

Kruse v Capuozzo

2010 NY Slip Op 30741(U)

March 31, 2010

Supreme Court, Richmond County

Docket Number: 100674/09

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index. 100674/09
Motion No.:001

VIRGINIA KRUSE,
by JAMES PIETROFESA and
ORLANDO MARRAZZO, JR.,
As her Attorneys-in-Fact,

Plaintiff

DECISION & ORDER
HON. JOSEPH J. MALTESE

against

RICHARD CAPUOZZO, and
J.P. MORGAN CHASE BANK,

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves through her attorneys-in-fact for an order granting her summary judgment on her complaint and striking the defendant's counterclaims and affirmative defenses pursuant to CPLR § 3212. Plaintiff further moves to dismiss the defendant, Richard Capuozzo's affirmative defenses and counterclaims pursuant to CPLR § 3211(a)(1)(6)(7) and (8). Alternatively, in the event the court denies the plaintiff's motion to dismiss the plaintiff seeks leave to amend her complaint pursuant to CPLR § 3025(b). The plaintiff's motion is granted to the extent that the defendant's counterclaims are dismissed.

Facts

Virginia Kruse brings this action through her attorneys-in-fact, James Pietrofesa and Orlando Marazzo, Jr. This case concerns property located on Staten Island, New York at 1150, Lot 1 known commonly as 55 LaSalle Street, Staten Island, New York (“the Premises”); and interest in a closely held corporation known as General Trade Mark Labelcraft, Inc. (“GTM”). Virginia Kruse and her brother Joseph Capuozzo, the defendant Richard Capuozzo father, each owned a one half interest in the Premises. On Joseph Capuozzo’s death his one half interest in the premises passed to his wife, Ann Capuozzo, the defendant’s mother, and subsequently passed to the defendant on his mother’s death on January 23, 2002. Since March 3, 1992 the plaintiff and the defendant, Richard Capuozzo, have been equal shareholders in GTM. The plaintiff asserts that he and his aunt worked together at GTM until 2003 when the plaintiff stopped working due to increased bouts with dementia. The plaintiff’s complaint alleges two causes of action, the first for partition of the Premises, and the second for an accounting of GTM to ascertain the plaintiff’s rights, interest and income.

In answering the plaintiff’s complaint the defendant, Capuozzo, asserts several affirmative defenses including: failure to state a cause of action, “unclean hands” and possible “self dealing.” The defendant claims that the attorneys-in-fact are improper parties because the plaintiff was allegedly incapable of executing a power of attorney, and the plaintiff’s attorneys-in-fact lack standing to bring the action. In addition to the asserted affirmative defenses, the defendants assert two counterclaims against the defendant Pietrofesa individually. The defendant alleges that Pietrofesa tortiously interfered with the March 3, 1992 Stock Redemption agreement between Kruse, Capuozzo and GTM; secondly the defendant alleges that Pietrofesa tortiously interfered with a possible deal between GTM and Digital Descriptor.

The plaintiff moves for summary judgment on her complaint dismissing the defendant’s affirmative defenses and counterclaims. Alternatively, the plaintiff seeks an order permitting the

amendment of her complaint if the court should deny her motion.

The plaintiff, Virginia Kruse, executed a durable power of attorney naming James Pietrofesa and her then attorney-at-law Orlando Marazzo, Jr. as her attorneys-in-fact on January 28, 2006. In support the plaintiff's motion for summary judgment the plaintiff submits a copy of the durable power of attorney executed by Virginia Kruse that was notarized by James A. Dollard, Esq., the law partner of Orlando Marazzo, Jr., along with the affidavits of Orlando Marazzo, Jr. and James Pietrofesa.

In his affidavit Mr. Marazzo states that he was the long time attorney for the Kruse family and attests that the plaintiff was fully competent to execute the power of attorney. However, Mr. Pietrofesa makes no reference to the plaintiff's competency to execute the durable power of attorney. Each affidavit gives a rendition of the facts seeking to disprove the claims asserted in the defendant's counterclaims.

In opposition to the plaintiff's motion for summary judgment, the defendant, Richard Capuozzo, submits the affidavits of Lana Capuozzo and Jessica Capuozzo. Lana Capuozzo is the defendant, Richard Capuozzo's wife. Jessica Capuozzo is Virginia Kruse's great-niece and Richard Capuozzo's daughter.

According to the affidavit of Lana Capuozzo, the plaintiff Virginia Kruse was diagnosed with Alzheimer's disease by Dr. Stephen Kulick in 2001. Additionally, Jessica Capuozzo's affidavit states that she observed the plaintiff, Virginia Kruse, in a unkempt manner with long greasy hair, uncut toe and fingernails. Other documents submitted in conjunction with the sworn affidavits from Lana Capuozzo and Jessica Capuozzo, recount incidents in early 2006 which resulted in the plaintiff being taken to the hospital for psychological evaluation.

Discussion

Summary judgment deprives the litigant of his day in court and is considered to be a drastic remedy, which should only be employed when there is no doubt as to the absence of triable issues.¹ 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. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers.² The burden of a court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist.³

The failure to append a complete set of pleadings to a motion for summary judgment usually requires a denial of the motion with leave to renew.⁴ However, in this instance, the court will accept the pleadings as annexed to the moving plaintiff's reply in the interests of judicial economy.

Summary Judgment dismiss the defendant's counterclaims

In this case, the defendant asserts two counterclaims against the James Pietrofesa in his individual capacity, rather than against Virginia Kruse. Here, James Pietrofesa is acting as Virginia Kruse's attorney-in-fact. It is well settled law that, "a claim and counterclaim must be by and against the same party in the same capacity."⁵

Therefore, the defendant's counterclaims against James Pietrofesa must be dismissed,

¹ *Van Noy v. Corinth Central School District*, 111 AD2d 592, [3d Dept 1985].

² *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].

³ *Dyckman v. Barrett*, 187 AD2d 553, [2d Dept 1992].

⁴ *Wider v. Heller*, 24 AD3d 433, [2d Dept 2005].

⁵ *Michelman-Cancelliere Iron Works, Inc. v. Kiska Construction Corp.- USA*, 18 AD3d 722, [2d Dept 2005], quoting *Ruzicka v. Rager*, 305 NY 191 [1953].

without prejudice.

Summary Judgment Dismissing the Defendant's Affirmative Defenses

The four affirmative defenses asserted by Richard Capuozzo can be distilled into an allegation that Virginia Kruse lacked the competency to execute a durable power of attorney. The defendant's argument essentially is that both James Pietrofesa and Orlando Marrazzo, Jr. lack standing to bring the present action against him.

In support of that branch of Virginia Kruse's motion for summary judgment seeking to dismiss the defendant's affirmative defenses, the movant submits the affidavit of Orlando Marrazzo, Jr. In that affidavit Marrazzo attests that as the long time attorney to the Kruse family he knew Virginia Kruse personally and believed her to be competent to execute the power of attorney on January 28, 2006. Such evidence is sufficient to demonstrate an entitlement to summary judgment, the burden shifts to Capuozzo to demonstrate that factual issues exist requiring trial.⁶

It is well settled that in order to defeat a motion for summary judgment, a party must come forward with evidentiary proof in admissible form sufficient to raise triable issues of fact.⁷ In opposition, the defendant submits the affidavit of Lana Capuozzo, a registered nurse, and wife of the defendant, that attests that Virginia Kruse had been diagnosed with Alzheimer's disease by Dr. Stephen Kulick as early as 2001. Additionally, Lana Capuozzo, Jessica Capuozzo and the defendant all attest to incidents that occurred in early 2006 that resulted in the admission of Virginia Kruse in a hospital psychiatric unit. On a motion for summary judgment, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from

⁶ *Hughes v. Cai*, 31 AD3d 385, [2d Dept 2006].

⁷ *Grosvenor v. Miemand Brothers*, 149 AD2d 459, [2d Dept 1989].

the pleadings, affidavits and competing contentions of the parties.⁸ Therefore, the plaintiff's motion to dismiss the defendant's affirmative defenses must be denied.

Subsequent to the commencement of this action, General Obligation Law ("GBL") § 5-1510 became effective on September 1, 2009. Prior to the enactment of this statute there was no clear remedy for problems arising out of a power of attorney.⁹ Currently, under GBL § 5-1510 a party may commence special proceedings under three categories—1) to compel the agent to turn over a copy of the power of attorney, 2) to determine the validity of the power of attorney, and 3) to compel a third party to accept a power of attorney. In this case, the defendant's affirmative defenses mirror the grounds for the commencement of a special proceeding pursuant to GBL § 5-1510(2)(a),(b), and (c) which allows a party to commence a special proceeding to: determine the validity of the power of attorney; to determine whether the principal had capacity at the time the power of attorney was executed; and to determine whether the power of attorney was procured through duress, fraud or undue influence.

In this case, the court will dispense with the formality of directing the defendant to commence a special proceeding pursuant to GBL § 5-1510. Instead, this court will exercise its power nunc pro tunc to order a hearing to determine the validity of the power of attorney executed by Virginia Kruse on January 28, 2006. The remainder of this motion shall be held in abeyance pending the determination of the hearing concerning the validity of the power of attorney executed by Virginia Kruse naming James Pietrofesa and Orlando Marrazzo, Jr. as attorneys-in-fact.

Accordingly, it is hereby:

⁸ *Robinson Motor Xpress, Inc. V. HSBC Bank, USA*, 37 AD3d 117, [2d Dept 2006].

⁹ Bailly and Hancock, Practice Commentary, McKinney's Cons. Laws of NY, Book 23A, General Obligation Law § 5-1510.

ORDERED, that plaintiff's motion for summary judgment is granted to the extent that the counterclaims asserted by the defendant against James Pietrofesa individually are dismissed; and it is further

ORDERED, that the remainder of the plaintiff's motion for summary judgment is held in abeyance pending the determination of a hearing to determine the validity of the power of attorney pursuant to General Obligation Law § 5-1510; and it is further

ORDERED, that the Clerk shall enter judgment accordingly, and it is further

ORDERED, that the parties shall return to DCM Part 3 for a pre-hearing conference on **Monday, May 3, 2010 at 9:30 a.m.**

ENTER,

DATED: March 31, 2010

Joseph J. Maltese
Justice of the Supreme Court