

DeSimone v DeSimone

2010 NY Slip Op 32849(U)

October 5, 2010

Supreme Court, Suffolk County

Docket Number: 09-7242007242/2010

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 8-31-10
ADJ. DATE 9-14-10
Mot. Seq. # 002 - MotD
003 -XMD

-----X		
ALEXANDRA DeSIMONE and JAMES	:	JACQUELYN TODARO, ESQ.
DeSIMONE,	:	Attorney for Plaintiffs
	:	11 Mellow Lane
Plaintiffs,	:	Westbury, New York 11590
- against -	:	
	:	
DEIRDRE DeSIMONE, The Estate of MARC	:	HALEY WEINBLATT & CALCAGNI, LLP
DeSIMONE, DEIRDRE DeSIMONE, as	:	Attorney for Defendant Deirdre DeSimone
Executrix of Administratrix of the Estate of	:	One Suffolk Square
MARC DeSIMONE and ADP Total Source NH	:	1601 Veterans Memorial Highway, Suite 425
XXVIII, as stakeholder,	:	Islandia, New York 11749
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 10 ; Notice of Cross Motion and supporting papers (003) 11-19 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (002) by the plaintiffs, Alexandra DeSimone and James DeSimone, for summary judgment on the first, second and third causes of action is granted only to the extent that judgment is granted as a matter of law to the plaintiff, James DeSimone, in the amount of \$20,000.00 as against the Estate of Marc DeSimone for the one-half obligation of the decedent for the costs of college incurred by James DeSimone pursuant to the Stipulation of Settlement dated September 19, 1996; and for further order permitting the plaintiffs to withdraw the plaintiffs' fourth and fifth causes of action is granted and the forth and fifth causes of action are deemed withdrawn; and it is further

ORDERED that this cross-motion (003) by the defendant, Deirdre DeSimone, for summary judgment to the moving defendant dismissing the first, second and third causes of action is denied; and further order denying that part of motion (002) which seeks an order directing the defendant to turn over \$100,000.00 to plaintiffs is denied; and for further order vacating the previous order of this court dated June 23, 2009 restraining Deirdre DeSimone from accessing so much of the life insurance proceeds received from ADP in the amount of \$100,000.00 is denied; and for further order dismissing that part of the complaint for judgment directing Deirdre DeSimone to turn over to James DeSimone the sum of \$20,000 as and for reimbursement for one-half of his college tuition, room and board at the State University of New York at Cortland has been rendered academic by that part of the decision rendered in motion (002) and is denied as moot.

The complaint of this action sets forth that the Estate of Marc DeSimone is the legal entity controlling the assets and obligations of decedent Marc DeSimone. To date, the Last Will and Testament of Marc DeSimone, if one exists, has not been presented for probate nor has it been seen or read by the plaintiffs. Alexandra DeSimone and James DeSimone are the children of decedent Marc DeSimone and his first wife, Bryony Rowling who were divorced on January 6, 1997, by Judgment of Decree issued by the Supreme Court, Suffolk County (McNulty, J.). Marc DeSimone and Bryony Rowling entered into a Stipulation of Settlement dated September 19, 1996 which was incorporated but not merged into the Judgment of Divorce. On or about March 11, 2000, Marc DeSimone married the defendant Deirdre DeSimone. Thereafter, James DeSimone resided with his father and step-mother in Suffolk County until decedent's death on December 20, 2008. It is alleged that Alexandra DeSimone was unwillingly forced from the residence by Deirdre DeSimone in or about August 2007. It is further alleged that at the time of his death, Marc DeSimone was suffering from metastatic stage four lung cancer and that Deirdre DeSimone administered him a lethal overdose of Morphine which hastened his death. At the time of his death, Marc DeSimone was to be possessed a life insurance policy insuring his life, as required by Article XV of the Judgment of Divorce, which life insurance policy he was to maintain with a minimum death benefit of \$100,000.00 for the benefit of the infant issue for so long as the children shall be unemancipated. A policy of insurance was obtained through ADP Total Source NH XXVIII, Inc. (ADP), decedent's employer's out-sourced human resource provider which is a stakeholder in this action. It is claimed that although the Judgment of Divorce of January 6, 1997 provided that the plaintiffs be named as beneficiary of this life insurance policy, that Deirdre DeSimone is named as beneficiary instead.

In motion (002), the plaintiffs seek summary judgment on the first, second and third causes of action and further seek to withdraw the fourth and fifth causes of action. In cross-motion (003), the defendants seek summary judgment dismissing the first, second and third causes of action and further order denying that part of motion (002) which seeks an order directing the defendant to turn over \$100,000.00 to plaintiffs; and judgment declaring Deirdre DeSimone is entitled to the previously restrained insured proceeds of \$100,000.00 as the sole beneficiary of the life insurance policy issued by ADP less the sum of \$20,000.00 to be paid to James DeSimone for reimbursement for one-half of the cost of his outstanding college tuition room and board.

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. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeraxon Prods., 148 AD2d 499 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a

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judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of motion (002), the plaintiffs have submitted, inter alia, the affidavit of Alexandra DeSimone and James DeSimone; an attorney's affirmation; a copy of the Judgment of Divorce dated January 6, 1997; a copy of the Stipulation of Settlement dated September 19, 1996; a copy of the summons and complaint; and verified answer dated March 10, 2009.

In support of cross-motion (003), the defendants have submitted, inter alia, an attorney's affirmation; affidavit of Deirdre DeSimone; copies of the unsigned transcripts of the examinations before trial of James DeSimone and Alexandra DeSimone both dated February 18, 2010; and a copy of the summons and complaint, answer; and uncertified copy of the death certificate of Marc DeSimone. The uncertified copy of the death certificate of Marc DeSimone is not in admissible form and is not considered on this motion.

In the first cause of action the plaintiffs assert that the decedent was contractually obligated to provide the aforementioned life insurance policy as provided by the Judgment of Divorce and that the defendant Deirdre DeSimone has become unjustly enriched by failing to turn over the death benefit to the plaintiffs who seek a constructive trust for the benefit of the plaintiffs on their father's life insurance policy. In the second cause of action, the plaintiffs seek judgment declaring that they are the sole owners and beneficiaries of the insurance policy issued through ADP, that Deirdre DeSimone has no legal interest in and to the insurance policy or its death benefit due to her fraudulent actions and undue influence. In the third cause of action, the plaintiffs allege that Deirdre DeSimone has breached her promise to the decedent to act in the best interests of the plaintiffs and upon their reaching majority, placing the insurance proceeds in plaintiffs names, for which the plaintiffs therefore seek judgment declaring that the plaintiffs are the sole owners of said policy.

The Judgment of Divorce dated January 6, 1997 provides that the plaintiff, Marc DeSimone, shall have sole physical custody of the infant children of the marriage, James Anthony born May 24, 1988 and Alexandra Grace born September 11, 1989. Both the plaintiff and defendant were to be equally responsible for the cost of college education leading to an undergraduate degree at an accredited college or university. Marc DeSimone was required to "pay for and maintain in full force and effect, and neither pledge, hypothecate nor encumber, life insurance policies with a minimum death benefit of \$100,000.00 insuring his life for the benefit of the infant issue for so long as the children shall be unemancipated, with the defendant named as trustee." The decree also provides that the Stipulation of Settlement entered into between the parties on September 19, 1996 is incorporated in the Judgment by reference but shall survive and shall not be merged in the Judgment.

The Stipulation of Settlement, at Article XIV EMANCIPATION, provides "Emancipation of a child, as used in this agreement, shall be deemed to have occurred upon the earliest happening of any of the following events: (a) The child attaining the age of twenty-one (21) years, unless the child shall be pursuing a continuous full time course of college education leading to an undergraduate degree as a full-time day, undergraduate student at an accredited college or university, in which event, emancipation shall not take place until the child attains the age of twenty-two (22), or graduation, whichever first occurs, unless another emancipation event shall have previously occurred; or (b) Marriage of the child.... (c) Entry of the child into the military service.... (d) Engaging in full-time employment and thereby becoming self-sustaining....

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Emancipation stemming from employment shall be deemed terminated upon the cessation by the child of full-time employment before any other emancipation event, and the child shall again be deemed to be unemancipated until the happening of another emancipating event; or ...If the child establishes a permanent resident away from that of the Father and subsequently returns to reside with the Father prior to another emancipation event, then the period of emancipation shall cease until the happening of another emancipation event; or ...;(g) Death of the father.

James DeSimone testified at his examination before trial on February 18, 2010 to the effect that he is a full time student at the State University of New York at Cortland, turned 21 years of age on May 24, 2009, and is graduated from college in May 2009. He lived at 14 Erita Lane for six years with his father, Deirdre and her children Melanie and Paul, and his sister Alexandra. After his father died, he stayed in Cortland while attending school, and when classes were out of session, lived with his Mom in Jupiter, Florida. He currently owes \$40,000.00 in loans for his education. His father only paid for his first year and advised him his mother was responsible for one half his college expenses.

Alexandra DeSimone testified to the effect that she is twenty years of age and single, never having been married. She is currently employed as a waitress and has two roommates with whom she has lived for the past one and one-half years. Prior to that she lived in Brooklyn with two roommates. She lived at Erita Lane, Smithtown for six years with her brother, her father, Dee, Melanie, and Paul. She stopped living at the Erita Lane address in about July 2007 and moved to Huntington to live with her mother for two weeks, and thereafter, moved to various residences and provided for her own food, clothing and living expenses. She testified that she was forced to move out of her father's home in July 2007 by her stepmother Deirdre and that her father did not say anything to her about moving out. Deirdre, she testified, told her that she (Alexandra) didn't care about her father, was never home and told her to "Pack your shit and move to Mommy's house." She did not discuss what Deirdre said to her with her father and moved out, but thereafter, saw her father on a number of occasions and shared holidays and other occasions. She testified that her father apologized to her for what happened and told her that he made mistakes and said he did not have control over it. He apologized that she could not go to school and had to live on her own. This conversation occurred when he was in the ICU at the hospital before he went to hospice. After Deirdre told her to move out, she would have liked to move back to Erita Street, but did not discuss it with anyone. She was unable to attend college due to financial reasons. Although she applied for admission to Pratt in 2007 after high school while still living at the Erita address, she needed a co-signer for financial aid and could not afford Pratt even with the financial aid. Her father advised her that he could not afford for her to attend Pratt and he refused to sign the student loans as he was not in a position to do so. Thereafter, after her father became ill, and she applied to the Fashion Institute, but could not afford to attend. She did not know there was a life insurance policy until her Uncle Robert told her.

Based upon the foregoing, it is determined that at the time of the death of Marc DeSimone on December 20, 2008, Alexandra was nineteen years of age and James was twenty years of age. James became emancipated at the time of his father's death on December 20, 2008, pursuant to the terms of the Stipulation. However, there are factual issues concerning whether Alexandra voluntarily became emancipated prior to her father's death in that she testified that she was told to move from her family home by her stepmother in July 2007. However, she continued to visit her father and family and share holidays and occasions with them, but received no monetary support from her father. Pursuant to Domestic Relations Law §32(3) and Family Court Act §413, a parent is obligated to support his or her children, according to the needs of the children and the means of the parent, until the child attains the age of 21 or is

sooner emancipated, Sassano v Sassano, 143 AD2d 893 [2nd Dept 1988]; In the Matter of Alice C. v Bernard G.C., 193 AD2d 97 [2nd Dept 1993]; see also, Burr v Fellner, 73 AD3d 1041 [2nd Dept 2010]).

Deirdre DeSimone set forth in her supporting affidavit that she married Marc DeSimone on March 3, 2000 and she and her children and Marc and his children, James and Alexandra, lived together. In the summer of 2007, Alexandra left their home to first live with her mother and later to live at various locations in New York City. She testified that Alexandra left their household to become free of parental limitations and left their household voluntarily. She is aware of the Stipulation between Marc and his previous wife and Marc's obligation to pay one half of James college costs and is willing to make payment to him in the amount of \$20,000.00 from the \$100,000 presently under restraint by the court. She first learned that she was the sole beneficiary of Marc's life insurance policy in or about October 2007 when they began discussing estate planning.

Here, the defendant, Deirdre DeSimone, admits that payment of \$20,000 is due to James DeSimone to pay for one half of his college costs. Although she is willing to pay for the same out of the \$100,000.00's being restrained by this Court, this court determines that the obligation to pay for one half the college expenses of the children as provided by the Stipulation and Settlement relating to the divorce is separate and apart from the obligation of Marc DeSimone to maintain a life insurance policy in the minimum amount of \$100,000.00 for the benefit of his children so long as they are not emancipated. Therefore, that \$20,000.00 which Deirdre DeSimone admits is due to James is to be paid from the assets of the Estate of Marc DeSimone, if any, and not from the \$100,000.00 life insurance policy.

Accordingly, judgment is granted to James DeSimone in the amount of \$20,000.00 as against the Estate of Marc DeSimone.

Here there are factual issues concerning whether Alexandra was forced to move out of the Erita Place household by the defendant Deirdre DeSimone or whether she voluntarily left the household. Thus, there are factual issues concerning the status of her emancipation at the time of her father's death. There are further issues concerning Marc DeSimone's obligation to support his child up to age twenty-one pursuant to the Stipulation of Settlement of September 19, 1996 and Domestic Relations Law §32(3) and Family Court Act §413, and thus whether the decedent was obligated to continue to pay support Alexandra until age twenty one pursuant to the Settlement. There are further factual issues concerning Marc DeSimone's obligation pursuant to that Stipulation to pay for one half of his daughter's college education until age 22 if still in college and not emancipated and whether the defendant, Deidre DeSimone, interfered with that obligation.

Although the parties discuss that there was a life insurance policy which Deirdre DeSimone was made the sole beneficiary for, no such policy has been presented to this Court for inspection to determine if she is the sole beneficiary or the trustee thereof for the benefit of Alexandra and James. Pursuant to the Stipulation of Settlement, the life insurance policy was to be in the name of Marc DeSimone's first wife, as trustee. Additionally absent from the affidavit of Deirdre DeSimone is whether there were any other policies of insurance on the life of Marc DeSimone which specifically named Alexandra and James DeSimone as beneficiaries. It has not been disclosed to this Court if Marc DeSimone left a Last Will and Testament with any provisions for the distribution of assets of his estate in lieu of or in addition to the life insurance policy for James and Alexandra. A copy of a Will has not been presented to this Court for inspection and to date, no party has applied for Letters Testamentary or Letters of Administration relating to the estate of Marc DeSimone. No reason for the failure to obtain Letters Testamentary or Letters of

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Administration has been offered. The aforementioned factual issues preclude summary judgment to the plaintiffs, Alexandra DeSimone and James DeSimone, and to the defendant, Deirdre DeSimone.

In motion (002), the plaintiff seeks to withdraw the fourth and fifth causes of action. In the fourth cause of action it is alleged that on or about December 20, 2008, Deirdre DeSimone, to end her emotional suffering, willfully and intentionally caused Marc DeSimone to ingest a lethal dose of Morphine which was five to seven time the amount then prescribed by the decedent's physician for a single dose, thus intentionally causing the death of Marc DeSimone and depriving the plaintiffs of his love and affection. In the fifth cause of action, it is alleged that Deirdre DeSimone intentionally caused the death of Marc DeSimone for which the plaintiffs seek a judgment declaring that Deirdre DeSimone, without legal justification, caused the premature death of decedent thus negating any right she may have to any benefit from his death as either beneficiary of any life insurance policy, mutual fund or 401K, or any such jointly held accounts or assets of which the assets of Marc DeSimone may have passed at his death or as a beneficiary or distributee of the estate assets and that all such assets be declared assets of the Estate of Marc DeSimone to which Deirdre DeSimone has not valid claim. In motion (002), the plaintiffs seek to withdraw these two causes of action.

Accordingly, that part of motion (002) which seeks an order permitting withdrawal of the fourth and fifth causes of action is granted and the fourth and fifth causes of action are deemed withdrawn.

Settle Judgment

Dated: Oct 5, 2010



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION