

Jacks v D'Ambrosio

2008 NY Slip Op 31597(U)

May 14, 2008

Supreme Court, Nassau County

Docket Number: 1545-06/

Judge: Kenneth A. Davis

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY

Present:

HON. KENNETH A. DAVIS
Justice

LAURENCE M. JACKS, X TRIAL/IAS, PART 3

Plaintiff,

INDEX NO.:06/021545
MOTION SEQUENCE: 1

-against-

JEANMARIE D'AMBROSIO, Individually and as
Executor of the Estate of LOUISE DALESSIO
and THE ESTATE OF LOUISE DALESSIO,

Submission date: 5/5/08

Defendant.

X

The following papers were read on this motion:

- NOTICE OF MOTION..... X
- AFFIRMATION in OPPOSITION..... X
- REPLY AFFIRMATION..... X

The defendant moves by Notice of Motion for an order pursuant to CPLR §3212 dismissing plaintiff's complaint in the entirety and granting summary judgment in defendant's favor. The plaintiff opposes the motion.

The plaintiff commenced the action for conversion, fraud and undue influence by filing a Summons and verified complaint on December 20, 2006. In his complaint the plaintiff alleges that on June 8, 2005 his name was added, as a joint tenant, to two bank accounts of defendant Dalessio held at JP Morgan Chase Bank N.A. The source of the funds, which totaled \$138,556.00, was solely defendant Dalessio. Defendant D'Ambrosio was also a named joint tenant on the accounts. On or about July 17, 2006, defendants Dalessio and D'Ambrosio withdrew all the funds from the aforementioned bank accounts, and deposited said funds in a separate account bearing the names of Dalessio and D'Ambrosio alone. Defendant Dalessio died on August 18, 2006.

In support of the motion for summary judgment the defendant

alleges that the plaintiff can not proffer any evidence to establish the allegations of undue influence and conversion set forth in the complaint relative to the conduct of D'Ambrosio. The defendant maintains that the plaintiff testified, at his examination before trial (hereinafter "EBT"), that he had no actual knowledge with regard to D'Ambrosio's actions relative to the subject bank accounts. According to the transcript of the plaintiff's EBT, the plaintiff denies knowledge as to whether or not the withdrawn funds were placed into a joint account with defendant D'Ambrosio and the deceased. The plaintiff also denied knowledge as to how the deceased was deprived of the withdrawn funds.

The defendant submits that defendant D'Ambrosio did escort defendant Dalessio to a nursing home and did remove the funds from the joint account into a newly created account, however maintains that these actions were carried out based on the wishes of defendant Dalessio. The defendant alleges that the new account was created "because [the deceased] wanted it done", and alleges that the deceased was concerned that the plaintiff had "taken her bank books, and checkbook." The defendant further claims that there is no evidence that defendant D'Ambrosio "converted" the funds at issue, or perpetrated a fraud or exerted undue influence in order to have the money transferred.

The plaintiff claims that the summary judgment motion should be denied on the grounds that defendant Louise Dalessio admittedly lacked mental capacity. The plaintiff maintains that because the defendant has failed to provide an accompanying affidavit from a person with knowledge of the facts, the allegations of lack of mental capacity, overreaching and conversion are unrefuted. The plaintiff further claims that the deposition testimony of defendant D'Ambrosio confirms the fact that defendant Dalessio was mentally and physically weak at the time of the withdrawals.

With respect to his rights as a joint tenant, the plaintiff alleges that he, D'Ambrosio, and the deceased were joint tenants with rights of survivorship on two bank accounts located at JP Morgan Chase Bank NA. On July 17, 2006, defendant D'Ambrosio allegedly made two withdrawals from the aforementioned accounts, totaling \$138,556.00, in effect closing both accounts. The defendant then deposited the withdrawn funds into a separate account in the names of defendant Dalessio and D'Ambrosio. The plaintiff alleges that because of defendant D'Ambrosio's actions, and the fraud and undue influence by which she caused the withdrawals to be made, he has been denied his rights as a joint owner of the accounts. The plaintiff claims that he has been damaged in the amount of \$69,278.00, which represents one-half of

the sum of the two accounts.

Based on the foregoing the motion is decided as follows:

The defendant's motion for summary judgment is denied. The movant in a summary judgment motion has the burden of presenting evidence which demonstrates that there are no genuine issues as to any material facts and that it is entitled to judgment as a matter of law. Baly v. Chrysler Credit Corp., 94 AD2d 781 (2nd Dept., 1983). Once the movant has met his burden, it is incumbent upon the party opposing said motion to produce evidentiary proof in admissible form sufficient to establish material issue of fact which warrant a trial. Alvarez v. Prospect Hosp., 68 NY2d 320 (Ct. Of App., 1986). A party opposing a motion for summary judgment is obligated "to lay bear his proofs" to sufficiently demonstrate, with admissible evidence, that a triable issue of fact will exist. LoBreglio v. Marks, 105 AD2d 621 (1st Dept., 1984).

In the instant case, the defendant has not satisfied its burden of establishing that there are no genuine issues as to any material facts. The affirmation of the defendant's attorney does not contain facts from a person with personal knowledge. The defendant does however submit the deposition testimony of defendant D'Ambrosio, which presents questions of fact as to many of the issues in this case. The plaintiff, on the other hand, has produced sufficient evidentiary proof to establish material issues of fact. Citing to the deposition testimony of defendant D'Ambrosio, plaintiff introduces testimony which calls into question defendant Dalessio's mental capacity. By her own admission, D'Ambrosio stated that she believed that Defendant Dalessio's mental capacity was on the decline by July 2006 due in part to alcohol abuse. The plaintiff also averred to personally witnessing defendant Dalessio act in a "confused and obviously impaired" manner on the morning of the withdrawal.

While it is true that where it concerns joint accounts the burden of proving fraud, undue influence or lack of capacity rests on the shoulders of whoever asserts it (In re Walther's Will, 6 NY2d 49 [Ct. Of App., 1959]), through the submission of deposition testimony of defendant D'Ambrosio, a person with personal knowledge, the court finds that the plaintiff has established that there are triable issues of fact as to Defendant Dalessio's mental capacity, and regarding undue influence exercised by defendant D'Ambrosio. Given the testimony of both the plaintiff and defendant, the court finds that issues of fact as to the mental capacity of Dalessio at the time the withdrawal was made and the second joint account was created exists. As such the defendant is

[* 4]
not entitled to summary judgment dismissing plaintiff's complaint.

The plaintiff has also demonstrated that issues of fact exists as to whether D'Ambrosio exercised undue influence over Dalessio. A proper showing of undue influence requires the proponent to prove that "the influence exercised amounted to moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the decedent to do that which was against her free will, but which she was unable to refuse or too weak to resist. A mere showing of opportunity and even of motive to exercise undue influence is insufficient to present a triable issue of fact, without additional evidence that such influence was actually exercised." In re Walther's Will, 6 NY2d 49. (Ct. of App., 1959); Matter of Philip, 173 AD2d 543 (2nd Dept. 1991).

Undue influence may also be proved by circumstantial evidence but this evidence must be of a substantial nature. In re Branovacki, 278 AD2d 791 (4th Dept., 2000). Evidence must be adduced from which inferences of undue influence can be reasonably drawn. "An inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference." In re Branovacki, 278 AD2d 791 (4th Dept., 2000).

Here, the plaintiff has alleged and presented sufficient evidentiary proof that questions of fact exists as to all elements of undue influence. The plaintiff submits that the defendant had the motive and opportunity, and that the influence was actually exercised in the withdrawal and subsequent creation of a new account.

The plaintiff has also presented circumstantial proof that an inference of undue influence can reasonably be drawn from the circumstances of the creation of the second bank account. Defendant D'Ambrosio took Dalessio to make the changes on a day where she was clearly upset, she did so outside of the presence of the plaintiff, and failed to tell him of her intentions. The defendant has produced no facts which indicate that the withdrawal was the product of the free will of Dalessio, to the contrary, the actions go against Dalessios' previously established actions.

Moreover, the circumstances surrounding creation of the second account appear to be inconsistent with the previous intentions of Dalessio. An inference can reasonably be drawn, from the evidence adduced by plaintiff, that the creation of the second joint account is the result of an "unexplained departure from a previously expressed intention of the decedent." The actions were inconsistent

in that the decedent previously set up a joint account naming plaintiff, made gifts of money to the plaintiff and also executed a durable power of attorney in his name.

The evidence heretofore presented raises issues of fact, which may be consistent with the claim that the D'Ambrosio induced the decedent by undue influence, therefore summary judgment must be denied.

Finally, with respect to the issue of conversion, the defendant similarly failed to establish entitlement to summary judgment. Subdivision (b) of Section 675 of the Banking Law creates a rebuttable presumption when a joint account is created that the funds therein belong to those in whose names the account was made. The creation of a joint account, in the absence of proof of contrary intent, is presumptive evidence of an intention to effect a present transfer of both an alienable interest in one half of the deposit in both depositors, and a right to whole fund in the survivor after the death of one of them. Kleinberg v. Heller, 38 NY2d 836 (Ct. Of App., 1976); In re Filfiley's Will, 63 Misc2d 824 (1970). This holds true even when withdrawals are made prior to the death of one of the depositors. Bricker v. Krimer, 13 NY2d 22 (Ct. Of App., 1963). The presumption is, however, rebuttable by establishing that no true joint tenancy was intended, and a withdrawal by the donor-depositor of the whole fund is evidence that no true joint tenancy was intended. And although the fact of withdrawal may be the only competent evidence (CPLR 4519), standing alone, it is insufficient to overcome the presumption. In re Filfiley's Will supra.

The plaintiff has introduced sufficient evidence which demonstrates that questions of fact exist regarding the intent of the donor/withdrawer, Defendant Louise Dalessio. The creation of the first joint account created a presumptive unconditional property interest in an undivided one half of the funds in the account, which could not be unilaterally cancelled by withdrawal of all the funds. Kleinberg v. Heller, 38 NY2d 836 (Ct. Of App., 1976), as neither joint tenant had the right, without the consent of the other, to destroy the joint tenancy by withdrawing all of the funds. In re Kramer's Estate, 54 Misc.2d 459 (1967).

Furthermore, although it is undisputed that the withdrawal by Dalessio could be evidence that she intended to terminate the rights of the plaintiff, standing alone, the withdrawal is insufficient to overcome the presumption of the joint tenancy. The defendant has not produced any evidence to rebut the statutory presumption, and it therefore prevails. Moreover, a long line of cases hold that where a joint tenant withdraws more than his share, there is an absolute right in the other tenant, during the lifetime

of both, to recover such excess. Kleinberg v. Heller; Bricker v. Krimer, 13 NY2d 22 (Ct. Of App., 1963). It is also established that the surviving depositor may recover from the estate of the deceased depositor the entire amount withdrawn from the joint account if he elects to hold the withdrawal as unauthorized. In re Kramer's Estate, 54 Misc.2d 459; Marrow v. Moskowitz, 255 NY 219 (Ct. of App., 1931).


Here, once Dalessio opened the account, plaintiff gained title to one third the funds. Moreover, upon Dalessio's death, the plaintiff's right of survivorship vested, and the plaintiff had a cause of action against the estate. Even if the plaintiff can not prove that defendant D'Ambrosio in fact withdrew the funds, a cause of action exists against the estate, In re Filfiley's Will, 63 Misc2d 824 (1970), and summary judgment must be denied.

Accordingly, the motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated:

MAY 14 2008



Hon. Kenneth A. Davis
J.S.C.

ENTERED

JUN 03 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE