, § 23, at 208; see also, Matter of Betz, 63 AD2d 769). Furthermore, it must be shown that, because of the affliction, the person was incompetent at the time of the transaction (see, Matter of Bush, 85 AD2d 887, 888). It has been stated that the inquiry is whether the person's mind was ‘so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction’ (Aldrich v Bailey, 132 NY 85, 89; see, Ortelere v Teachers' Retirement Bd. of City of N.Y., 25 NY2d 196, 202).” (Feiden v Feiden, 151 AD2d 889, 890 [3d Dept 1989]).

Thus, it has been held that an aged person suffering from a progressive, debilitating mental disease such as Alzheimer's or senile dementia may make a valid deed or will during a lucid interval (see id.; Matter of Buchanan, 245 AD2d 642, 645-646 [3d Dept 1997]; Matter of Ruso, 212 AD2d 846, 847-848 [3d Dept 1995]).

Plaintiff has not offered any evidence that the decedent was incompetent on the day that he allegedly gave defendant the track loader. The medical proof submitted concedes that the decedent had good days during which the effects of his disease were very limited. Plaintiff submitted the transcript of defendant's examination before trial in which defendant testified that the decedent came to pick defendant up in the decedent's

car, that decedent drove around for several hours while discussing the possibility of purchasing land for subdivision development and questioning the defendant about the procedures to have wetlands removed from the federal listing, among other topics of conversation. Defendant stated that he seemed as sharp as plaintiff's attorney. Defendant has also submitted numerous affidavits from friends and acquaintances of the decedent indicating that around the time of the alleged gift he appeared to be fully functional when in public. Under such circumstances, plaintiff has not met her burden of conclusively establishing that on the date of the alleged gift the decedent was incompetent and could not have formed the requisite intent to give defendant the track loader.

Plaintiff also contends that based upon the uncontroverted facts, defendant cannot establish the element of delivery, either actual or constructive, in order to constitute a valid gift of property.

“In order to have a valid inter vivos gift, there must be a delivery of the gift, either by a physical delivery of the subject of the gift or a constructive or symbolic delivery such as by an instrument of gift, sufficient to divest the donor of dominion and control over the property (see, Matter of Szabo, 10 NY2d 94, 98-99, supra; Speelman v Pascal, 10 NY2d 313, 318-320, supra; Beaver v Beaver, 117 NY 421, 428-429, supra; Matter of Cohn, 187 App Div 392, 395). As the statement of the rule suggests, the requirement of delivery is not rigid or inflexible, but is to be applied in light of its purpose to avoid mistakes by donors and fraudulent claims by donees (see, Matter of Van Alstyne, 207 NY 298, 308, supra; Matter of Cohn, supra, 187 App Div at pp. 395-396; Mechem, Requirement of Delivery in Gifts of Chattels and of Choses in Actions Evidenced by Commercial Instruments, 21 Ill.L.Rev. 341, 348-349). Accordingly, what is sufficient to constitute delivery ‘must be tailored to suit the circumstances of the case’ (Matter of Szabo, supra, 10 NY2d at p. 98). The rule requires that “[t]he delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit” (id.; Vincent v Rix, 248 NY

76, 83; Matter of Van Alstyne, *supra*, 207 NY at p. 309; *see*, Beaver v Beaver, *supra*, 117 NY at p. 428).” Gruen v Gruen, 68 NY2d 48, 56 [1986]).

However, “[i]ntention or mere words cannot supply the place of an actual surrender of control and authority over the thing intended to be given.” (Matter of Van Alstyne, 207 NY 298, 308 [1913]). Moreover, it has consistently been held that the delivery must be in the present, and not *in futuro* (*see* Matter of Maier, 97 AD2d 940 [4th Dept 1983, dissenting opinion], *revd on dissenting opinion*, 61 NY2d 856 [1984]; Matter of Wicks, 42 AD2d 1021 [3d Dept 1973]; Matter of Seigle, 262 App Div 879, 880 [2d Dept 1941] *revd on other grounds*, 289 NY 300 [1942]) or based upon some contingency (*see* Widom v Mittman, ___ AD3d ___, 2007 NY Slip Op 03356 [1st Dept 2007]).

The subject track loader was sitting in a field and had not been used in some time. Defendant states that it had been years since it had run, while plaintiff’s daughter has alleged that it was used the year before. In any event, at the time of the alleged gift, it was not readily operable. The decedent did not deliver any physical item associated with the track loader, and was not even in the immediate presence of the loader when he allegedly gave it to defendant. There was nothing other than spoken words constituting the act of giving. Moreover, defendant expressly testified that the decedent told him “If you get it going, you can have it.” Defendant submitted an affidavit from a friend who had talked with the decedent and the defendant shortly after the alleged gift was made. Such witness stated “Henry told Austin that if he, Austin, could get the 555 started, and out of the field and up to Austin’s home, that he could have it.” “Henry made clear his

intention that if Austin got the 555 clam bucket loader started, out of his field and moved onto Austin's property, that the 555 would be Austin's." Such evidence conclusively establishes that the alleged gift was conditional and to be completed at some time in the future. Even though the decedent lived for almost two years after the alleged gift, defendant never contacted the decedent to inform him that he had gotten the track loader running and had removed it from the decedent's land. There is no evidence that the decedent ever made any form of delivery, symbolic or otherwise, to complete the gift once the alleged condition was fulfilled and the track loader driven from the decedent's land.

It is therefore determined that there was no effective gift of the track loader. As such, plaintiff is entitled to summary judgment declaring that she is the lawful owner of the track loader and granting her immediate possession.

The Court therefore turns to defendant's cross-motion for summary judgment on the counterclaim. Defendant seeks recovery for his labor, the monies he has expended for parts, materials and other's labor, together with other work he performed for the decedent before and after the purported gift. Based upon the uncontroverted record, the plaintiff never requested defendant to perform any repairs. The only request by the decedent that defendant perform repairs on the track loader was limited to getting it started and running well enough to drive it a few hundred yards. There was no request that defendant fix the hydraulics, the wiring, the turbo charger, the tracks or any of the other systems which

defendant allegedly worked on.

It is elementary that one who provides work, labor or services voluntarily and without request from the owner may not recover the value of such services, as there is no implied contract for payment (see Perlmutter v Timely Toys, Inc., 8 AD2d 834 [2d Dept 1959]; see also Marinoff v Natty Realty Corp., 17 AD3d 412, 416 [2d Dept 2005, dissenting opinion]). Defendant therefore may not recover in *quantum meruit* for the value of the services, parts and materials provided to repair the track loader, other than merely getting it started, as such would be the measure of damages in implied contract (see Robbins v Cooper Assoc., 19 AD2d 242, 244 [1st Dept 1963], *revd on other grounds* 14 NY2d 913 [1964]). Defendant also testified that he had performed numerous services prior to the purported gift of the track loader for the decedent voluntarily and without any expectation of payment. Defendant may not recover for any of those services either.

It does appear that defendant has a valid claim for unjust enrichment. “A cause of action for unjust enrichment requires a showing that (1) the [plaintiff] was enriched, (2) at the expense of the [defendant], and (3) that it would be inequitable to permit the [plaintiff] to retain that which is claimed by the [defendant].” (Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC, 31 AD3d 983 [3d Dept 2006]). Defendant has shown that he came into possession of the track loader in good faith. He performed significant and costly repairs to the track loader in the reasonable belief that he owned the equipment. The Court finds that under the circumstances herein, it would be inequitable for plaintiff

to receive the benefit of such repairs without payment of any sort. However, the measure of damages in unjust enrichment is not the reasonable value of the services provided by defendant, but the amount by which such services have benefitted the plaintiff (see Robbins v Cooper Assoc., 19 AD2d at 244), that is, the difference in value of the loader before and after the repairs. Defendant has not offered any probative proof on such issue.

Defendant shall therefore be granted partial summary judgment on the counterclaim on the issue of liability for the increase in value of the track loader attributable to the repairs he performed, and the value of services rendered to get it running, if not duplicative.

Lastly, the Court declines to entertain plaintiff's request, made for the first time in her reply papers, that she be permitted to serve a reply to defendant's counterclaim, since no formal motion (or cross-motion) for such relief was made.

Accordingly it is

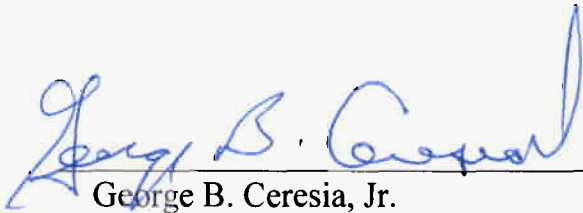
ORDERED that plaintiff's motion to for summary judgment is hereby granted to the extent indicated herein, and it is further,

ORDERED that defendant's cross-motion for summary judgment on the counterclaim is hereby granted on the issue of liability.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for plaintiff, who are directed to enter this Decision/Order without notice and to serve counsel for defendant with a copy of this Decision/Order with notice of

entry.

Dated: Troy, New York
June 8, 2007



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated March 23, 2007; Affirmation of David J. Pollock, Esq. dated March 23, 2007 with Exhibits A-C annexed;
Affidavit of Christine Randall sworn to March 23, 2007 with Exhibit A annexed;
Affidavit of Avery Wood, M.D. sworn to March 21, 2007 with Exhibit A annexed;
Affidavit of Jeffery Yucht, M.D. sworn to March 20, 2007;
Memorandum of Law dated March 23, 2007;

Affidavit of Charles J. Wilcox, Esq. sworn to April 25, 2007 with Exhibits A and B annexed;
Affidavit of Austin McGrath sworn to April 25, 2007 with Exhibits A-C annexed;
Affidavit of Jacqueline A. McGrath sworn to April 25, 2007;
Affidavit of John Stoate sworn to April 25, 2007;
Affidavit of Francis Knapp sworn to April 25, 2007;
Affidavit of Rick Tinkham sworn to April 25, 2007;
Affidavit of John Cooney sworn to April 25, 2007;
Affidavit of Leon Jacobs sworn to April 25, 2007;
Affidavit of George Driscoll sworn to April 25, 2007;
Memorandum of Law dated April 26, 2007;

Reply Affirmation of David J. Pollock, Esq. dated May 17, 2007 with Exhibit E annexed;
Affidavit of Margaret Randall sworn to May 14, 2007.