

**Cheliotis v Stratakis**

2008 NY Slip Op 33503(U)

December 24, 2008

Surrogate's Court, Nassau County

Docket Number: 348855

Judge: John B. Riordan

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

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ZINOVIA CHELIOTIS,

Plaintiff,

File No. 348855

-against-

Dec. No. 660

JOHN C. STRATAKIS, individually and as Trustee of the  
MARIA ABELIOTIS TRUST, ALEXANDRA GERAZOUNIS  
and the MARIA ABELIOTIS RESIDENCE TRUST,

Defendants.

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This is a miscellaneous proceeding involving the estate of the decedent, Maria Abeliotis, and the Maria Abeliotis Residence Trust (“the trust”). This proceeding was transferred to this court by order of the Supreme Court dated September 2, 2008. The decedent’s sister, Zinovia Cheliotis (“Cheliotis”), commenced this action against John C. Stratakis, individually and as trustee of the trust, Alexandra Gerazounis (“Gerazounis”), the remainderman of the trust, and the trust itself. The action seeks to impress a constructive trust on the premises located at 884 Bryant Avenue, New Hyde Park (“the premises”), which were transferred to the trust and vacate and set aside the trust and the deed on the basis of fraud and undue influence. Before the court are the defendants’ motions to dismiss on the following grounds: 1) lack of standing; 2) failure to plead the allegations of fraud and undue influence with particularity; 3) statute of limitations; and 4) failure to state a cause of action. Gerazounis also asks for an order directing the Nassau County Clerk to cancel the Notice of Pendency filed by Cheliotis against the premises and imposing legal fees and costs amounting to \$5,042.50. Defendant, John C. Stratakis, also asks for legal fees and costs amounting to \$7,500.00. For the reasons that follow, the motions are denied.

## FACTUAL BACKGROUND

The decedent, Maria Abeliotis, died on September 30, 2007, in Greece. Cheliotis is the decedent's sister. On May 4, 2001, the decedent transferred the premises into the trust, which is irrevocable. The trust instrument, which was in English, was prepared by the decedent's attorney, John C. Stratakis. Stratakis is named as the trustee of the trust. A deed transferring the premises into the trust was recorded on July 27, 2001 in the Nassau County Clerk's office.

A purported will dated February 12, 2004 prepared by Stratakis has been offered for probate in this court ("the 2004 instrument") by Stratakis, who is nominated as the executor thereunder. The 2004 instrument bequeaths the decedent's residuary estate to the Chios Reforestation Society.

In addition, Cheliotis has commenced a proceeding in the Greek courts with respect to an unsigned instrument dated July 24, 2006 ("the 2006 Greek instrument"). The precise nature of the Greek proceeding is unclear. The defendants argue that the 2006 Greek instrument has merely been published, which is of no effect since the decedent was a New York domiciliary and any testamentary instrument can only be proved valid by the New York courts. Cheliotis's papers, on the other hand, recite that the 2006 Greek instrument has been offered for probate in the Greek courts. The 2006 Greek instrument provides, in pertinent part, as follows:

"I hereby leave and bequeath to my sister, Zinovia, wife of Georgios Cheliotis, at full ownership (sic) my house in Long Island of New York, United States of America in the address 884 Bryant Avenue, New Hyde Park, as it is with its furniture's (sic) and household items. I also leave and bequeath to her the whole of my movable property, the deposits in Banks and everywhere else, my shares in the Athens Exchange market and United States of America and any monetary claim arising from any cause."

In addition, Cheliotis has filed a petition in this court for ancillary probate with respect to the 2006 Greek instrument and a petition for limited letters of administration.

#### THE SUMMONS AND COMPLAINT

Cheliotis alleges four causes of action in her summons and complaint dated March 20, 2008 sounding in fraud and undue influence and for a declaratory judgment and equitable relief under Article 15 the Real Property Law. Cheliotis alleges that, prior to May 4, 2001, Stratakis represented to the decedent that because she was of advanced age, ill and unable to get around, Gerazounis would hold title to the premises for the decedent's benefit and convenience. Gerazounis is related to Stratakis. Stratakis and Gerazounis told the decedent that she should place title to the premises in the irrevocable trust in order to enable them to care for her. Based upon these promises and her confidential relationship with her attorney, Stratakis, decedent established the trust. The decedent did not intend to make a gift of the premises to Gerazounis. Rather, based upon Stratakis' and Gerazounis's representations, the decedent was induced into creating the trust for convenience and Medicaid and tax planning purposes. Cheliotis alleges that Stratakis and Gerazounis made false representations to the decedent, deceived and defrauded her, exerted undue influence on her and exercised severe mental pressure on the decedent, causing her to execute the trust and transfer the premises to the trust.

Counsel for Gerazounis argues that the action should be dismissed because Cheliotis does not have standing to maintain the action in her individual capacity. Gerazounis contends that Cheliotis asks the court to set aside the conveyance of the premises which she, in fact, never owned. Cheliotis, Gerazounis correctly points out, is not the legal representative of the estate, and only the legal representative of the estate may bring an action to set aside the trust and deed.

Gerazounis claims that the action is essentially an SCPA 2103 proceeding which seeks to bring property back into the estate. Such a proceeding can only be brought by a fiduciary. Here, Gerazounis argues that Cheliotis only has a “tenuous interest” in the premises as the purported legatee of the premises in the 2006 Greek instrument. Cheliotis’s status as a beneficiary or distributee is irrelevant and does not confer upon her an independent cause of action. Accordingly, the complaint must be dismissed and the Notice of Pendency cancelled due to Cheliotis’s lack of standing.

In addition, Gerazounis argues that even if it is assumed that Cheliotis had standing, the complaint must be dismissed for failure to meet the pleading requirements set forth in the CPLR. Gerazounis contends that the first cause of action, which vaguely sounds in fraud in the inducement, the second cause of action for undue influence, and the third cause of action, also appearing to be grounded in fraud, must be dismissed for failure to plead fraud and undue influence with particularity. Gerazounis argues that Cheliotis’s allegations are “nebulous” at best and do not meet the elements of fraud, which are 1) representation of a material fact, 2) falsity, 3) scienter, 4) deception and 5) injury. According to Gerazounis, the complaint is devoid of any factual details to sustain its conclusory allegations of fraud and undue influence. Accordingly, Gerazounis argues that the first, second and third causes of action set forth in the complaint must be dismissed.

Furthermore, Gerazounis claims that each cause of action warrants dismissal on the grounds that the statute of limitations has run. Gerazounis argues that an action for fraud is governed by a six year statute of limitations, which commences to run at the time the allegedly fraudulent conveyance occurs or, in the case of actual fraud, either six years from the fraudulent

transfer or two years from the time the fraud was discovered or could have been discovered with reasonable diligence. According to Gerazounis, the statute of limitations expired six years from the date of the allegedly improper execution of the irrevocable trust and the deed on May 4, 2001, or May 4, 2007, almost a year before the action was commenced. Gerazounis claims that the decedent never sought to set aside the trust or deed while she was alive. According to Gerazounis, the same result is achieved if the two-year discovery rule is applied since the decedent was the grantor of the trust, and Gerazounis reasons that because the decedent was the grantor, the time for discovery ran from the time of creation of the trust. Therefore, the statute of limitations would have expired on May 4, 2003. Gerazounis claims that the decedent's failure to set aside the trust or deed during her lifetime is binding on Cheliotis.

With respect to the fourth cause of action, a declaratory judgment pursuant to Article 15 of the Real Property Law, Gerazounis argues that the action should be dismissed on the basis of lack of standing and statute of limitations. Article 15 of the RPL provides that "where a person claims an estate or interest in real property ... such person ... may maintain an action ... to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make." Gerazounis argues that Cheliotis's "interest" in the subject premises derives solely from her status as legatee under an alleged will. Moreover, she does not represent the estate since she has not been appointed fiduciary. Accordingly, she lacks standing. In addition, Gerazounis argues that the statute of limitations bars the cause of action.

Cheliotis also seeks an accounting from Gerazounis and the imposition of a constructive trust. With respect to the demanded accounting, Gerazounis claims that there is no fiduciary

relationship, and, therefore, no obligation to account. With respect to the imposition of a constructive trust, Gerazounis claims that Cheliotis fails to plead the necessary elements of a constructive trust. She also argues that the statute of limitations for the imposition of a constructive trust is six years. Accordingly, the statute expired on May 4, 2007, six years from the alleged procurement of the trust and deed.

Lastly, Gerazounis asks the court to direct the Nassau County Clerk to cancel the Notice of Pendency against the property because Cheliotis wrongfully and maliciously affected title to the premises and interfered with its alienability. Gerazounis also seeks costs and expenses of \$5,042.50.

Defendant John C. Stratakis submits his own affidavit and the affidavit of his father and law partner, Christ Stratakis, in support of his motion to dismiss on the same grounds proffered by Gerazounis. According to Stratakis, he became the attorney within his firm most responsible for the decedent's legal affairs in October 2000 when she suffered heart pains and was admitted to the hospital. Following her recuperation, she came to counsel's firm to consult about estate planning changes. She advised him that she felt indebted to Gerazounis's mother who had "saved her life" and "she wanted to leave Mrs. Gerazounis a sizeable portion of her estate."

They discussed various instruments that would accomplish this task and decedent decided upon a trust in which she would retain a life estate in the premises and, upon her death, the remainder interest would be transferred to Gerazounis. The decedent consulted with Mrs. Gerazounis, who informed her that she did not want to be left anything. After a lengthy discussion, however, it was decided that the decedent could leave something to Mrs. Gerazounis's daughter, Alexandra (the defendant herein). Counsel prepared the trust document

“pursuant to the desires and instructions” of the decedent. The decedent expressed her concern that it be made irrevocable because “due to her strong feelings of indebtedness to the Gerazounis family, she wanted to make sure that her gift would never be withdrawn.” According to Stratakis, decedent “remained insistent throughout that the Abeliotis trust be made irrevocable.” On May 4, 2001, the premises were placed into the trust. Over the next few years, counsel’s firm continued to represent decedent. During this time, decedent spoke little of her sister and appeared to remain estranged from her. The decedent was in the pattern of living in New York during the winter months and going to Greece each year from approximately April or May until September. On February 12, 2004, the decedent approached counsel about modifying her March 2000 will. In early 2005, decedent purchased a summer house in Chios, Greece. At some point prior to February 2006, decedent had an argument with Gerazounis’s mother. Decedent advised counsel that she was considering changing the beneficiary of the trust to the Chios Reforestation Society. Counsel advised her that it would be difficult to do this without Gerazounis’s consent. The decedent advised counsel that she wanted to think about it and, in anticipation of her decision, a change of beneficiary document was prepared for her review. Stratakis “reached out” to decedent sometime thereafter, but was instructed not to contact Gerazounis until after decedent had given the matter further thought. Decedent sent counsel’s firm a letter dated February 2, 2006, a copy and a translation of which are submitted in connection with the motion. The letter reads as follows:

“With regard to my house at 884 Bryant Avenue, New Hyde Park, New York 1104(?), I had instructed your office to put it into trust so that, when I die, it goes to Alexandra B. Gerazouni [sic], which is what you did. Because I asked it to be irrevocable, I understand that it is hard for me to change it. But the family has behaved very badly towards me and said nasty things to me and I wish to change the trust so that, when I die, the house goes to the Chios Forest Friends Union.”

Counsel also states that he never received further instructions regarding the change, and only had “intermittent contact” with decedent during the next year. In March 2007, she advised counsel that she would be leaving for Greece again in the summer and returning in September, and she sent funds to his firm for payment of estimated taxes and household expenses. In July 2007, she advised counsel she would be returning to New York earlier than planned. Subsequently, Cheliotis telephoned counsel to advise that decedent had been hospitalized due to a stroke. In August 2007, counsel visited decedent during a trip to Chios. He found her incapable of communication and mobility, and he was concerned about the care she was receiving. She died soon thereafter. Counsel had no knowledge of the 2006 Greek instrument until after decedent’s death.

Also submitted in support of the motion to dismiss is the affidavit of Christ Stratakis, John C. Stratakis’s father and law partner. According to his affidavit, it was because of their shared common Chiote heritage and fluency in Greek that decedent came to counsel’s firm after her husband’s death. It became apparent that decedent had few friends and little social life. She also spoke very little English. He introduced decedent to a fellow Chiot, Mrs. Frederik Gerazounis, whose husband is a distant cousin of his, in an effort to help decedent adjust to her new life as a widow. Christ Stratakis states that Mrs. Gerazounis was compassionate and was involved in the Greek community having helped and cared for elderly people. He thought the two could develop a friendship. Christ Stratakis reiterates many of the facts recited in his son’s affidavit; however, he adds the following: Sometime after 1999, decedent attempted a reconciliation with her sister, from whom she had been estranged. He was advised that another attorney would be handling the decedent’s legal affairs. At the end of 1999 or beginning of 2000,

the decedent again reached out to counsel and advised him that she was “wary” of her sister and the lawyers her sister had referred to her. She wanted to return her work to his firm and revoke a will that had been executed in 1999. She was “adamant” that counsel prepare a new will whereby her sister would receive nothing from her estate and evidently executed a new will in March 2000. After the decedent’s illness in October 2000, Mrs. Gerazounis was a frequent visitor and drove decedent to and from her doctors’ appointments. On February 12, 2004, decedent approached Christ Stratakis about modifying her March 2000 will. The 2004 instrument specifically disinherited Cheliotis like the March 2000 will. The primary change was to the selection of the residuary beneficiary from the American Heart Association to the Chios Reforestation Society. The decedent chose the Society because she wanted to preserve the memory of her husband with memorialized signs on the mountains and trees.

In addition, counsel submits (i) the affidavit of Scott R. Johnston, an associate at his firm, seeking costs of not less than \$7,500.00 and (ii) the affidavit of Diana Poulous Andriotis, the attorney for The Chios Reforestation Society, stating that there is no affiliation between Christ Stratakis and the Chios Reforestation Society as alleged by Cheliotis’s attorney.

Cheliotis opposes the motions to dismiss by an affirmation of opposition submitted by her counsel. He argues that courts have long recognized that fraud and undue influence are seldom practiced openly but rather are the product of persistent and subtle pressure. Moreover, undue influence may be proved by circumstantial evidence. Counsel argues that Stratakis concedes that decedent had few friends after her husband’s death and little proficiency in English. He alleges that decedent did not know Gerazounis and only met Gerazounis’s mother years after her husband’s death. Counsel further contends that decedent was increasingly dependent upon

Stratakis “in all phases of her life including her legal, financial and social affairs.” In addition, counsel argues that Stratakis acknowledges that decedent’s husband’s sudden death left her in a weakened mental state. Thus, he claims the “conditions were ripe for them to insinuate themselves into all of her affairs and, most significantly here, her wealth and property.” Counsel also claims that significant questions exist concerning Stratakis’s statement that he had “some discussion of various instruments” with decedent regarding her desire to benefit Gerazounis, i.e. did counsel explain to the decedent the difference between an irrevocable and revocable trust. According to plaintiff’s counsel, making the trust irrevocable in no way benefitted decedent as shown by her inability to change the trust despite her later clearly expressed desire. The only person benefitted by making the trust irrevocable was Gerazounis.

Counsel also points out that the letter dated February 2, 2006 was well within the limitations period. He argues that although Stratakis told decedent she would need Gerazounis’s consent to change the trust, he does not address whether he advised the decedent that an action could be commenced if Gerazounis did not consent. According to counsel, Stratakis was less than diligent in carrying out decedent’s desire to revoke the trust. Moreover, he argues that Stratakis concedes that, after decedent expressed her desire to change the trust, their communication became “intermittent.” Counsel argues that it is entirely possible that Stratakis led decedent to believe that he was taking steps to change the trust and revoke the gift to Gerazounis, even though he was not, which could explain why she included a bequest of the premises in the 2006 Greek instrument.

As to the issue of standing, counsel argues that a petition for limited letters of administration has been prepared and will be filed. In fact, since the date of counsel’s

affirmation in opposition, such an application has been filed.

Gerazounis's counsel has submitted a reply affirmation in which he argues that Cheliotis has failed to address the material issues of the motion and instead attempts to divert the court's attention with emotional pleas. In addition, counsel argues that Cheliotis's opposition papers make a number of factual misstatements. Gerazounis and the decedent knew each other since 1998. Counsel further argues that the argument of facts is immaterial as Cheliotis's claims are barred by the statute of limitations and are procedurally defective for failure to plead the elements of fraud and undue influence with particularity.

#### ANALYSIS

On a motion to dismiss pursuant to CPLR 3211, every favorable inference must be afforded to the challenged pleading (*Held v Kaufman*, 91 NY2d 425 [1998]; *Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]). "On a motion to dismiss a complaint for failure to state a cause of action, the complaint is to be construed in a light most favorable to the plaintiff (*Cohn v Lionel Corp.*, 21 NY2d 559), and deemed to allege whatever can be implied from its statement by fair intendment" (*Howard Stores Corp v Ope*, 1 NY2d 110)" (*Matter of Carvel*, NYLJ, Nov. 24, 1995, at 33 [Sur Ct, Westchester County]). In addition, on a motion to dismiss for failure to state a cause of action, all of the allegations contained in the pleading must be assumed true, and the court must determine whether the alleged facts fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481 [1980]).

#### STANDING

Gerazounis and Stratakis argue that the complaint should be dismissed in its entirety because Cheliotis lacks standing to recover assets for decedent's estate or an interest under

Article 15 of the RPL. Here, Cheliotis is simply a distributee of the decedent. Although there is a bequest allegedly made to her in the 2006 Greek instrument, her status as a legatee is uncertain. Not only would Cheliotis have to successfully prove that the 2006 Greek instrument is a valid will, but she would also have to be successful in her attempt to set aside the trust and deed. Accordingly, Gerazounis and Stratakis argue that Cheliotis's status is tenuous at best.

A beneficiary does not have an independent cause of action to seek to recover assets withheld from an estate (*McQuade v Perot*, 223 NY 75 [1918]). An individual must obtain letters of administration before suing on behalf of the decedent's estate (*Brandon v Columbian Mut. Life Ins. Co.*, 264 AD2d 436 [1997]). Under certain circumstances, however, it has been held that the interested party has standing to assert a claim for return of property especially where the executor was involved in the alleged wrongful transfer (*Inman v Inman*, 97 AD2d 322 [1993]). Nevertheless, it appears that the more appropriate remedy would have been for Cheliotis to commence the causes of action relating to the property which she claims should be part of the estate as a fiduciary of the estate, which would afford protection to any creditors of the estate. Here, Cheliotis has filed two proceedings to be appointed fiduciary. She has filed a petition seeking 1) limited letters of administration to “[p]rosecute action to impose constructive trust on, and/or set aside deed conveying title of Decedent's residence at 884 Bryant Avenue, New Hyde Park, New York”; and 2) ancillary letters testamentary. Since Cheliotis is a non-domiciliary alien, pursuant to SCPA 708 (1)(c), she can only serve with a co-fiduciary who is a resident of this state. It appears that a New York resident has joined in the petition for ancillary letters, but not in the application for limited letters. The application for limited letters has been held in abeyance pending a decision on this motion.

The court declines to dismiss the complaint on the basis of lack of standing. Limited letters of administration with respect to the decedent's estate shall issue to Cheliotis upon the filing of an amendment to the petition seeking her appointment together with a New York domiciliary, together with an oath and designation from the proposed co-fiduciary. Accordingly, the issuance of such letters will cure any alleged standing defect. The same rationale applies to the action for the imposition of a constructive trust.

**FAILURE TO PLEAD CAUSES OF ACTION FOR FRAUD  
AND UNDUE INFLUENCE WITH PARTICULARITY**

Defendants argue that the causes of action for fraud and undue influence should be dismissed for failure to plead with particularity.

To state a cause of action for fraud, a plaintiff must allege: (1) a representation of material fact, (2) the falsity of the representation, (3) knowledge by the party making the representation that it was false when made, (4) justifiable reliance, and (5) resulting injury. Alternatively, instead of an affirmative misrepresentation, a fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information. Thus, where a fiduciary relationship exists "the mere failure to disclose facts, which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive" (*Kaufman v Cohen*, 307 AD2d 113, 120 [1st Dept. 2003]) (internal citations omitted).

One asserting undue influence must show that (1) the influence exercised amounts to moral coercion, (2) which independent action destroyed free agency or which by importunity, could not be resisted; 3) constrained the [victim] to do that which was against his free will and desire, but 4) which he was unable to refuse or too weak to resist (*Matter of Caffrey*, 95 Misc 466 [Sur Ct, New York County [1916]). This classic formulation about what constitutes undue

influence still resonates in the case law: "[i]t must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency . . . It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear" (*Children's Aid Socy. v Loveridge*, 70 NY 387, 394 [1877]; see also *Matter of Kumstar*, 66 NY2d 691, 693 [1985]). Moreover, undue influence may be established by indirect or circumstantial evidence (*Matter of Walther*, 6 NY2d 49, 54 [1959]; *Matter of Ana*, 284 NY 421 [1928]; *Matter of Collins*, 124 AD2d 48 [4th Dept 1987]). The elements of undue influence have been described as motive, opportunity, and the actual exercise of undue influence (*Matter of Fiumara*, 47 NY2d 845, 846 [1979]).

CPLR 3016(b) requires that "[w]here a cause of a action or defense is based upon...fraud, or...undue influence, the circumstances constituting the wrong shall be stated in detail." The Court of Appeals recently held in *Pludeman v Northern*, 10 NY3d 486, 491-492 [2008]), as follows:

"The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. We have cautioned that section 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud. Thus, where concrete facts are peculiarly within the knowledge of the party charged with fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings [internal citations and quotations omitted].

Here, Cheliotis has made the following allegations. The decedent was of advanced age,

ill and unable to get around. Defendant Stratakis proposed that title to the premises be placed in trust, and the decedent relied upon defendant's advice. The decedent transferred the premises to the trust, but did not intend to make a gift. Her purpose in creating the trust was for convenience and to engage in Medicaid and/or tax planning. Decedent was ill and dependent on defendant Stratakis and Gerazounis's mother, who befriended the decedent, cared for and took her to her doctors' appointments. Defendant Stratakis was decedent's attorney and had a confidential relationship with the decedent. He undertook the payment of decedent's bills and taxes while she was in Greece and reviewed her mail during her yearly stays in Greece. Decedent had difficulty with the English language. Decedent was lonely and despondent after the death of her husband. Decedent conveyed the premises in reliance upon misrepresentations that the conveyance would facilitate her care and treatment during illness. Cheliotis contends that "[g]iven that fraud and undue influence are rarely practiced openly, more specificity in pleading is difficult without any discovery." Moreover, Cheliotis points out that Gerazounis is related to defendant, Stratakis, the attorney-draftsman and trustee.

The crux of the complaint is alleged fraudulent behavior by the defendants in connection with the creation of the trust and the transfer of the premises to the trust. The basis of the complaint is that the trust was the product of fraud and undue influence perpetrated upon decedent, who was in a weakened mental state, and who was dependent upon defendant, Stratakis. Accordingly, the court finds that the branch of the motion seeking dismissal for failure to properly plead the allegation of fraud and undue is denied.

Moreover, Cheliotis argues that the complaint adequately pleads a cause of action to impress a constructive trust. The elements of a constructive trust are (i) a confidential or

fiduciary relationship; (ii) a promise or agreement, express or implied; (iii) a transfer in reliance upon such agreement; and (iv) unjust enrichment (*Matter of Tschernia*, 18 Misc 3d 1114(A), 2007 NY Slip op. 52510[U] [Sur Ct, Nassau County, 2007]). These criteria are not rigidly applied (*Simonds v Simonds*, 45 NY2d 233, 241[1978]) and “a constructive trust may be erected whenever necessary to satisfy the demands of justice” (*Latham v Father Divine*, 299 NY 22, 27 [1949]).

Here, Cheliotis argues that the elements of a constructive trust are present and adequately pled. First, a confidential and fiduciary relationship existed between the decedent and defendant, Stratakis. Second, there was a transfer of title to the premises from the decedent to the trust benefitting Gerazounis. Third, Gerazounis was unjustly enriched since she is the remaindermen of the trust. The complaint also alleges that the premises was deeded to the trust in reliance upon a promise or representation from Stratakis that it was to the decedent’s benefit for the trust to hold title to premises. The trust would facilitate Gerazounis’s care for decedent.

The court agrees that Cheliotis has made out a cause of action for fraud, undue influence and constructive trust.

#### STATUTE OF LIMITATIONS

The Defendants argue that even if the motion to dismiss is denied on the other grounds, it must be granted as to the statute of limitations.

The statute of limitations for a proceeding in which fraud is alleged is six years from the commission of the wrong or two years from the discovery of the fraud or the date on which it could reasonably have been discovered, whichever is later (CPLR 203[g]; 213[8]). The statute of limitations for an action based on constructive trust is six years.

Defendants argue that the statute has expired because it begins to run six years from commission of the wrong. Here, the alleged wrong is the creation of the trust on May 4, 2001. Thus, defendants argue that the statute ran on May 4, 2007 and, thus, the action is time-barred. Even if the two year discovery rule applies, defendants contend that the statute still has run. According to defendants' theory, the two year discovery rule also runs from the date of the creation of the trust since the decedent was the grantor. Essentially, they argue that decedent should have been aware she was being defrauded at the moment she was being defrauded.

Cheliotis argues that the defendants should be equitably estopped from asserting a statute of limitations defense due to Stratakis' alleged deceptive conduct. Defendant Stratakis states that on February 2, 2006 decedent told him that she wanted to revoke the gift of the remainder to Gerazounis. The 2006 Greek instrument includes a bequest of the premises. Cheliotis claims that decedent could have included a bequest of the premises in the 2006 Greek instrument because of decedent's belief based upon misrepresentations made by Stratakis that he had caused title to the premises to be restored to the decedent. Such "false representations" could possibly have lulled the decedent into the belief that she need not take any legal action. Cheliotis argues that this type of deceptive conduct tolls the statute of limitations (*Morando v Morando*, 41 AD3d 559 [2d Dept 2007]).

Where the question is when the fraud could or should have been discovered, and there is a factual dispute as to when the party knew or should have discovered the alleged fraud, the complaint should not be dismissed even though it may well turn out at trial that the claim is time barred (*Trepuk v Frank*, 44 NY2d 723 [1978]; *Matter of Colonna*, NYLJ, Oct 13, 1998, at 33, *affd* 271 AD2d 444 [2000]; *Matter of Liebowitz*, NYLJ, Mar 28, 1991, at 30]). There are issues

raised in the complaint which preclude dismissal at this stage on grounds of statute of limitations. Here, the decedent's letter to defendant Stratakis regarding revocation of the trust is within the six year limitations period. There are factual issues regarding the circumstances of the February 2006 letter, which preclude dismissal at this stage on the grounds of statute of limitations.

#### ACCOUNTING

The court finds that the request for an accounting at this time is premature as Cheliotis has not yet established her interest in the premises. Accordingly, a request for an accounting is denied at this time without prejudice.

#### NOTICE OF PENDENCY AND COSTS

Defendants further argue that the court should exercise its discretionary powers and cancel the Notice of Pendency. Defendants cite CPLR 6514(b) and *Nastasi v Nastasi*, 26 AD3d 32, 41 [2d Dept 2005] for the proposition that “[w]here a plaintiff is using the notice of pendency for an ulterior purpose a finding of lack of good faith can be made.” The defendants claim that Cheliotis commenced the instant action and filed the instant Notice of Pendency in bad faith. Accordingly, they also seek the imposition of costs.

Cheliotis argues that there is no basis to find that the action was commenced in bad faith. According to Cheliotis, defendant, Stratakis' affidavit confirms that Cheliotis acted in good faith because it raises many questions and contains many admissions. In addition, she argues that bad faith is a difficult burden to meet (*551 West Chelsea Partners v 565 Holding, LLC*, 40 AD3d 546 [1st Dept 2007]), which has not been met here.

The court finds no evidence of bad faith and declines to cancel the Notice of Pendency.

This matter is scheduled for a conference on January 27, 2009, at 9:30 a.m.

Settle order.

Dated: December 24, 2008

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court