

Pirraglia v Decanio

2010 NY Slip Op 32327(U)

August 3, 2010

Supreme Court, Suffolk County

Docket Number: 08135/2006

Judge: Ralph T. Gazzillo

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

condition became progressively worse over that course of time, leaving her almost totally without motor skills, unable to move her arms and legs, confined to her bed and/or a wheelchair, and unable to care for herself. On September 30, 2003, she passed away. At the time of her death she was the defendant's wife. Approximately eleven months prior to her demise, by deed dated October 28, 2002, and as sole and exclusive owner of the property, she allegedly transferred her interest. The transfer was from her to herself and the defendant as tenants by the entirety, subject to a life estate on behalf of her daughter, the plaintiff herein. During the trial, by stipulation, the parties agreed that she - the decedent - could not have physically and independently signed her name to any documents on the date of the deed.²

The disputed issue and the central focus of the trial was whether the decedent had in fact and in law executed the deed. Plaintiff contends that the signature is a forgery in that her mother could not and therefore did not execute the deed due to her medical condition. The defendant disagrees.

TRIAL EVIDENCE

In support of her contentions, the plaintiff offered the testimony of four witnesses as well as a number of documents. Of the four witnesses, only one testified in person, the remaining three by a

² *De hors* the trial record, the regularity of the execution of the decedent's Last Will and Testament has also been questioned. That issue was not before this Court, nor is the instant decision directed towards its resolution.

reading of selected portions of their pre-trial depositions.³

As to the in-court testimony, Kathryn O'Hara—the decedent's sister—contended that decedent and defendant's relationship had been troubled and marked by animosity, including times when the defendant had allegedly been abusive. Additionally, she alleged that the decedent desired that her daughter, the plaintiff herein, receive "everything." This witness did not, however, supply any first-hand knowledge of the events surrounding the alleged property transfer.

Plaintiff also offered portions of the depositions of two of the decedent's attending physicians, Dr. John Gill, M.D. and Dr. Mark Gudesblatt, M.D. Both doctors painted a similar, dismal picture of their patient's condition, including reference to her "Motor Strength" score of zero.⁴ Dr. Gudesblatt indicated that she could have acknowledged or "acquiesced" to a signing, that it was medically possible for someone to place a pen in her hand and hold it, and that she was capable of some slight movement. His testimony also indicated that the decedent was capable of indicating her complaints, and in fact had previously expressed reluctance to taking certain medications. Moreover, his September 19, 2002, written report to Dr. Gill noted that her speech was "fluent with dysarthria". Neither doctor was, however, present at the deed's execution.

With respect to the defendant's case, it was comprised of his *viva voce* testimony as well as

³ As noted herein, two of the depositions were of medical doctors; they were admissible in the witnesses' absence via CPLR §3117(a)(4). The third deposition is of a person who is out of the state; it was admitted pursuant to CPLR §3117(a)(3)(ii).

⁴ The scale is 0 to 5, 0 being the lowest and 5 the best. A 0 is indicative of "no range of motion."

that of Jonathan M. Young, Esq. Mr. Young had represented the decedent prior to her death and had conducted the deed-signing ceremony. Additionally, the defendant provided selected portions of the deposition of Ms. Roberta D'Angelo⁵, as well as a number of exhibits.

The defendant's testimony included a description of their marriage. As related by him, it was obvious that their union was plagued by a number of medical and financial difficulties, and included some periods of separation. He did, however, profess his emotional attachment to the decedent, described her illness, and explained some of the care he gave her. His cross-examination explored his struggle with his finances; at the very least, his solutions were somewhat extraordinary. He was, however, steadfast in his denial of any wrongdoing during the deed's execution. Instead, he indicated that the decedent had held a pen with one finger, and he merely held her hand closed.

Mr. Young described his professional relationship to the decedent, his knowledge of her condition, and stated that she could speak clearly. His best recollection of the deed's execution was that the defendant "grasped" the decedent's hand to help her hold the pen, but he did not move it. Mr. Young also recalled that the decedent had orally demonstrated that she was "mentally clear," and could manifest her intent.

The deposition of Ms. D'Angelo, office manager, bookkeeper and paralegal for Mr. Young explained certain office practices, all of which generally appeared reasonable and appropriate. As to the event in question, she had a vague memory and little recall of any specifics. She was firm, however, in stating that she never signed as a witness to another's signature without seeing the

⁵ On consent of both parties and due to a medical issue, Ms. D'Angelo's appearance was excused and her deposition admitted.

Pirraglia v. Decanio
Index No.: 8135/2006
Page 6 of 11

The Court's determination begins by noting that the undersigned has reviewed the evidence, testimonial as well as by way of exhibits. Regarding that testimony, the exercise included coolly, calmly and objectively observing the witnesses, "the very whites of [their] eyes," during some brief, limited questioning by the court as well as and primarily their direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth." *Wigmore on Evidence*, §1367. Quite obviously, the depositional testimony read into the record by the attorneys from a mere cold, inanimate transcript was not subject to the same scrutiny; nonetheless, the depositions did provide relevant and material information. As a result, the court is satisfied that the record contains sufficient facts to resolve the issue at hand. It should, however, go without saying that in evaluating the witnesses' contributions - in this as well as all such determinations - it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence*, 2d ed., §1090. Additionally, during the course of its fact-finding analysis, the undersigned's task included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

The product of that exercise is a number of facts which have been satisfactorily inferred, if not established. For instance, it appears that there may have been some periods of animosity between the decedent and the defendant. At one time or another, she may have in fact stated a preference that her daughter receive some of her property, but there is no indication that she actively pursued that goal. Additionally and undoubtedly, the decedent was extremely disabled and

executing a deed would not have been an easy task. She was, however, clearly able to express her wishes. As to the actual signing of the deed, that event was in the presence of the witnesses, under her attorney's supervision and with his approval, by having a pen placed in her hand and the hand held closed by her husband. Her signature was acknowledged by the notary.

Focusing on the plaintiff's allegations of forgery, they are speculative at best, and not supported by the record. Indeed, she has failed to supply any direct evidence of what transpired during the deed signing. In fact, most of the information relating to that event was provided on the defendant's case and it did little to bolster the plaintiff's cause.

Pivotal to this case, however, is a silent witness - the deed. As noted above, it contains an acknowledgment of the decedent's signature. In law and in fact, that creates a presumption which—under the facts of this case—cannot co-exist with the plaintiff's claim. Stated otherwise, to prevail, the plaintiff has to overcome the statutory presumption of due execution which accompanies an acknowledged signature.

The legal aspect and analysis of that issue begins with CPLR §4538 which provides in pertinent part as follows:

Acknowledged, proved or certified writing; . . . Certification of the acknowledgment or proof of a writing, except a will, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is *prima facie* evidence that it was executed by the person who purported to do so.

As regards an acknowledgment, Real Property Law §298 provides “[t]he acknowledgment or proof, within this state, of a conveyance may be made: 1. At any place within the state, before (a) a justice of the supreme court; (b) and official examiner of title; (c) an official referee; or (d) a

notary public.” Further, Real Property Law §303 states that “[a]n acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument.”

The importance and respect accorded certificated acknowledgments was underscored well over a hundred years ago when the Court of Appeals stated that,

“a certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, *but only upon proof so clear and convincing as to amount to a moral certainty.*”

Albany County Sav. Bank v. McCarthy, 149 NY 71, at 80 (1896) (emphasis added).

Notwithstanding its age, the *Albany* case’s rule of law is still cited verbatim. See, e.g., *John Deere Ins. Co. v. GBE/Alasis Corp.*, 57 AD3d 620, 622 (2d Dept 2008); *Beshara v. Beshara*, 51 AD3d 837, 838 (2d Dept 2008).

In addition to setting out the rule, *Albany* panel provided the following, somewhat exhaustive, description of what was needed to challenge a certificate of acknowledgment:

“The following expressions of learned judges indicate the nature of the proof required to impeach a certificate of acknowledgment. It must be of a ‘clear, complete and satisfactory character;’ (*Young v. Duvall*, 109 US 573, 577); ‘clear, cogent and convincing;’ (*Pierce v. Feagans*, 39 Fed. Rep. 587, 592); ‘clear, convincing and conclusive, reaching a high degree of certainty, leaving upon the mind no fair, just doubts;’ (*Smith v. McGuire*, 67 Ala. 34); ‘so full and satisfactory as to convince the mind that the certificate is false or forged;’ (*Griffin v. Griffin*, 125 Ill. 431, 436); ‘it should by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent;’ (*Marston v. Brittenham*, 76 Ill. 611); ‘clear and conclusive, excluding every reasonable doubt;’ (*Strauch v. Hathaway*, 101 Ill. 11); ‘so clear, strong and convincing as to present no loophole of escape from its power;’ (*Canal & Dock Co. v. Russell*, 68 Ill. 426, 438). The certificate makes a ‘*prima facie* case. That is the least that can be claimed for it;’ (*Borland v Walrath*, 33 Iowa 130). It ‘is, of itself, entitled to more weight than the testimony

by which it is attacked,' which was that of two mortgagors; (*Bearss v. Ford*, 108 Ill. 26, 27). It 'ought to be regarded as of high a grade of evidence as testimony given under oath;' (*Warrick v. Hull*, 102 Ill. 280, 283). 'Whenever the fact is fairly debatable, the presumption of law must prevail;' (*Hughes v. Coleman*, 10 Bush (Ky.) 2460).

It 'is entitled to great and controlling weight until overcome by clear and satisfactory proof;' (*Blackman v. Hawks*, 89 Ill. 512, 514). 'No matter what the magistrate may have sworn to on the trial, the plaintiffs were entitled to have his official certificate go to the jury;' (*Heeter v. Glasgow*, 79 Penn. St. 79, 80). 'The mere evidence of the party purporting to have made the acknowledgment cannot overcome the officer's certificate, nor will it be with slight corroboration.' (*Russell v. Baptist Theological Union*, 73 Ill. 337, 341).

In *Thomas on Mortgages* it is said that 'as to the statements of fact contained in a certificate of acknowledgment which is regular in form, such for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud.' (*Thomas on Mortgages*, vol. 1, § 500).

Mr. Wharton says that 'the true view is that the certificate of acknowledgment is *prima facie* proof of the facts it contains, if within the officer's range, but is open to rebuttal between the parties by proof of gross, concurrent mistake or fraud.' (*Wharton on Evidence*, 1052). Mr. Devlin in his work on deeds says that 'the certificate standing by itself, without other proof, is *prima facie* evidence of all that it rightfully contains. While not conclusive, it is entitled to the utmost consideration. * * * We regard it as sufficient proof if, after weighing all the probabilities, the evidence shall clearly and strongly preponderate in favor of the party attacking the acknowledgment. If, however, the probabilities balance each other, the soundest principles of public policy and respect for the security of land titles, demand that the certificate of acknowledgment should not be set aside.' (*Devlin on Deeds*, § 534, p. 540.)

* * *

To hold that it merely shifts the burden of proof would be a narrow and unsafe rule and would overlook the nature of the act required of the certifying officer."

Albany County Sav. Bank v. McCarthy, *supra*, at 80-82.

Certificated acknowledgments are not, however, totally impervious to any assault. It has been suggested they might be vulnerable to an affidavit of a handwriting expert, or a lay witness present at the signing, or someone else familiar with the signer's handwriting (*John Deere Ins. Co. v. GBE/Alasia Corp.*, *supra*) or an affidavit by the alleged signer (*Seaboard Sur. Co v Earthline Corp.*, 262 AD2d 253 [1st Dept. 1999]). Recently, the presumption accorded acknowledgments was

deemed rebutted for summary judgment purposes when the plaintiff submitted his own affidavit denying signing the deed as well as an affidavit by the notary indicating he could not testify that the signature belonged to the plaintiff. *Moffett v. Gerardi*, AD3d , NYLJ 7/9/10, p. 39, col. 6 (2d Dept).

As regards the instant matter, it is, therefore, the opinion and finding of the undersigned that there has not been any demonstration that the plaintiff's allegations of forgery are anything beyond naked speculation, speculation which has less than a preponderance of the credible evidence as support. Secondly, even if, *arguendo*, there were some evidence from which a forgery might be inferred, that hypothesis would be overcome by the presumption of due execution accorded acknowledged signatures. In sum, the Court, therefore, finds the plaintiff's proof insufficient not only in the first instance as to any alleged forgery, but also to overcome the contrary presumption which accompanies the signature.

For the purpose of completeness, it should be noted that upholding the decedent's signature does not contradict or do violence to the parties' trial stipulation which stated that the decedent "could not have physically and independently signed her name to any documents on the date of the deed." That agreement may have expedited the trial, but it did not relieve the plaintiff of the burden of proof. Notwithstanding a valiant attempt, as above-indicated, her proof did not reveal any untoward acts or omissions during the deed's execution or any other reason—beyond speculation—to invalidate the signature or support a finding that it was a forgery. Moreover, and albeit redundantly, in the absence of such evidence, the defendant, and the signature, remained shielded by the presumption afforded certified acknowledgments. As such, and under the specific

facts and posture of this case, it was not necessary for him to go forward to prove—or disprove—anything.

Nonetheless, even without certification, the evidence adduced during the trial lends support to upholding the signature. For example, witnesses to the signing indicated that the defendant's signature was made by her hand, a hand held closed with the defendant's aid. Additionally, even if, *arguendo*, she was assisted, it appears that she assented to the signature; that practice is acceptable. *See, e.g. Celauro v. Celauro*, 2009 NY Misc. LEXIS 5303 (Surr. Ct. N.Y. 9/25/09).

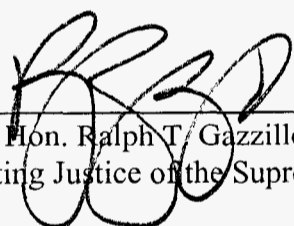
DETERMINATION

It is therefore the determination of the Court that the proof offered by the plaintiff is insufficient to establish her allegations by a preponderance of the evidence. As a result, the Court finds for the defendant and the plaintiff's complaint is dismissed.

The foregoing constitutes the decision, verdict, and order of the Court.

Dated: _____

8/3/10



Hon. Ralph T. Gazzillo
Acting Justice of the Supreme Court

NOVICK & ASSOCIATES, P.C.
202 East Main Street
Huntington, N.Y. 11743

JAMES D. REDDY, ESQ.
873 South 7th Street
Lindenhurst, N.Y. 11757