Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE VALERIE BRATHWAITE NELSON IA Part 7
Justice

OLGA MAVROIDIS, etc., x	Index Number 24387 2006
Plaintiff,	
- against -	Motion Date April 21, 2009
CONSTANTINA ARTAVANIS, et al.,	Motion Cal. Number 25
Defendants. x	Motion Seq. No. 11

The following papers numbered 1 to 13 read on this motion by plaintiffs for leave to renew that portion of its prior cross motion which sought to strike the answer of defendant Constantina Artavanis and granting summary judgment in their favor, and upon renewal striking the answer of said defendant and granting summary judgment and declaring the deed dated January 16, 2004 null and void, setting aside the deed and restoring the property to the Estate of Lillian Artavanis and granting summary judgment cancelling and discharging the JP Morgan Chase Bank, N.A. and National City Bank mortgage liens. Defendant JP Morgan Chase Bank, N.A. cross-moves in opposition and seeks an order granting leave to renew its prior motion declaring its mortgage dated April 19, 2006 is a valid mortgage lien against the premises 20-61 27th Street, Astoria, New York.

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The Court, on its own motion, hereby recalls and vacates the Short Form Order in the above-captioned action dated June 10, 2009 and the following is issued in its place:

Upon the foregoing papers the motion and cross motion are determined as follows:

This court in its order of February 20, 2009, denied those branches of plaintiffs' cross motion which sought to strike defendant Artavanis' answer and for summary judgment, with leave to renew, and gave this defendant who is appearing pro se one final opportunity to appear for a deposition. Defendant Constantina Artavanis was directed to appear for a deposition to be held at a date, time and place selected by defendants, but in any event, no later than March 26, 2009, and to comply with the prior order of April 18, 2008 with respect to her responses to certain discovery demands. That branch of plaintiffs' cross motion which sought to cancel and discharge the JP Morgan Chase Bank, N.A. and National City Bank mortgage liens were denied as premature. The cross motion of defendant JP Morgan Chase Bank, N.A., was denied with leave to renew upon the completion of Ms. Artavanis' deposition.

A copy of the February 20, 2009 order together with notice of entry was served on Ms. Artavanis on March 3, 2009 at her last known address by Federal Express Overnight Delivery, and by certified mail. Enclosed in each package was a letter dated March 3, 2000 from plaintiffs' counsel in which she stated that she had tried to contact Ms. Artavanis by telephone but that her number had been disconnected, and that all parties, plaintiffs and defendants, agreed that Ms. Artavanis would be deposed on March 23, 2009 and if not completed the deposition would continue on March 24, 2009, at 10:00 A.M. on both dates, at the offices of plaintiffs' counsel. Counsel also requested that Ms. Artavanis supplement her responses to the plaintiff's bill of particulars and first notice for discovery and inspection, as directed by the court, on or before March 20, 2009.

Plaintiffs' counsel has submitted a copy of the Federal Express tracking report which indicates that said package was left at Ms. Artavanis' front door. Plaintiffs' counsel has also submitted a certified mail receipt, and a copy of the envelope which is stamped return to sender, which she asserts Ms. Artavanis refused to accept on March 11, 2009. However, Ms. Artavanis in various correspondence which she faxed to the parties, stated that she had been served with copy of the order together with notice of entry, and had also obtained her own copy from the court.

Ms. Artavanis faxed a seven page letter to counsel for defendants JP Morgan Chase Bank, N.A. and National City Bank, on March 6, 2009, in which she stated "THE JUDGE DENIED MANY MOTION PAPERS. THE JUDGE DENIED MY MOTION." She further stated, in pertinent part, that: "BEFORE ANY ONE THINKS OF SCHEDULING ANY DEPOSITIONS FIRST I WOULD LIKE TO SEE A SCHEDULE OF THE OTHER

ACTIVE DEFENDANTS AND I WANT THE NAME AND FIRM OF THE ATTORNEY WHO WOULD DEPOSE ME AND HIS REGISTRATION ID NUMBER AND IT HAS TO BE A DATE THAT I AM AVAILABLE ON BEFORE YOU DO ANYTHING BUT IT IS SENSELESS YOU ALL KNEW WHAT TOOK PLACE AND I GAVE A LOT OF INFO TO THE COURTS AND SPOKE THE TRUTH YOU ALL KNOW WHAT THE REAL STORY IS WHAT'S THE POINT TO WASTE MY TIME. AND WHY SHOULD I BE PUT IN A POSITION WHEN I DID NOTHING WRONG. PLAINTIFF HAS TO COMPLY WITH MY DISCOVERIES THAT WAS STIPULATED THAT WON'T HAPPEN BECAUSE SHE IS A LIAR AND HAS NO PAPER PROOF AND YOU ALL KNOW THAT. SO BEFORE YOU WASTE YOUR TIME AND EFFORTS WAIT TO SEE IF I PUT IN ANY PAPERS TO OPPOSE THAT MEMO DECISION IN REGARDS TO MY MOTION TO VACATE OR ANY MOTION PAPERS IF I DO YOU WILL GET NOTICE NO LATER THAN TWO WEEKS."

Although Ms. Artavanis did not fax this letter to plaintiffs' counsel, co-defendants furnished plaintiffs' counsel with a copy of said letter. Plaintiffs' counsel in a letter dated March 18, 2009 informed Ms. Artavanis that the deposition was scheduled to take place on March 23, 2009 at 10:00 A.M. at her office, and if not concluded would continue on March 24, 2009, and requested that she provide the discovery responses, as directed by the court, on March 20, 2009. This letter was sent to Ms. Artavanis by Federal Express Overnight Delivery and regular first class mail. The Federal Express label states that the addressee was not in, "3rd attempt" and thus indicates that delivery was not made.

Ms. Artavanis, in a three page letter dated March 18, 2009 and addressed to plaintiffs' counsel stated, in pertinent part, that counsel did not ask her if she was available for the deposition on the dates selected, that she could have contacted her by mail, and that "you went ahead and scheduled dates without my approval." She stated that she was not available for the scheduled date and claimed to have shown up for the prior deposition on May 9, 2008. She also asserted that she had complied with the discovery demands in the past, and inquired as to the depositions of other parties. A copy of this letter was sent to counsel for the other parties and other pro se parties.

Plaintiffs' counsel in a letter dated March 19, 2009 acknowledged receipt of Ms. Artavanis' correspondence of March 18, 2009, noted that she had documentary evidence of the March 3, 2009 mailings to Ms. Artavanis, and stated that as Ms. Artavanis had failed to contact any of the parties to schedule a deposition and failed to provide any dates of availability, this was a "clear and blatant refusal on your part to comply with the specific order of the Court," and therefore the deposition remained scheduled for March 23, 2009 in plaintiffs' counsel's office at 10:00 A.M. Counsel states that all of the parties and/or their

counsel and a court reporter would be present at that time, and that if Ms. Artavanis failed to appear counsel would make a further application to strike her answer.

Ms. Artavanis, in a fax sent on March 20, 2009 stated that she was not available on March 23 and March 24, 2009, that she did not wish to talk to plaintiff's counsel by telephone and therefore requested communications be made by mail, claimed that she did not receive correspondence as plaintiff was stealing her mail, and requested that it be sent again, inquired as to what happened to the deposition of the other defendants, stated that papers can be "thrown under her door," that nothing was ever hand delivered, and "please do not come onto my premises again."

Ms. Artavanis in a fax sent on March 20, 2009 to counsel for JP Morgan Chase stated that she was not available for deposition, that opposing counsel scheduled the March 23 and 24 dates "without her consent or approval or to see if I was available," and claimed she had not received some of the correspondence.

Ms. Artavanis, in a fax sent on March 21, 2009 to counsel for plaintiffs, stated in pertinent part that she was not asked about her availability to be deposed, that she received the Federal Express package at her door with the copy of the court's order and deposition dates and had also obtained a copy of the order from the court, and that she should have been asked what dates she will be available.

Counsel for plaintiffs, in a letter dated March 22, 2009, which was delivered "in hand" stated that although Ms. Artavanis indicated that she was not available to be deposed on March 23, 2009 she had failed to provide any alternative dates; that the court order obligates Ms. Artavanis to appear for a deposition on or before March 26, 2009; that all parties are ready, willing and able to take her deposition on March 23,2009 and that "[i]n the event that you fail to appear for your deposition as required, please advise me as to which date you are available to be deposed in accordance with the Court order. Given that only a few days remain for you to comply with the Court order, please fax a letter to my office no later than 4:00 P.M. on March 23, 2009 indicating your available dates so that I may notify the other defendants." Counsel also stated that notwithstanding the court's order, Ms. Artavanis had failed to respond to the outstanding discovery requests.

Ms. Artavanis did not reply to the letter of March 22, 2009, and never advised plaintiffs and co-defendants of any date she was available for a deposition. In addition, Ms. Artavanis did not supplement the discovery requests as ordered by the court.

On March 23, 2009, plaintiff Olga Mavroidis, plaintiffs' counsel, counsel for defendant National City Bank, and counsel for defendant Family Land Abstract, were present

at plaintiffs' counsel's office, at which time a court reporter recorded that Ms. Artavanis had failed to appear by 11:00 A.M.; that she had been notified of the scheduled deposition by FedEx, by certified mail and by regular first class mail; and that in addition to the parties present, the attorney for JP Morgan Chase Bank, N.A., and defendant Walter Drobenko were both on call and indicated that they would appear for the deposition once Ms. Artavanis appeared.

Ms. Artavanis in a letter dated March 5, 2009, which was addressed and faxed to plaintiff's counsel on March 26, 2006, stated in pertinent part: "PLEASE BE ADVISED NOT TO COME AROUND MY HOME TRYING TO HARSSS(sic) ME WITH MY SISTER TRYING TO THROW PAPERS UNDER MY DOOR ETC. THIS BEHAVIOR WILL NOT BE ACCEPTED FORI (sic) IT IS IMPROPER ON YOUR PART TO BEHAVE THIS WAY. KEP(sic)AWAY FROM ME AND MY HOME IT IS IMPROPER ON YOUR PART TO BEHAVE THIS WAY. KEP(sic) AWAY FROM ME AND MY HOME PLEASE. JUST SENT ANY CORRESPONDENCE AS YOU HAVE BEEN BY REGULAR MAIL .... I AM STILL WAITING FOR A SCHEDULE TO SEE WHAT DATES YOU HAVE FOR THE OTHER DEFENDANTS TO BE DEPOSED, I WILL NOT SCHEDULE A DATE UNTIL I SEE THAT FIRST AS WE WERE ALL REQUIRED TO BE DEPOSED. DID YOU KNOW THAT ANY PARTY CAN PUT A REQUEST TO THE COURTS TO HAVE YOUR FIRM DEPOSED."

Plaintiffs' counsel served the within motion to renew on March 30, 2009, by Federal Express, Overnight Delivery on all of the defendants, including Constantina Artavanis. Plaintiffs counsel served the supplemental affirmation and additional papers upon all the parties on April 2, 2009 by ordinary mail. Defendant Artavanis has defaulted in answering the within motion.

In view of the fact that defendant Constantina Artavanis failed to be deposed on or before March 26, 2009, and failed to provide the supplemental discovery as directed by this court in the order of February 20, 2009, the within motion to renew the prior cross motion for summary judgment is granted.

As regards plaintiffs' request to strike Constantina Artavanis' answer, "[t]he nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Reyes v Vanderbilt*, 303 AD2d 391 [2003], citing *Patterson v New York City Health & Hosps. Corp (Queens Hosp. Ctr.)*, 284 AD2d 516 [2001]). Before invoking the drastic remedy of striking a pleading, however, the "court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate, and contumacious conduct or its equivalent" (*Reyes v Vanderbilt*, *supra* at 392; *see* CPLR 3126; *Viteritti v Gelfand*,

289 AD2d 566, 567 [2001]; *Solomon v Horie Karate Dojo*, 283 AD2d 480, 480-481 [2001]; *Cianciolo v Trism Specialized Carriers*, 274 AD2d 369, 370 [2000]).

Unconditionally striking a pleading pursuant to CPLR 3126 is appropriate where the resisting party's default is deliberate and contumacious (*see Pimental v City of New York*, 246 AD2d 467, 468-469 [1998]; *Furniture Fantasy v Cerrone*, 154 AD2d 506 [1989]). Disobedience of a court order and frustration of the disclosure scheme provided by the CPLR warrant imposition of the sanction (CPLR 3126; *see Zletz v Wetanson*, 67 NY2d 711 [1986], and cases cited therein). Plaintiffs, as the moving party, must establish that defendant Artavanis willfully failed to comply with discovery demands (*Herrera v City of New York*, 238 AD2d 475 [1997]).

Here, a compliance conference order dated February 13, 2008 provided that all parties who had not been deposed were to be appear for a deposition on April 3, 2008. Since defendant Constantina Artavanis had not been deposed, said order was applicable to her. Ms. Artavanis, however, informed the parties that she would not be appearing on that date and all of the parties thereafter appeared at a pre-trial conference before Judge Ritholtz on April 18, 2008 and executed a so-ordered stipulation. Defendant Artavanis, pursuant to the April 18, 2008 order agreed to be deposed on May 9, 2008. The parties all appeared before Judge Ritholtz on May 9, 2008, and Ms. Artavanis was to be deposed that afternoon at 2:00 P.M., at a court reporting office located on Sutphin Boulevard across the street from the courthouse. As previously stated in the order of February 20, 2009, Ms. Artavanis did not attend her deposition on May 9, 2008, and declined to be deposed on May 20, 2008, following Mr. Drobenko's deposition. This court, in its order of February 20, 2009, determined that Ms. Artavanis' failure to attend the May 9, 2008 deposition was a violation of a valid order of the court. The court further determined that Ms. Artavanis' response to discovery requests dated May 5, 2008, failed to comply with the prior so-ordered stipulation.

Ms. Artavanis' failure to appear for a deposition on March 23, 2009, her failure to propose any dates on which she was available for a deposition and her failure to comply with the discovery requests constitutes a violation of the court's order of February 20, 2009. The willful and contumacious character of Constantina Artavanis' failure to appear can be inferred from her repeated failure to comply with three court orders directing her appearance, and the lack of an adequate excuse for her failure to appear, and from her correspondence with the parties in which she stated that she viewed the deposition as a waste of her time and useless (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2007]; *Xina v City of New York*, 13 AD3d 440, 441 [2004]; *Kroll v Parkway Plaza Joint Venture*, 10 AD3d 633 [2004]; *Beneficial Mtge Corp. v Lawrence*, 5 AD3d 339, 340 [2004]; *Patterson v Greater N.Y. Corp of Seventh Day Adventists*, 284 AD2d 382, 383 [2001]).

As regards that portion of the order of February 20, 2009 which directed Ms. Artavanis to provide supplemental discovery, compliance with an order to disclose requires both a timely response and a good faith effort to address the request meaningfully (*see Kihl v Pfeffer*, 94 NY2d 118 [1999]). Here, Ms. Artavanis failed to comply with that portion of the February 20, 2009 order which directed that she properly supplement the discovery demands. Ms. Artavanis' willful and contumacious conduct in this regard can be inferred from her argumentative response to the order of February 20, 2009, contained in her correspondence with the parties, in which she claimed to have previously provided information. Ms. Artavanis, however, ignored that portion of the February 20, 2009 order which found her prior discovery response to be insufficient.

In view of the fact that Ms. Artavanis has failed to comply with three prior orders to be deposed, and has failed to comply with the discovery orders, and has defaulted in answering this motion and thus has failed to provide any excuse for her failure to comply with said orders, that branch of plaintiffs' prior cross motion which seeks to strike defendant Constantina Artavanis' answer is granted.

Plaintiff Olga Mavroidis alleges in her first cause of action that her sister Constantina Artavanis fraudulently caused their mother to execute the August 28, 2003 power of attorney and fraudulently procured the September 8, 2003 revocation of the January 20, 2003 power of attorney. It is also alleged that the transfer of the real property known as 20-61 27th Street, Astoria, New York by Constantina Artavanis as attorney-in-fact for Lillian Artavanis to herself, constituted a breach of her fiduciary duty as an attorney-in-fact, and was not authorized by the purported power of attorney. It is, therefore, asserted that this transfer is void on its face. Ms. Mavroidis also asserts that her mother, Lillian Artavanis, never received any value or consideration for the transfer of the real property, and that her sister is now seeking to deprive her of a one-third interest in the property that belonged to their mother. Plaintiffs seek to set aside said deed, to re-convey said real property to the Estate of Lillian Artavanis, and to cancel the liens and encumbrances on the real property including the mortgages held by JP Morgan Chase Bank, N.B., and National City Bank.

It is well settled that "[o]n a motion for summary judgment pursuant to CPLR 3212, the proponent 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" (*Sheppard-Mobley v King*, 10 AD3d 70, 74 [2004], *affd as mod*, 4 NY3d 627 [2005], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Sheppard-Mobley v King*,

supra, at 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, *supra*, at 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (*see*, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 [2006], citing *Secof v Greens Condominium*, 158 AD2d 591 [1990]).

Plaintiffs, in their moving papers, have apparently abandoned the claim that the power of attorney was obtained by undue influence. Rather, it is asserted that the power of attorney does not authorize gift transfers to be made on behalf of the of the grantor/principal and therefore the transfer of the property on behalf of Lillian to Constantina is void. It is also asserted that even if the power of attorney had authorized Constantina to make gifts of her mother's property on her behalf, the instant transfer must be set aside because it was not in Lillian's best interest. Finally, it is asserted that as the deed transfer is void, defendant Artavanis could not have executed valid mortgage liens against the subject property and said mortgages should be set aside, canceled and discharged.

The documentary evidence submitted here establishes that on January 8, 1991, Olga Mavroidis (referred to hereinafter as O. Mavroidis so as to distinguish her from the plaintiff herein whose name is also Olga Mavroidis) transferred ownership of the real property improved by a two-family house, located at 20-61 27th Street, Astoria, New York, to her daughter, Lillian Artavanis, pursuant to a deed, for the recited consideration of $10.00. Lillian Artavanis was the mother of Olga Mavroidis (plaintiff herein and the granddaughter of O. Mavroidis), Constantina Artavanis and Gerasimos Artavanis.

At present, Olga Mavroidis and her daughter reside in the second floor apartment in the subject premises and Constantina Artavanis resides in the first floor apartment. Gerasimos Artavanis is alleged to reside in a nursing home.

On January 20, 2003, Lillian Artavanis executed a power of attorney, naming Olga and Constantina as attorneys-in-fact. On August 28, 2003, Lillian Artavanis executed a short form power of attorney, appointing her daughter, Constantina, as attorney-in-fact, and authorizing her to act with respect to the following identified matters: real estate transactions; bond, share and commodity transactions; banking transactions; estate transactions; claims and litigation; records, reports and statements; retirement benefit transactions; tax matters; and all other matters. This power of attorney was recorded on June 2, 2004.

On September 8, 2003, Lillian Artavanis executed a revocation of the January 20, 2003 power of attorney, in order to "make the new POWER OF ATTORNEY dated August 28, 2003 active with only MS. CONSTANTINA E. ARTAVANIS."

On January 16, 2004, Constantina Artavanis, in her capacity as attorney-in-fact for Lillian Artavanis, executed a deed conveying to herself the subject real property for the recited consideration of $1.00, and purportedly reserved a life estate for Lillian Artavanis. The deed was acknowledged by Walter Drobenko, and was thereafter recorded on September 29, 2004.

On April 19, 2006, Constantina Artavanis obtained a mortgage secured by the subject real property from JP Morgan Chase Bank, N.A. in the sum of $325,000.00, which was recorded on May 15, 2006.

Lillian Artavanis died intestate on August 25, 2005, and is survived by her three children.

On September 18, 2006, Constantina Artavanis executed a credit line mortgage, secured by the subject real property, in favor of National City Bank, in the sum of $250,000.00, which was subsequently recorded.

New York courts impose fiduciary duties on attorneys-in-fact (*In re Estate of Ferrara*, 7 NY3d 244, 254 [2006]; *In re Culbreth*, 48 AD3d 564, 564 [2008]; *Marszal v Anderson*, 9 AD3d 711, 712-13 [2004]) for the benefit of the principal (*Mantella v Mantella*, 268 AD2d 852 [2000]; *Moglia v Moglia*, 144 AD2d 347, 348 [1988]). The relationship between an attorney-in-fact and her principal has been characterized as agent and principal with the attorney-in-fact under a duty to act with the utmost good faith toward the principal in accordance with the principles of morality, fidelity, loyalty and fair dealing (*Semmler v Naples*, 166 AD2d 751, 752 [1990], *appeal dismissed* 77 NY2d 936 [1991]). Although a transfer of assets by the holder of the power of attorney to herself is no longer presumed improper (General Obligations Law § 5-1502), the burden of proving the invalidity of such a transfer generally falls on the party challenging it.

Here, the August 28, 2003 instrument naming defendant Constantina Artavanis as attorney-in-fact contains no language that could be construed as authorizing her to make a gift to either herself or a third party. To the extent that the power of attorney grants powers for "all other matters," this is not a "specific provision ... authorizing gifts" (*Masterson*, 46 AD3d at 1092). Defendant Constantina Artavanis, as the holder of the power of attorney, was obligated to "act in the utmost good faith and undivided loyalty toward [Lillian] and must act in accordance with the highest principles of morality, fidelity, loyalty and fair

dealing" (*In re Estate of Ferrara*, *supra*, at 254, quoting *Semmler v Naples*, *supra*). While General Obligations Law § 5-1503 allows a power of attorney to be augmented to allow the attorney in fact to make unlimited gifts to herself, the Court of Appeals specifically held in *In re Estate of Ferrara*, (*supra*, at 253), that General Obligations Law § 5-1502M which requires an attorney in fact to act in the principal's best interests still applies.

Defendant Constantina Artavanis cannot meet the heavy burden of rebutting the presumption of impropriety by demonstrating "'the clearest showing of intent'" on the decedent's part to make a gift to her of her assets (*Semmler v Naples*, *supra*, at 752). To the extent that Constantina Artavanis asserted in prior affidavits that her mother transferred the subject real property to her because it was her express desire to do so, her self-serving statements cannot establish donative intent.

The court further finds that there is no evidence that Constantina acted in her mother's best interests when she transferred the real property to herself. Walter Drobenko, an attorney who represented Constantina with regard to the conveyance of the subject property, stated at his deposition that he spoke with Lillian Artavanis on the telephone on the date of the transfer, January 16, 2004, that she confirmed that the power of attorney was still in effect, and that she gave her consent to the transfer of the property to her daughter Constantina, after being assured that she would have a life estate in the property. An examination of the January 16, 2004 deed reveals that although Lillian Artavanis is described as the grantor with a life estate, the entire property was conveyed by Constantina Artavanis as attorney-in-fact to herself for the sum of $1.00. The deed does not contain any language which can be construed as reserving a life estate in favor of Lillian Artavanis. Therefore, said deed does not reflect donative intent.

Mr. Drobenko also testified that the subject conveyance was prompted by the desire to shield the real property from any claims for nursing home or medical expenses which might be incurred by Lillian Artavanis. A general desire to preserve asserts, however, is not a clear indication of donative intent, nor does it establish that such a transfer was in Lillian Artavanis' best interest.

Plaintiffs have submitted copies of real property transfer tax forms dated January 16, 2004. On the City of New York Real Property Transfer Tax Return, the percentage transferred is listed as "100%,"the box "gift transfer not subject to indebtedness" is checked, and consideration is listed as "0.00." The Combined Real Estate Transfer Tax Return describes the conveyance as a gift, with "0.00" consideration. The New York State Real Property Transfer Reportax, states that the purchase price is $1.00, that this is a sale between relatives, and that the buyer is Constantina Artavanis. It appears from these tax

documents that Constantina Artavanis either paid no consideration or paid $1.00, and viewed the transaction as a gift.

The power of attorney authorized Ms. Artavanis to engage in real estate transactions on behalf of the grantor. However, where, as here the deed itself recites a nominal consideration, no presumption exists that the purchaser is one in good faith (5-50 Warren's Weed New York Real Property § 50.63). Furthermore, such a sale of the real property by Constantina Artavanis, as attorney in fact, to herself constitutes self dealing and therefore is invalid (*see* 5-54 Warren's Weed New York Real Property § 54.59).

Finally, there is no evidence that said conveyance was intended as compensation for services that Constantina Artavanis performed for Lillian Artavanis. No provision in the powers of attorney discusses compensation, and there is no evidence of any other agreement indicating such an arrangement (*see In re Estate of Naumoff*, 301 AD2d 802, 804 [2003}). Furthermore, where parties are related, "it is presumed that the services were rendered in consideration of love and affection, without expectation of payment" (*In re Estate of Wilson*, 178 AD2d 996, 997 [1991]).

The conveyance of the subject real property by Constantina Artavanis, as attorney in fact, to herself therefore is invalid. Lillian Artavanis remained the title holder of the subject real property until her death on August 26, 2005. Since Lillian Artavanis died intestate, the subject real property passed by operation of law to her distributees, Olga Mavroidis, Constantina Artavanis and Gerasimos Artavanis, and thus will not be re-conveyed to the Estate of Lillian Artavanis (EPTL 4-1.1).

The documentary evidence submitted herein establishes that following the purported conveyance of the property, but prior to Lillian's death, Constantina Artavanis obtained a mortgage secured by the subject real property from JP Morgan Chase Bank, N.A. in the sum of $325,000.00, on April 19, 2006, which was recorded on May 15, 2006. Constantina Artavanis also executed a credit line mortgage, secured by the subject real property, on September 18, 2006, in favor of National City Bank, in the sum of $250,000.00.

Constantina Artavanis apparently obtained a mortgage from Ameriquest on November 23, 2004 in the sum of $223,718.74. The proceeds of that loan as well as the proceeds of the JP Morgan Chase loan and the National City Bank loan were deposited in Constantina Artavanis' personal checking account with Citibank NA and were used to pay her credit card bills, and other personal expenses. The proceeds of the JP Morgan Chase loan were also used, in part, to satisfy the Ameriquest mortgage.

As regards the JP Morgan Chase mortgage, prior to entering this transaction, the lender obtained a title report from Family Land Abstract which raised exceptions to title:

"Schedule B:

8. Deed in Liber/Reel CFRN 2004000608736, Page is a no or nominal consideration deed. One of the following is required for title to close:

(b) A confirmatory deed from said grantor confirming the deed in question.

(c) Affidavit from Grantor of the deed in question, confirming delivery of the deed in question and setting forth the reason that the transfer was made without consideration.

(d) If the attorney who supervised the execution of, or acknowledged the signature of the grantor on the deed in question is available, he/she could give an affidavit as to the identity of the grantor and the delivery of the deed.

(e) Such other proofs or explanations that the company deems sufficient. Please call clearance for guidance."

"26. Proof is required that the Power of Attorney given by Lillian Artavanis to Constantina E. Artavanis recorded in CFRN 2004000608735 had not been revoked and that the principal named therein was alive and consented to the delivery of the deed recorded in CFRN 2004000608736 which was executed pursuant to the power of attorney, at the time of the delivery of said deed."

"27. An affidavit must be provided that Lillian Artavanis was of sound mind when the deed was conveyed."

"28. Deed from Lillian Artavanis to Constantine E. Artavanis dated 1/16/2004 recorded 9/29/2004 in CFRN 2004000608736 is null and void by reason of being self-serving. Grantee, Constantina E. Artavanis is also the Attorney in Fact therefore this is a self serving transaction. Additional exceptions may be raised."

JP Morgan Chase thus was on notice of potential problems arising out of the conveyance of the property by Constantina Artavanis as attorney in fact, to herself. Since there is no evidence that the proceeds that the JP Morgan Chase mortgage was used to pay off a debt relating to the land, or that any of the Chase loan proceeds were used for the

benefit of the plaintiff Olga Mavroidis, JP Morgan Chase cannot establish it has an equitable mortgage interest against plaintiff Olga Mavroidis. Therefore, that branch of plaintiffs' cross motion which seeks summary judgment cancelling the JP Chase Morgan mortgage as it applies to plaintiffs, is granted.

As regards the National City Bank credit line mortgage, there is no evidence that the proceeds from this mortgage were used to pay off a debt relating to the land, or that any of the loan proceeds were used for the benefit of the plaintiff. In view of the fact that the court finds that the subject deed is null and void, that branch of plaintiffs' cross motion which seeks to cancel said mortgage, as it applies to plaintiffs, is granted.

National City Bank, however, may maintain its cross claim against Constantina Artavanis for breach of contract in which it seeks to recover the amount loaned to her.

That branch of JP Morgan Chase, cross motion to renew its prior cross motion is granted. Although the subject deed is invalid, at the time that Constantina Artavanis entered into the mortgage agreement with this lender, she was an heir at law, with a one-third interest in the subject premises. Therefore, this lender's request for summary judgment on its cross claim against Constantina Artavanis is granted to the extent that it is the declaration of the Court that J.P. Morgan Chase has an equitable lien against Constantina Artavanis' one-third interest in the subject premises.

Dated:

VALERIE BRATHWAITE NELSON, J.S.C.