

Matter of Estate of Goldinger

2008 NY Slip Op 33355(U)

November 18, 2008

Surrogate's Court, Nassau County

Docket Number: 347645

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Estate of

HELEN GOLDINGER,

Deceased.

File No. 347645

Dec. No. 595

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In this proceeding to enforce the terms of a stipulation of settlement in a matrimonial action and for related relief, the respondents move to dismiss the petition for failure to state a cause of action pursuant to CPLR 3211(a)(7); the petitioner has opposed the motion and cross-moves for summary judgment.

The decedent Helen Goldinger and her former husband Sidney Goldinger had two children, Karen S. Goldinger and Cary Scott Goldinger, both of whom are adults. Cary is an attorney admitted to practice in New York and is evidently an experienced real estate attorney. Karen is the petitioner in this proceeding in her capacity as the preliminary executor of Helen’s estate. The original respondents were Sidney and Cary. Sidney has since died and Cary, in his capacity as the limited administrator of Sidney’s estate, has been substituted in Sidney’s place; Cary also remains a respondent in his individual capacity.

The terms of the stipulation of settlement in the matrimonial action were spread on the record of Supreme Court, Nassau County before Hon. Angela G. Iannacci on two separate dates, June 3, 2004 and October 27, 2004. The stipulation of settlement was incorporated but not merged into the divorce judgment. Several provisions of the stipulation are at issue in this proceeding. The first is the provision requiring Sidney to convey to Helen within 10 days of

October 27, 2004, his interest in the residence in Cedarhurst, New York. Sidney never complied with that provision and, in fact, two days after Helen's death he purported to convey his interest in the property by deed to Cary, apparently for no consideration. Also at issue are sums allegedly due to Helen's estate in the sum of \$12,166.00 for mortgage payments from July 2006 until Helen's death in March 2007. Additionally, Karen claims that Sidney failed to pay \$4,764.00 in dental bills, \$969.00 for flood insurance, and \$32,055.00 for expenses related to Helen's automobile, all of which Sidney was liable for pursuant to the stipulation of settlement. Finally, Karen claims that the stipulation of settlement requires Sidney or his estate to pay the entire outstanding balance on the mortgage.

Karen's petition seeks a decree (1) declaring the Cedarhurst premises to be an asset of the estate; (2) directing respondents, or, alternatively, the Sheriff to convey title to the estate; (3) setting aside the conveyance from Sidney to Cary and declaring the conveyance void and fraudulent pursuant to the Debtor and Creditor Law; (4) directing Sidney (now Sidney's estate) to pay the sum of \$49,954.00 to the estate for the aforementioned sums allegedly due pursuant to the stipulation of settlement; (5) declaring that Sidney's estate is required to satisfy the outstanding mortgage on the Cedarhurst premises; (6) awarding reasonable attorney's fees against both respondents pursuant to Debtor and Creditor Law §276-a; and (7) for such other and further relief as the court deems appropriate.

Regarding the motion to dismiss, "[i]t is well settled that on a motion to dismiss pursuant to CPLR 3211, the pleading is to be liberally construed. The facts alleged in the pleading are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference to

determine whether the facts as alleged fit within any cognizable legal theory” (*IHC Services, Inc., v Product Safety Management, Inc.*, 268 AD2d 559 [2d Dept 2000]; accord *Lauer v City of New York*, 95 NY2d 95, 117 [2000]). Here, Karen has demonstrated the existence of a bona fide justiciable controversy, which is a sufficient showing to withstand a motion to dismiss for failure to state a cause of action (*10 E. Realty, LLC v Village of Valley Stream*, 17 AD3d 474 [2d Dept 2005]; *Halloran v Halloran*, 161 AD2d 562 [2d Dept 1990]). Accordingly, the motion to dismiss the petition is denied in its entirety.

Regarding the cross-motion for summary judgment, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

“A matrimonial settlement is a contract subject to principles of contract interpretation ... [and] a court should interpret the contract in accordance with its plain and ordinary meaning” (*Awerman v Awerman*, 36 AD3d 842, 843 [2d Dept 2007] quoting *Edwards v Poulmentis*, 307 AD2d 1051, 1052 [2d Dept 2003]). An action or proceeding regarding the interpretation of a stipulation of settlement entered into in a matrimonial action may be decided summarily where

no triable issue of fact exists (*see Galyn v Schwartz*, 56 NY2d 969 [1982]; *Fade v Pugliani*, 8 AD3d 612 [2d Dept 2004]). Also, the personal representative of a decedent's estate may be compelled to execute a deed where the decedent could have been compelled to do so (*see Matter of Gebauer*, 79 Misc2d 715 [Sur Ct, Cattaraugus County 1974]).

Here, the language of the stipulation of settlement clearly required Sidney to convey his interest in the Cedarhurst property to Helen. As indicated above, he failed to comply with that obligation and instead conveyed his interest in the property to Cary almost immediately after Helen's death. Cary does not dispute the plain meaning of the language of the matrimonial agreement. Rather, he contends that "[m]y mother, during her lifetime, did not effectuate the transfer of the [Cedarhurst] premises into her name only," ignoring the plain language of the stipulation of settlement which clearly placed that burden on Sidney. Cary intimates that by not ensuring that the transfer was made during her lifetime, Helen has waived her right to enforce the stipulation of settlement and the matrimonial judgment which issued thereafter.

Thus, there is no factual issue to determine, only the legal issue of whether Helen waived her right to enforce the terms of the stipulation of settlement and the judgment of divorce. In *Andrews v Dolan* (158 AD2d 569 [2d Dept 1990]), the court found that the plaintiff wife had not waived her right to enforce a provision in the judgment of divorce regarding the sale of the marital residence even though her action was not brought for six years. The court held that "although a spouse may waive his or her rights under a judgment of divorce, [a] waiver must be an intentional relinquishment of a known legal right (*Joyce v Joyce*, 110 AD2d 682) and will not be inferred from mere silence or inaction (*see Agati v Agati*, 92 AD2d 737, *affd* 59 NY2d 830)"

(*Andrews v Dolan*, 158 AD2d 569, 570 [2d Dept 1990]). The burden of proof is on the person claiming the waiver of the right (*East 56th Plaza, Inc., v Abrams*, 91 AD2d 1129 [3d Dept 1983]). The court finds that Karen has made out a prima facie showing of entitlement to judgment as a matter of law. Where the movant has made out a prima facie case sufficient to warrant judgment as a matter of law, the burden shifts to the party moved against to lay bare his proof and demonstrate the existence of a triable issue of fact (*Kaplan v Hamilton Medical Assocs., P.C.*, 262 AD2d 609 [2d Dept 1999]).

Here, Cary offers no evidence whatever that Helen intentionally relinquished her right to ownership of the subject premises. In fact, the evidence is clearly to the contrary. Prior to death, Helen moved to have Sidney held in contempt for his failure to comply with the terms of the matrimonial agreement and the judgment of divorce. Justice Iannacci, in a decision and order dated February 16, 2005 (*Goldinger v. Goldinger*, Index No. 201249/04, Motion Sequence 004,005, Sup Ct, Nassau County, Iannucci, J.), denied the motion to the extent that it sought an order holding Sidney in contempt because at the time the motion was made, the judgment of divorce had not yet been entered. Justice Iannacci's order did provide, however, that "to the extent the motion seeks an order compelling the husband to comply with the terms of the stipulation of settlement entered into in open court on October 27, 2004, it is granted." Furthermore, on December 11, 2006, a letter was sent to Sidney by an attorney retained by Helen to assist her in enforcing the terms of the matrimonial agreement and the judgment of divorce. The letter specifically identifies Sidney's failure to execute a deed conveying title to the subject

premises and the financial aspects of the agreement as among the issues for which counsel was retained.

Accordingly, the court finds that Karen is entitled to summary judgment on the issue of title to the subject premises. The court finds that Cary was aware of Sidney's obligation to convey his interest in the property to Helen and of Sidney's failure to do so. It is also apparent from the papers submitted that the purported conveyance of Sidney's interest to Cary was without consideration. As such, Cary is not a bona fide purchaser for value and the deed conveying Sidney's interest in the property from Sidney to Cary is therefore vacated (*see Ferdico v Zweig*, __ AD3d __, 865 NYS2d 294 [2d Dept 2008] and cases cited therein). Cary, in his capacity as limited administrator of the estate of Sidney Goldinger is directed to execute a deed and any other papers necessary for the recording of the deed in the Office of the Nassau County Clerk. Karen's attorney shall prepare the deed and related documents for Cary's signature. Cary is directed to execute the documents within 7 days of receipt the transfer documents or service upon him of a copy of the order to be entered, whichever is later.

Regarding the branch of Karen's motion for an order directing Sidney or his estate to pay the sum of \$49,954.00 to the estate of Helen, as with the real property, Cary does not dispute that the amounts are due pursuant to the agreement. Rather, he contends that Helen waived her right to enforce the matrimonial agreement and judgment of divorce. For the reasons recited above with regard to the real property, the court finds that Karen is entitled to judgment as a matter of law.

Regarding the branch of Karen's motion awarding Karen's reasonable attorneys' fees from Cary and/or the estate of Sidney, Debtor and Creditor Law § 276-a permits such an award of fees only upon a finding of "actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors." In order to make such a finding a hearing will be necessary. Counsel shall appear at a conference at the courthouse to be held on December 10, 2008, at 9:30 a.m. to arrange an agreeable date for the hearing.

Karen has also moved for summary judgment declaring that Sidney's estate is required to satisfy the outstanding mortgage on the subject property. However, the court finds that the agreement clearly supports Cary's argument that Sidney's estate would only be obligated to satisfy the mortgage in the event that Sidney predeceased Helen. While there is some confusion on pages 4 and 5 of the October 27, 2004 stipulation of settlement, the agreement is clearly set forth during the allocution of Sidney Goldinger on pages 10 and 11 of that stipulation that he would pay lifetime maintenance to Helen in the form of monthly mortgage payments. On page 10, beginning on line 12, Sidney is responding to questions posed to him by his then-attorney.

Q. Now, you heard the fact that there was to be lifetime maintenance in the form of the payment on the mortgage which would encompass principal and interest—are you okay?

A. Yeah.

Q. – real estate taxes and insurance?

A. Yes.

Q. That's roughly today about \$1,400 a month, correct?

A. Yes.

Q. And you agree that you, to satisfy your obligation of lifetime maintenance, that you will make that monthly payment for the rest of your life?

A. Yes.

THE COURT: For as long as--

Q. As long as the plaintiff lives?

A. Right, yes.

Q. Okay. In the event that you predecease her, you laid out \$102,000 on your co-op, correct?

A. Yes.

Q. So, to the extent of that \$102,000 that you have advanced, you agree to have a lien on that portion of it in the event you predecease, or die, before the plaintiff, correct?

A. Yes.

Q. And that then in the event that the plaintiff survives you, that the mortgage would be paid off by your estate?

A. Yes.

The court finds it is clear that the understanding was the Sidney would make the mortgage payments for as long as Helen lived and that Sidney's estate would satisfy the mortgage in full in the event that Sidney predeceased, which he did not. The agreement is in keeping with the definition of maintenance in the Domestic Relations Law which provides that "maintenance shall terminate upon the death of either party" among other triggering events (Domestic Relations Law § 236B[1][a]).

On a motion for summary judgment, the court has the authority to search the record and grant summary judgment to the non-moving party (*JMD Holding Corp. v Congress Financial Corporation*, 4 NY3d 373, 385 [2005]; CPLR 3212[b]). The court is satisfied that there is no question that the stipulation of settlement requires neither Sidney nor his estate is to satisfy the outstanding mortgage on the subject property. Accordingly, summary judgment is awarded to Sidney's estate on this issue.

Settle order on five days notice with five additional days if service is by mail.

Dated: November 18,` 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court