

Finn v Doran

2009 NY Slip Op 32182(U)

September 17, 2009

Supreme Court, Queens County

Docket Number: 19657/07

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
ANNA FINN, CAROL VERDIGI and VITO
DELISO,

Index No: 19657/07
Motion Date: 5/20/09
Motion Cal. No: 14
Motion Seq. No.: 1

Plaintiff,

-against-

MARIA CLAIRE DORAN, MICHAEL ADDEO,
CARMELA ADDEO, et. al.,

Defendants.

-----X

The following papers numbered 1 to 14 read on this motion for an order, pursuant to CPLR § 3212, granting summary judgment to defendant Maria Claire Doran, and dismissing the complaint against her.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Memorandum of Law in Opposition.....	6 - 10
Reply Affirmation-Exhibits.....	11 - 14

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action for, inter alia, the imposition of a constructive trust upon property located at 34-23 9th Street, Long Island City, New York (the “premises”), commenced by plaintiffs Ann Finn and Vito Deliso, the niece and nephew of Vivian Verdigi (“decedent”) and Carol Verdigi, the niece of Louis Verdigi (“Verdigi”), the late husband of decedent, against defendants Maria Claire Doran (“defendant”), decedent’s niece, and Michael Addeo and Carmela Addeo, decedent’s brother and sister-in-law. Verdigi and decedent were owners of a three-fourth interest in the premises and the Addeo defendants owned the remaining one-fourth interest.

Relevant Facts

On June 2, 1992, Verdigi and decedent, who had no children, executed joint and reciprocal Wills leaving their interest in the premises to, inter alia, plaintiffs and defendant upon their deaths. On January 13, 1999, Verdigi died and decedent held the entire three-fourth interest by operation of

law. On June 26, 2000, decedent transferred to defendant her interest in the property to be held with the Addeo defendants' one-fourth interest as tenants in common. On March 3, 2003, decedent executed a Will revoking all previous wills and codicils, and reiterated her testamentary plan to leave the premises to, inter alia, plaintiffs and defendant. By Will dated June 1, 2006, decedent revoked all previous wills and codicils, and left her entire estate to defendant. Thereafter, on June 2, 2006, decedent execute a correction deed transferring her interest in the property to defendant, with the reservation of a life estate to herself. Thereafter, decedent died on August 5, 2006.

Plaintiffs commenced this action on August 8, 2007, seeking to impress a constructive trust upon the three quarter interest in the premises now held by defendant, alleging that she failed to fulfill a promise she purportedly made to decedent to hold the premises for the benefit of all the nieces and nephews of decedent and Verdigi, and distribute the estate, upon decedent's death, to same, as set forth in the original testamentary plan detailed in the 1992 Will. In her answer to the pleadings, defendant asserted two affirmative defenses, to wit, the action is barred by Estates Powers Trust Law § 13-2.1 and the complaint fails to state a cause of action. It is upon the foregoing that defendant moves for an order, pursuant to CPLR § 3212, granting summary judgment in her favor and dismissing the complaint against her.

Discussion

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Lui v. Park Ridge at Terryville Ass'n, Inc., 196 A.D.2d 579 (2d Dept.1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957); Conde v. City of New York, 24 A.D.3d 595 (2nd Dept. 2005); .D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1st Dept. 1985). Generally, the proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853 (1983); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). “[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” Rotuba Extruders v. Ceppos, supra, 46 N.Y.2d at 231; Coughlin v. Bartnick, 293 A.D.2d 509 (2nd Dept. 2002). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Here, in support of the motion, defendant proffered the aforementioned Will executed by decedent on June 1, 2006, prepared by her attorney, Joseph Risi (“Risi”), naming defendant as the sole heir of her estate. In further support of the motion, defendant also proffered, inter alia, the deposition and affirmation of Attorney Risi, who stated that he knew decedent for twenty years and represented her throughout that time. He stated that in June 2000, at decedent's request, he prepared a new deed transferring decedent's interest in the property to defendant, and in so doing, he contends

that she “expressly stated that she wanted and intended that her interest in her house go to [defendant], and no one else.” Attorney Risi asserted that decedent did not request nor discuss with him that defendant promised to give such interest in the premises to, inter alia, plaintiffs, after her death. He further asserted that to the best of his knowledge, the execution of the June 26, 2000 deed was not conditioned upon any promises or agreements, and in his opinion decedent was of “sound mind, memory and understanding, and was not under coercion, restraint or undue influence,” at the time of such execution.

Attorney Risi also stated that it was his opinion that decedent had testamentary capacity when she had him draft, and when she executed, the June 1, 2006 Will leaving the premises solely to defendant. Further, he testified in his deposition that as is his custom, he went over the terms of the June 1, 2006 Will with decedent in preparing the instrument, and it was his understanding that the Will represented the desires that decedent intended. When asked did decedent explain why she wanted to revoke the March 3, 2003 Will eliminating all beneficiaries except defendant, he stated the following:

On numerous occasions [decedent] told me that [defendant] was the only person that cared about her, the only person that took her anywhere, the only person that visited her and she wanted to make sure that [defendant] got everything she had. She considered her like a daughter she never had. She referred to her as her baby. She adored her and she wanted to avoid exactly what’s happening today from happening.

Lastly, Attorney Risi contends that he was not aware of any other conveyance arrangement pursuant to which defendant would hold decedent’s estate in trust for plaintiffs.

Defendant argues that, notwithstanding plaintiffs’ contentions that there was a plan between decedent and defendant for the estate to be held in trust by defendant, who purportedly made an oral promise to decedent to distribute her estate upon her death to plaintiffs and defendant, there is no indication in the Will, in the first instance, that decedent’s estate was to be held in trust by defendant, whom was named not only as the Executrix of decedent’s estate, but decedent’s sole heir. Consequently, defendant contends that as there was no promise, the imposition of a constructive trust does not lie and the complaint fails to state a cause of action upon which relief can be based.

A constructive trust is an equitable remedy and “‘is the formula through which the conscience of equity finds expression.” Simonds v. Simonds, 45 N.Y.2d 233, 241 (1978); O’Brien v. Dalessandro, 43 A.D.3d 1123 (2nd Dept. 2007). [T]he ultimate purpose of a constructive trust is to prevent unjust enrichment and, thus, a constructive trust may be imposed ‘when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest’(citations omitted).” O’Brien v. Dalessandro, 43 A.D.3d 1123, 1124 (2nd Dept. 2007); see, Williams v. Eason, 49 A.D.3d 866 (2nd Dept. 2008). To “state a cause of action to impose a constructive trust, a plaintiff must allege (1) a confidential or fiduciary relationship, (2)

a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (citations omitted).” Zane v. Minion, 63 A.D.3d 1151 (2nd Dept. 2009); see, also, Pereira v. Glicker, 61 A.D.3d 948 (2nd Dept. 2009) Williams v. Eason, 49 A.D.3d 866 (2nd Dept. 2008); Iwanow v. Iwanow, 39 A.D.3d 476 (2nd Dept. 2007); Losner v. Cashline, L.P., 41 A.D.3d 789 (2nd Dept. 2007); Rocchio v. Biondi, 40 A.D.3d 615 (2nd Dept. 2007); Osborne v. Tooker, 36 A.D.3d 778 (2nd Dept. 2007); Cruz v. McAneney, 31 A.D.3d 54 (2nd Dept. 2006).

Here, defendant made out her prima facie entitlement to summary judgment by proffering the Will executed on June 1, 2006, and the testimony of Attorney Risi, which conclusive demonstrate the testamentary intent of decedent to make defendant her sole heir to the exclusion of plaintiffs, and that such was not predicated upon a promise for defendant to distribute the premises to plaintiffs upon decedent’s death. Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasanani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). Pursuant to CPLR 3212, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (2nd Dept. 1993). Plaintiffs failed to do so.

Contrary to plaintiffs’ contentions, although there was clearly a testamentary plan that included them in the 1992 and 2003 Wills of decedent, the June 1, 2006 Will revoked that plan and excluded them from participating in decedent’s estate. Moreover, as plaintiffs’ contentions with regard to the alleged promises and agreements made by defendant are purely conjecture and not based in evidence, the 2006 Will is dispositive. Plaintiffs thus have failed to raise triable issues of fact precluding defendant’s entitlement to summary judgment.

Likewise, defendant is entitled to summary judgment and dismissal of the action based upon the Statute of Frauds prohibition, as a promise made by defendant to distribute decedent’s estate upon her death to plaintiffs must satisfy section 13-2.1 of the New York State Estates, Powers and Trusts Law (“EPTL”). The relevant statutory provision, entitled “Agreements involving a contract to establish a trust, to make a testamentary provision of any kind, and by a personal representative to answer for the debt or default of a decedent, required to be in writing,” states, in pertinent part, the following:

(a) Every agreement, promise or undertaking is unenforceable unless it or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

(1) Is a contract to establish a trust.

(2) Is a contract to make a testamentary provision of any kind.

(3) Is a promise by a personal representative to answer for the debt or default of his decedent.

Thus, as neither the purported testamentary plan allegedly devised by decedent, nor defendant's alleged oral promise purportedly made to decedent to make, inter alia, plaintiffs distributees of her estate, was memorialized in a writing, the promise is unenforceable pursuant to EPTL 13-2.1(a)(2). See, In re Urdang, 304 A.D.2d 586 (2nd Dept. 2003); Lowinger v. Lowinger, 287 A.D.2d 39 (1st Dept. 2001); In re Huyot, 276 A.D.2d 697 (2nd Dept. 2000); see, also, General Obligations Law § 5-701(a)(1).

Conclusion

Accordingly, based upon the foregoing, the motion by defendant Maria Claire Doran for an order, pursuant to CPLR § 3212, granting summary judgment in her favor, and dismissing the complaint upon the ground that the action is barred by the Statute of Frauds and the complaint fails to state a cause of action, is granted in its entirety. The complaint hereby is dismissed.

Dated: September 17, 2009

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J.S.C.