

Killane v Philblad

2013 NY Slip Op 31246(U)

June 6, 2013

Supreme Court, Queens County

Docket Number: 24019/2010

Judge: David Elliot

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Robert Philblad commenced this action on September 22, 2010 and, upon his death, plaintiff, one of Robert's daughters, was substituted in her capacity as executor of the Estate of Robert Philblad into the action in place of the decedent (*see* so-ordered stipulation filed on March 26, 2012). In the second amended complaint, it is alleged that defendant and the decedent, who were brothers, resided together for years in the real property known as 211-22 46th Avenue, Bayside, New York (the 46th Avenue property) which had been bequeathed to them, along with their sister Carol Sefcik, by their mother, in equal shares.¹ It is also alleged that at a time when defendant and decedent were residing together at the 46th Avenue property (Carol lived elsewhere), defendant requested the decedent, who suffered from various medical problems, to convey his interest in the 46th Avenue property to defendant in exchange for defendant's promises to hold title to the property for decedent's benefit, always provide a "roof" over decedent's head, care for decedent and absolve decedent of financial responsibility for any bills. It is further alleged that in reliance upon such promises, decedent transferred his ownership interest in the 46th Avenue property to defendant by deed dated June 30, 2006. On February 26, 2009, defendant and Carol Sefcik sold the 46th Avenue property to a third party, but decedent allegedly did not receive any proceeds of the sale. Meanwhile, defendant, who had purchased by deed dated August 24, 2007, the real property known as 228-04 53rd Avenue, Bayside, New York (the 53rd Avenue property) in his own name, allegedly refused to permit decedent to reside there and, upon the sale of the 46th Avenue property, refused to return decedent's share of the sale proceeds to decedent. Plaintiff alleges causes of action based upon breach of oral agreement, constructive trust, unjust enrichment, promissory estoppel, fraud and misrepresentation, and seeks specific performance, and to recover damages and impose a constructive trust on the 53rd Avenue property to the extent of decedent's "fair share."

In his second amended answer, defendant denies the material allegations of the second amended complaint, and asserts various affirmative defenses and three counterclaims. The first and second affirmative defenses are based upon the statute of frauds, and the seventh affirmative defense is based upon the decedent's receipt of past consideration from defendant in exchange for the transfer of decedent's ownership interest in the 46th Avenue property. Defendant also asserts as an eighth affirmative defense and first counterclaim, that the decedent fraudulently induced him to provide total financial support to decedent by

1. It was discovered that another individual named "Mary Louise Dean" had an interest in the 46th Avenue property and, later, a deed dated October 24, 2008 was executed by Mary Louise Dean as grantor, conveying her interest in the property to defendant and Carol Sefcik as tenants in common.

misrepresenting that the 46th Avenue property belonged to defendant. Defendant additionally asserts a ninth affirmative defense and second counterclaim for an accounting with respect to the financial support he provided to the decedent. Plaintiff served a reply to the counterclaims asserted in the second amended answer.

It is well settled that a motion for summary judgment must be made within 120 days after the filing of the note of issue, except with leave of court on good cause shown (CPLR 3212 [a]; *Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725, 726-727 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). The preliminary conference order dated April 27, 2011 directed that any motion for summary judgment be made no later than 120 days after the filing of the note of issue. The note of issue was filed on July 6, 2012, and as a consequence, the motion by defendant was untimely, having been served on November 12, 2012, nine days beyond the 120-day limit. Defendant's counsel asserts that he was delayed in making this motion for summary judgment, because he was adversely impacted as a result of "Superstorm" Sandy. Under such circumstances, defendant has demonstrated good cause exists for permitting his late motion. In addition, there is no showing of prejudice. The court, therefore, shall exercise its discretion and entertain the motion of defendant (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2004]).

It is well established that to obtain summary judgment, a movant must establish a cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in the movant's favor, and the movant must do so by tender of evidentiary proof in admissible form (*see CPLR 3212 [b]; Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], *see also Rebecchi v Whitmore*, 172 AD2d 600, 601 [2d Dept 1991]). Conversely, in order to defeat a motion for summary judgment, the opposing party "must . . . produce sufficient evidentiary proof in admissible form to raise a triable issue of fact warranting a trial" (*Chamberlain v Suffolk County Labor Dept.*, 221 AD2d 580, 580 [2d Dept 1995]). The court has the "burden to determine whether a triable issue of fact exists" (*id.*, *see also Rebecchi*, 172 AD2d at 601). Summary judgment must be granted, as a matter of law, when no triable issues of fact exist (*see Grand Union Co. v Klein*, 220 AD2d 483, 483 [2d Dept 1995]).

Defendant asserts that the first and third causes of action for breach of the alleged oral agreement are barred pursuant to General Obligations Law §§ 5-701 and 5-703.

The statute of frauds requires that an agreement be in writing if by its terms performance is "not to be completed before the end of a lifetime" (General Obligations Law §5-701 [a] [1]). It also provides that "[a] contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party

to be charged therewith, or by his lawfully authorized agent” (General Obligations Law § 5–703 [3]). The statute further provides that “[n]othing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance” (General Obligations Law § 5–703 [4]).

It is apparent that the alleged oral promises by defendant to care for decedent for the remainder of decedent’s life and to allow decedent to reside with defendant always, by their terms, were not to be completed before the end of the decedent’s lifetime, and therefore, that portion of the first cause of action which relates to the breach of such promises is barred by the statute of frauds (*see* General Obligations Law § 5–701 [a] [1]; *Yedvarb v Yedvarb*, 237 AD2d 433 [2d Dept 1997], *lv to appeal denied* 90 NY2d 804 [1997]); *Matter of Kittay*, 118 AD2d 647 [2d Dept 1986]). To the extent plaintiff contends that promissory estoppel should bar the application of the statute of frauds, the circumstances alleged herein are not so egregious as to render the application of the statute of frauds unconscionable (*see Yedvarb*, 237 AD2d at 434). Furthermore, to the extent defendant orally promised to “always take care of” the decedent, plaintiff has failed to present any evidence as to the specifics as to the form, frequency and amount of payment and the nature of the occupancy to spell out a meaningful promise (*see id.*; *Dombrowski v Somers*, 41 NY2d 858 [1997]; *Matter of Kittay*, 118 AD2d at 648; *see also Lowinger v Lowinger*, 287 AD2d 39 [1st Dept 2001]; *Saunders v Baryshnikov*, 110 AD2d 511 [1st Dept 1985]).

In addition, to establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise (*see Rogers v Town of Islip*, 230 AD2d 727 [2d Dept 1996]). This doctrine has been held to be limited in application to a class of cases in which the person to whom the promise is made, in reliance upon the promise, has suffered unconscionable injury (*see Tutak v Tutak*, 123 AD2d 758 [2d Dept 1986]; *D & N Boening v Kirsch Beverages*, 99 AD2d 522 [2d Dept 1984], *affd* 63 NY2d 449 [1984]). To the extent plaintiff asserts a second cause of action based upon promissory estoppel, she has failed to allege that her decedent suffered unconscionable injury as a consequence of his reliance upon the alleged promises made by defendant, and the evidence submitted herein does not bring her case within the scope of this doctrine.

Plaintiff’s assertion of part or full performance on the part of defendant by defendant’s setting up living quarters for the decedent in the 53rd Avenue property, furthermore, does not take her breach of oral contract claim out of the statute of frauds. The partial performance must be by the party seeking to enforce the contract, not by the party invoking the statute of frauds as a defense to enforcement (*see Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group PLC*, 93 NY2d 229, 235 [1999]). The exception to the statute of

frauds for part performance, furthermore, applies to General Obligations Law § 5–703, which deals with real estate transactions, and has not been extended to General Obligations Law § 5–701 (*see id.* at 234 n 1 [1999]; *Valentino v Davis*, 270 AD2d 635, 637–638 [3rd Dept 2000]).

To the degree plaintiff seeks to rely upon her decedent’s conveyance of his interest in the 46th Avenue property to defendant to overcome the defense of the statute of frauds vis-a-vis the promise to allow co-occupancy, such reliance is misplaced. “Part performance only applies to overcome the defense of the [s]tatute of [f]rauds in an action for specific performance of a contract” (*Tecler v Siwek*, 151 AD2d 813, 815 [3d Dept 1989]; *see* General Obligations Law § 5–703 [4]; *Papell v Calogero*, 114 AD2d 403, 404 [2d Dept 1985], *mod. on other grounds* 68 NY2d 705 [1986]; *see also Stainless Broadcasting Co. v Clear Channel Broadcasting Licenses, L.P.*, 58 AD3d 1010 [3d Dept 2009]; *Mulford v Borg–Warner Acceptance Corp.*, 115 AD2d 163, 164 [3d Dept 1985]). Although plaintiff seeks specific performance as a fifth cause of action of the alleged agreement to allow the decedent to reside with defendant, the claim abated upon the decedent’s death. Thus, plaintiff’s equitable claim of part performance cannot be applied in relation to her breach of contract and promissory estoppel causes of action for money damages (*see Farash v Sykes Datatronics, Inc.*, 90 AD2d 965 [4th Dept 1982]; *see also Spodek v Riskin*, 150 AD2d 358 [2d Dept 1989]; *Mihalko v Blood*, 86 AD2d 723 [3d Dept 1982]; General Obligations Law § 5–703 [4]), and the fifth cause of action fails to state a claim for specific performance.

The second cause of action seeks to impose a constructive trust on the 53rd Avenue property in effect declaring that defendant holds title to the property as constructive trustee for the benefit of plaintiff. The statute of frauds does not bar an action for a constructive trust (*see Berger v Berger*, 81 AD3d 765 [2d Dept 2011]; *Vanasco v Angiolelli*, 97 AD2d 462 [2d Dept 1983]). A constructive trust nevertheless may be imposed only where one party holding title to property is under an equitable duty to convey it to another (*see Janke v Janke*, 47 AD2d 445, 447–448 [4th Dept 1975], *affd* 39 NY2d 786 [1976]; *see Leire v Anderson–Leire*, 22 AD3d 944, 945 [3d Dept 2005]; *Terrille v Terrille*, 171 AD2d 906, 907 [3d Dept 1991]). In this instance, defendant has established that he purchased the 53rd Avenue property with his own savings and mortgage from a bank, before the sale of the 46th Avenue property and therefore, plaintiff cannot impress a constructive trust on the 53rd Avenue property based upon her claim that defendant used the proceeds of the sale of the 46th Avenue property to purchase the 53rd Avenue property. In addition, plaintiff has made no cross motion for leave to amend the complaint to assert a claim for imposition of a constructive trust on any of the funds realized by defendant from the sale of the 46th Avenue property.

To the extent plaintiff also asserts a claim for unjust enrichment in her second cause of action, she alleges that defendant has been enriched unjustly by retaining the fruits of the transfer of decedent's interest in the property. Plaintiff, however, makes no claim for damages or reimbursement of the portion of the decedent's share of the sale proceeds of the 46th Avenue property in relation to this cause of action, including in the second amended complaint's prayer for relief. Plaintiff only has sought to impress a constructive trust with respect to the 53rd Avenue property, and has made no request for leave to amend her complaint to assert a claim for damages with respect to the second cause of action for unjust enrichment.

With respect to the fourth cause of action based upon fraud and misrepresentation, the elements of a cause of action alleging fraud in the inducement are a representation of a material existing fact, falsity, scienter, reliance and injury (*see Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Urstadt Biddle Props., Inc. v Excelsior Realty Corp.*, 65 AD3d 1135 [2d Dept 2009]; *Urquhart v Philbor Motors, Inc.*, 9 AD3d 458, 458-459 [2d Dept 2004]). Defendant avers the June 30, 2006 deed transfer was to ensure that the decedent would be eligible to receive Medicaid benefits and that, notwithstanding, he never made any promise to the decedent, he purchased the 53rd Avenue property with enough bedrooms for decedent's eventual occupancy. Defendant also avers that he set up a bedroom in his house and gave the decedent a key to it, and the decedent moved his possessions into it. Defendant further avers that at a time when he believed the decedent would be able medically to leave the Long Island Care Center, he renovated his basement in the 53rd Avenue property so to make it handicapped accessible for his brother. He states that the decedent's continued residency at the Center was solely due to the decedent's medical condition and not occasioned by any refusal on his part to allow the decedent to live with him. Defendant indicates in his affidavit that he financially supported the decedent for the period from June 30, 2006 to March 2009, as well as the 15-year period prior to the deed transfer, and that Medicaid covered the decedent's expenses for the last 2½ years of his brother's life.

Plaintiff has failed to present any admissible evidence that defendant made any oral promise knowingly false when made, to induce the decedent to convey the decedent's interest in the 46th Avenue property to defendant. Moreover, to the extent plaintiff claims defendant promised to take care of his brother to induce the decedent to transfer his ownership interest, a prediction of something which is hoped or expected to occur in the future does not sustain an action to recover damages for fraud (*see generally Coccia v Liotti*, 70 AD3d 747 [2d Dept 2010]).

Under such circumstances, summary judgment dismissing the first, second, third, fourth and fifth causes of action asserted in the second amended complaint is warranted.

To the extent plaintiff cross moves for leave to renew her prior motion, plaintiff previously moved pursuant to CPLR 3212 for partial summary judgment dismissing the seventh, eighth and ninth affirmative defenses and first and second counterclaims asserted by defendant and pursuant to CPLR 3015 (a) to preclude defendant from introducing at trial any evidence in support of an unpleaded affirmative defense based upon non-performance of a condition precedent. By order dated November 21, 2012, the unopposed motion was denied. The court determined that plaintiff had failed to meet her prima facie burden of showing entitlement to partial summary judgment as a matter of law. The court noted that plaintiff did not provide a copy of the full deposition transcript of each witness, and failed to demonstrate compliance with CPLR 3116 (a). The court also noted that plaintiff did not provide a copy of the deed evidencing her decedent's prior ownership interest in the real property.

A motion for leave to renew must be supported by new or additional facts “not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]), and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]). “CPLR 2221(e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form” (*Schwelnus v Urological Assoc. of L.I., P.C.*, 94 AD3d 971, 972 [2d Dept 2012]; *see Hackney v Monge*, 103 AD3d 844 [2d Dept 2013]).

The inadvertent failure to provide a copy of the full transcripts, including the signature page and a copy of the deed was tantamount to law office failure which, under the circumstances of this case, constitutes a reasonable justification (*see Hackney*, 103 AD3d at 845; *Gordon v Boyd*, 96 AD3d 719, 720 [2d Dept 2012]; *Schwelnus*, 94 AD3d at 972; *Arkin v Resnick*, 68 AD3d 692, 694 [2d Dept 2009]; *Simpson v Tommy Hilfiger U.S.A., Inc.*, 48 AD3d 389, 391 [2d Dept 2008]). As such, that branch of plaintiff's cross motion for renewal is granted.

That having been said, with respect to that branch of the motion by plaintiff for partial summary judgment dismissing the seventh, eighth and ninth affirmative defenses, and pursuant to CPLR 3015 (a) to preclude defendant from introducing at trial any evidence in support of an unpleaded affirmative defense based upon non-performance of a condition precedent, such branch is academic because defendant is entitled to summary judgment dismissing the second amended complaint asserted against him for the reasons stated above, which do not relate to the seventh, eighth and ninth affirmative defenses or any unpleaded affirmative defense. Under such circumstances, that branch of the motion by plaintiff for summary judgment dismissing the seventh, eighth and ninth affirmative defenses and pursuant to CPLR 3015 (a) to preclude defendant from introducing at trial any evidence in

support of an unpleaded affirmative defense based upon non-performance of a condition precedent, is denied.

With respect to the branch of the motion by plaintiff for partial summary judgment dismissing the first and second counterclaims for fraud and an accounting, respectively, plaintiff contends that they are barred by the statute of limitations to the extent such claims arose prior to November 26, 2004.

A cause of action based upon fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered, or with reasonable diligence could have been discovered, whichever is longer (*see* CPLR 203 [g]; 213 [8]). A claim for an accounting is governed by a six-year statute of limitations (*see* CPLR 213 [1]; *Lazides v Kouzounas*, 7 AD3d 676 [2d Dept 2004]). It is undisputed that the counterclaims were commenced on November 26, 2010, and defendant has failed to raise a triable issue of fact precluding summary judgment based on the six-year limitations period for any claimed acts which occurred prior to November 26, 2004 (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 560). Thus, the counterclaim based upon fraud is time barred to the extent such claim seeks damages for alleged fraudulent acts which occurred prior to November 26, 2004 (*see* CPLR 213 [8]; *Oggioni v Oggioni*, 46 AD3d 646, 648 [2d Dept 2007]) and the counterclaim for an accounting is time-barred relative to any payments made prior to the same date (*see* CPLR 213 [1]; *Lazides*, 7 AD3d 676; *see also Butler v Gibbons*, 173 AD2d 352 [1st Dept 1991]).

To the extent the counterclaim for fraud is based upon the alleged fraudulent misrepresentations made by the decedent to defendant during the period November 26, 2004 through June 30, 2006 that the 46th Avenue property “belonged” to defendant, such representation may be considered to be one of opinion rather than fact. However, even assuming such representation was one of fact regarding titled or vested ownership, defendant has failed to state a cause of action because there was no justifiable reliance thereon. Prior to the conveyance of decedent’s interest in the property to him, defendant as an heir of his mother, had the right to access the documents which showed he was bequeathed an ownership interest in the property. He also had access to the deeds of record. Certainly, upon the conveyance of the decedent’s interest in the 46th Avenue property to defendant, the decedent’s representation regarding defendant’s ownership interest could no longer have been a misrepresentation, and defendant’s payments in relation to the maintenance of that property from then on were consistent with his having an ownership interest therein. Any financial support given by defendant to the decedent following the conveyance was not in justifiable reliance upon any alleged misrepresentation by the decedent regarding to whom the property “belonged.”

In addition, to the extent the counterclaim for an accounting is based upon payments made by defendant during the period November 26, 2004 to 2009, the purpose of an accounting is compel the defendant to account for and pay over money owed to the plaintiff but held by the defendant. Defendant, however, contends that he himself paid all expenses in relation to the 46th Avenue property during such period and makes no claim the decedent collected rent or income from the property. Thus, defendant does not need an accounting from plaintiff for such payments. In addition, to the extent defendant contends he gave money to the decedent during such period for decedent's personal expenses, defendant was under no legal obligation to do so, and again, an accounting is unwarranted.

Accordingly, the branches of the motion by defendant for summary judgment dismissing the first, second, third, fourth and fifth causes of action and to cancel the notice of pendency are granted. The County Clerk of Queens County is directed, upon the payment of any fees which may be due and owing, to cancel the notice of pendency filed in this action against the property located at 228-04 53rd Avenue, Bayside, Queens, New York and indexed under Block 7503, Lot 17. The Clerk shall enter upon the margin of the record a notice of cancellation referring to this order. That branch of the motion by defendant for an award of counsel fees is denied (*see Hunt v Sharp*, 85 NY2d 883 [1995]; *Chapel v Mitchell*, 84 NY2d 345, 348-349 [1994]; *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]). That branch of the cross motion by plaintiff for leave to renew her prior motion is granted. That branch of the cross motion for summary judgment dismissing the seventh, eighth and ninth affirmative defenses and pursuant to CPLR 3015 (a) to preclude defendant from introducing at trial any evidence in support of an unpleaded affirmative defense based upon non-performance of a condition precedent, is denied as moot. That branch of the cross motion by plaintiff for partial summary judgment dismissing the first and second counterclaims for fraud and an accounting is granted.

In summary, the second amended complaint, and the first and second counterclaims are, respectively, dismissed. Neither party has moved for relief with respect to the third counterclaim.

Dated: June 6, 2013

J.S.C.