

Preshaz v Przyziadniuk
2007 NY Slip Op 33030(U)
August 30, 2007
Supreme Court, Queens County
Docket Number: 0009242/2006
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

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LILLIAN PRESHAZ, etc.	x	Index Number <u>9242</u>	2006
		Motion Date <u>May 15,</u>	2007
-against-			
EUGENE PRZYZIAZNIUK		Motion Cal. Number <u>19</u>	
		Motion Seq. No. <u>3</u>	
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The following papers numbered 1 to 22 read on this motion by defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and in his favor on his first, second, fourth and sixth counterclaims; and this cross motion by plaintiff to strike defendant's answer pursuant to CPLR 3120 for failure to provide executed medical authorizations.

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Notice of Motion - Affidavits - Exhibits.....	1-7
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Reply Affidavits.....	19-22

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Walter Przyziazniuk a/k/a Wladislaw Przyziazniuk a/k/a Wakter Przyziazniuk, the parties' now deceased father, and his wife, Rosalia Przyziazniuk, acquired title, as tenants by the entirety, to the premises known as 41-50 39th Place, Sunnyside, New York, by deed recorded on December 10, 1971. Rosalia Przyziazniuk died on February 17, 1987, leaving Walter Przyziazniuk as the sole fee owner. Walter Przyziazniuk thereafter conveyed the property by deed dated July 17, 2000, recorded on August 9, 2000 to defendant. On October 10, 2001, defendant recorded a mortgage, in the principal amount of

\$80,000.00, dated August 24, 2001 against the property. On November 6, 2005, Walter Pzyziazniuk died, leaving a last will and testament dated January 24, 1991, nominating defendant as sole executor and bequeathing the subject premises, to be shared equally between the parties herein. Plaintiff has filed a petition to probate such will.

Plaintiff commenced this action, alleging that the July 17, 2000 deed to defendant was forged, or alternatively, had been executed at a time when Walter Pzyziazniuk lacked the capacity to convey the property due to mental infirmity, or was procured by defendant by fraud, or through undue influence. Plaintiff seeks a judgment declaring that the parties are each seized and possessed as tenants in common in fee of an undivided one-half interest in the premises, and setting aside and cancelling the July 17, 2000 deed.¹ She also seeks an accounting, and an award of special and punitive damages.

Defendant served an answer denying the material allegations of the complaint and interposing counterclaims to quiet title pursuant to RPAPL Article 15, and for ejectment, trespass, a permanent injunction, partition and sale (in the alternative), and unjust enrichment. Plaintiff served a reply, asserting that she is seized and possessed of at least an undivided one-half interest in the premises as a tenant in common with defendant, and otherwise denying the material allegations of the counterclaims.

At the outset, the court notes that the cross motion by plaintiff has been withdrawn pursuant to an affirmation of plaintiff's counsel, presented to the court at a compliance conference held on May 30, 2007, following the date of the submission of the instant motion and cross motion.²

Defendant moves for summary judgment, dismissing the complaint, and in his favor on his first, second, fourth and sixth counterclaims. In support of his motion, defendant offers,

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Plaintiff, in her complaint, also sought to void and cancel the August 24, 2001 mortgage and to declare that all amounts due thereunder to be debts of defendant personally and not of the Estate of Walter Pzyziazniuk. Nevertheless, she has presented evidence which indicates that the mortgage has been since satisfied.

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Plaintiff expressly did not withdraw her opposition to defendant's motion for summary judgment (see infra at 3).

among other things, a copy of the pleadings, his own affidavit and the affirmations of Charles A. Levas and Evan Metalios, attorneys who prepared the July 17, 2000 deed and the "life estate" agreement, respectively, and copies of various documents and relevant deeds, including the deed dated July 17, 2000 and the certificate of acknowledgment attached thereto, and the transcript of the deposition testimony of plaintiff. Plaintiff opposes the motion, and offers, among other things, her own affidavit, and copies of the last will and testament of Walter Pzyziazniuk, dated January 24, 1991, an "M11-q" application form dated September 17, 2002, to the City of New York, Office of Home Care Services, for the provision of home care services for Walter Pzyziazniuk, the transcript of the deposition testimony of defendant, and medical records of Walter Pzyziazniuk.

It is well established that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]), and that the 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]; Zuckerman v City of New York, 49 NY2d 557 [1980]). As such, the function of the court on the instant motion is issue finding and not issue determination (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, supra). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). 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 or her position (see Zuckerman v City of New York, 49 NY2d 557, supra).

Defendant asserts that the July 17, 2000 deed was duly executed and is not a forgery. Defendant cites the existence of the certificate of acknowledgment annexed to the deed, and states he witnessed Walter Pzyziazniuk's execution of the deed.

The certificate of acknowledgement constitutes prima facie proof of the authenticity of Walter Pzyziazniuk's signature (see CPLR 4538; Langford v Cameron, 73 AD2d 1001, 1002 [1980]; see Son Fong Lum v Antonelli, 102 AD2d 258 [1984], affd 64 NY2d 1158 [1985]). "A certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution, which presumption ... can be rebutted only after being weighed

against any evidence adduced to show that the subject instrument was not duly executed'" (Albin v First Nationwide Network Mtge. Co., 248 AD2d 417, 418 [1998], quoting Son Fong Lum v Antonelli, 102 AD2d at 260-261) (Elder v Elder, 2 AD3d 671 [2003]).

Plaintiff states that she is familiar with Walter Pzyziazniuk's signature, and believes the signature on the July 17, 2000 deed, purported to be his, is not genuine. Plaintiff, however, has failed to demonstrate that she is a qualified expert on handwriting, and, thus, any comparison of signatures by her does not constitute competent evidence (see Seplow v De Camillis, 115 AD2d 393, 394 [1985]; DeMarco-McCluskey v DeMarco, 11 Misc 3d 1058(A); Freeman Check Cashing, Inc. v State, 97 Misc 2d 819, 822 [1979]). Plaintiff has failed to submit an affidavit from a handwriting expert, or other evidence which may be used to overcome the presumption of due execution of the July 17, 2000 deed (see e.g. Hoffman v Kraus, 260 AD2d 435 [1999]). Therefore, plaintiff's affidavit, without more, is insufficient to overcome the presumption (see Osborne v Zornberg, 16 AD3d 643 [2005]; Elder v Elder, 2 AD3d 671, *supra*; Giamundo v McConville, 309 AD2d 895 [2003]; Republic Pension Services, Inc. v Cononico, 278 AD2d 470 [2000]; see also Albany County Savings Bank v McCarty, 149 NY 71, 80 [1896]). Thus, plaintiff's submissions have failed to rebut defendant's prima facie showing of entitlement to summary judgment, dismissing the portion of the complaint asserting a cause of action to set aside the July 17, 2000 deed based upon forgery.

As a general rule, the competence of the grantor of a deed, is presumed, and to set aside a transfer of property on the ground of lack of capacity, the plaintiff must establish that the grantor did not understand the nature of the transaction at the time of the conveyance as a result of his or her mental disability (see Buckley v Ritchie Knop, Inc., 40 AD3d 794 [2007]; Crawn v Sayah, 31 AD3d 367 [2006]; Whitehead v Town House Equities, Ltd., 8 AD3d 367 [2004]; Feiden v Feiden, 151 AD2d 889 [1989]; Lopresto v Brizzolara, 91 AD2d 952 [1983]). However, with respect to a claim of procurement of a deed by fraud and through undue influence, the existence of a family relationship between the parties to a deed is an important factor in determining whether a deed is invalid, and equity will intervene to grant relief and prevent the abuse of such confidence where the person, through the influence of such relationship, acquires title to property (see Matter of Gordon v Bialystoker Center & Bikur Cholim, 45 NY2d 692, 698 [1978]; Allen v La Vaud, 213 NY 322 [1915]; Matter of Bumbaca, 182 AD2d 756 [1992]; Loiacono v Loiacono, 187 AD2d 414 [1992]; Matter of Kurtz, 144 AD2d 468 [1988]). As a consequence, when a confidential or family relationship exists between a grantor and a grantee, the grantee must demonstrate by clear and convincing

evidence that the deed is not the product of undue influence (see Atkinson v McHugh, 250 AD2d 560 [1998]; JML Investors Corp. v Hilton, 231 AD2d 493 [1996]).

Defendant asserts that Walter Pzyziazniuk is presumed to have had the requisite mental capacity to execute the July 17, 2000 deed, and that his father was never declared incompetent by any court. Defendant further asserts that he did not procure that deed from his father by fraud, or through undue influence. According to defendant, simultaneous with his father's execution of the July 17, 2000 deed, he and his father executed an agreement, whereby he acknowledged a life estate in favor of his father with respect to the property. In addition, defendant asserts that at about the same time, his father signed two other documents, one written in English and the other in Ukranian, acknowledging the transfer of the right, title and interest in the premises to defendant, and which mentioned Walter's "hav[ing] in mind [plaintiff], but mak[ing] no provision further in connection with the transfer of title herein." Defendant states that he did not make any false representations to his father to induce him to execute the deed, the life estate agreement or acknowledgments, and that at the time of the conveyance, his father was not suffering from any condition or disability which impaired his father's judgment or free will. Defendant further states that plaintiff refuses to vacate the premises, or to pay any rent or carrying charges or expenses related to it.

Mr. Levas affirms that he was contacted by defendant to prepare a deed transferring the premises from Walter Pzyziazniuk to defendant, and that he witnessed Walter's signing of the deed. He also affirms the deed was acknowledged before him as a notary public, and that he witnessed Walter's signing of the life estate agreement. Mr. Levas opines that based upon the comments and responses of Walter Pzyziazniuk, Walter fully understood and comprehended the nature and consequences of conveying the premises to defendant, and was not pressured in any manner to make the conveyance. He further opines that "Walter seemed very alert, sharp and very savvy about protecting his interests."

Mr. Metalios affirms that Walter Pzyziazniuk retained him to prepare a life estate in connection with the deed transaction transferring the premises to defendant. Mr. Metalios states that during the initial meeting, Walter Pzyziazniuk "was lucid and very capable of describing precisely what it was that he wanted." Mr. Metalios further states he witnessed Walter Pzyziazniuk's execution of the July 17, 2000 deed, and opines that Walter was appropriately dressed, responded appropriately to his greetings and comments and "was otherwise competent."

Both Messrs. Levas and Metalios state that they did not make false representations to Walter Pzyziazniuk to induce him to execute the documents, and that no one else in their presence, or to their knowledge, made any such false representations. They both opine that at the time of the conveyance, Walter Pzyziazniuk was not suffering from any condition or disability which would have impaired his judgment or free will.

The evidence offered by defendant is sufficient to make a prima facie showing of mental competency on the part of Walter Pzyziazniuk (see Buckley v Ritchie Knop, Inc., 40 AD3d 794, supra) and the absence of wrongful conduct on defendant in the procurement of the July 17, 2000 deed (see Matter of Gordon v Bialystoker Center & Bikur Cholim, 45 NY2d at 698-699).

The burden shifts to plaintiff to establish a triable issue of fact (see CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, supra).

Plaintiff states that her father had been very sick, both physically and mentally, since the late 1990s, and believes he was not competent in 2000 to make any decision to transfer title to his home. Plaintiff avers that in 1999 her father occasionally confused her with her mother, and was found wandering in the neighborhood without knowing where he lived. Plaintiff also avers this behavior persisted until his death. She similarly testified at her deposition that her father was hospitalized in 1999 and had a toe amputated, and was unable to recognize her and her brother, calling her brother "amigo" or "friend." She also testified that her father was diagnosed at that time in 1999 by Dr. Agarwal as having cardiovascular dementia. Plaintiff states that she resided in the premises with her father from the onset of his illness and in the years preceding his death, for the purpose of caring for him, including administering his medications, and cooking and cleaning for him. She testified that on Monday afternoons in 2000, while she received "soft tissue" therapy in Monroe, New Jersey, defendant attended their father at the premises. In addition, she testified that in 1991, while in Brazil with her father, her father informed her that he was going to make a will. She opines in her affidavit that at the time of the making of the will her father was "still lively and fully aware of all of his family and property." Plaintiff states that she first learned of the existence of the July 17, 2000 deed following her father's death. Plaintiff asserts that she had a very close, loving and affectionate relationship with her father to the end of his life, and has no reason to believe he would have knowingly and willingly disinherited her.

The "M11-q" application form, signed by defendant on September 19, 2002, contains a physician's certification, pursuant to which one "Vishwa N. Agarwal, M.D," certified, to the best of his knowledge, the medical information set forth thereon was true and complete. The form indicated that as of an examination conducted on September 17, 2002, Walter Pzyziazniuk had "Alzheimers" (sic), and was suffering from numerous behaviors highly suggestive of impaired mental status. The form also indicates that Walter Pzyziazniuk required personal care and chore services, and that Dr. Agarwal had been treating Walter Pzyziazniuk since January 15, 1983.

Defendant admitted at his deposition that Walter Pzyziazniuk was sick, suffering from diabetes, and regularly taking medication, during the last six years of his life. Although defendant testified that his father was diagnosed in 2002 by Dr. Agarwal as having "slight Alzheimer's," defendant also admitted that sometime prior to September 19, 2002, a physician stated that his father had Alzheimer's. Defendant claimed he could not recall when he had heard that statement.

Under these circumstances, numerous questions of fact exist for the trier of fact as to whether Walter Pzyziazniuk had the requisite mental capacity to transfer title of the premises to defendant, and whether undue influence was exerted to procure the transfer (see Casucci v Casucci, 8 AD3d 523 [2004]).

Accordingly, the motion by defendant for summary judgment is granted only to the extent of dismissing the third cause of action of the complaint.

Dated: August 30, 2007

Augustus C. Agate, J.S.C.