

**Lequerique v Lequerique**

2007 NY Slip Op 33544(U)

October 26, 2007

Supreme Court, New York County

Docket Number: 0115195/2005

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 115195/2005  
**LEQUERIQUE, GABRIELLE**  
 VS.  
**LEQUERIQUE, STELLA**  
 SEQUENCE NUMBER : 001  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

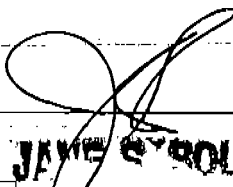
Upon the foregoing papers, it is ordered that this motion

*is decided in accompanying  
 Memorandum Decision Order & Judgment.*

**UNFILED JUDGMENT**

his judgment has not been entered by the County Clerk  
 and notice of entry cannot be served based hereon. To  
 obtain entry, counsel or authorized representative must  
 appear in person at the Judgment Clerk's Desk (Room  
 11B)

Dated: 10/26/07



**JANE S. SOLOMON**

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 55

-----X

GABRIELLE LEQUERIQUE, Individually  
and as Preliminary Executrix of the  
Estate of Richard Lequerique,

Plaintiff,

-against-

INDEX NO. 115195/05

STELLA LEQUERIQUE and LEKERIKA, LLC,  
Defendants.

DECISION, ORDER AND  
JUDGMENT

-----X

JANE S. SOLOMON, J.

This case involves competing claims to the ownership of a building located at 445 West 43<sup>rd</sup> Street in Manhattan (the property). Defendant Stella Lequerique (Stella) moves for summary judgment dismissing the complaint. The motion is granted for the reasons below.

Background

Stella's late husband was Richard Lequerique (decedent), and Plaintiff Gabrielle Lequerique (Gabrielle) is their daughter. Decedent was the sole shareholder of Buckley Funeral Home, Inc. (Buckley) in 1994,<sup>1</sup> at which time Buckley owned the property. By a deed dated February 24, 1994, decedent caused Buckley to transfer the property to himself. The deed was

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<sup>1</sup> In another lawsuit that is before me, Davis v SML Realty Holdings, LLC (NY County Index No. 603292/06), the plaintiff alleges that he owned half of Buckley at the time of the transfer. All parties to this action contend that Davis's claim is without merit, and it does not change the outcome here.



contemporaneously recorded (Affidavit Of Stella Lequerique in support of the motion [Stella Aff.], Exhibit E). In 2000, decedent transferred the property to himself and Stella as tenants by the entirety. The 2000 deed was recorded as well (Stella Aff., Exhibit F).

Stella was not involved with decedent's operation of Buckley and the property. By 2003, Gabrielle was involved with her father in the operation of his businesses. Late in 2003, Gabrielle contacted George Calcagnini, Esq., an attorney she knew, because an offer for a long term lease of the property had been received. He referred her to David P. Stich, Esq., for Mr. Stich's expertise in real estate matters. Mr. Stich submits an affidavit describing his January 2004 meeting with Gabrielle, Stella and decedent and the advice he gave; he states that he did no work thereafter and that he did not charge a fee for the consultation. He states:

I learned that Mr. and Mrs. Lequerique owned the Property in their individual names, in equal shares, with right of survivorship. I was struck by this ownership structure as it was unusual because my experience had been that most commercial property owners chose ownership by a business entity such as a limited liability company, to insulate themselves from personal liability. I discussed this with Mr. and Mrs. Lequerique. In particular, I recall that Mrs. Lequerique was concerned about the type of liability she could personally have as a result of the title as it then stood, and how it could be avoided. I recall giving them the advise that, no matter what, if the Property was not going to be sold or otherwise conveyed in the near future, they should form a business entity and transfer title of the Property to a business

Stella. At his deposition, he could not recall that she said anything much, only that she signed documents when told to. Mr. Calcagnini testified that he viewed the decedent as his client, although he spoke by phone mostly with Gabrielle, who sought his involvement by calling on February 18, 2004 to tell him that her father was ill with kidney cancer and wanted to form the LLC (Transcript of George Calcagnini, at 20). He also described his conversations with the decedent, including that, in response to concerns the lawyer continued to express, the decedent reported on consultations with his accountant (id., at 27), and in which he explained his disagreement with the articulated reason for transferring the property, namely that the Lequeriques would protect their assets, by discussing the protection provided by adequate insurance (id., at 74). Perhaps most significantly, when asked what he would have done had he seen the 2000 deed, he stated:

Well, first thing I would have to explain to Stella about the rights of survivorship and particularly in view of the fact Richard was going to pass away in a very short period of time. I would have had to explain to her at that point it would have raised a conflict of interest, I would have now made sure she was giving up rights of survivorship. (Id., at 52).

Richard had made a will in 1991 leaving everything to Stella or, if she predeceased him, 75% to their then infant daughter Alexandra and 25% to Gabrielle. On October 19, 2004, he executed a new will, this one prepared by Mr. Calcagnini, which

left Stella only her marital share, and the balance to the daughters, this time with Gabrielle receiving 80% and Alexandra 20%. Richard died on July 17, 2005. Stella offered the 1991 will for probate. Thereafter, the 2004 will was found in decedent's office, and the Surrogate's Court of Westchester County appointed Gabrielle as preliminary executor; preliminary letters testamentary were issued to her on or about November 16, 2005.

This Lawsuit

Plaintiff here is Gabrielle, originally in her own right; the complaint subsequently was amended by court order to permit her also to proceed as preliminary executrix of decedent's estate. Underlying all the relief sought is her assertion that Stella had intended to transfer her entireties interest to Lekerika. Stella now moves for summary judgment dismissing the complaint on the ground that, as the surviving spouse of property owned as tenants by the entirety, she became its sole owner upon decedent's death.

Gabrielle alleges in the complaint that Lekerika was created in connection with decedent's estate planning, that decedent and Stella believed that title to the property was transferred to Lekerika, and that the attorney involved in the transaction mistakenly relied upon the 1994 deed and was unaware of the 2000 deed. She seeks a declaration that Lekerika is the

owner of the property, with Stella and the estate being co-owners of Lekerika, and she seeks reformation of the deeds to conform to the parties' intent. She also asserts claims for conversion, demands \$5 million in damages, and seeks to impose a constructive trust on the property for the benefit of decedent's estate. The property is valued at approximately \$7 million.

A tenancy by the entirety is a form of real property ownership available only to parties married at the time of the conveyance (Goldman v Goldman, 95 NY2d 120 [2000]). It is distinguished by the fact that it confers on the surviving spouse a right to absolute ownership of the property upon the other spouse's death (V.R.W. Inc. v Klein, 68 NY2d 560 [1986]). "It is well established that a conveyance by one tenant, to which the other has not consented, cannot bind the entire fee or impair the nonconsenting spouse's survivorship rights." (Id. at 564).

Stella, Gabrielle, and Mr. Calcagnini were deposed during this lawsuit and the transcripts are submitted on this motion. They, as well as Mr. Stitch, submit affidavits on this motion as well. The testimony suggests that Stella was not fully informed about the chain of title to the property. Accordingly, her acquiescence in creating the limited liability company and the transfer to Lekerika is not evidence that she consented to conveying the property from herself as a tenant by the entirety, or that she consented to her husband conveying his interest in

the property they shared as tenants by the entirety and thereby destroying her right of survivorship. Any such transfer would need to be in writing to be effective (General Obligations Law § 5-703). Indeed, the 2004 deed, which purports to transfer an interest that decedent did not own, is defective on its face.

Gabrielle argues that Stella may have been aware of the 2000 deed, and intentionally gave Gabrielle a copy of the wrong deed, i.e., the 1994 deed, in connection with creating Lekerika and transferring the property to it. If true, this would support the contention that Stella was aware that she was an owner of the property; but it undermines Gabrielle's argument that Stella intended to transfer the property from herself to Lekerika. Instead, it supports the view that Stella was not consenting, and that there was no mistake to justify reformation. If Stella's ignorance of the true nature of her interest in the property is accepted, then there could not have been assent on her part to transfer title away and relinquish her right to survivorship at a time when it was known that decedent was seriously ill.

Reformation is an equitable remedy intended to make a defective writing conform to the agreement of the parties upon which there was mutual assent (27 Lord, Williston on Contracts § 70:19 [4<sup>th</sup> ed]). If the writing fails to set out the agreement correctly because of a mutual mistake, it may be reformed (id.). "Mutual mistake involves situations where the parties have

reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (id.). The mistake must have been in the drafting of the instrument, not in the making of the contract (66 Am. Jur 2d, Reformation of Instruments § 11). Generally, ignorance of a fact is not grounds for reformation, but it could be grounds for rescission on the theory that there was no meeting of the minds (66 Am. Jur 2d, Reformation of Instruments § 14). A proponent of reformation must establish her right to such relief by clear, positive and convincing evidence (Amend v Hurley, 239 NY 587, 595 [1944]).

Gabrielle has not met her burden to justify reformation. Mr. Stich states that Stella and decedent knew that Stella owned the property as a tenant by the entirety, and that he advised them of their rights in that form of ownership. Yet Gabrielle, by faxing the 1994 deed, conveyed her father's instruction to Mr. Calcagnini to draft a deed by which only he conveyed title. Mr. Calcagnini made no mistake; he did what he was told with the information provided to him. We never will know what was on the decedent's mind, and the record here does not support a mistake by Stella either. There was a mistake in fact extrinsic to the contract. The discussion in Petchanuk v. Mohlsik (209 Misc 39, 43 [1954]) is instructive. There, the mistake communicated to the scrivener, that the parties were married (but they were not) did not justify reformation to make

the deed there one of a joint tenancy. Similarly, the mistake communicated to Mr. Calcagnini, that only the decedent owned the property, does not justify reforming the deed to include Stella as grantor.

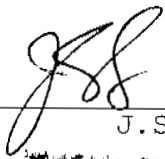
Finally, there is no evidence to support a claim by Gabrielle in her individual capacity, which is implicitly acknowledged by the parties' submissions addressing only the claim by decedent's estate. Plaintiff's other contentions have been considered, and are unavailing. Accordingly, it hereby is

ADJUDGED and DECLARED that Stella Lequerique is the owner of the property located at 445 West 43<sup>rd</sup> Street, in New York County, State of New York; and it further is

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: October 26, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**JANE S. SOLOMON**

**UNFILED DOCUMENT**  
his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 918)

