

Kelly v Overbaugh

2008 NY Slip Op 32124(U)

July 30, 2008

Supreme Court, Greene County

Docket Number: 0020071/8971

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

MATTHEW JAMES KELLY, ESQ., as Special
Guardian of ELEANOR BROOKS, an
Incapacitated Person,

-against-

Plaintiff,

DECISION and ORDER
INDEX NO. 07-1897
RJI NO. 19-08-3446

SHEILA J. OVERBAUGH,

Defendant.

Supreme Court Greene County All Purpose Term, July 8, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Eleanor Brooks (hereinafter "Ms. Brooks") transferred a remainder interest in the title to her home to her daughter Sheila Overbaugh, the defendant, by deed dated January 5, 2007. It is not contested that by March 2007, Ms. Brooks was diagnosed with Alzheimer's dementia. The parties dispute whether Ms. Brooks was suffering from Alzheimer's dementia approximately two months earlier when the above transfer occurred and what influence defendant exerted over her at the time of the deed transfer.

The complaint sets forth four causes of action seeking, alternatively, to set aside the

above conveyance or a judgment in the amount of the value of the interest conveyed. Before answering the complaint, defendant brought this motion to dismiss alleging plaintiff has failed to state a cause of action.¹ In opposition, plaintiff construes its complaint as setting forth causes of action sounding in fraud, undue influence, unjust enrichment, and to set aside the deed due to Ms. Brooks' incompetence. Because the complaint states a legally cognizable claim, defendant's motion to dismiss is denied.

“On a motion to dismiss for failure to state a cause of action, the court must liberally construe the petition, accept all of its allegations as true, accord petitioners every favorable inference and decide only whether the alleged facts fit within any recognized legal theory.” Abele v. Dimitriadis, ___ AD3d ___, 2008 WL 2831829 (3d Dept. 2008).

In Larkin v. Rejebiab (271 AD 910 [3d Dept. 1946]) the Third Department held that where a transferor was mentally incompetent, and could not appreciate the nature of the transaction, an action to set aside a deed would lie. More recently the Second Department in Pershaz v. Przyziazniuk (51 AD3d 752 [2008]) held “a party's competence is presumed, and in order to set aside a transfer of property on the ground of lack of capacity, it must be established that the party did not understand the nature of the transaction at the time of the conveyance as a result of his or her mental disability.” Here, the complaint alleges that Ms. Brooks was suffering from dementia and experiencing memory loss, confusion, bewilderment and misunderstanding at

¹Defendant's motion also, originally, sought dismissal of plaintiff's complaint, pursuant to CPLR §3211(a)(3), alleging that Ms. Brooks' did not have the capacity to bring suit. The entire motion was stayed during the pendency of an Article 81 proceeding, wherein Ms. Brooks was determined to be an incapacitated person. As reflected in the caption, a special guardian was appointed to protect Ms. Brooks' interest in this litigation and defendant has not pursued this portion of its motion. Accordingly, the Court finds that the portion of defendant's motion seeking dismissal based upon CPLR §3211(a)(3) is now moot.

the time the deed herein was executed and delivered. Accepting such allegations as true, as the Court must on this motion to dismiss, the facts alleged fit within a cause of action to set aside the deed due to Ms. Brooks' incompetence.

Likewise, a cause of action for fraud and undue influence has also been stated. “[A] constructive fraud... claim is stated where, irrespective of actual intent to deceive, the plaintiff can show that a confidential or fiduciary relationship existed between the parties.” Sears v. First Pioneer Farm Credit, ACA, 46 AD3d 1282 (3d Dept. 2007), *see also* Williams v. Lynch, 245 AD2d 715 , 716 (1997)(stating that a confidential relationship is one of “trust and confidence”). Such showing will then require the “defendant to come forward with clear proof that there was no fraud, deception or undue influence”. Mazza v. Fleet Bank, 16 AD3d 761(3d Dept. 2005). Likewise “once a fiduciary relationship is found to exist between two parties, transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood, and that there was no fraud, mistake or undue influence”. In re Mazak, 288 A.D.2d 682, 684 (3d Dept. 2001) (quoting Gordon v. Bialystoker Center and Bikur Cholim, Inc., 45 N.Y.2d 692 [1978]). Here, plaintiff’s complaint alleges plaintiff and defendant are mother and daughter, that a confidential relation exists, and that the plaintiff was in a state of confused dementia at the time the deed was executed. According plaintiff with every favorable inference therefrom, plaintiff’s complaint sets forth sufficient facts to establish a confidential relation and shift the burden of proof to defendant to prove that there was no fraud or undue influence. This the defendant did not prove as a matter of law, as such inquiry is necessarily fact driven and issue laden. On this record, defendant did not demonstrate that plaintiff failed to state a cause of action in either fraud or undue influence.

“The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” Paramount Film Distributing Corp. v. State, 30 N.Y.2d 415 (1972). Again, the complaint, taken as true, sets forth such an equitable claim. The complaint’s allegations, in sum, allege that the plaintiff’s daughter has taken advantage of her unsound mind to obtain a deed to her home. If true, as assumed on this motion to dismiss, the equities would not allow defendant to retain such property.

The Court is mindful that the complaint’s fraud and undue influence allegations are not overly specific (CPLR §3016[b]); however, they do sufficiently inform the “defendant with respect to the incidents complained of”. P.T. Bank Central Asia v. ABN AMRO Bank N.V., 301 A.D.2d 373 (1st Dept. 2003), see also P.S. Auctions, Inc. v. Exchange Mut. Ins. Co., 105 AD2d 473 (3d Dept. 1984), Jered Contracting Corp. v. New York Transit Authority, 22 N.Y.2d 187 (1968). Especially where, as here, due to plaintiff’s mental capacity it may be “impossible to state in detail the circumstances constituting a fraud”. Jered Contracting Corp., supra at 194.

Accordingly, defendant’s motion to dismiss is denied.

All papers, including this Decision and Order are being returned to the attorneys for the plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: July 30, 2008
Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 30, 2008, Affidavit of Sheila Overbaugh, dated January 29, 2008, Affidavit of Robert J. Gagen, dated January 30, 2008, and Affidavit of Lance R. Miner, dated January 24, 2008, with attached Exhibits "A" - "C".
2. Affidavit of Lawrence Brooks, dated June 26, 2008, Attorney Affidavit of Paul Freeman, dated June 26, 2008, with Attached Exhibits "A" - "C" and accompanying Affidavit of Charles E. Sturges, dated June 27, 2008.
3. Reply Affidavit of Shelia Overbaugh, dated July 3, 2008, Reply Affidavit of Robert J. Gagen, dated July 3, 2008, with attached Exhibits "1" - "2".