

Sachs v Soffer

2010 NY Slip Op 30675(U)

March 16, 2010

Supreme Court, New York County

Docket Number: 114699/08

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 114699/2008

SACHS, LINDA SOFFER

VS.

SOFFER, BARBARA K.

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO.

114699/08

MOTION DATE

MOTION SEQ. NO.

004

MOTION CAL. NO.

n this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

A-Q

Answering Affidavits — Exhibits

1-4

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAR 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

MAR 16, 2010

Dated: _____

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
LINDA SOFFER SACHS,

Plaintiff,

Index No.: 114699/08

-against-

BARBARA K. SOFFER, individually and as
Trustee of the JOSEPH SOFFER 2001
REVOCABLE FAMILY TRUST, and STUART M.
SOFFER, individually and as Trustee of
the JOSEPH SOFFER REVOCABLE 2001 FAMILY
TRUST, and the JOSEPH SOFFER 2001
REVOCABLE FAMILY TRUST,

Defendants.

FILED
MAR 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

MARTIN SHULMAN, J.:

In the underlying complaint, plaintiff, Linda Soffer Sachs ("Soffer-Sachs" or "Plaintiff") seeks to impose a constructive trust and declare herself the owner of a condominium unit known as Unit 16F located at 155 East 38th Street, New York, New York 10016 (the "Condo Apt.") and other related relief. Plaintiff's mother and co-defendant, Barbara K. Soffer, individually and as Trustee of the Joseph Soffer 2001 Revocable Family Trust ("B. Soffer"), Plaintiff's brother and co-defendant, Stuart M. Soffer, individually and as Trustee of the Joseph Soffer 2001 Revocable Family Trust ("S. Soffer") and co-defendant, the Joseph Soffer 2001 Revocable Family Trust (the "Trust"¹) (collectively, "Defendants") now move pursuant to CPLR 3212 for summary judgment dismissing Soffer-Sachs' complaint.

¹ Plaintiff's late father, Joseph Soffer ("J. Soffer" or "Father") established an intervivos trust as part of the decedent's overall estate plan.

In or about April of 1987, the Condo Apt. in which Plaintiff was living as a tenant converted to condominium residences. Plaintiff's Father gifted her \$12,000, which Soffer-Sachs needed as a down payment to purchase the Condo Apt. As part of the acquisition, Plaintiff and her Father, as co-borrowers, took out an adjustable rate note for \$65,000 (Exhibit D to Motion). For the next two years, Plaintiff resided in the Condo Apt. and paid the monthly common charges and the monthly amount due on the mortgage note.

In 1989, Plaintiff became engaged to be married. According to B. Soffer's sworn affidavit, her husband, J. Soffer, at the time of the Plaintiff's engagement, told Soffer-Sachs that as a wedding gift he would either pay off the mortgage note on the apartment, or pay for her wedding, which cost an estimated \$100,000 (Exhibit 1 to Armstrong Opp. Aff. at ¶ 6). Allegedly, Plaintiff chose the wedding and consequently transferred all of her right, title and interest in the Condo Apt. to her Father, in consideration for which J. Soffer assumed the entire mortgage note. Plaintiff was relieved of any further financial obligation with respect to the Condo Apt. (*Id.*; *see also*, Exhibits G and I to Motion). Thereafter, Plaintiff married and moved to her husband's home in Connecticut.

Plaintiff alleges that she transferred title to her Father in consideration of his oral promise to keep the Condo Apt. in trust for her so she would have a place to reside if she and her husband divorced. After Plaintiff vacated the Condo Apt., it was rented to a tenant who remained in possession until 2008. Plaintiff states that she found the tenant for the Condo Apt.

On or about August 2, 2001, the Trust was created, granting B. Soffer and S. Soffer unrestricted power and discretion to act with respect to the Trust's assets (Exhibit J to Motion). According to the Trust's provisions, upon the death of J. Soffer, the grantor, and B. Soffer, the assets remaining in the Trust at that time were to be distributed to J. Soffer's children in accordance with the following percentages: 30% to S. Soffer; 30% to Alan M. Soffer; 20% to David S. Soffer; and 20% to Plaintiff. The Trust specifies the following:

In dividing the property of this trust among the shares provided [above], the Trustees shall (to the extent possible, but in no event to exceed the percentages provided [above]) allocate the following specific trust assets as follows:

(A) To the share set aside for the Grantor's daughter, LINDA KAREN SACHS, any interest in a cooperative or condominium apartment located in New York, New York . . .

At the time the Trust was created, the Trust had no interest in the Condo Apt. On or about September 20, 2004, J. Soffer transferred title to the Condo Apt. to the Trust (Exhibit K to Motion) and subsequently passed away on January 6, 2005.

In August, 2008, the long term tenant vacated the Condo Apt. and the co-trustees, B. Soffer and S. Soffer decided to sell it. A few months later, neighboring residents offered to purchase the Condo Apt. for \$560,000, without a brokerage fee. The Trust notified Plaintiff of the offer and afforded Soffer-Sachs the opportunity to buy the Condo Apt. for \$495,000 and required a down payment of \$50,000 (Exhibit L to Motion). When Plaintiff failed to respond, the Trust contracted for the sale of the Condo Apt. with the neighbors on October 20, 2008, who, in turn, furnished a down payment of \$56,000 (see Exhibits M and N to Motion).

Plaintiff initiated the instant lawsuit, alleging that the Condo Apt. belonged to her, and she filed a notice of pendency (Exhibit O to Motion). Not surprisingly, the sale to the neighbors fell through.

In the complaint, Plaintiff alleges that since her marriage and move to Connecticut in 1989, she paid all of the mortgage note and common charges and that the tenant who took possession of the Condo Apt. at that time always paid monthly rent to Plaintiff. Plaintiff further alleged that her Father made no payments towards any of the apartment's expenses (see Complaint as Exhibit A to Motion at ¶¶ 6-7).

At her examination before trial, Plaintiff stated that the complaint was in error and that she did not pay any mortgage or common charges after she moved out of the Condo Apt. in 1989. Plaintiff further testified that J. Soffer paid all of those charges from the monthly rent that the tenant occupying the Condo Apt. paid to him (Plaintiff's EBT Transcript as Exhibit B to Motion at pp. at 19-20). Additionally, Plaintiff said that she never memorialized in writing the alleged promises that her Father made to her about the Condo Apt. (*Id.* at p. 55, lines 2-16), but that she was mystified to learn at or about the time of her father's death in 2005 that J. Soffer had transferred title to the Trust. However, Plaintiff conceded she did not do anything about it at that time. *Id.* at pp. 62-65. Moreover, Plaintiff again conceded she never responded to the Trust's letter inviting her to purchase the Condo Apt. communicating her legal interest thereto (*Id.* at p. 75, lines 16-21).

Further, as testified to in her EBT, during the next 20 years after her voluntary vacatur of the Condo Apt., Soffer-Sachs never received any rental payments from the

tenant occupying the Condo Apt., never visited the Condo Apt. and never sought the return of title to the Condo Apt. from her Father, B. Soffer, S. Soffer and/or the Trust.
Id.

Plaintiff alleges three causes of action against Defendants: (1) constructive trust of the Condo Apt. for her benefit; (2) declaratory judgment that she is the owner of the Condo Apt.; and (3) unjust enrichment in the amount of \$500,000.

DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted].” *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Defendants’ motion for summary judgment is granted. Defendants have met their initial burden of making out a prima facie case for summary judgment, documented by the deed transferring title from Plaintiff to her Father; J. Soffer’s assumption of the mortgage note; the Intervivos Trust instrument; J. Soffer’s transfer of

*7]
title to the Condo Apt. to the Trust; and Plaintiff's own testimony that, after her marriage in 1989, she had no further financial or possessory interest in the Condo Apt.

The burden now shifts to Plaintiff to come forward with evidentiary facts in admissible form to raise a genuine issue of fact. Plaintiff's first argument is that pursuant to her oral agreement with her late Father, the Condo Apt. should be held by the Trust in a constructive trust for her benefit.

As held in *Simonds v Simonds*, 45 NY2d 233, 241 (1978):

[A] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Thus, a constructive trust is an equitable remedy [internal quotation marks and citations omitted].

In order to substantiate the claim that the court should impose a constructive trust on the title holder, four factors must exist: (1) a promise; (2) a transfer in reliance on that promise; (3) a fiduciary or confidential relationship between the parties; and (4) unjust enrichment (45 NY2d at 242). Here, Plaintiff fails to demonstrate the existence of these four factors to allow the court to create a constructive trust in her favor.

Defendants argue that the dead man's statute precludes Plaintiff from asserting the oral promises her Father allegedly made to Soffer-Sachs about the Condo Apt. This court disagrees.

CPLR 4519 disqualifies parties interested in litigation from testifying about personal transactions or communications with deceased or mentally ill persons. The underlying purpose of the rule is to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court. The statute prevents any person interested in the event from testifying to a personal transaction with the deceased unless the representative of the deceased has waived the protection of the statute by testifying himself or

introducing the testimony of the decedent into evidence at trial [internal quotation marks and citations omitted].

Sepulveda v Aviles, 308 AD2d 1, 18 (1st Dept 2003).

Plaintiff asserts that because B. Soffer, as J. Soffer's Executrix and Trustee, testified in her affidavit as to what Plaintiff's Father intended with respect to the transfer of title to the Condo Apt., B. Soffer has waived the application of the dead man's statute. In opposition, Defendants argue the only way in which the statute's provisions may be waived is by testimony at trial, not by pre-trial affidavits. *Matter of Wood's Estate*, 52 NY2d 139 (1981).

However, "such evidence, which may be excludable at trial [because of the dead man's statute], can be considered to defeat a motion for summary judgment."

Lancaster v 46 NYL Partners, 228 AD2d 133, 140 (1st Dept 1996). Also,

it cannot be said as a matter of law that the Dead Man's Statute will not be waived [at trial] so long as a matter of law it may be waived. Of course, it is the earmark of summary judgment that the court is confined to determining whether an issue of fact exists as a matter of law.

Phillips v Joseph Kantor & Co., 31 NY2d 307, 315 (1972). Therefore, this court may consider Plaintiff's statements regarding the oral promises her late Father made to her in opposition to Defendants' motion for summary judgment, even if such testimony might eventually be excluded at trial.

However, evidence otherwise excludable at trial may not form the sole basis for this court's determination. *Hammett v Diaz-Frias*, 49 AD3d 285 (1st Dept 2008). In this action, the only evidence Plaintiff proffers to support her contentions are the oral

promises J. Soffer allegedly made to her which, standing alone, would be insufficient to defeat Defendants' summary judgment motion.

Even if this court were to arguably entertain her Father's alleged oral promises, however, Plaintiff can neither overcome the statute of frauds, nor demonstrate her reliance on that oral promise, the second requisite factor to establish a right to a constructive trust of the Condo Apt.

The statute of frauds prohibits the conveyance of real property without a written contract. While the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance, the claimed partial performance must be unequivocally referable to the agreement. It is not sufficient that the oral agreement gives significance to the plaintiff's actions. Rather, the actions alone must be unintelligible or at least extraordinary, [and] explainable only with reference to the oral agreement [internal quotation marks and citations omitted].

Pinkava v Yurkiw, 64 AD3d 690, 692 (2d Dept 2009); GOL § 5-703 (4); *see also*, *Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group PLC*, 93 NY2d 229 (1999).

"Under the part performance doctrine, it is the conduct of the entity seeking to enforce the oral agreement, and its detrimental reliance on the agreement, that makes proper the invocation of equitable principles [internal quotation marks and citations omitted]." *McCormick v Bechtol*, 68 AD3d 1376, 1379 (3d Dept 2009).

In analyzing Plaintiff's actions, this court cannot discern any question of fact that has been raised that would preclude granting Defendants' motion. Plaintiff married; conveyed her full title in the Condo Apt. to her Father, in consideration for which she was relieved of all financial obligations with respect thereto; moved into her husband's home; made no claim to, or had any contact with, the Condo Apt. for 20 years; and did

not contest her Father's transfer of his title in the Condo Apt. to the Trust for more than 3 years after she allegedly first became aware of the transfer. None of her actions is unequivocally referable to the oral agreement that she allegedly had with her Father (*Tringle v Tringle*, 40 AD3d 353 [1st Dept 2007]).

The court also finds unpersuasive Plaintiff's contention that but for her Father's alleged oral promise, there would have been no reason for her to convey her title in the Condo Apt. to him without consideration. First, according to B. Soffer's affidavit, upon which Plaintiff relies to defeat the application of the dead man's statute, the consideration for the transfer was her Father's payment of Plaintiff's \$100,000 wedding. And second, Plaintiff's relief of her mortgage note and maintenance obligations (and discharge of her financial responsibilities), is considered legally sufficient consideration to support the transfer. See generally *People ex rel. Metropolitan St. Ry. Co. v Barker*, 121 AD 661 (1st Dept 1907), *affd* 200 NY 509 (1910).

Furthermore, the mere fact that Plaintiff and J. Soffer were father and daughter does not automatically create a confidential or fiduciary relationship, the third factor necessary to create a constructive trust. *Carpenter v Soule*, 88 NY 251 (1882). Here, Plaintiff has failed to come forward with any evidence to raise a question of fact as to a confidential or fiduciary relationship existing between her and her Father. Since Plaintiff cannot establish the factors necessary for this court to impose a constructive trust of the Condo Apt. in her favor, Defendants are entitled to summary judgment dismissing the first cause of action.

Because the imposition of a constructive trust is dependent upon Plaintiff minimally establishing a question of fact regarding her right to title in the Condo Apt., which she has failed to do, Defendants are entitled to summary judgment dismissing Plaintiff's second cause of action for declaratory relief.

Lastly, without a right to have a constructive trust imposed for Plaintiff's benefit or a declaration that Plaintiff is the title-holder of the Condo Apt., there can be no finding that Defendants were unjustly enriched to Plaintiff's detriment. Therefore, Defendants are entitled to summary judgment dismissing the third and final cause of action.

Based on the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further


ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that pursuant to the parties' stipulation, notice of entry of this decision and order shall be served and filed on or before May 14, 2010.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
March 16, 2010

FILED
MAR 18 2010
NEW YORK
COUNTY CLERK'S OFFICE


Hon. Martin Shulman, J.S.C.