

Spears v Spears Fence, Inc.

2007 NY Slip Op 33167(U)

October 2, 2007

Supreme Court, Suffolk County

Docket Number: 0015296/2006

Judge: John J.J. Jones

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER



INDEX NO.: 0015296/2006
SUBMIT DATE: 7/11/2007
MTN. SEQ.#: 002; 003

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 6/29/2007
MOTION NO.: 002 - MD
003 - XMD

-----X	
JANET SPEARS a/k/a JANET BRICK,	KLEIN & VIZZI, LLP
	By: John J. Vizzi, Esq.
Plaintiff,	Attys. for Plaintiff
	370 Sunrise Highway, Suite B
-against-	West Babylon, NY 11704
	FEERICK LYNCH MacCARTNEY, PLLC
SPEARS FENCE, INC., KERRY SPEARS a/k/a	By: Donald J. Feerick, Jr., Esq.
KATHLEEN SPEARS as voluntary	Attys. for Defendants
Administratrix of the Estate of Edward J.	96 South Broadway
Spears, and DONALD FEERICK, JR., ESQ.,	P.O. Box 612
Defendants.	South Nyack, NY 10960
-----X	

Upon the following papers numbered 1 to 59 read on this motion and cross-motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-22; 45-46; Notice of Cross Motion and supporting papers 23-44; Answering Affidavits and supporting papers 47-52; Replying Affidavits and supporting papers 53-59; Other ; it is

ORDERED that this motion by defendants, Spears Fence, Inc., Kerry Spears, also known as Kathleen Spears, as voluntary administratrix of the Estate of Edward J. Spears, and Donald J. Feerick, Jr., Esq., and the cross-motion by plaintiff, Janet Spears,

also known as Janet Brick, for an order granting summary judgment in their respective favors are denied.

Plaintiff is the former wife of decedent, Edward J. Spears, who commenced this declaratory judgment action to ascertain the rights of the parties in connection with the distribution of certain insurance proceeds and other funds. It is undisputed that plaintiff is a 40% shareholder of all outstanding shares of Spears Fence, Inc., a corporation that was incorporated on February 11, 1994. The remaining 60% of the outstanding shares of the corporation were held by decedent, Edward J. Spears. According to the plaintiff's affidavit which was submitted in support of her cross-motion for summary judgment, decedent was initially the sole shareholder of Spears Fence, Inc., and plaintiff was an employee of the corporation whom decedent married in 1987. In or about July 2001, a majority of the assets of the corporation, exclusive of bank accounts and receivables, was sold to Island Fence Company, but "corporate existence was continued to permit an adequate period of time to wind down corporate operations." When the funds in two corporate bank accounts were withdrawn on or about October 28, 2001, plaintiff commenced an action against Edward J. Spears and Kathleen Spears alleging, among other things, conversion of corporate assets. The action was resolved by stipulation of settlement dated December 20, 2001, under which corporate liabilities were to be paid and substantial corporate funds were to be disbursed to plaintiff and decedent in accordance with their respective equity holdings. Following the death of Edward J. Spears on June 20, 2004, plaintiff directly applied for and obtained funds under an insurance policy on the life of decedent in which the named beneficiary was Spears Fence, Inc. Plaintiff claims that she received a check in the amount of \$101,808.22 issued to Spears Fence, Inc., on January 21, 2005 which is presently being held in escrow. In addition, plaintiff claims that an additional \$5,018.53 owned by Spears Fence, Inc., is being held in a separate escrow account. On June 1, 2006, plaintiff commenced this action for a judgment declaring that such funds be disbursed and paid in the proportionate shares of 40% to plaintiff and 60% to the estate of decedent.

In their answer to the complaint, defendants asserted three counterclaims. Under the first and second counterclaims, defendants allege that plaintiff converted and misappropriated the insurance proceeds, and they seek recovery of the insurance funds. Under the third counterclaim, defendants claim that plaintiff is liable for the cash value of a life insurance policy on her life under which the corporation, Spears Fence, Inc., was the named beneficiary. Defendants also seek summary judgment against plaintiff on their contention that she relinquished her claim to the insurance proceeds in a stipulation that settled plaintiff's prior claim for distribution of corporate assets. A judgment of divorce filed on April 15, 2004, incorporated by reference the stipulation of settlement between decedent, Edward J. Spears and plaintiff, Janet Spears, dated January 8, 2004, and provided that the stipulation would survive and not be merged in

the judgment. Under Article V of the stipulation, the parties agreed as follows:

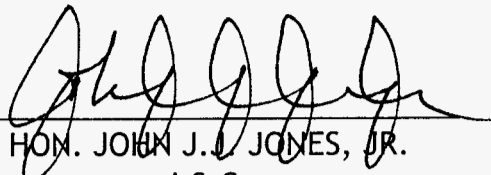
Except as set forth hereinafter, the parties further waive, release and/or relinquish all rights which either may have, or hereinafter acquire, except by a separate writing to be executed subsequent to the date of the Agreement, as against the other spouse's estate, life insurance, pension fund and/or other testamentary substitute or otherwise as a beneficiary under and by virtue of any designation as a beneficiary, in any form, arising prior to the date of execution of his Agreement.

It is the contention of the plaintiff that the parties did not intend for the divorce agreement to include distribution of their respective interests in the corporation, and that plaintiff did not relinquish her right to share in the insurance proceeds as a shareholder of Spears Fence, Inc. Defendants, on the other hand, contend that it was the intention of the parties to wind up the affairs of the corporation upon the settlement of plaintiff's prior action in 2001 and that plaintiff relinquished any claim she had to the proceeds of insurance on the life of the decedent. In this regard, defendants note that the bulk of corporate funds were distributed, beginning with the execution of the stipulation of settlement in 2001. Furthermore, defendants note that defendant Kerry Spears testified at her deposition that she was told by decedent that he had paid the premiums on the insurance policy for 2002, 2003 and 2004. In addition, on or about February 23, 2004, he completed a request for a change of beneficiary to remove the corporation and change the named beneficiary on his policy to his children. Kerry Spears also testified that she mailed the form to the National Benefit Life Insurance Company, which had issued the policy.

Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned, and abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 850 NE2d 653, 817 NYS2d 606 [2006]). However, waiver "should not be lightly presumed" and must be based on "a clear manifestation of intent" to relinquish a contractual protection, and generally the existence of an intent to forgo such a right is a question of fact (see *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d at 105, quoting *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968, 520 NE2d 512, 525 NYS2d 793 [1988]). Moreover, there are issues of fact whether the parties intended that the affairs of the corporation would wind up following the execution of their 2001 stipulation, or that their respective interests in the corporation would continue until all corporate assets had been distributed. Additionally, the evidence before this Court leaves unresolved material issues of fact as to whether, through plaintiff's own failure to act in the three years following the execution of the stipulation,

she abandoned any rights she may have had to share in the proceeds upon the death of decedent (see *Tierney v Drago*, 38 AD3d 755, 833 NYS2d 127 [2d Dept 2007]).

DATED: 2 Oct. 07



HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION