Matter of Loeffler

2009 NY Slip Op 33141(U)

December 24, 2009

Surrogate's Court, Nassau County

Docket Number: 328878

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--x
Accounting by Eric R. Loeffler, as the Executor of the Estate of

ALBERT L. LOEFFLER,

Deceased.
--x

File No. 328878

Dec. No. 837

In this voluntary accounting proceeding, the objectants, Kirk A. Loeffler and Carla P. Baylis, have moved for partial summary judgment denying specific performance of a purported agreement to sell the decedent's real property located at 18 Arnold Court, Montauk, New York to the petitioner Eric L. Loeffler, who is the executor of the estate. They have also moved for an order (i) enjoining Eric from selling, mortgaging or otherwise disposing of the Montauk property without a court order; (ii) directing the listing of the Montauk property for sale; (iii) awarding them attorneys' fees, disbursements and costs; (iv) appointing Carla executor of the estate and authorizing her to sell the Montauk property; (v) declaring each of Eric, Carla and Kirk a one-third owner of the Montauk property; and (vi) directing Eric to account for all rent collected for the Montauk property and to pay over to Carla and Kirk their one-third share thereof.

The decedent, Albert L. Loeffler, Jr., died on March 26, 2003. He was survived by his three children, Eric R. Loeffler, Carla P. Baylis and Kirk A. Loeffler. The decedent's will dated December 23, 1999 was admitted to probate by this court by decree dated July 21, 2003 and letters testamentary issued to Eric R. Loeffler. At the time of his death, the decedent owned real property located at 18 Arnold Court, Montauk, New York. The will leaves the decedent's estate to his three children equally. Eric alleges that Carla and Kirk orally agreed to sell him their

respective interests in the Montauk property. Carla and Kirk dispute that there ever was such an agreement.

On or about January 18, 2006, Eric commenced an action against Carla and Kirk in the Supreme Court in Suffolk County. The basis of that action was that Carla and Kirk had orally agreed to sell the Montauk property to Eric. The Supreme Court action requested specific performance of that agreement. On or about April 21, 2006, Carla and Kirk answered and counterclaimed in the Supreme Court action.

Thereafter, Carla and Kirk initiated a compulsory accounting proceeding against Eric, as executor, in this court. Eric filed an account of his proceedings as executor. The accounting reflects the purported oral agreement. Objections to the account were filed by Carla and Kirk, including an objection to Eric's claim that he is entitled to the Montauk property based upon the purported oral agreement. Carla and Kirk have now moved for partial summary judgment. The parties have filed a stipulation discontinuing the Supreme Court action in Suffolk County.

Kirk and Carla have each submitted an affidavit in support of the motion. Carla and Kirk argue that the statute of frauds (GOL 5-703[2]) is a bar to the enforcement of the purported sale of the Montauk property. According to Kirk and Carla, Eric, as the executor, was in complete control of the affairs, money and property of the estate. Kirk and Carla claim that neither of them entered into a contract to sell their interest in the Montauk property. They admit that there was a series of negotiations in which Eric harassed them to sell their interests; however, an agreement was never reached. Carla and Kirk allege that the Montauk property is currently worth in excess of $1,000,000.00, yet Eric claims that they willingly agreed to a sale based upon a value of

$335,000.00, one-third of which Eric would not pay because of his one-third interest in the estate. Moreover, Carla and Kirk dispute the $335,000.00 value as the correct date of death value. According to appraisals commissioned by Carla and Kirk, the Montauk property had a date of death value of $450,000.00 and a value of $600,000.00 in April of 2004 , which is when Eric alleges the agreement was reached. Carla and Kirk claim that they were unaware that Eric collected rental income for the property. Kirk and Carla claim neither of them ever agreed to sell Eric their interets in the Montauk property in April 2004 or at any other time. They note that in his papers filed in the Supreme Court action, Eric does not list a date for the purported contract other than "in 2004" yet in this proceeding, he alleges that the agreement was reached in April of 2004. Kirk and Carla argue that these inconsistencies support their position that an actual agreement was never reached. Carla and Kirk argue that not only is there no written agreement for the purchase of the Montauk property, but there is no memorialization of any details. There is no evidence of a down payment and there is no evidence what the terms of payment were. There is nothing in writing as to when the sale was to be completed, nor is there any writing concerning the finances. They also argue that Eric himself testified that the terms of the alleged agreement were not specific.

In addition, Kirk and Carla state that the monies they received from Eric were not partial payments as Eric alleges but rather distributions from their shares of their father's estate. According to Carla and Kirk, their father was wealthy and they assumed that these payments were distributions. In fact, they claim that they had no information concerning their father's estate despite requests made to Eric for such information. They state that Eric's own deposition

confirms that he did not make any notations on the checks to indicate that the payments were anything other than distributions.

Moreover, Carla and Kirk argue that Eric's expenditure of funds on the Montauk property, as well as repairs and landscaping work he claims to have done, inured to his own benefit since he and his family used the Montauk property for their own enjoyment. They further claim that Eric's payment of real estate taxes and insurance was simply part of his fiduciary duties and do not constitute partial payments. Kirk and Carla argue that Eric is using this litigation to pay them below fair market value for their interests in the Montauk property. They accuse Eric of self-dealing in breach of his fiduciary duties which they argue warrants his removal as executor. Carla and Kirk contend that Eric never listed the Montauk property for sale and never made any attempts to market it. They claim that Eric as a fiduciary had the duty to deal with them honestly, and he breached that duty. Thus, Carla and Kirk maintain that even if it is determined that an agreement was reached, it should be voided based on impropriety.

In opposition to the motion, Eric has submitted his own affidavit, his attorney's affirmation and two affidavits from his mother, Sheila. Eric states that from the time his father was alive and after his death it was always intended that the Montauk property would be held by a family member. Initially after their father's death, Eric claims that he, Carla and Kirk discussed owning the property together. He was never asked by Carla or Kirk to list the Montauk property for sale or to market it because it was agreed the property should remain in the family. Thereafter, Kirk decided that he wanted to be bought out of his one-third interest. Kirk was living in Alaska and evidently needed the money. As a result of Kirk's decision, an initial appraisal

was obtained. Eric states that he asked the estate attorney, Brian Tully, to obtain an appraisal. The appraisal came in at $350,000.00. Carla wanted to buy out both Kirk and Eric. Kirk told Eric he was fine with the $350,000.00 value. Eric told Carla he did not want to sell his share, but they could own it together and buy out Kirk. Carla advised Eric that she did not want to own the property with him, so it was agreed he would buy out her share. Eric states that in all of these dealings he did not view it as negotiations between an executor and beneficiaries. Rather, Kirk saw it as three siblings trying to work out a deal to keep the Montauk property in the family, a desire to which they all were committed.

Eric disputes Carla's and Kirk's assertions that the terms were not agreed upon. According to Eric, he asked for a reduction in the price since the property was staying in the family. Kirk then asked Eric if he was comfortable with $335,000.00 and he said yes. Accordingly, a price was agreed to. In addition, Eric asserts that the payment terms were also fixed. It was agreed that Eric would make partial payments from his share of the estate and then pay the balance by obtaining a loan. Eric explained to Carla and Kirk that he would have to rent the property in order to show the lender that the property was self-sufficient. They all agreed to this arrangement. Eric then spoke with Mr. Tully to advise him of the arrangement. Eric annexes to his opposition papers notes from two conversations he had with Mr. Tully on April 19, 2004 and May 21, 2004 concerning the transaction. Mr. Tully's notes reflect that the price was $335,000.00 divided by 3 with $111,667 to Kirk and Carla with a mortgage to be take out in the range of $120,000.00 to $140,000 .00.

Eric also argues that both Carla and Kirk confirmed the sale to their mother Sheila. Eric

sent Kirk via bank wire $60,000.00 representing a down payment of his one-third share. He then sent Kirk an additional $35,000 on July 1, 2004. Eric also sent Carla $27,774.58 on September 20, 2004. In August of 2003, the decedent's Hicksville property was sold. The net proceeds were $350,452.48. Each of Carla, Kirk and Eric received $30,000.00. From the remaining $260,000.00, Kirk received two payments of $22,637.20 and $143,000.00. Carla received an additional payment of $105,000.00 and Eric received an additional payment of $15,000.00. Eric contends the disproportionate payments were a manifestation of the agreement regarding the Montauk property. These payments were in excess of any equal distributions Carla and Kirk were entitled to from the estate. Moreover, Eric asserts that Carla actually gave him the name of a mortgage broker. Eric also claims that after May of 2004, he stopped paying expenses on the house from the estate account and started paying them from his personal funds. He worked on the house traveling back and forth from Arizona to New York, thereby missing days at his business. Eric states that he cleaned the house, painted it, purchased new furniture and furnishings and landscaped the property. Eric claims the purchase has put him in financial jeopardy. Eric states that in May of 2004 Kirk actually congratulated him on the purchase.

According to Eric, in August of 2005, he was prepared to close on the loan. He told Kirk that he needed the deed to close the loan and once he received the loan he would pay Carla and Kirk the balance. Kirk advised Eric that he and Carla were not complying with the deal. According to Kirk, Carla was "unhappy" and the deal was on hold. At Kirk's request, Eric obtained a second appraisal through Mr. Tully. They agreed the price would be the average of the two appraisals. The second appraisal assessed the value at $360,000.00. When Kirk was

advised of the result of the second appraisal, he told Eric he and Carla wanted an appraisal as of the spring of 2004 not the date of death. The value as fixed by the third appraisal was $400,000.00. In September of 2005, Eric was advised that Carla and Kirk had retained an attorney to contest the deal.

Eric asserts that Carla and Kirk have misrepresented to the court their knowledge concerning their father's assets. According to Eric, both Carla and Kirk knew that their father owned the Montauk property and the Hicksville property as well as $30,000.00 in the bank and $15,000.00 in securities.

According to Sheila Loeffler, the parties' mother, she visited Carla from April 16, 2004 through April 24, 2004. Together they drove out to the Montauk property to remove some personal effects because Eric and his wife were coming in from Arizona to paint the house and ready it for the summer. She and Carla spoke at length. Carla told her that Eric was buying Kirk and Carla out of the house. Kirk had no desire to own the property. Carla wanted the property, but she did not want to own it with Eric. Carla felt an arrangement with Eric would be too difficult since Eric lived far away. Both Carla and Kirk agreed that if only one of them could own it, it should be Eric because of his love of fishing. Carla mentioned that she was disappointed because the appraisal was too low, but if Kirk and Eric felt the price was right, she was not going to argue. Sheila told her to get another appraisal. Sheila also mentioned that it might not be easy for Eric to get a loan.

Sheila also visited Kirk in Alaska from September 4, 2004 through September 12, 2004. Kirk told her that he and Eric had arrived at a price by telephone in early April 2004. Eric then

called Carla to make sure the price was acceptable to her. At the time, Kirk looked at the "settlement as a done deal." They talked about the fact that if Carla and Eric shared ownership, the burden of caring for the property would fall on Carla since she lived closer. Nevertheless, it was Carla who came to the decision not to share ownership with Eric. There was never a question of Kirk sharing in the ownership because he was in need of money.

Eric's counsel argues that the agreement is not barred by the statute of frauds because it falls within the exception of partial performance in GOL 5-703(4). He also argues that the agreement is enforceable under the doctrine of equitable estoppel. He claims that the terms of the deal were defined. Provisions were made for the price, the payment method and the timing of the closing. Counsel asserts that there was no indefiniteness. Counsel further argues that Eric's actions are "unequivocally referable" to the agreement. Eric paid to Carla and Kirk 95% of the remaining cash in the estate. Eric expended his own funds after May of 2004 to pay insurance and other expenses. Eric and his wife flew in from Arizona to work on the property. In addition, Eric instructed Mr. Tully to obtain three separate appraisals for the property. These appraisals were obtained pre-litigation as opposed to the appraisals commissioned by Carla and Kirk after the litigation began .

SUMMARY JUDGMENT

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d

395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

ANALYSIS

The statute of frauds (Gen Obligations Law §5-703[2]) provides that a sale of real estate is void unless the contract is in writing. "It is long settled under New York's Statute of Frauds

that an oral agreement to transfer an interest in real property... is ‘nugatory and unenforceable’, and a party to the agreement may legally and rightfully refuse to recognize or perform it” (*Edelman v Hatami,* 19 Misc 3d 1105[A] [Sur Ct, Westchester County 2008] [internal citations omitted]). The purpose is to prevent frauds “by the assertion of claims not evidenced by a written agreement” (61 NY Jur Frauds, Statute of §3). “With respect to oral agreements relating to real property, for example, it has been stated that the court cannot lose sight of the fact that the purpose of the statute of frauds is to prevent litigation over such oral agreements where the terms are always dependent on the uncertainty and varying memory of witnesses.” (61 NY Jur Frauds, Statute of§3). “[A]n agreement which violates the statute of frauds may be enforceable where there has been part performance ‘unequivocally referable’ to the contract by the party seeking to enforce the agreement” (*Luft v Luft*, 52 AD3d 479, 480 [2d Dept 2008]; Gen Obligations Law 5-703[4]). Thus, “courts of equity may compel the specific performance of agreements under the doctrine of ‘part performance,’ as codified in General Obligations Law 5-703(4), in recognition of the fact that it would amount to fraud to allow one party to a real estate transaction to escape performance after permitting the other to perform in reliance on the agreement” (*Edelman v Hatami*, 19 Misc 3d 1105[A] [Sur Ct, Westchester County 2008]). The claimed partial performance must be “unequivocally referable” to the agreement, which means that the actions alone must be “unintelligible or at least extraordinary; and explained only with reference to the oral agreement” (*Pinkava v Yurkiw*, 64 AD3d 690, 692 [2d Dept 2009][internal citations omitted]).

Here, in response to Carla’s and Kirk’s prima facie showing that enforcement of the

alleged oral agreement was barred by the statute of frauds, Eric has raised triable issues of fact as to whether he partially performed in a manner unequivocally referable to its terms. Eric submitted an affidavit stating that he made disproportionate distributions from the estate, paid expenses on the Montauk property from his personal funds after May 2004, made improvements and repairs to the property and obtained three appraisals in connection with the agreement. This evidence raises a triable issue of fact as to part performance which precludes an award of summary judgment on the grounds of the statute of frauds. There is evidence from which a trier of fact may conclude that Eric's conduct was extraordinary and explainable only by reference to the oral contract (*Pinkava v Yurkiw*, 64 AD3d 690 [2d Dept 2009]; *Luft v Luft*, 52 AD3d 479 [2d Dept 2008]).

In addition, Kirk and Carla aver that summary judgment is appropriate because the terms of the alleged agreement are deficient. They argue that the agreement is indefinite as to the purchase price, payment terms and closing date. They also point to inconsistencies in Eric's assertions in the Supreme Court proceeding and this proceeding regarding the date of the alleged agreement. In this respect, "summary judgment is appropriate where the moving party establishes the deficiency of an oral contract's terms and the responding party fails to raise a triable issue of fact rebutting that showing" (*Edelman v Hatami*, 19 Misc 3d 1105[A] [Sur Ct, Westchester County 2008]). Not all of the terms of a contract need be fixed with absolute certainty (*Id*). The court finds that, viewed in a light most favorable to Eric, the alleged agreement does not fail for lack of indefinite terms. Eric has submitted copies of Mr. Tully's records as well as the testimony of his mother which sufficiently support Eric's contentions

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regarding the alleged oral agreement. Accordingly, the court finds that the foregoing terms as alleged by Eric are sufficient to withstand dismissal for lack of definiteness.

Concerning the branch of the motion which seeks Eric's removal as executor and Carla's appointment in his place, the court notes that it is well-settled that a fiduciary owes a duty of undivided loyalty to the beneficiaries and cannot act in his own self-interests (*Matter of Rothko,* 43 NY 2d 305 [1977]). The request for Eric's removal is premature. The court has not made a final determination as to whether there was an agreement to sell the Montauk property. Until such a determination is made, it is unnecessary to address whether Eric breached his fiduciary duties.

The motion for summary judgment is denied in its entirety. Counsel shall appear for a conference on January 28, 2010, at 9:30 a.m., to set the matter down for trial.

This constitutes the decision and order of the court.

Dated: December 24, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court