

Curro v Powers

2007 NY Slip Op 31633(U)

June 12, 2007

Supreme Court, Suffolk County

Docket Number: 0014570/2004

Judge: William B. Rebolini

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM B. REBOLINI
Justice

Index No. 14570-04
CASE DISP

Mary L. Curro,

Plaintiff(s)

-against-

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Donna M. Powers and Debra D. Newman,

Defendant(s)

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This action was commenced by the filing of a summons and verified complaint on or about the 23rd day of June, 2004 and was timely served on defendant Donna Powers (hereinafter defendant Powers) and defendant Debra Newman (hereinafter defendant Newman). Issue was joined on or about the 4th day of August, 2004 and plaintiff served her reply on or about the 13th day of December, 2004.

In her complaint, plaintiff Mary Curro (hereinafter plaintiff) sets forth six causes of action, the first five of which were asserted against defendant Powers and the sixth against defendant Newman. The causes of action against defendant Powers are:

(1) For a constructive trust on real property located at 8 Saltaire Road, Lindenhurst, New York as a result of defendant Powers refusal to sign a proffered agreement on or about May 12, 1999 when half the said real property was transferred to her by plaintiff, the signing of which agreement was alleged to be a condition precedent to the said transfer; and

(2) For damages based on an alleged failure of consideration in the transfer; and

(3) For a judgment declaring that based on the alleged failure of consideration, the conveyance of the real property is null and void; and

(4) For imposition of a trust on said real property and/or the proceeds from any sale thereof; and

(5) For damages based on fraud.

The sixth cause of action is for breach of an employment contract for legal services rendered by defendant Newman to plaintiff. The legal services provided by defendant Newman included a deed transfer, bankruptcy, and preparation of a proposed agreement between plaintiff and defendant Powers.

A separate summary proceeding commenced in the Second District Court of Suffolk County by defendant Powers against plaintiff for, inter alia, a warrant of eviction which was previously consolidated with this action was withdrawn at trial. The counterclaims by defendant Powers for dissipation of assets by plaintiff and sanctions for institution of a frivolous lawsuit, as well as all cross claims were also withdrawn at trial

The trial of the within matter was held on February 14, 2007, February 15, 2007, February 16, 2007 and February 26, 2007. The following witnesses testified: plaintiff Mary Curro, defendant Donna Powers, defendant Debra Newman, plaintiff's daughter Laura Furnell, plaintiff's granddaughter Stephanie Powers and plaintiff's appraiser, Edna Kowalczyk. Written summations, memoranda of law and reply memoranda of law were fully submitted on April 20, 2007. The following constitutes the court's Findings of Fact and Conclusions of Law.

Findings of Fact

Plaintiff, 78 years of age and her daughter, defendant Powers, 43 years of age, both reside at the subject property located at 8 Saltaire Road, Lindenhurst, New York. Although the property was originally purchased by plaintiff, it is now fully titled in defendant Powers' name.

She resides there with her four children and her fiancé, Paul Marinelli, who is the father of her youngest child. As stated above, her mother, the plaintiff, resides there as well. Prior to moving to Lindenhurst in January 1993, plaintiff and defendant Powers lived together in a one family home in Plainview, New York which was owned by plaintiff as the surviving tenant by the entirety with her late husband, Joseph Curro. The parties lived there together with defendant Power's husband and the Powers' two children. Defendant Powers was pregnant with her third child in December, 1992 when her husband died. The parties, with defendant Powers' two children, moved into the subject property which plaintiff purchased for \$152,500.00 with \$132,000.00 of the proceeds from the sale of the Plainview home and a mortgage of \$20,000.00. Plaintiff paid the utilities, mortgage, real estate taxes and homeowners insurance and defendant Powers provided to plaintiff \$500.00 per month until plaintiff transferred one half interest of the subject property to defendant Powers on October 19, 1993.

More specifically, plaintiff encountered some financial difficulty and was unable to make the mortgage payments. Defendant Powers gave plaintiff \$28,000.00, a portion of which went to satisfy the outstanding principal on the purchase money mortgage, with the remainder to discharge plaintiff's credit card debts. Plaintiff transferred half the house to defendant Powers as a result of defendant Powers' payment of the \$28,000.00. The transfer, by deed dated October 19, 1993 was a completed inter vivos gift. Accordingly, plaintiff has made no claim for relief as a result of the transaction.

At the Lindenhurst home, the parties shared expenses, with defendant Powers paying the greater portion of said expenses. Since the partial transfer to defendant Powers in 1993, defendant Powers paid the real estate taxes for the property. However, plaintiff thereafter continued to accumulate credit card debt between October 1993 and mid-1996 of approximately \$38,000.00. After plaintiff asked defendant Powers to refinance the house, the parties obtained a

mortgage of \$50,000.00 on the real property. Plaintiff received \$38,000.00 to discharge her credit card debt, while defendant Powers received \$12,000.00 to discharge her own debt. Defendant Powers assumed responsibility for repayment of the mortgage. At the time of trial, payments on the mortgage were current. Plaintiff made no mortgage payments from 1996 to 2007, but continued to incur further credit card debt.

In March 1999, plaintiff, again experiencing financial difficulty, consulted defendant Newman about filing a petition for bankruptcy. Defendant Newman advised plaintiff that, as the owner of real property, the value of which exceeded the amount of her debt, she would not be able to receive a discharge in bankruptcy. Plaintiff requested that defendant Powers consent to a second mortgage on the house in order to pay off her additional credit card debt. Defendant Powers, unwilling to consent, offered to provide plaintiff the sum of \$22,000.00 in exchange for plaintiff's transfer of the remaining half of the subject property to her. Plaintiff agreed.

Plaintiff contacted defendant Newman and requested that she prepare a deed transferring the remainder of the subject property to defendant Powers and a document memorializing the transaction. On May 12, 1999 plaintiff and defendant Powers went to defendant Newman's office in Amityville, New York for the deed transfer in exchange for the payment of \$22,000.00 to plaintiff. While defendant Powers remained in an anteroom, plaintiff conferred with defendant Newman in her private office. Defendant Newman presented the proposed deed and read an agreement that defendant Newman prepared at plaintiff's request. Plaintiff requested several changes to the document. The document with the changes was prepared. Thereafter, defendant Powers was invited into defendant Newman's private office. Defendant Newman informed defendant Powers of the document and began to read it to her. Defendant Powers stated it was the first time she was informed of the terms and conditions and stated that she was not willing to sign it without having it reviewed. Defendant Newman provided a copy to

defendant Powers and suggested she have it reviewed by counsel of her own choice. Defendant Powers and plaintiff left the office. The deed, which had already been signed by plaintiff and defendant Powers was held by defendant Newman, pending further instructions from plaintiff. The court credits Defendant Newman's testimony that at this juncture she realized that her client had misinformed her when she advised her that defendant Powers was fully aware of the agreement.

Defendant Powers and plaintiff left defendant Newman's office. Plaintiff returned within minutes, informing defendant Newman that the deed should be recorded since she needed the money. The parties agreed that the \$22,000.00 was to be used to discharge plaintiff's additional credit card debts. The deed was recorded. Neither plaintiff nor defendant Powers signed the purported agreement. The court finds plaintiff's testimony that the deed was executed in May 1999 and the purported agreement was presented to defendant Powers in June 1999 and that plaintiff had no input into the "agreement" not credible.

In May 2001, approximately two years thereafter, plaintiff, who was again in financial difficulty, returned to defendant Newman's office to file for bankruptcy. Plaintiff's bankruptcy petition did not list any real property in her individual name or in trust for her. Plaintiff testified before this court that the petition was true and that she "owned nothing." Plaintiff testified that she understood that she could not have any equity in the subject premises in order to file for bankruptcy. Plaintiff, complaining of ill health, asserts that she has been treated unfairly by defendant Powers, resides in uninhabitable conditions, is uneducated and relied upon her daughter, defendant Powers, to allow her to stay at the premises until she dies or provide her with one-half of the sales proceeds if the premises are sold. No written agreement provides for same and the facts and circumstances subsequent to the final transfer deed indicate the contrary. Plaintiff was apparently satisfied with the services of defendant Newman and presumably the final deed

transfer even without a written agreement between herself and defendant Powers since plaintiff subsequently sought defendant Newman's services as a bankruptcy attorney. It was only after the bankruptcy proceeding and more than two years after the final deed transfer that plaintiff decided to pursue a claim against defendant Powers and defendant Newman after repeated phone calls and after defendant Newman advised her that litigation against defendant Powers would cost \$500.00 per hour.

Conclusions of Law

Each of plaintiff's causes of action will be addressed in order.

"It is well settled that issues of credibility are for the trier of fact who saw and heard the witnesses, and its decision will not be disturbed on appeal if it is supported by a fair interpretation of the evidence" (Jones v. Hart, 233 AD2d 296, 649 NYS2d 805 [2d Dept. 1996]).

The Court was called upon to judge the credibility of the witnesses who testified and the Court's determination in assessing the evidence is entitled to deference (see Northern Westchester Professional Park Assocs. v. Town of Bedford, 60 NY2d 492, 470 NYS2d 350 [1983]). A court's determination will not be disturbed unless its conclusions could not be reached under a fair interpretation of the evidence (see BGW Dev. Corp. v. Mount Kisco Lodge No. 1552, AD2d 565, 567, 669 NYS2d 56 [2d Dept. 1998]). In this case, the resolution of various issues turned upon questions of credibility. The Second Department has repeatedly held that credibility is a matter within the special competence of the trier of fact (see Fisher v. Fisher, 87 AD2d 808, 448 NYS2d 781 [2d Dept. 1982]); Kurtish v. Iskokovic, 204 AD2d 847, 612 NYS2d 263 [2d Dept. 1994]).

With respect to plaintiff's constructive trust claim, the Appellate Division Second Department in Ubriaco v. Martino, 36 AD3d 793, 828 NYS2d 490 (2d Dept. 2007) has set forth the factors for consideration in determining the imposition of a constructive trust and has held:

“A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee” (Beatty v. Guggenheim Exploration Co., 225 NY 380, 386, 122 NE 378). The four factors to be considered in ascertaining whether the imposition of a constructive trust is warranted are the existence of a fiduciary or confidential relationship, a promise, a transfer in reliance thereon, and unjust enrichment (see Sharp v. Kosmalski, 40 NY2d 119, 121, 386 NYS2d 72, 351 NE2d 721; Matter of Noble, 31 AD3d 643, 820 NYS2d 595).

The Court of Appeals in Sharp v. Kosmalski, *id.*, has held that:

“Generally, a constructive trust may be imposed” (W)hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest’ (**75 Beatty v. Guggenheim Exploration Co., 225 NY 380, 386, 122 NE 378, 380; 1 Scott, Trusts (3d ed.), s 44.2, p. 337; 4 Pomeroy’s Equity Jurisprudence (5th ed.), s 1053, p. 119). The salutary purpose of the constructive trust remedy is to prevent unjust enrichment...”

The court in Sharp, *id.*, further states that whether “one has been unjustly enriched is essentially a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties.”

Since plaintiff did not meet her burden of establishing the elements of a constructive trust by the preponderance of credible evidence (see Fisher v. Fisher, 87 AD2d 808, 448 NYS2d 781 [2d Dept. 1982]), the first cause of action is dismissed.

As stated above, plaintiff and defendant Powers are mother and daughter. This in itself does not automatically confer a confidential or fiduciary relationship. The fiduciary relationship arises when one has a duty to act for or to advise the other for her own benefit within the parameters of the relationship. The concept is grounded in the concept that one party has a superior position or special influence over the other party (see Chasanoff v. Perlberg, 16 AD3d 635, 798 NYS2d 116 [2d Dept. 2005]).

The credible evidence established that plaintiff did not rely on defendant Powers for advice or guidance in resolving her financial difficulties. The credible evidence established that

although defendant Powers was the daughter of plaintiff, she was not in a position of dominance and control and that plaintiff would often confer with her other children and counsel for assistance in making a determination with respect to her debt and assets.

Plaintiff had an undivided on half interest in the subject property. At the suggestion of plaintiff's own attorney, plaintiff sought to take a second mortgage on the premises with defendant Powers who was under no obligation to do so. Defendant Powers declined. Defendant Powers, however, did agree to provide plaintiff with \$22,000.00 in exchange for a transfer of plaintiff's remaining interest.

The credible evidence did not establish that there was any promise other than the payment of money. Plaintiff herself testified that defendant Powers did not promise to hold half the house in trust for her. Plaintiff testified that she "took it for granted" that defendant Powers would upon demand, either reconvey her prior one-half interest and/or the one-half of the proceeds of the sale. Defendant Powers credibly testified that she neither made or implied such a promise. Nor do the circumstances require the court to constructively impose such a promise.

The court finds that the transfer of the remaining one-half interest by plaintiff to defendant Powers was not made in reliance upon any promise other than the payment of \$22,000.00 to plaintiff. The plaintiff notes that the failure to set forth any consideration on the recording documents is evidence that there was no consideration. The court disagrees and the credible evidence establishes otherwise. The court finds that the transfer was not made in reliance upon defendant Powers holding her one-half interest in the subject property in trust for plaintiff. Plaintiff initially relied on defendant Newman, to protect her interests and then decided to receive the \$22,000.00 in exchange for the deed transfer to Powers. Apparently, plaintiff independently attempted to enter into an actual written trust arrangement with defendant Powers, which terms were refused by defendant Powers. Thereafter, plaintiff decided to move forward

with the deed transfer in exchange for \$22,000.00.

The credible evidence failed to establish that defendant Powers was unjustly enriched. Moreover, the credible evidence failed to establish or even suggest the value of the property at the time defendant Powers was purportedly unjustly enriched upon the happening of the transfer in May 1999. The 2005 appraisal received in evidence does not enlighten the court as to the May 1999 value.

Additionally, in considering the totality of the circumstances, the court is mindful that the household expenses were paid by defendant Powers at the time of the final transfer, except possibly the monthly sum of \$380.00. Within the category of expenses, the credible evidence established that defendant Powers paid the real property taxes on the subject property from October 1993 to date and the mortgage payments from 1996 to date.

Plaintiff failed to establish by credible evidence that she transferred the subject premises upon reliance upon a promise by defendant Powers or that other than a family relationship that there was any further special relationship between plaintiff and defendant Powers giving rising to a constructive trust. There was no evidence of any undue influence or reliance by plaintiff upon defendant for advice. If plaintiff considered her relationship with defendant Powers as a court defined confidential relationship, plaintiff would not have sought a written agreement between herself and defendant Powers setting forth conditions of the transaction followed by an independent and unilateral decision to move forward with the deed transfer notwithstanding that the purported agreement was not signed by either party.

Plaintiff has failed to present credible evidence that there was lack of consideration for the transfer in May 1999. Plaintiff was represented by counsel in both the transaction and the prior 1993 transaction. Defendant Powers was unrepresented. The plaintiff demanded and received consideration for the transfer. She also benefitted from a discharge in bankruptcy.

Parenthetically, the court notes that plaintiff's instant litigation is either without merit since she had previously sworn to the truth of the contents of the bankruptcy petition wherein she claimed she did not have an interest in real property or is based upon a deliberate misrepresentation to the bankruptcy court. At minimum, her testimony is not credible. She clearly stated under the penalties of perjury that she had no interest in any real property. The court further notes that the amounts of consideration is not unreasonable when viewed in light of the totality of the circumstances. The credible evidence set forth at trial is not sufficient to set aside or modify the transaction. Accordingly, plaintiff's first cause of action is dismissed.

Plaintiff's second and third cause of action are based on an alleged failure of consideration in the transfer of the subject property. There was no evidence to establish that plaintiff entered into an agreement with defendant Powers to sell the subject property for any specific sum of money. The evidence clearly established there was consideration paid. The evidence did not establish any price agreed to or even discussed between the parties for the transfer of the property and as such, the court is unable to consider the amount of consideration paid based upon a claim of failure of consideration. Acknowledging that consideration is either a benefit to the promisor or a detriment to the promisee bargained for by the parties, consideration has been established by the credible evidence. Parenthetically, the court notes there is no claim for inadequacy of consideration. Plaintiff's insufficient claim of failure of consideration bars judgment declaring that the conveyance of the real property be declared null and void. Accordingly, plaintiff's second and third causes of action are dismissed.

With respect to the fourth cause of action, the imposition of a trust upon the real property and/or the proceeds from the sale thereof, based upon a sale of the subject premises and a purported intention by defendant to leave the jurisdiction has not been established. The issue of the sale of the premises and relocation of defendant Powers is not in and of itself sufficient to

establish a constructive trust entitling plaintiff to the relief requested. The elements of a constructive trust as more fully set forth previously herein have not been satisfied by the evidence presented. Accordingly, plaintiff's fourth cause of action is dismissed.

With respect to the fifth cause of action, based in fraud requesting damages in an amount to be determined by the court, plaintiff has failed to assert and demonstrate her entitlement to same. There was no credible evidence to establish that defendant Powers made any false representation of material fact, that she knew the representation to be falsely made, that the representation was made for the purpose of inducing plaintiff to perform a specific act, that plaintiff performed the act in reliance upon her representation and that plaintiff was damaged as a result (see Fink v. Citizens Mortgage Banking Ltd., 148 AD2d 578, 539 NYS2d 45 [2d Dept. 1989]). The credible evidence does not establish that the transfer of the subject premises to defendant Powers was made upon a representation that was false when defendant Powers credibly testified that she never said she would sign the purported agreement and never agreed to its terms. The credible evidence established that defendant Powers agreed to provide \$22,000.00 to plaintiff should the final deed transfer be effectuated without any condition precedent. Plaintiff accepted the \$22,000.00 for her benefit to satisfy her credit card debt. Plaintiff's conversations with defendant Newman clearly indicate that plaintiff knew that defendant Powers had made no promise to her. The credible evidence does not support any of the elements of a cause of action in fraud. Accordingly, plaintiff's fifth cause of action is dismissed.

With respect to the sixth and final cause of action for a breach of contract against defendant Newman, the credible evidence established that plaintiff initially consulted with defendant Newman on a bankruptcy matter. The testimony established that defendant Newman explored the possibility of a Chapter 7 bankruptcy and a Chapter 13 bankruptcy with plaintiff and determined that plaintiff was not eligible for a Chapter 13 bankruptcy and would not be able

to totally discharge her debts in a Chapter 7 bankruptcy inasmuch as she owned an interest in real property.

The credible evidence established that some time thereafter upon plaintiff's request, defendant Newman prepared documents to transfer her remaining one-half interest in the subject property to her daughter, defendant Powers. At the same time, the credible evidence established that defendant Newman prepared a proposed agreement for plaintiff for her and defendant Powers signature. The credible evidence established that defendant Newman, after making modifications requested by plaintiff, prepared an agreement that plaintiff was satisfied with. The credible evidence established that both the plaintiff and defendant Powers did not sign the purported agreement. The credible evidence established that a deed transferring full ownership of the subject property to defendant Powers and the accompanying documents were executed and were to be held pending plaintiff's direction. The credible testimony established that after leaving defendant Newman's office and after considering the matter, plaintiff unilaterally and independently decided to transfer the subject premises to defendant Powers in exchange for the payment of plaintiff's debt by defendant Powers. The credible evidence established that plaintiff understood the nature of her acts and decided to act in the absence of any agreement with defendant Powers.

The credible evidence established it was not until more than two years later after plaintiff sought and utilized the services of defendant Newman to successfully file a bankruptcy petition and obtain a discharge in bankruptcy that plaintiff became dissatisfied with defendant Newman's services. Plaintiff's dissatisfaction took place after she had sworn under the penalties of perjury in a bankruptcy petition that she had no interest in real property. The credible evidence clearly established that plaintiff, after benefitting from a discharge in bankruptcy, based upon the truth of her petition wherein she stated she had no interest in real property, did plaintiff express her dissatisfaction that defendant Newman did not compel defendant Powers to sign the purported

agreement between the parties either before or after the final deed transfer. Plaintiff's claim for breach of contract against defendant Newman after she received and benefitted from a discharge in bankruptcy is disingenuous and has not been established by the credible evidence.

Accordingly, plaintiff's sixth cause of action is dismissed and the lis pendens filed against the subject property shall be discharged.

Based upon the foregoing, the court finds for defendants on all causes of action and the complaint is dismissed without costs or disbursements. The court notes that plaintiff indicated in the event of the dismissal of her case, plaintiff intends to reside with her son in Virginia.

The foregoing constitutes the decision and judgment of the court.

Dated: June 12, 2007


HON. WILLIAM B. REBOLINI, J.S.C.