

**Jacks v D'Ambrosio**

2008 NY Slip Op 32547(U)

September 3, 2008

Supreme Court, Nassau County

Docket Number: 1545-06/

Judge: R. Bruce Cozzens

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK**

PRESENT: HON. R. BRUCE COZZENS, JR.  
Justice.

TRIAL/IAS PART 8  
NASSAU COUNTY

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LAWRENCE M. JACKS,

Plaintiff(s),

-against-

INDEX#21545/2006

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

Defendant(s).

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The plaintiff seeks to recover from the defendants the sum of \$69,028.00, with interest from July 17, 2006. The plaintiff bases his action on a claim that the defendant, Jean Marie D'Ambrosio ("D'Ambrosio") and her daughter, Gina Mazzola ("Mazzola"), a nonparty wrongfully converted funds from two bank accounts held jointly by the plaintiff, D'Ambrosio, and the deceased, Louise Dalessio ("Dalessio"). The accounts held a total of \$138,056.00 on the date of the alleged wrongful acts, July 17, 2006.

The plaintiff testified on his own behalf. Although he was not related to Dalessio, he had known her all his life and referred to the decedent as Aunt Lou. Aunt Lou had been a friend of his mother as well as his godmother. Dalessio had not been married and had no children. On July 8, 2005, the aforesaid joint accounts had been established at the JP Morgan Chase Bank. A savings and checking account were established using Dalessio's funds. At about the same time, Dalessio granted the plaintiff a durable power of attorney. Also, in 2005, Dalessio gave the plaintiff gifts of cash totaling \$87,000. D'Ambrosio name had previously been on the account with Dalessio and remained so.

Copies of the signature cards establishing the accounts were entered into evidence. These show that the accounts were joint and payable to either owner or the survivor.

On June 20, 2006, Dalessio fell and was hospitalized until July 12, 2006. On July 17, 2006, she was admitted to an assisted living facility. It was on this date that the plaintiff alleges that the wrongful acts of D'Ambrosio and her daughter occurred. The parties had met at

Dalessio's apartment that morning and then had eaten at a diner. From there the plaintiff drove to the assisted living facility. Dalessio and D'Ambrosio drove with Mazzola. Prior to going to the facility, the latter three stopped at the Chase Bank where the funds were withdrawn from the two accounts. Two new accounts were established and the new account deposit slips were entered into evidence. The plaintiff testified that the handwriting on these slips was not that of the decedent. The plaintiff was not a joint owner on the new accounts, only D'Ambrosio and Dalessio. Prior to this date the plaintiff also testified that the decedent had not been paying her bills and her landlord had told him that she wanted to rent Dalessio's apartment. He also contended that the decedent was having a problem with alcohol use.

Upon originally establishing the accounts with plaintiff, he testified that Dalessio knew that he would get money if she passed away.

Defendant D'Ambrosio testified for the defendants. She was married to Dalessio's nephew. They became friendly and defendant lived in close proximity to the decedent. Dalessio had made D'Ambrosio a joint owner of her accounts fifteen to twenty years before trial. In 2005, D'Ambrosio was diagnosed with cancer and suggested to Dalessio that the plaintiff's name be added to their accounts.

On July 17, 2006, after the diner, she went with Dalessio to the bank. Mazzola was also present. Dalessio sat down with the bank manager and the witness observed the decedent writing. She saw Dalessio fill out the deposit slips which the witness testified were in decedent's handwriting. The witness did not help Dalessio fill out any forms nor did she tell the decedent to fill out any forms.

The witness, on cross examination, testified that she believed the decedent had been taken advantage of by some people and was forgetful at times.

Mazzola also testified for defendants. She confirmed going to the diner with the others on July 17, 2006. The decedent was upset on this date. She drove Dalessio and D'Ambrosio to the Chase bank. At the bank, Dalessio filled out the forms. Neither Mazzola nor D'Ambrosio told the decedent that they were taking her to the bank. She also identified the handwriting on the deposit slips as that of Dalessio. She did not help Dalessio fill out the forms.

At the time of the transaction, the decedent was 88 years old.

The complaint sets forth two causes of action. The first cause of action sounds in conversion. The second alleges that D'Ambrosio had the trust and confidence of the decedent and through fraud and undue influence breached that trust.

This case factually differs significantly from the probate situations where the decedent has made an outright gift to a donee which is claimed to be fraudulent or the result of undue influence. Here, the donor remained an owner of the asset. There was no outright gift given to D'Ambrosio. D'Ambrosio had also been a prior joint owner of the accounts before the plaintiff was added to the accounts.

The evidence here shows that the joint accounts were opened merely for the convenience of the decedent. The decedent was the sole depositor of the account, the account was used exclusively by the decedent, the creation of a survivorship interest would deviate from the

decendent's testamentary plan, and the decedent retained the right to withdraw the proceeds (see *Matter of Gilman* [Surrogate's Ct., Nas. Co., 2004] 6 Misc.3d 1001A, 800 NYS2d 346). The decedent's will, in evidence, made no bequest to the plaintiff. Plaintiff was not a natural object of decedent's bounty.

In order to establish undue influence, "It must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted constrained the [donor] to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist." *Matter of Walther* [1959] 6 NY2d 49, 188 NYS2d 168. The party asserting undue influence has the burden of proof. *Matter of Connelly* [2nd Dept., 1993] 193 AD2d 602, 597 NYS2d 427. However, under a theory of constructive fraud, where a confidential or fiduciary relationship exists, only slight evidence is required to shift the burden to the defendant to show a transfer was made freely without fraud or undue influence from the donor to the donee. *Matter of Gordon* [1978] 45 NYS2d 692, 412 NYS2d 593.

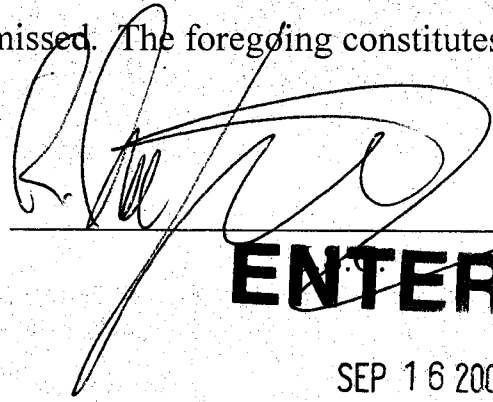
In determining undue influence, generally an explanation by the donee is not required if there is a family relationship. *Matter of Swain* [2nd Dept., 1986] 125 AD2d 574, 509 NYS2d 643. In a family relationship, the burden will be shifted only if there are other factors influencing the donor (see, *Matter of Walther, supra*).

The plaintiff presented no medical evidence to establish a reduced mental capacity of the decedent. To presume such a condition would require mere speculation.

Here, the plaintiff has failed to establish undue influence or fraud which would shift the burden of proof to the defendants. However, even if plaintiff had done so, the defendants' evidence was clear and convincing that there was no fraud by D'Ambrosio. There was no proof that the decedent was compelled against her will to go to the bank and open new joint accounts. Furthermore, she remained the owner of the accounts and made no provision in her will to devise property to the plaintiff. D'Ambrosio, upon the opening of the new accounts, received no new interest in the decedent's assets.

For the stated reasons, the Complaint is dismissed. The foregoing constitutes the Court's Decision and Order.

Dated: **SEP 03 2008**



**ENTERED**

SEP 16 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**