

Soran v Addeo

2011 NY Slip Op 30159(U)

January 10, 2011

Sup Ct, Nassau County

Docket Number: 19940/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

JENNIFER SORAN and JAMES A. ADDEO,

Plaintiff(s),

-against-

ANN ADDEO,

Defendant(s).

_____ x

Index No. 19940/10

Motion Submitted: 11/12/10
Motion Sequence: 001

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....XX
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiffs bring this application by order to show cause for a preliminary injunction prohibiting defendant from disposing, transferring, selling, encumbering, mortgaging or otherwise hypothecating the real property known as 296 Evans Avenue, Oceanside, New York.¹ Defendant opposes the requested relief.

¹The Court struck the provision in the order to show cause for a temporary restraining order.

Plaintiffs are two of defendant's three adult children.² Plaintiffs commenced an action against their mother on or about October 22, 2010 sounding in breach of contract, constructive trust/unjust enrichment, fraud, and conversion stemming from defendant's refusal to comply with the terms of a written "Family Agreement" (the "Agreement") signed by all parties on January 21, 2008. The Agreement concerned the transfer of defendant's husband's assets to defendant in order that defendant's husband qualify for Medicaid assistance. Defendant's husband died on September 4, 2010.

The Agreement calls for defendant to, *inter alia*, convey the subject premises in Oceanside to defendant's three children, retaining a life estate in such property, within thirty days of defendant's husband's death. At the time that the Agreement was signed, the subject property was jointly held in the names of defendant and her husband. Concurrently with the execution of the Agreement, a deed transferring the property from defendant and her husband to defendant alone was executed, without consideration.

The court notes that both the Agreement and the deed were signed in defendant's husband's name by plaintiff Soran as "attorney-in-fact."

Defendant has not made such transfer of the subject premises to her children, and she has refused to comply with the Agreement executed in January 2008.

Plaintiffs assert that they are entitled to a preliminary injunction on the ground that if defendant transfers, sells, encumbers or otherwise disposes of the subject property, plaintiffs will be irreparably harmed. Plaintiffs assert that defendant has "threatened" to transfer the subject property to their sibling, Deborah Benjamin, in contravention of the Agreement. Plaintiffs seek preservation of the status quo until a final determination can be made on the underlying action.

Defendant alleges that plaintiffs have failed to establish that defendant has threatened to make any such transfer to Deborah Benjamin, and that the Agreement is void for lack of consideration, and smacks of Medicaid fraud. In her verified answer to the underlying action, defendant denies the existence of a valid and legally binding agreement between the parties (the Agreement). Defendant also alleges as an affirmative defense that plaintiffs engaged in a scheme to defraud Medicaid, and that defendant, who was unrepresented by counsel at the time, was coerced into signing the Agreement by plaintiffs' false representations.

²Defendant's third adult child is known as Deborah Benjamin, and she is not a party to this action.

The purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (*Putter v. Singer*, 73 A.D.3d 1147, 901 N.Y.S.2d 382 [2d Dept., 2010]). Furthermore, a preliminary injunction is a drastic remedy for which the moving party must establish a “clear right to that relief under the law and the undisputed facts” (*Omakaze Sushi Restaurant, Inc. v. Lee*, 57 A.D.3d 497, 868 N.Y.S.2d 726 [2d Dept., 2008]).

In order to obtain a preliminary injunction, the party seeking relief must be able to demonstrate 1) a likelihood of success on the merits, 2) that irreparable harm or injury will occur if the relief is not granted, and 3) that the balancing of the equities favors the party seeking the injunction (*Doe v. Axelrod*, 73 N.Y.2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44; *Putter, supra*).

Where, however, the facts are in sharp dispute, a petitioner cannot be said to have established a “clear right” to a preliminary injunction (*Matter of Advanced Digital Security Solutions, Inc. v. Samsung Techwin, Co., Ltd.*, 53 A.D.3d 612, 862 N.Y.S.2d 551 (2d Dept., 2008); *Omakaze, supra*).

The decision to grant or deny a preliminary injunction requires a court to consider the aforementioned variety of factors, and is a matter ordinarily committed to the sound discretion of the lower court (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840, 833 N.E.2d 191, 800 N.Y.S.2d 48 [2005]). Additionally, the court’s discretion allows for it to compensate for the weakness in one of the elements required to be established by the moving party by stressing the strengths of the others (see e.g. *Schlosser v. United Presbyterian Home at Syosset, Inc.*, 56 A.D.2d 615, 391 N.Y.S.2d 880 [2d Dept., 1977]).

At the outset, the Court notes that the evidence submitted by plaintiffs establishes that defendant signed the Agreement providing for the transfer of the subject property to plaintiffs within thirty days of their father’s death, while defendant was to retain a life estate in that property. However, there are sharply disputed issues of fact surrounding the signing of the Agreement by defendant, who was apparently unrepresented at the time.

The fact that the Agreement plainly states that it was executed in order to render defendant’s husband eligible for Medicaid calls into question the motivation and credibility of all of the parties to that Agreement. While this Court will not rule on the providence and legality of such Agreement for that purpose, the fact that it was executed to protect plaintiffs’ inheritance from the state and federal governments providing medical assistance to their father serves to underscore the sharply disputed issues of fact surrounding this matter. Furthermore, plaintiffs have not established under what authority plaintiff Soran signed her father’s name to the Agreement and attendant deed to the subject property.

With respect to plaintiffs' breach of contract claim, this Court recognizes that consideration to support an agreement exists where there is "either a benefit to the promisor or a detriment to the promisee" (*Hollander v. Lipman*, 65 A.D.3d 1086, 885 N.Y.S.2d 354 (2d Dept., 2009), quoting *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 464, 443 N.E.2d 441, 457 N.Y.S.2d 193 [1982]). In this case, defendant appears to be the promisor, agreeing to hold all of her husband's assets for the benefit of her children, but "any and all the assets (sic) transferred to [defendant] shall not be used for the benefit of [defendant]." Furthermore, it does not appear that the promisees (plaintiffs) are promising, doing, forbearing or suffering any detriment as a result of the Agreement. Thus, plaintiffs have failed to demonstrate the likelihood of success on the merits of the underlying breach of contract action (see e.g., *Matter of Related Properties, Inc. v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587, 591, 802 N.Y.S.2d 221 [2d Dept., 2005]).

As to plaintiffs' claims that their mother committed fraud and conversion, plaintiffs have failed to demonstrate their likely success on the merits thereof. Aside from their bare allegations of fraud and conversion, plaintiffs offer nothing more to this Court in terms of specificity with respect to those allegations.

Plaintiffs' claim that defendant has been unjustly enriched by her actions, thereby warranting the imposition of a constructive trust for the benefit of the plaintiffs is also unlikely to succeed on the merits.

The elements of a constructive trust are "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." (*Squiciarino v. Squiciarino*, 35 A.D.3d 844, 830 N.Y.S.2d 163 [2d Dept., 2006]). In view of the fact that a constructive trust is an equitable remedy, the court may apply the requirements flexibly rather than rigidly (*Henderson v. Thorpe*, 73 A.D.3d 978, 900 N.Y.S.2d 668 [2d Dept., 2010]). The third element can be satisfied if the party attempting to impose the trust contributes funds, time, or effort to the property in reliance on a promise to share interest in it. (*Squiciarino, supra*; *Moak v. Raynor*, 28 A.D.3d 900, 902, 814 N.Y.S.2d 289 [3d Dept., 2006]; see *Artache v. Goldin*, 133 A.D.2d 596, 600, 519 N.Y.S.2d 702 [2d Dept., 1987]). In this case, plaintiffs have failed to submit any proof that they contributed anything to the property in question in reliance on a promise to share an interest in it. Rather, plaintiffs contend that their "rights" to the property derive from the Agreement signed by the parties on January 21, 2008.

Further, there is no demonstration that the plaintiffs could not be able to be remunerated by monetary damages should defendant transfer, dispose of, or encumber the subject property. A preliminary injunction should not be issued where the legal remedy is satisfactory (*Orange & Rockland Utilities, Inc. v. Amerada Hess Corp.*, 67 Misc.2d 560,

324 N.Y.S.2d 494 (Sup. Ct. Rockland County 1971); *Town of Hempstead v. New York*, 9 Misc.3d 1040, 805 N.Y.S.2d 231 (Sup. Ct. Nassau County 2005), *aff'd*, 42 A.D.3d 527, 840 N.Y.S.2d 123 (2d Dept., 2007); *see also Gaynor v. Rockefeller*, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 [1965]). Plaintiffs simply allege that they would be irreparably harmed by a transfer of the property, but fail to specify any basis for that bare assertion. There is no evidence that money damages would not adequately compensate plaintiffs for a possibly improper transfer of the subject property by defendant.

Finally, the balance of equities are not in plaintiffs' favor. Even if defendant was to transfer the subject property, neither plaintiff would be left without a place to live. Pursuant to the Agreement submitted by plaintiffs, Jennifer Soran resides in Connecticut, and James A. Addeo resides in Long Beach, New York. Neither of the defendants allege that they have paid any monies with respect to a mortgage or upkeep on the subject property, which could dictate that plaintiffs receive the requested injunctive relief.

Plaintiffs' application for a preliminary injunction is denied.

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 24th of February, 2011, at 9:30 a.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the movant shall serve a copy of this Order on all parties. A copy of the Order with affidavits of service shall be served on the DCM Clerk within seven (7) days after entry.

The foregoing constitutes the Order of this Court.

Dated: January 10, 2011
Mineola, N.Y.


J. S. C.

ENTERED
JAN 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE