

Friedland v Vitucci

2008 NY Slip Op 31542(U)

May 27, 2008

Supreme Court, Nassau County

Docket Number: 0765-06/

Judge: John M. Galasso

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
GEORGE FRIEDLAND, as Administrator of
the Estate of Shirley Dounan a/k/a Shirley
Damsker, Plaintiffs,

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Sequence #004

- aga nst -

Part 40

BENJAMIN M. VITUCCI, Defendant.

5/14/2008

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Upon the foregoing papers defendant’s motion for an order pursuant to CPLR §3212 for summary judgment based on documentary evidence is granted and the complaint is dismissed in its entirety.

This case involves decedent’s residence to which defendant ultimately obtained title based upon consideration. The notarized documents reflect that on August 8, 2001 for the consideration of \$110,000.00 and which was subsequently recorded as \$134,410.00, the subject premises were conveyed by the deceased to defendant with the retention of a life estate and subject to her paying local real estate taxes and sewer and water bills. According to defendant and as evidenced by Exhibits “2 through 4”, the monetary discrepancy is explained that at closing, additional sums were necessary to pay-off decedent’s June 19,1998 \$249,000.00 reverse mortgage.

On February 14, 2002 decedent executed a quit claim deed to defendant, thereby relinquishing her life estate for the consideration of \$10.00 plus “other valuable consideration” to be used for the purposes of improvement of the property.

On the same day defendant entered into an FNMA rehabilitation loan agreement and mortgage for \$180,000.00 on the property.

Simultaneously, decedent as tenant and defendant as landlord executed a witnessed lease agreement, whereby deceased leased the main floor of the subject premises for a term of 20 years,

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rent free, with exception of payment for her utilities.

Subsequently, the house was renovated and the certificate of completion filed on June 17, 2003.

On August 14, 2003, decedent executed a will, power of attorney and health care proxy listing her address as the subject premises.

On April 17, 2006 decedent passed away having lived at the subject premises until her death.

Plaintiff, decedent's brother and an administrator of her estate, asserts that decedent was manipulated and under defendant's undue influence when she executed the two deeds over four years prior to her death. He submits his own deposition testimony and that of defendant in support of his claim. Plaintiff also points to other subsequent matters involving building permits and a permit to have a legal senior residence apartment as evidence of defendant's prior intent to use undue influence upon the decedent.

Thus, plaintiff maintains he has raised issues of fact and credibility necessitating a trial.

Defendant has established by conclusive documentary evidence his titled ownership of the subject property as a matter of law (*Held v. Kaufman*, 91 NY2d 425; see *M. Fund, Inc., v. Carter*, 31 AD3d 620).

The burden of *prima facie* proof of the claim of undue influence now rests on plaintiff.

The case before the Court is lacking in any facts demonstrating defendant's influence amounted to moral coercion that destroyed the deceased's free will (see *In Re Walter's Will*, 6 NY2d 49).

Circumstantial evidence indicating motive and opportunity are insufficient to raise a triable issue of fact unless there is actual evidence of the undue influence (*Whitehead v. Townhouse Equities*, 8 AD3d 367; see *Matter of Fuimaia*, 47 NY2d 845, *In re Chiurazzi*, 296 AD2d 406).

Plaintiff refers to a conversation with the deceased about five months prior to her death when she was 85 years old when she stated she was "fearful," without quite articulating the reasons or origin of her state of mind. There are no allegations whatsoever that the deceased was, at any time, mentally incompetent. Plaintiff merely "thinks" his sister was manipulated. The record reveals that,

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that defendant, who lived next door with his parents, knew "Shirley" since he was a child.

At some point she began living alone in the house, her children and husband having predeceased her. She obtained a reverse mortgage to pay for her expenses. Her resources were rapidly depleting and it is uncontradicted that she was in debt to several creditors.

After the scenarios described above supported by documentary evidence and uncontradicted statements, she was living in the main floor of the house rent free. Thereafter, she was able to obtain medicaid for at-home nursing care. Defendant, now as landlord, was entirely responsible for the house upkeep, taxes, etc. Her only expense was to pay for her portion of the utilities, which she did out of her own money. Plaintiff has failed to sustain any claim that defendant wrongfully converted her monetary assets.

Plaintiff also points to the quit claim deed of February 14, 2002 as evidence of undue influence, asserting there was a lack of consideration. Aside from the rule of law that the adequacy of the consideration is irrelevant with respect to a deed's validity (see *Adamkiewicz v. Lansing*, 288 AD2d 531), plaintiff's assertion is not accurate.

It is undisputed that the deceased lived next door with defendant's parents during the renovation process, also rent free. Defendant used the monies he obtained from the mortgage to improve the entire house and convert it to a senior residence. The deceased ultimately resided in the main apartment. Plaintiff admits prior to the renovation that the house was not in good condition.

Plaintiff's allegation that his sister did not live in the apartment rent free is based on his speculative testimony that he had helped her to obtain medicaid by filling out the forms and, in the process, reviewed her financial documents from the prior three years. However, no canceled rent checks or bank statements are produced to indicate she was paying rent. Furthermore, plaintiff also testified he actually paid defendant the decedent's utility bills with her own money and that was all he paid to defendant on her behalf. Moreover, the deceased previously told him she was living in the apartment rent-free.

Whether defendant employed certain fictions to obtain the requested building permits and certificate of occupancy by itself is irrelevant to any question of undue influence. Plaintiff has no standing to challenge the legitimacy of any municipal approval process just as defendant was

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not privy to the Medicaid application.

As to the cause of action for conversion of the decedent's personal property left in the apartment, this Court by prior order arranged for plaintiff's retrieval of her possessions. Plaintiff has submitted no evidence in support of the fourth cause of action.

Concerning the sixth cause of action, which the Court severs from the main action, plaintiff's claim the estate is due the monies collected for rent from defendant's new tenant thus precluding summary judgment is unsupported. Notwithstanding the general rule that a lease for a number of years is not terminated by the death of the lessee but passes to the estate which remains liable for the rent (NYJUR LANDLORD §817; Real Property Law §236), the lease specifically states that it terminates upon the death of the tenant.

The purpose of Real Property Law §236 governing the assignment of a deceased tenant's lease is to benefit the estate by relieving it of the leasehold rent obligations for the rest of the term if the landlord either terminates the lease or unreasonably refuses to consent to a sublet (*Joint Properties Owners, Inc. v. Deri*, 113 AD2d 691, 497 NYS2d 658). The subject lease's provision that it terminates upon the tenant's death is not contrary to Real Property Law §236 because it absolves the estate from any potential liability, e.g., for damage to the apartment.

Furthermore, there is no evidence that plaintiff made any attempt to comply with Real Property Law §236; consequently, defendant also had the statutory power to terminate the lease (see *Wisnod v. Kibel*, 115 AD2d 735, 738).

Accordingly, the sixth cause of action is, likewise, dismissed.

Dated: May 27, 2008

**ENTERED** J.S.C.  
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