

Reilly v Davenport

2011 NY Slip Op 32513(U)

September 21, 2011

Supreme Court, Nassau County

Docket Number: 18664/10

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3**

**Present: HON. UTE WOLFF LALLY
Justice**

MD

**ERIN REILLY,

Plaintiff,**

**Motion Sequence #1
Submitted July 20, 2011**

-against-

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**HEATHER DAVENPORT and CITIBANK, N.A.,

Defendants.**

The following papers were read on this motion to dismiss:

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Upon the foregoing, it is ordered that this motion by the defendant Heather Davenport for an order pursuant to CPLR 3211(a)1., 5. and 7. dismissing the plaintiff's complaint is determined as provided herein.

The plaintiff in this action seeks to enforce an interest on real property at 569 North Seventh Street in New Hyde Park. The property was owned by her mother Patricia Reilly from 1991 to 1997. By deed dated July 21, 1997 which was recorded on August 21, 1997, Patricia Reilly retained a life estate in the property and deeded it to her daughter, the plaintiff's sister, the defendant Heather Davenport, without consideration. The deed provided:

“The Grantor, Patricia Reilly, hereby reserves a power of appointment to appoint the remainder so as to change the interest of the Grantee herein named, as between themselves, Heather Davenport and Erin Reilly. The power shall be exercisable or the power may be revoked during the Grantor’s lifetime by deed, however, no instrument shall be effective to exercise or revoke the power unless it contains a specific reference to the power and is executed and recorded in the County Clerk’s Office where this deed is recorded prior to the grantor’s death.”

While various mortgages have been taken on the property since the transfer to the defendant, there is no record of the parties’ mother exercising her power of appointment.

In seeking to void the deed, the plaintiff alleges that her mother had a confidential relationship with the defendant and that the defendant was her mother’s attorney-in-fact. She alleges that her mother transferred the property to the defendant based upon an understanding that upon her death, her only heirs, the parties to this action, would share equally in the property. In seeking to void the deed, the plaintiff has advanced five causes of action: constructive trust, undue influence, lack of mental capacity, fraud and an accounting. The defendant seeks dismissal of the complaint pursuant to CPLR 3211(a)1., 5. and 7.

In opposing this motion, the plaintiff attests that the property was put in her sister’s name for financial reasons and that during her mother’s life, everyone agreed that ultimately the equity in the property would be shared equally by her daughters, the parties to this action. The plaintiff attests that only after her mother’s death did the defendant claim exclusive ownership of the property. The plaintiff has submitted affidavits of four of her mother’s close friends who have all attested that it was always Patricia Reilly’s intent that her daughters share equally in the property.

When deciding a motion pursuant to CPLR 3211, the court must treat all of the opposing parties' allegations as true and resolve all inferences in their favor. (*Morris v Gianelli*, 71 AD3d 965, 966, citing *Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366; *Leon v Martinez*, 84 NY2d 83, 87-88).

Contrary to the defendant's argument, this action is not barred by Real Property Actions and Proceedings ("RPAPL") § 1501 as the plaintiff has in fact alleged an interest in real property. "An action to quiet title may be brought 'where a person claims an estate or interest in real property . . . to compel the determination of any claim adverse to that of the plaintiff which the defendant makes.'" [*Gentile v Spadaro*, 28 Misc3d 1218(A) (Supreme Court Queens County 2010), citing RPAPL § 1501; *Compare, Lennard v Chinkpoo Realty Holding Corp.*, 76 AD3d 1052]. Furthermore, "the statute of frauds is not a defense to a properly pleaded cause of action to impose a constructive trust on real property." (*Ubriaco v Martino*, 36 AD3d 793, 794, citing *McGrath v Hilding*, 41 NY2d 625, 628-629; *Cilibrasi v Gagliardotto*, 297 AD2d 778).

When a party seeks dismissal of a claim as barred by the Statute of Limitations, he bears the burden of establishing *prima facie* that the time in which to sue has expired. (*Morris v Granelli*, *supra*, at p. 66, citing *Savarese v Shatz*, 273 AD2d 219, 220; *Sabadie v Burke*, 47 AD3d 913, 914).

"A cause of action to impose a constructive trust is governed by a six-year statute of limitations and begins to accrue "upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered."" [*Auffermann v Distl*, 56 AD3d 502, quoting *Reiner v Jaeger*, 50 AD3d 761, quoting *Soscia v Soscia*, 35 AD3d 841; see also, *Tampa v Delacruz*, 77 AD3d 910; CPLR 213(1)]. "A

determination of when the wrongful act triggering the running of the statute of limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition . . . or whether the constructive trustee wrongfully withholds property acquired lawfully . . . in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property.”” (*Auffermann v Distl, supra* at p. 502, quoting *Jakacic v Jakacic*, 279 AD2d 551, 552, quoting *Sitkowski v Petzing*, 175 AD2d 801, 802).

A claim for undue influence must be interposed within six years, in the absence of continuing undue influence. (*Hosseiniyar v Alimehri*, 48 AD3d 635, *lv dismiss.*, 11 NY3d 744; *DeMille v DeMille*, 5 AD3d 428).

The Statute of Limitations for a claim of lack of mental capacity depends upon the character of the claim. An outright conversion claim has a three-year Statute of Limitations whereas a claim premised upon breach of fiduciary duty has a six-year claim. [*In re Muller*, 19 Misc3d 536, 540 (Surrogate’s Court Westchester County 2008), citing *Elghanayan v Victory*, 192 AD2d 355; *Kaufman v Cohen*, 307 AD2d 113]. And again, if a fiduciary relationship exists, the claim does not accrue until the fiduciary has repudiated his obligation or rendered an accounting. (*In re Muller, supra*, at p. 540, citing *Westchester Religious Institute v Kamerman*, 262 AD2d 131; *In re Barabash, supra*).

A fraud claim must be interposed within six years of its occurrence or within two years from the time that the plaintiff discovered or could have discovered it with reasonable diligence. (*Sargiss v Magarelli*, 12 NY3d 527, 532).

The Statute of Limitations to compel a fiduciary to account is six years. [*In re Saft*, 24 Misc3d 1214(A) (Surrogate's Court 2009), citing *In re Barabash's Estate*, 31 NY2d 76 rearg den., 31 NY2d 963; *Matter of Estate of Seaman*, 146 Misc2d 563 (Surrogate's Court, New York County 1990)]. "The claim does not begin to accrue until there is either an open repudiation of the fiduciary's obligation or a judicial settlement of the fiduciary's obligation to account." [*In re Saft*, 24 Misc3d 1214(A) (Surrogate's Court 2009), citing *In re Meyer*, 303 AD2d 682, 683].

Finally, "[u]nder the doctrine of equitable estoppel, a defendant may be precluded from invoking a statute of limitations defense where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding (citations omitted)." (*Tampa v Delacruz, supra*, at p. 911; see also *Putter v North Shore University Hosp.*, 7 NY3d 548, 552; *Zumpano v Quinn*, 6 NY3d 666, 673; *Reiner v Jaeger, supra*).

The defendant has not established that the constructive trust claim is untimely. The plaintiff has not alleged that the defendant acquired the property wrongfully. Rather, the plaintiff has alleged that the defendant acquired the property rightfully from their mother during her lifetime but that she has wrongfully withheld the plaintiff's interest in it since her mother's death. The plaintiff further alleges that the defendant had a confidential relationship of trust and confidence with their mother, was her attorney-in-fact and that her mother transferred the deed to the defendant with an understanding and reliance that she would share the property with her sister upon her death. (See, *Morris v Granelli, supra*; *Parrish v Parrish*, 24 AD3d 642; see also, *Maric Pipingm, Inc. v Maric*, 43 AD3d 888).

The defendant has not established that the undue influence claim is untimely as the defendant's alleged undue influence may well have continued until the decedent's death.

The accounting and lack of mental capacity claims have not been shown to be untimely for similar reasons; i.e., only after their mother died did defendant allegedly repudiate her alleged fiduciary obligations.

The defendant has not established that the fraud claim which has been adequately plead is untimely in view of the fact that the fraud may have only been evidenced after the decedent's death. And while ordinarily a promise to confer a future benefit cannot serve as the basis for a fraud claim, whether the defendant ever intended to fulfill her agreement is a factual issue not readily determined on a CPLR 3211 motion. (*Braddock v Braddock*, 60 AD3d 84, app withdrawn, 12 NY3d 780).

The defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)1., 5. and 7. is denied.

Dated: **SEP 19 2011**


UTE WOLFF LALLY, J.S.C.

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ENTERED
SEP 21 2011
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