

Matter of Esposito (Morreale)
2010 NY Slip Op 33079(U)
September 30, 2010
Surrogate's Court, Nassau County
Docket Number: 356975/B
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 Willam Esposito and
 Kiem Esposito Pursuant to Article 21 of the SCPA for an
 Order Cancelling and Setting Aside a Conveyance of Real
 Property by

File No. 356975/B

ALBERT MORREALE
 a/k/a ALBERT R. MORREALE,

Dec. No. 26639

Deceased,

to Alan Morreale.
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In this miscellaneous proceeding, the petitioners move for an order granting summary judgment to them pursuant to CPLR 3212. The motion is opposed by the respondent. For the reasons that follow, the motion is denied.

The decedent, Albert Morreale, died testate on February 26, 2009 survived by two children, Alan Morreale and Elizabeth Varian. On August 3, 2009, the decedent's last will and testament dated February 9, 2009 was admitted to probate and letters testamentary were issued to Alan. The will provides, among other things, that Alan has the right to live in the decedent's home located at 18 Horse Hollow Road, Lattingtown, New York 11560, for the remainder of his life and contains directions for the distribution of the remainder either after Alan's death or his vacating of the premises.

The petitioners allege that they are creditors of the estate. They base their assertion on a document entitled, "Sales Agreement," dated April 29, 2006, between the decedent, who is defined in the agreement as "Seller", and the petitioners, who are defined as "Buyers." The petitioners allege that by the term of the agreement the decedent granted the petitioners the right of first refusal to purchase the property for \$1,600,000.00 and that in the agreement the decedent

acknowledged his receipt of two deposits by check totaling \$350,000.00 that the petitioners paid to the decedent for the right of first refusal. The sales agreement defines the property as located at 18 Horse Hollow Road, Lattintown, NY 11560. The pertinent terms of the agreement for purposes of this proceeding and motion are as follows:

“WHEREAS, Buyers made a deposit to [S]eller for \$50,000.00 in September 2005 to hold the Property for one year.

WHEREAS, Buyers made an additional deposit of \$300,000.00 on April 26, 2006 to ensure right of first refusal for purchase of property.

. . .

When Seller finds a new home he wants to buy, he will notify Buyers of his intent to buy a new property and Buyers shall have 30 days to make a decision whether to purchase Property or refuse.

Should Buyers decide to buy Property, Seller and Buyers shall set a date for closing on purchase of Property within 60 days or as they agree. . .

Should Buyers decide not to purchase Property, Seller will put the Property on the market. Upon closing of Property, Seller shall return deposit of \$300,000.00 to [B]uyers.”

There is no dispute that the decedent was the sole owner of the property on the date he executed the sales agreement and that the property was the decedent’s residence at the time of his death. When asked at his deposition whether the decedent owed the petitioners their \$300,000.00 deposit when the decedent died, Alan testified, “After reading the agreement, yes, I guess so.”

Annexed to the petition filed by William Esposito and Kiem Esposito is a deed dated February 16, 2009 from the decedent transferring title to the Lattintown property to Alan, the

respondent. The deed was recorded in the Nassau County Clerk's Office on February 27, 2009, one day after the decedent died. Alan testified at his deposition that he did not pay anything to the decedent for the property. In the probate petition, the property is listed as the decedent's domicile.

The petitioner's allege that the decedent's failure to offer the property to them for sale prior to conveying the property to Alan constitutes a breach of the agreement by the decedent. As a result, the petitioners ask the court to issue an order granting summary judgment in their favor against the decedent's estate (1) cancelling the deed dated February 16, 2009 as a fraudulent conveyance; (2) directing Alan to promptly reconvey the property to the estate and, if Alan fails to do so, directing the Sheriff of the County of Nassau to convey the property to the estate by duly executed sheriff's deed within fifteen days after receiving notice of entry of the court's order; (3) directing Alan, as executor of the estate, to hold the property in trust for the petitioners until their claim against the estate is adjudicated; and (4) granting petitioners a judgment in the amount of \$300,000.00, with interest at the rate of nine percent per annum, from February 16, 2009 until the judgment is paid, plus the costs and disbursements of this proceeding, including reasonable attorneys' fees.

The petitioners assert that the documentary evidence and Alan's deposition testimony conclusively demonstrate that the transfer of the property from the decedent to Alan was a fraudulent conveyance under New York Debtor and Creditor Law § 273 because it rendered decedent and his estate insolvent and under New York Debtor and Creditor Law § 276 because it demonstrates decedent's actual intent to evade his obligation to the petitioners. According to the

probate petition, the decedent's gross testamentary estate was valued at between \$10,000.00 and \$18,000.00. Alan's deposition testimony confirms this.

Alan also testified that on the date that the decedent transferred the property to him there were two mortgages recorded against the property, a first mortgage held by Chase Bank in the approximate amount of \$34,000.00, and a \$120,000.00 mortgage held by Gilda Morreale, who is the decedent's sister and Alan's aunt. Alan disputes the authenticity of Gilda's mortgage. Gilda commenced a foreclosure proceeding against Alan in Supreme Court, Nassau County. The petitioners' motion to intervene in that proceeding and to stay the action pending the determination of their claims in this proceeding was granted.

In opposition to the instant motion, Alan has filed an affidavit wherein he states that he personally and as executor of the estate agrees to pay the petitioners the sum of \$300,000.00 from the proceeds of sale of the property, and, in his answer to the petition, Alan states that he personally agrees to pay any claim determined by the court to be due to the petitioners, although Alan alleges that there is no pre-judgment interest due to them. Alan also alleges that the pending foreclosure action has made it difficult to refinance the mortgage on the property or to market it for sale. Alan claims that the conveyance of the property from the decedent to him was done since Elizabeth, the decedent's daughter, is on public support and the decedent did not want her to receive money from the estate that would ultimately be used to reimburse the government for her indebtedness. Alan states that he offered to sell the property to the petitioners after the decedent's death.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*,

31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

The issue in this proceeding is whether the decedent breached the sales agreement and, if so, whether and to what extent the petitioners are entitled to damages. Here, the court finds that

there are issues of material fact that preclude granting summary judgment to the petitioners. For example, the petitioners allege that the decedent did not offer to sell the property to the petitioners as required by the terms of the sales agreement. Alan contends otherwise, although the deposition testimony of William Esposito that Alan cites in his opposing affidavit is incomplete and misleading. Nevertheless, Alan has sworn that the decedent offered to sell the property to the petitioners prior to the decedent's death. Alan also states that William told Alan that, after William purchased neighboring property in 2007 or 2008, he no longer had the money to buy the property. The court notes that the agreement on its face discusses only the circumstances where the decedent was required to inform the petitioners of his intent to buy a new property "[w]hen Seller [the decedent] finds a new home he wants to buy . . ." This is not what occurred here.

The matter will appear on the court's calendar on November 9, 2010, at 10:00 a.m., for a status conference.

This is the decision and order of the court.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court