

Wilder v Tomaino

2007 NY Slip Op 34602(U)

January 9, 2007

Surrogate's Court, Suffolk County

Docket Number: 2110 P 2004

Judge: John M. Czygier

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JAN 0 3 2007

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SURROGATE'S COURT : SUFFOLK COUNTY

Greg Wilder and Grace Fields, as)
Co-Executors of the goods, chattels and)
credits which were of LENA M. GUARRACI)
a/k/a NICOLINA M. GUARRACI, Deceased,)

Plaintiffs,)

- against -)

Janet Tomaino, Santino Tomaino, James)
C. Schultz, National Summit Group, Inc.)
Irrevocable Living Trust, National)
Summit Group, Inc.,)
Defendants.)

DECISION AND ORDER

By: HON. JOHN M. CZYGIER, JR.,
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Surrogate
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Dated: January 9, 2007

File #: 2110 P 2004
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This action was commenced in Supreme Court for a declaratory judgment and for judgment directing defendant(s) to execute a deed transferring certain premises at 77 Newton Blvd., Lake Ronkonkoma, New York to then plaintiff, Lena Guaracci. By decision dated September 9, 2005, a motion to dismiss by certain named defendants was granted and a cross-motion to dismiss by the Tomaino defendants was denied. Since that time, the complaint has been amended and James C. Schultz and National Summit Group, Inc. Irrevocable Living Trust have been added as party defendants. Plaintiffs now move for an order granting summary judgment; a declaration that they are the legal owners of certain premises located at 77 Newton Boulevard, Lake Ronkonkoma, New York; setting aside the transfer of 77 Newton Boulevard from Lena Guarraci to Defendant National Summit Group, Inc.; and for other relief attendant thereto. For the reasons set forth herein, the motion is granted, in part.

The procedural history of this matter was detailed in the aforementioned September 9, 2005 decision. Said procedural history and other background information will not be reiterated herein. The parties have now completed their discovery in this matter.

It is undisputed that the Tomainos had a close and confidential relationship with the decedent, particularly after her husband died in January, 2002. Upon her release from the hospital in June, 2002, plaintiffs' decedent was eighty-six (86) years of age and in a weakened condition. During her recovery at home, the Tomainos, presented her with various papers for her signature. According to the pleadings she initially filed, plaintiffs' decedent later discovered that the papers included a power of

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attorney, which decedent executed in favor of Janet Tomaino, a document the parties refer to as a "health care proxy" naming Janet Tomaino "Guardian for Care and Management of Lena M. Guarraci and Estate," and a deed transferring the property at 77 Newton Boulevard, Lake Ronkonkoma, New York. The Court notes that both the power of attorney and "health care proxy" carry the date June 28, 2002. Plaintiffs' decedent's signature on the deed was not notarized or acknowledged. Subsequently, Janet Tomaino signed the deed as decedent's attorney-in-fact and then transferred the property into the name of National Summit Group, Inc., of which the Tomainos were sole owners. The deed carries the date of July 1, 2002, although the date on the notary is July 5, 2002.

It was plaintiffs' decedent's contention that she did not learn of the transfer of the property until she had an estate planning consultation with an attorney who advised her that her home was no longer in her name. In fact, an affidavit from Nancy Burner, Esq. attached to plaintiffs' papers supports this contention and details the actions she undertook to commence recovery of the property, including contacting the District Attorney's Office, obtaining the names of the owners of National Summit Group, contacting Adult Protective Services to arrange for revocation of the power of attorney, and demanding that the Tomainos return the property. Attorney Burner advises that the Tomainos promised to do so but never executed a deed to that effect. Decedent then retained Attorney Burner to commence an action in Supreme Court for that purpose. Said action was commenced by filing a summons and complaint with notice of pendency in October, 2003. Attorney Burner emphatically states that decedent was fully aware of the allegations contained in the Supreme Court action, as well as the contents of the will Attorney Burner prepared at decedent's direction. Decedent's will, dated August 25, 2004, was admitted to probate in this Court on April 18, 2006.

On November 1, 2004, some five days after decedent's death, her representatives obtained a temporary restraining order, pursuant to their request for a preliminary injunction, which restrained the Tomaino and National Summit Group, Inc. defendants "...their agents, servants, employees, assigns, and all persons acting on their behalf...from expending, selling, pledging, transferring, assigning, distributing, encumbering and otherwise disposing of the property located at 77 Newton Boulevard, Lake Ronkonkoma, New York...." Subsequently, the trustee (defendant Schultz) of a certain *inter vivos* trust established by the Tomainos

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appeared at the property for the purpose of changing the locks. He was advised of the temporary restraining order and pending action concerning the property. It appears that the trust was created and property transferred to it without notice to plaintiffs' decedent and in spite of the pending Supreme Court action and a *lis pendens* on the property. The transfer to the trust on August 24, 2004 was not discovered until after plaintiffs' decedent's death. Indeed, a motion was made to add party defendants for that reason, resulting in a decision granting same on December 27, 2005. The trustee (Schultz) then transferred the property to Janet Tomaino on January 12, 2006, in apparent violation of the restraining order.

In addition to the chronology of events concerning the subject property's transfers, plaintiffs point to Jonathan Kahn's deposition testimony. Kahn was the notary public who witnessed decedent's signature on the power of attorney and "health care proxy." He testified that, on the day in question, June 28, 2002, he went to decedent's home and found her sitting up in bed. While he testified that she appeared awake and alert, she also appeared to be sick and frail, and there were what appeared to be medications on her bedside table. While she initially refused to sign the papers, the testimony indicated that she eventually signed them after Santino Tomaino discussed them with her. Kahn testified that he never notarized decedent's signature on a deed, only Janet Tomaino's signature. He acknowledged that he crossed out decedent's signature on the deed because decedent was not present for him to notarize the signature on July 5, 2002.

Plaintiffs also support their arguments with the deposition testimony of Detective Kevin Keyes of the Suffolk County Police Department, District Attorney's Office. Keyes testified that he originally met with the decedent in May, 2004, after she had filed a complaint with the police about her house. He filed a report, but criminal proceedings abated upon decedent's death.

Plaintiffs note that Santino Tomaino testified at his deposition that he prepared the power of attorney and "health care proxy" on his computer. Plaintiffs argue that the form used does not comply with the statutory requisites for a short form power of attorney (General Obligations Law §5-1501), that it did not contain authority to make gifts and that there has been no showing that the gift of the house would have been in decedent's best interests. They further maintain that the testimony of the Tomainos and Kahn lend credence to their contention that decedent never read these documents herself and did not understand what she was signing.

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There is no evidence that valid consideration was exchanged for the property. Further, they maintain, there is testimony from Santino Tomaino that when she questioned the transfer he may have told decedent that her nephew would put her in a (nursing) home as soon as she gave him (her nephew) the house.

This leads plaintiffs to conclude that there were false representations made to decedent in order to induce her to execute the documents at issue herein.

They also emphasize Santino Tomaino's testimony about decedent's assets to which the Tomainos believed they were entitled, including the contents of the garage, which contained two cars, a snow blower and tools, as well as a John Hancock account containing \$130,000.00. Santino Tomaino stated in his deposition "...that money belongs to Janet and I." He, apparently, believed that decedent made a promise to give that money to them.

Defendants' attorney, Arthur V. Graseck, Jr., Esq. (Graseck) was also deposed. He is the nominated "Trust Protector" and alternate successor trustee of the National Summit Group, Inc. Irrevocable Living Trust. In his testimony, Graseck appeared to claim that the trust was created in order to make the Tomainos' purposes clear after receiving a negative impression from the Supreme Court Judge's law clerk regarding the transfer to the corporation. They profess that they wanted it known that the house would be available to decedent (via a purported life estate) while they (the Tomainos) had a future interest in the property. This and Graseck's continued attempts to keep decedent from recovering title to the property leads plaintiffs to argue that Graseck breached a fiduciary duty to decedent and that he should be sanctioned.

Defendant Schultz testified at his deposition that, upon reviewing the deed transferring the property from decedent to National Summit Group, he felt that there was a conflict of interest between Janet Tomaino and National Summit Group, but still arranged for preparation of the trust and conveyance of the property from National Summit Group to the trust. He, apparently, did this while he was aware of the lawsuit and the notice of pendency. Plaintiffs maintain that this conduct is also sanctionable and that both Graseck and Schultz should be responsible for the costs of this action.

In his papers in opposition to plaintiffs' motion, defendant

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Schultz indicates that he was consulted by Attorney Graseck to insure that decedent would be able to remain on the premises at 77 Newton Boulevard in Lake Ronkonkoma for the rest of her life. To this end, he reviewed the deed, which transferred title to National Summit Group, Inc. without retention of a life estate. He also asserts that he knew of the order of protection keeping the Tomainos from contacting decedent, but was not aware of a restraining order prohibiting further transfer of the property. He maintains that his drafting the trust and deed transferring the property to the trust was for the sole purpose of giving decedent a life estate in the property.

For their part, the Tomainos have maintained in their pleadings and papers in connection with prior motions in this matter that they were friends and neighbors of plaintiffs' decedent and her predeceased husband since 1979. It is their contention that Frank Guarraci expressed his concern to them that his wife would be taken advantage of by a relative (nephew Greg Wilder, plaintiff herein). They claim that it was never their intention to defraud her, but to protect the property for her benefit. They argue that, to this end, they established an *inter vivos* trust in August, 2004, giving decedent a life estate in the home. They continue to maintain that all their actions had been intended to save decedent from the ill intentions of her relative(s), who they further claim was the driving force behind the pursuit of the instant action against them.

It is also counsel's contention that the transfer was intended to compensate Janet Tomaino for services rendered, not as a gift.

The Tomainos insist that decedent was intimidated and afraid that her nephew (plaintiff Wilder) would place her in a nursing home and that this entire litigation is at his behest.

Arguments

In his memorandum of law, Schultz argues that plaintiffs have not sustained their burden of proof, that much of the evidence they proffer at this point is barred by CPLR 4519, that the validity of the initial deed executed by decedent in favor of National Summit Group, Inc. is not dependent upon a valid power of attorney, and that the Court should deny the motion for summary judgment, as only a jury should be allowed to sort out the intent of the parties to the various documents at issue herein.

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The Tomainos' counsel in opposition to this motion appears to be arguing that plaintiffs' are making their arguments based on unsubstantiated conclusions and subjective analysis of the defendants' credibility at their depositions. He further argues that there is no evidentiary value to the claims raised on this motion and that there is, thus, insufficient basis for the Court to grant summary judgment. Counsel also argues that a *lis pendens* merely connotes notice of litigation, but does not prevent the transfer of the property which is the subject of the action. In addition, he argues that the existence of the preliminary injunction did not prevent the transfer of the property from the trust to Janet Tomaino. Counsel claims that Santino Tomaino's testimony that decedent's signature on the deed was crossed out due to a misunderstanding of an instruction he (Tomaino) received from the County Clerk's Office and his insistence that decedent signed said deed before a notary public create issues of fact. He accuses plaintiff Wilder of being the source of the allegation that the Tomainos attempted to extract money from decedent's bank account and of instigating the underlying litigation while his aunt was still alive. For some reason, he insists that where a conflict exists between the Tomainos' testimony regarding a notary of the signature on the deed and Kahn's testimony that he never notarized the deed, the Tomainos' testimony should be accepted as accurate, as opposed to the testimony of a disinterested, non-party witness.

Plaintiffs' argument is that the facts before the Court are undisputed: the Tomainos and decedent had a close, confidential relationship; decedent executed a power of attorney and deed under "questionable" circumstances; the Tomainos used the power of attorney to convey the premises to their corporation, a transfer not authorized by the terms of the power of attorney; upon discovery of the transfer, decedent revoked all powers of attorney and demanded the return of her property; defendants refused to comply; after the underlying action was commenced, defendants created the National Summit Group, Inc. Irrevocable Living Trust; the property was then conveyed to same, and then to Janet Tomaino after decedent's death while these proceedings were pending.

With respect to the transfer of the property itself, plaintiffs' contend that the motivation behind these transactions is inconsequential. The initial transfer of the Lake Ronkonkoma premises was invalid, therefore, the circumstances surrounding same are irrelevant.

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Discussion

The power of attorney discussed herein named Janet and Santino Tomaino "Co-Agents." Paragraph 11 of the form executed states, in part: "...my Agent may not make gifts of my property to the Agent, the Agent's estate or creditors, or the creditors of the Agent's estate." Decedent's signature appears on the deed transferring 77 Newton Boulevard to National Summit Group, Inc., but was never properly acknowledged. Said signature was crossed out and Janet Tomaino's signature, as attorney-in-fact, was notarized by Jonathan Kahn. Santino Tomaino signed as witness.

Since the initial transfer of 77 Newton Boulevard was invalid, pursuant to the terms of the power of attorney, all subsequent transfers of the premises are invalid.

References made during deposition testimony to funds transferred or considered by the Tomainos to be theirs due to alleged conversations with the decedent do not rise to the level of a cause of action for *quantum meruit* relief (See, *Estate of McCarty*, 7/30/97 NYLJ 26 (col. 4); citing, *Bauman Associates v. H & M Intern. Trans.*, 171 AD2d 479 and *Matter of Gordon's Estate*, 8 NY2d 71). Thus, any transfers made to defendants through the subject power of attorney can only be deemed alleged gifts, which would be prohibited by the very language of the instrument itself. As such, the transfer of the subject realty and any additional transfers made to the Tomainos directly or indirectly (to their corporation or to the trust in which they have an interest) are also invalid, not only because they violate the terms of the subject power of attorney, but because defendants have not established that the transfers were in the best interest of the principal (*Matter of Ferrara*, 7 NY3d 244).

Plaintiffs are also seeking compensatory and punitive damages in their complaint, but this will require an evidentiary hearing and a determination by the trier of fact. Sanctions may be awarded after a hearing before the undersigned.

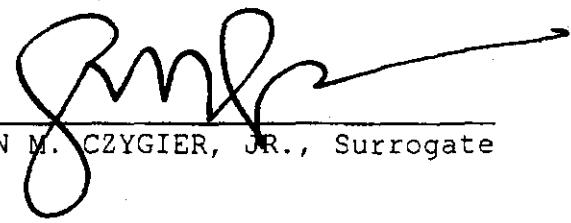
Accordingly, for the reasons set forth herein, it is

ORDERED THAT plaintiffs' motion for summary judgment is granted solely to the extent of declaring plaintiffs, as representatives of subject decedent's estate, to be the legal owners of 77 Newton Boulevard, Lake Ronkonkoma, New York; setting aside the transfer of the property from Lena Guarraci to National

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Summit Group, Inc.; cancelling and vacating the deed running from Lena Guarraci to National Summit Group, Inc.; setting aside the transfer of the property from National Summit Group, Inc. to James C. Schultz and National Summit Group, Inc. Irrevocable Living Trust; cancelling and vacating the deed running from National Summit Group, Inc. to James C. Schultz and National Summit Group Inc. Irrevocable Living Trust; setting aside the transfer of property from National Summit Group Inc. Irrevocable Living Trust to Janet Tomaino; cancelling and vacating the deed running from National Summit Group, Inc. Irrevocable Living Trust to Janet Tomaino; directing these defendants and/or the current title holder of 77 Newton Boulevard to execute a deed and/or all documents necessary to effectuate transferring the real property to plaintiffs; and requiring defendants to disclose all assets transferred by them under the purported power of attorney and turn over said assets to plaintiffs, as representatives of subject decedent's estate.

Counsel shall attend a conference at the Surrogate's Court on January 31, 2007 at 9:30 a.m. to discuss any outstanding issues concerning the subject action.



 JOHN M. CZYGIER, JR., Surrogate

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