

Conklin v Conklin

2008 NY Slip Op 32896(U)

September 30, 2008

Supreme Court, Nassau County

Docket Number: 017852/03

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

HOWARD J. CONKLIN.

Plaintiff.

- against -

Sequence No.: 003 & 004
Index No.: 017852/03

HOWARD F. CONKLIN, ALBERTO PEREZ and
MARIA PEREZ.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

The court set the instant matter down for a hearing which was held.

The following facts are not in dispute. Plaintiff is the son of now deceased Howard F. Conklin (originally a defendant herein and hereinafter referred to as "decedent") and Howard F. Conklin's ex-wife, Joan Conklin. On March 13, 1985 defendant Conklin and Joan Conklin executed a separation agreement pursuant to which, *inter alia*, Mrs. Conklin was to convey her interest in certain real property located in Margaretville, New York owned by the entirety by her and decedent to their son, plaintiff herein. The deed conveying Mrs. Conklin's interest in the property was executed on that same date and by its terms conveyed title to the subject property to "Howard J. Conklin." At this time it should be noted that plaintiff and decedent have identical names except that plaintiff has the middle initial "J" and decedent "F". On February 27, 2003 decedent sold the premises to defendants Alberto and Maria Perez and title was conveyed to them by deed of the same date.

Plaintiff commenced the instant action and asserts causes of action for 1) decedent's fraud in representing the true ownership of the property to plaintiff and unjust enrichment based upon that fraud; 2) conspiracy to deprive plaintiff of his right, title and interest in the subject property through a fraudulent conveyance from decedent to defendants Perez; and 3) a claim in equity for rescission of the conveyance to defendants Perez. Plaintiff seeks monetary damages and the

imposition of a constructive trust. Defendants now move for summary judgment dismissing the complaint or dismissal pursuant to CPLR 3211.

At the hearing Mrs. Conklin testified as follows on direct examination:

- 1) in 1985 she and her then husband, Howard F. Conklin owned between 130 and 150 acres in Margaretville, New York;
- 2) in 1985 she commenced a divorce proceeding against her husband;
- 3) pursuant to the separation agreement therein, Mrs. Conklin was to remove her name from the deed to the property and convey her interest in same to her son, plaintiff herein;
- 4) she always intended to convey her interest in the property to her son; and
- 5) she acknowledged that the deed reflected the name "Howard J. Conklin" as grantee.

On cross-examination of Mrs. Conklin by defendants Perez's attorney Ms. Conklin testified that:

- 1) she purchased the subject property with her husband;
- 2) she acknowledged that the grantors in the 1985 deed were herself and Howard J. Conklin;
- 3) both she and her husband still resided at the address in New Hyde Park which is set forth for the grantors' address in the deed;
- 4) at first she testified that her son did not reside at that New Hyde Park address at the time the deed was executed; and
- 5) she then testified that her son may have resided at the New Hyde Park address at the time the deed was executed but that she did not remember.

On cross-examination by defendants Perez's attorney Mrs. Conklin testified that she had reviewed the deed with her attorney prior to executing same.

The hearing at which Ms. Conklin testified may not have been helpful.

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to oppose the motions for summary judgment, plaintiff must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

Prior to his death decedent asserted that summary judgment dismissing the complaint should be granted on the basis that 1) a constructive trust may not be imposed in this matter; 2) there is no agreement in place giving plaintiff any rights to the property; and 3) plaintiff refused a potential gift of the property from decedent (whom, defendants all claim had title to the property). In support of his motion and prior to his death, decedent asserted that at the time of the executions of the separation agreement and deed in 1985, Mrs. Conklin's attorney did not

wish to convey title to the property to plaintiff and it was agreed to convey said title to decedent. The deed which, decedent alleged conveys Mrs. Conklin's title to decedent, was executed by the decedent and Mrs. Conklin in the presence of their attorneys. (See, deposition transcript of Howard F. Conklin, pp. 11-14). Decedent further denied making any representations to plaintiff as to whether plaintiff had an interest in the subject property. (*Id.*, p. 32, l. 8-34; p. 47, l. 5-13). Decedent testified that at one point in 1985, he offered to give the property to plaintiff for nothing and that plaintiff refused his offer. (*Id.*, p. 29, l. 7-12).

First, contended decedent, any interest plaintiff may claim to have in the property pursuant to the terms of the divorce agreement were merged into and extinguished by the terms of the deed which conveyed Mrs. Conklin's interest to decedent. Generally, prior negotiations and agreements are merged into deeds and are therefore inadmissible to determine the intent of the parties. See, e.g., Summit Lake Assocs. Inc. v. Johnson, 158 A.D.2d 764 (3rd Dep't 1990).

On this point, decedent made much of the fact that the court should conclude that the conveyance was to him and not his son as evidenced that even though the deed transfers title to an individual with the same name as plaintiff (including the middle initial), the address on the deed of transfer is that of decedent and not plaintiff. Decedent would have had this court conclude that no issue of fact exists as to whom the title was conveyed because although the name of the transferee is incorrect, the address listed on the deed should operate to straighten out this issue. This raises a question in the mind of the court as to why the reverse should not be true. In other words, it appears that an issue of fact exists as to whether title to the property was in fact conveyed to plaintiff but that the incorrect address for the transferee is listed on the deed as opposed to the name. Mrs. Conklin's testimony did nothing to aid the court and certainly nothing to aid the cause of Mr. Conklin's estate in determining this issue. To engage in any analysis on this point on the record presented would require the court to improperly engage in determining credibility. Niklas v. Tedlen Realty Corp., 305 A.D.2d 385 (2nd Dep't 2003). Parenthetically on this point, defendants Perez in their cross-motion point to evidence that Conklin the elder used the middle initial "J" from the time of his confirmation at age twelve. The court likewise finds this to be inconclusive on this issue.

Decedent also moved for summary judgment dismissing the complaint on the basis that plaintiff may not seek imposition of a constructive trust. In asserting a claim for a constructive trust, plaintiff must prove 1) a confidential or fiduciary relationship; 2) a promise; 3) a transfer in reliance thereon; and 4) unjust enrichment. See, Sharp v. Kosmalski, 40 N.Y.2d 119 (1976). Decedent claimed that plaintiff may not seek a constructive trust because no promise was made to plaintiff and plaintiff did not make a conveyance in reliance upon said promise. Further, asserted decedent, plaintiff may not seek a constructive trust where he has no ownership interest in the property. See, Scivoletti v. Margola, 97 A.D.2d 401 (2nd Dep't 1983); Matter of Wells, 36 A.D.2d 471 (4th Dep't 1971).

First, as set forth above, the issue of whether plaintiff has an ownership interest is to be determined by the trier of fact. The other elements appear to be met here. It appears that from a

review of the separation agreement that both parties agreed that Mrs. Conklin would convey her interest in the property to plaintiff. Such to this court constitutes a promise. There is also a fiduciary relationship in that defendant Conklin was plaintiff's father. Djamoos v. Djamoos, 153 A.D.2d 871 (2nd Dep't 1989). The fact that the two were not close is unavailing. There is an issue of fact as to whether there was a transfer in that Joan Conklin transferred the property to either decedent Conklin (in which case the divorce agreement is merged into the deed) or to plaintiff. Further, an issue of fact exists as to whether decedent was unjustly enriched in that he sold the property while he may not have had the right to do so. Where, as here, the moving defendant fails to make a *prima facie* demonstration of entitlement to summary judgment, the court will deny the motion regardless of the sufficiency of the opposition papers. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

The court shall now determine that portion of decedent's motion which sought an order dismissing the complaint pursuant to CPLR 3211 on the bases that 1) plaintiff failed to name a necessary party to the action, plaintiff's mother; and 2) plaintiff failed to timely commence the instant action as required by the applicable statute of limitations.

First, the court rejects defendant Conklin's position that the complaint should be dismissed pursuant to CPLR 3211(a)(10) for plaintiff's failure to join Joan Conklin as a defendant. Plaintiff is alleging fraud on the part of decedent and not on the part of his mother. The court sees no allegation against Mrs. Conklin which leads the court to conclude that she, as opposed to decedent, perpetrated an alleged fraud upon plaintiff. Further, it is noted that prior to his death decedent never commenced a third-party action against Mrs. Conklin if he had a good faith belief that Mrs. Conklin should be a party hereto.

Decedent also failed to demonstrate entitlement to summary judgment or dismissal based upon plaintiff's failure to comply with the six year statute of limitations for an action founded in fraud as set forth in CPLR 213. A cause of action for fraudulent concealment accrues when plaintiff becomes aware of or should have become aware of the fraud with reasonable diligence. Cerulean Land Developers Corp. v. Colon Developments Corp., 144 A.D.2d 615 (2nd Dep't 1988). There is nothing presented on this motion which leads the court to conclude that plaintiff should have known of this fraud for at least six years prior to the commencement of this action.

Defendants Perez move for summary judgment dismissing the complaint on the same grounds as upon which decedent moved except that they also contend that 1) as bona fide purchasers for value, a constructive trust may not be asserted against them; and 2) even were this court to find that plaintiff was conveyed Joan Conklin's interest in the property, decedent also had a interest in the property and could convey his interest therein.

First, while a constructive trust may not be imposed upon a bona fide purchaser for value (Simonds v. Simonds, 45 N.Y.2d 233), defendants Perez offer no indication as to whether they purchased the property for value beyond the \$50,000 purchase price. No other proof in admissible form which would lead this court to conclude the price was reasonable is provided.

Further, as set forth above, an issue of fact exists as to whether decedent had any interest in the property and therefore had the right to convey same. It should also be noted that the Perez defendants are therefore necessary parties in that they may share title to the property with plaintiff or they may be divested of title altogether.

Accordingly, defendants Perez' motion is hereby denied.

As a note of issue has been filed herein, the court directs that the instant matter is set down for trial in the Calendar Control Part on November 18, 2008 at 9:30 a.m.

So Ordered.

Dated: September 30, 2008


A.J.S.C.

ENTERED

OCT 09 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**