

Crawford v Smith

2013 NY Slip Op 31279(U)

June 11, 2013

Sup Ct, Suffolk County

Docket Number: 18411/2012

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX NO. 18411/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
 Supreme Court Justice

RICHARD CRAWFORD, AS NOMINATED
 EXECUTOR OF THE WILL OF JOAN T.
 SMITH and RICHARD CRAWFORD,
 INDIVIDUALLY,

Plaintiffs,

-against-

KENNETH SMITH,

Defendant.

ORIG. RETURN DATE: 1/28/2013
FINAL SUBMISSION DATE: 2/23/2013
MTN. SEQ.#004
MOTION: MG DISM

PLAINTIFFS' ATTORNEY:

Donald Novick, Esq.
 202 East Main Street, Suite 208
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 (631) 547- 0300

DEFENDANT'S ATTORNEY:

LAW FIRM OF GARY N. WEINTRAUB, LLP
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 Huntington, New York 11743
 (631) 421-2500

The Defendant, Kenneth Smith, petitions the Court by way of motion for an order pursuant to CPLR § 3212 granting Defendant summary judgment dismissing the Complaint herein, on the ground that the “same is without merit.” In rendering its decision, the Court has considered the Defendant’s petition, counsel’s Affirmation, the Affidavit of the Defendant, with Exhibits A through K.

The Plaintiff, Richard Crawford, as preliminary executor of the Will of Joan T. Smith and himself oppose the application. In opposition, the Plaintiff submits the Affirmation of counsel and Exhibits A through R; and Exhibits A through J; and a third Exhibit designated A.

The Defendant-Petitioner also submits a Reply Affirmation, and an Affidavit of Kenneth Smith with Exhibits A through E.

As a background, the Court notes that on August 1, 2012 it considered an application by the Plaintiff, Respondent herein Richard Crawford, wherein Mr. Crawford sought an order enjoining and restraining the Petitioner herein, Kenneth Smith, from selling, mortgaging,

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encumbering or otherwise depleting the ownership and equity he holds in the premises known as 832 Hampshire Road, Bay Shore, New York pending trial as well as other relief not germane to the present petition.

In its August 1, 2012 Short Form Order, the Court noted the following:

This unfortunate familial dispute surrounds the ownership of the parties' late mother's home located at 832 Hampshire Road, Bay Shore, New York.

Essentially, the sole basis, at law or equity, of Petitioner's claim (Respondent herein) is that "a deed dated February 26, 2010 purports to convey title to the subject property from my mother to my brother. This deed is dated exactly one (1) month prior to my mother's consultation with attorney Shannon Falcone-Macleod. I submit that my mother did not sign this deed or, if she did, she did not know or understand the nature of what she was signing or what was placed under duress by my brother and forced to sign that deed."

The Court went on to note that "other than the bare assertion of overreaching, forging, undue influence and perhaps fraud, the Petitioner asserts no factual predicate other than an argument in the nature of 'how could this be?'" The Court thereafter denied the petition.

Joan T. Smith, (hereinafter "the Decedent") was the mother of Richard Crawford and Kenneth Smith. On February 26, 2010 the Decedent transferred fee title to the premises known as 832 Hampshire Road, West Bay Shore, New York to the Defendant-Petitioner, Kenneth Smith. The deed reserved a life estate to the Decedent. On May 19, 2010, the Decedent executed a last Will and Testament. Thankfully, that Will is not an issue before this Court.

On or about June 6, 2012, the Plaintiff-Respondent commenced an action by way of Verified Complaint. The Complaint consists of five (5) causes of action. Each cause of action contains essentially the same factual predicates to wit (1) on April 20, 2010, a deed dated February 26, 2010, was recorded, said deed allegedly granting ownership to the Defendant-Petitioner herein; (2) Joan T. Smith is deceased; (3) the subject property has a fair market value of Four Hundred Thousand Dollars (\$400,000.00); (4) Plaintiff-Respondent is

a legatee under the last Will and Testament of the Decedent; (5) that prior to Decedent's death, the Petitioner-Defendant caused Decedent to execute the subject deed under duress; (6) that the subject premises are to be impressed with a constructive trust; (7) Plaintiff-Respondent alleges that the Decedent promised Plaintiff an ownership interest in the subject property albeit without memorandum or recordable paper; (8) that the Defendant-Petitioner has been unjustly enriched; (9) that the Plaintiff-Respondent is entitled to impress the premises with a constructive trust; (10) that the Plaintiff-Respondent is entitled to an accounting which would result in the sale of the subject premises and a division of proceeds.

A fair summary of the Plaintiff-Respondent's allegation is set forth within the Affirmation of Defendant-Petitioner's counsel. In sum and substance, the Plaintiff-Respondent is alleging a confidential and fiduciary relationship between himself and the Decedent, detrimental reliance on a promise made by the Decedent to him that he would have an ownership interest in the subject property, and therefore entitled to impress the subject property with a constructive trust in order to avoid unjust enrichment of the Defendant-Petitioner. To substantiate said claim the Plaintiff-Respondent notes provisions in the last Will and Testament of the Decedent found essentially in a residuary clause.

In order to sustain a summary judgment claim, the movant must make a *prima facie* case by tendering evidence to demonstrate an absence of any material issues of fact. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986).

The Respondent correctly recites that not only does the existence of an arguable issue of fact require that the issue proceed to trial, "even the color of a triable issue of fact forecloses the remedy." Citing, *Matter of Cuttitto Family Trust*, 10 A.D.3d 656, 657 (2nd Dept. 2004). Summary Judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and that the issues of credibility may not be determined on the motion, but must await the trial. Furthermore, the function of the Court on a motion for summary judgment is not resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. Summary Judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues. *Stukas v. Streiter*, 83 A.D.3d 18, 23 (2nd Dept. 2011).

The Petitioner has set forth evidence meeting his initial hurdle whereby the burden shifts to the Respondent. More particularly, the Court is provided with an Affirmation by Milagros Rogers, an attorney duly licenced to practice law in all the courts of the State of New York. Her affidavit sets forth the fact that she was an acquaintance of the Smith family for some years, and did indeed know the Decedent, Joan T. Smith. She further notes that in

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early 2010, Decedent called her to schedule an appointment to discuss how to best protect the family residence in light of her being a patient at a facility in West Islip. She thereafter advised Decedent on various options which included, transferring the residence to the Defendant-Petitioner while maintaining a life estate, in the event she recovered and was able to return home.

She further notes that on February 26, 2010, she visited the Decedent with a notary public. Counsel notes that she sat with the Decedent for an hour and discussed all options available. Ms. Rogers indicates, that during extensive conversation she noted that the Decedent could indeed identify individuals from photographs that were placed in her room. Upon completion of these discussions, the Decedent instructed her to draft a deed transferring the premises to the Defendant-Petitioner while retaining a life estate. The deed was executed on February 26, 2010. Counsel witnessed the signature and the same was notarized and submitted.

Counsel further notes that Ms. Smith called and thanked her for her services while remitting full payment for services rendered.

Ms. Rogers notes the following:

In my opinion, both as an experienced attorney and individual, Ms. Smith possessed the necessary capacity and cognitive ability during the entire period from the time she called me to discuss transferring the deed, to the date of transfer. I do not have any doubt that she was aware of what she was doing when she executed the deed. There was no duress or influence on behalf of either her son, Kenneth Smith or her daughter, Joan E. Smith-Miller, since they did not initiate my relationship with Mrs. Smith and were not present at the execution of the deed. This was completed strictly at the request of Joan T. Smith. I would not have permitted Mrs. Smith to execute deed if I had any doubt that she did not have the requisite mental capacity or was under any duress from a third party (emphasis added).

The Plaintiff-Respondent during oral argument and throughout his papers, claims that the fact the Decedent conversed with another attorney, subsequent to her execution of the deed regarding the disposition of the property, is evidence that precludes summary judgment. The Court noted that assuming all that to be true, the testimony of the attorney would suffer

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a double hearsay impediment. The attorney's remarks as to what the Decedent said are hearsay and the remarks of the Decedent are precluded by a sound application of the Dead Man's Statute. Furthermore, other than innuendo, the Plaintiff-Respondent cannot produce a single line in the form of a memorandum, letter or anything else which would allow the Court to find an articulable question of fact.

The Affirmation of Ms. Rogers, the attorney who drafted and supervised the execution of the Will, is compelling. Furthermore, the deposition testimony of the Plaintiff-Respondent corroborates the fact that the Decedent, during her final days, was strong willed, alert and quite competent.

The Defendant's petition to dismiss the Complaint is **GRANTED**.

The foregoing shall constitute the decision and Order of this Court.

Dated: June 11, 2013


HON. JERRY GARGUILO, JSC