

Matter of Barbara DeAngelo

2010 NY Slip Op 31713(U)

June 30, 2010

Sur Ct, Nassau County

Docket Number: 353751/A

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of Barbara DeAngelo,
as Co-Trustee of the HARVE P. SIMMONS LIVING TRUST
Dated September 22, 2006, Seeking to Confirm the Transfer of
Real Property to the HARVE P. SIMMONS LIVING TRUST
and for Other Relief.

File No. 353751/A
Dec. No. 26314

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In the Matter of the Application of Harve P. Simmons,
as Co-Trustee of the HARVE P. SIMMONS LIVING TRUST
Dated September 22, 2006,

Cross Petitioner,

Seeking to Implead Michael J. Greenberg, Esq.,

Cross Respondent.

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Submitted for decision is the cross-petition by Harve P. Simmons, as co-trustee of the Harve P. Simmons Living Trust dated September 22, 2006. By the cross-petition, Simmons seeks to: (1) join Michael J. Greenberg, the attorney who drafted the trust, as a party to the proceeding; (2) rescind the trust because Simmons was misled by Greenberg into believing that the trust would benefit him and serve his estate-planning needs; (3) rescind the trust because, by its terms, the trust is not capable of accomplishing the objectives that Simmons requested; (4) rescind the trust because, in implementing and in preparing the amendment, Greenberg was following the dictates of Barbara DeAngelo and not Simmons; (5) compel Greenberg to contribute and/or indemnify Simmons, as may be appropriate, for any surcharge that may be imposed on Simmons resulting from the relief requested in the petition; and (6) compel Greenberg to pay attorney’s fees, costs and expenses incurred by Simmons in relation to this matter and in defense of the petition. Greenberg opposes all of the relief requested by Simmons.

BACKGROUND

In 2008, Barbara DeAngelo, as co-trustee of the trust, commenced a proceeding seeking an order (1) compelling Simmons to execute a deed confirming the September 22, 2006 transfer of certain real property into the trust or, in the alternative, removing Simmons as co-trustee if he refused to execute a deed and authorizing DeAngelo to execute the deed; (2) removing Simmons for wasting trust assets, (3) compelling Simmons, as co-trustee, to provide DeAngelo with information to confirm that the expenses of the property are current or, in the alternative, removing Simmons as co-trustee if he refused; and (4) compelling Simmons to provide DeAngelo with information required to file accurate federal and state income tax returns for the trust or, in the alternative, removing Simmons as co-trustee if he refused.

According to the petition, Simmons, as grantor and trustee, executed the declaration of trust on September 22, 2006 in the presence and under the supervision of Greenberg, the attorney who drafted the instrument. DeAngelo was present and executed the trust as trustee. Greenberg took the acknowledgments of the signatures. According to the petition, Simmons contemporaneously executed a deed transferring his two-family home located at 112 Capitol Avenue, Williston Park, New York, to the trust, together with the required transfer tax and other forms necessary to record the deed. The property is listed on Schedule A of the trust as trust estate property. Greenberg took the acknowledgment of Simmons' signature on the deed. DeAngelo then executed the transfer tax documents as grantee. The deed and transfer tax documents were placed in Greenberg's care for recording; however, the deed was never recorded, and Greenberg states that he can neither find the deed or any evidence that he sent it to the Nassau County Clerk's Office for recording. Simmons has refused to execute a replacement

deed, although Article Fourth of the trust, which is captioned “Irrevocability,” states, “This Agreement and the trusts created hereunder are irrevocable. The Grantor shall execute such further instruments as shall be necessary to vest the Trustees with full title to the property which is the subject of the Agreement.” Additionally, DeAngelo claims that Simmons is wasting trust assets by refusing to rent the first floor of the two-family dwelling and that he has refused to inform DeAngelo about the status of the property and provide her with information needed to prepare tax returns for the trust. Simmons filed an answer to the petition in which he, among other things, denies that a deed was ever executed.

During the course of Article 31 discovery, Simmons subpoenaed Greenberg, a non-party. He was deposed for more than two days. Immediately thereafter, Simmons served Greenberg with the cross-petition and the order to show cause by which the cross-proceeding was commenced. Greenberg filed an answer to the cross-petition, along with his attorney’s affirmation and a memorandum in opposition. Essentially, Greenberg asks the court to dismiss the cross-petition pursuant to CPLR 3211. Simmons filed a reply affirmation in support of the cross-petition, which was then submitted for decision.

ANALYSIS

Greenberg asks the court to dismiss the cross-petition on a number of grounds: (1) pursuant to CPLR 3211 (a) (7), for failure to state a cause of action; (2) pursuant to CPLR 3211 (a) (1), based upon documentary evidence; (3) Simmons has not pled the cause of action for fraud with specificity, pursuant to CPLR 3016 (b); (4) there is no basis for Simmons to seek indemnification or contribution from Greenberg; (5) the proceeding is premature because the court has not determined whether the trust is valid. Simmons opposes the motion.

In reviewing a motion to dismiss made pursuant to CPLR 3211, the court must interpret the pleadings in favor of the party against whom the motion is made (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]; *Ozdemir v Caithness Corp.*, 285 AD2d 961 [3d Dept 2001]). The court must determine whether, “accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated” (*People v New York City Tr. Auth.*, 59 NY2d 343, 348 [1983]). A petition will not be dismissed where a cause of action may exist if the petitioner is given every benefit of the doubt (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action (*McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660 [2d Dept 2005]). Thus, a motion to dismiss must be denied if, from the pleading’s four corners, “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).

The elements required to plead a cause of action for fraud are “material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]), and must be pleaded with particularity as required by CPLR 3016 (b). The essence of the cross-petition is that Greenberg misled Simmons into creating the trust for Medicaid and estate planning purposes when, as alleged, the trust would not accomplish Simmons’ goals. Simmons has failed to plead a cause of action for fraud since absent from the allegation is that Greenberg had knowledge of the falsity of his representations. Thus, even allowing for the liberal standard this court must use when deciding a motion to dismiss, Simmons’ cause of action for fraud is

dismissed (CPLR 3211 [a] [7]). The court finds no basis upon which to dismiss the remainder of the allegations in the cross-petition.

Greenberg argues the claims against him are premature since DeAngelo's claims against Simmons have not been decided. However, it is well recognized that "[i]mpleader is one of the rare instances in which the law permits what amounts to a premature action" (Siegel, NY Prac, § 159 [4th ed]). The court finds that the facts underlying the claims Simmons has made against Greenberg in the cross-petition are intrinsically connected to those that form the basis of DeAngelo's claims against Simmons. Therefore, the court grants Simmons' request that Greenberg be impleaded pursuant to CPLR 1007.

The petition and cross-petition will appear on the court's calendar for a conference with a member of the law department on July 8, 2010, at 2:30 p.m.

This is the decision and order of the court.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court