

Rogowsky v McGarry

2007 NY Slip Op 32983(U)

September 20, 2007

Supreme Court, Suffolk County

Docket Number: 0004519/2007

Judge: Melvyn Tanenbaum

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agreed to not contest their father's Will in return for defendant's promise to share the proceeds of the sale of the Brooklyn apartment. Defendant sold the apartment in 2006 and retained the proceeds of the sale. Plaintiffs commenced this action seeking damages based upon defendant's conduct alleging causes of action sounding in breach of contract, promissory estoppel, fraud, conversion, and unjust enrichment.

Defendant's motion seeks an order dismissing plaintiff's complaint claiming that no viable causes of action exist against "McGARRY". In support of the application defendant submits two affidavits and two affirmations of counsel and claim that this Court lacks subject matter jurisdiction of this action since the issues surrounding the distribution of assets of the decedent's Will are determinable in the Surrogate's Court. Defendant asserts that none of the nine causes of action in the complaint set forth a viable claim against "McGARRY". Defendant maintains that plaintiffs causes of action seeking specific performance (fourth), a permanent injunction (sixth), and imposition of a constructive trust (eighth) must be dismissed since none of these claims set forth a viable claim and since plaintiffs have not opposed their dismissal. Defendant claims the breach of contract cause of action (first) is not sustainable since absent a written agreement the Statute of Frauds bars a claim consisting of an alleged oral contract for the transfer of real property. Defendant argues that documentary evidence contradicts plaintiffs attempt to resurrect the oral contract to allege it included only the proceeds of the sale and not a transfer of the apartment and/or the Southold house. Defendant asserts that an undated letter from MARK ROGOWSKY to "McGARRY" which is attached to the complaint states that defendant was to "make appropriate arrangements to have the Apartment transferred to us"(plaintiffs). It is defendant's position that the breach of contract claim clearly includes an alleged agreement involving the transfer of real property (the apartment and the household) and not merely a transfer of money. Defendant also claims that even if an agreement existed based on his oral promise to transfer the sale proceeds of the apartment to plaintiffs, no valid consideration is alleged since plaintiffs promise to "not contest the decedent's Will" is meaningless absent a showing that some underlying basis existed to contest the Will. Defendant contends that plaintiffs have failed to submit any facts to support viable claims of undue influence, lack of testamentary capacity, fraud or mistake which would have prevented the probate of the Will.

Defendant also claims that no valid claims based upon conversion, promissory estoppel, fraud and unjust enrichment exist since there is no evidentiary proof to support these causes of action. Defendant asserts that plaintiffs cannot prove a clear promise (by "McGARRY") or reasonable reliance upon a promise sufficient to make out a promissory estoppel claim. Defendant maintains that plaintiffs can never prove legal ownership of the apartment or the apartment sale's proceeds which therefore precludes their assertion of claims for conversion and pursuant to RPAPL Article 15 to quiet title. Defendant also maintains that the unjust enrichment claim is not viable since "McGARRY", as a joint tenant, obtained ownership of the house by operation of law upon "ROGOWSKY's" death and obtained the right to the apartment and/or the apartment sale's proceeds upon probate of "ROGOWSKY's" Will. It is defendant's position that no unjust enrichment can be shown since he was legally entitled to them under the terms of the Will and the deed. Defendant also claims the three year statute of limitations period (CPLR Section 214(3)) bars the conversion and unjust enrichment claims since plaintiffs executed the waiver and consent forms in 2001.

Defendant argues that plaintiffs contentions concern the testamentary intent of the decedent "ROGOWSKY" and were therefore litigated and determined in the Surrogate Court proceeding. It is defendant's position that plaintiff is therefore collaterally estopped from asserting these same claims in this proceeding since plaintiffs had the opportunity to contest "ROGOWSKY's" Will in Surrogate Court but elected to execute waivers and consents. Defendant argues that in the alternative since the claims involve persons claiming an interest against a decedent, the proper forum for this dispute is Surrogate's Court and the action should therefore be transferred to Kings County Surrogate's Court.

In opposition to defendant's motion plaintiffs submit affidavits from themselves and their mother, LESLIE ROGOWSKY, and claim that no basis exists to dismiss their complaint since substantial issues of fact exist concerning their father's intent to transfer ownership of his apartment and house to plaintiffs and concerning defendant's promise to fulfill the decedent's wishes sufficient to defeat movant's application. Plaintiffs claim that while he was alive their father repeatedly expressed his intent to leave the Brooklyn apartment or the proceeds from its sale to them and that defendant repeatedly acknowledged that he would honor "ROGOWSKY's" wishes. Plaintiffs assert that they signed the waiver and consent forms based upon defendant's repeated assurances that they would receive the proceeds of the apartment's sale and claim that defendant's failure to honor his commitment provides the basis for claims asserted against him. The root of their disappointment is that they claim that their good relationship with "McGarry" during their fathers life unraveled after their father's death when "McGARRY" started a new relationship with a new partner.

Plaintiffs claim that a valid breach of contract cause of action is set forth in the complaint and that the Statute of Frauds does not bar the claim since defendant agreed to transfer the money realized from the sale of the apartment and not the apartment. It is plaintiffs position that while the Statute of Frauds bars conveyance of real property unless an agreement is in writing, it does not bar a transfer of money representing the proceeds of the real property's sale. Plaintiffs also claim that actionable claims for promissory estoppel, conversion, fraud, unjust enrichment and to quiet title (RPAPL Article 15) are set forth in the complaint. Plaintiffs assert that the three year statute of limitations does not bar the conversion or unjust enrichment claims since the time within which to commence such a claim began when the apartment was sold. Plaintiffs maintain that the Supreme Court has jurisdiction to determine the claims in the complaint and that no basis exists to transfer this action to Surrogate's Court since the controversy in issue involves not the administration of "ROGOWSKY's" estate but the wrongful actions taken by the defendant following "ROGOWSKY's" death. Plaintiffs argue that the doctrine of collateral estoppel does not preclude litigation of the issues raised by the plaintiffs since defendant breached the obligation to pay the proceeds from the sale of the apartment after ownership of the apartment had been transferred to "McGARRY" under the Will and therefore that issue could not have been decided by the Surrogate.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

The doctrine of res judicata prevents a party from litigating a claim which has already been litigated or which ought to have been litigated. (See Siegel, NY Civ. Prac. Sec. 4442, 4443 pp. 585). The principle is grounded upon the premises that "once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again." (GRAMATAN HOMES v. LOPEZ, 46 NY2d 481, 484, 414 NYS2d 308 (1979)).

Collateral estoppel is a component of the broader doctrine of res judicata. A party asserting it must show: 1) that the issue in question is identical with an issue in the prior proceeding, 2) that the issue in question was actually litigated or necessarily determined in the prior action, and 3) that the determination of the issue was necessary to reach the judgment awarded in the prior proceeding (CAPITAL v. PATTERSONVILLE, 56 NY 2d 11, 451 NYS 2d 11 (1982); GILBERG v. BARBIERI, 53 NY 2d 285, 441 NYS 2d 49 (1979)).

The essence of plaintiffs claim is that although their father executed a will leaving most of his estate to defendant, "ROGOWSKY, during his lifetime" repeatedly expressed the desire to allocate the proceeds of his Brooklyn apartment to his sons when it was sold by the defendant "McGARRY". Plaintiffs assert that the defendant was aware of their father's wishes, promised to carry them out and upon his failure to do so this action was commenced. Based upon these undisputed facts no viable contract claim is stated against the defendant.

The elements that must be alleged for a viable breach of contract claim are: 1) formation of a contract between plaintiff and defendant; 2) performance by plaintiff; 3) defendant's failure to perform; and 4) resulting damage (See 2 N.Y. PJI §4:1 438 (2003); FURIA v. FURIA, 116 AD2d 694, 498 NYS2d 12 (2d Dept., 1986); LEDAIN v. ONTARIO, 192 Misc 2d 247, 746 NYSA2d 760 (NY Sup Ct 2002). Even were the Court to accept plaintiffs version of what occurred, no agreement was entered into by the parties and defendant had no obligation to the plaintiffs to transfer funds received in payment for his apartment. The claimed consideration for the transfer of funds was: 1) to fulfill the decedent's wishes; and 2) plaintiffs consent to not contest probate of "ROGOWSKY's" Will. Under the facts in this action, neither formed valid consideration for a binding contract. Moreover plaintiffs have provided no evidence that they had legal grounds to contest their father's will when they executed the waiver and consent forms. There has been no assertion of an absence of testamentary capacity. Absent a showing that grounds existed in the form of undue influence, fraud or duress, plaintiffs relinquished nothing of value in exchange for defendant's alleged obligation to transfer the apartment's sale proceeds. No contract between the parties existed and no valid claim for breach of contract therefore was stated against the defendant.

The remaining claims set forth in plaintiffs complaint sounding in conversion, promissory estoppel, specific performance, fraud, to quiet title, to impose a constructive trust, unjust enrichment and a permanent injunction all emanate from the identical set of facts which formed the basis of plaintiffs breach of contract claim and none states a valid cause of action against the defendant. The decedent "ROGOWSKY" executed a will leaving the Brooklyn apartment he and defendant lived in to "McGARRY". The deed which conveyed title to the Southold home to "ROGOWSKY" and "McGARRY" clearly vested title as joint tenants with the right of survivorship. By operation of law upon "ROGOWSKY's" death, "McGARRY" acquired sole ownership of the Southold house. The Will offered for probate without objection transferred title of the apartment to "McGARRY". No relevant, admissible evidence has been submitted to form any viable claim to contest defendant "McGARRY's" title to either property. Prior to his death, "ROGOWSKY" could have but apparently chose not to modify his will. Moreover, there was no issue submitted as to his ability or testamentary capacity to make changes.

In addition, plaintiffs claim the promises made by "McGARRY" should be enforced. They describe his action in defaulting on his promises as a morally reprehensible act by one who after his lovers death turned his back on his lover's children after starting a new relationship. The promises, if any, on the present record, however have not ripened into a legal obligation. Defendant's motion for an order pursuant to CPLR Section 3211 (a)(7) & 3212 dismissing plaintiffs complaint must therefore be granted. Accordingly it is

ORDERED that defendant's motion for an order pursuant to CPLR Sections 3211(a)(2),(5),(7) & 3212 & 3016 is granted. The complaint is hereby dismissed without prejudice.

Dated: September 20, 2007

MELVYN TANENBAUM

J.S.C.

FINAL DISPOSITION