

Faraldo v Anne N. McKenna Irrevocable Trust

2014 NY Slip Op 32766(U)

October 21, 2014

Supreme Court, Suffolk County

Docket Number: 12-38759

Judge: Jerry Garguilo

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

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 8-2-13
ADJ. DATE 12-11-13
Mot. Seq. # 002 - MotD
003 - XMotD

-----X
ANNE MCKENNA FARALDO,

Plaintiff,

ANNE MCKENNA FARALDO, Pro Se
1309 Paumanack Village Drive
Greenlawn, New York 11740

- against -

EZRATTY, EZRATTY & LEVINE
Attorney for Defendants
80 East Old Country Road
Mineola, New York 11501

THE ANNE N. MCKENNA IRREVOCABLE
TRUST, DATED OCTOBER 21, 2005, LAURA
MCKENNA and CHRISTINE KESSLER as
individuals and as attorneys in fact of ANNE N.
MCKENNA, and as trustees of the ANNE N.
MCKENNA IRREVOCABLE TRUST, ANNE
N. MCKENNA,

Defendants.
-----X

Upon the following papers numbered 1 to 29 read on this motion and cross motion to amend the pleadings and for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-5; Notice of Cross Motion and supporting papers 6-23; Answering Affidavits and supporting papers 24; Replying Affidavits and supporting papers 25; Other 26; 27-29; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Anne McKenna Faraldo for an order granting leave to file an amended complaint is granted as to the first, second and fourth causes of action in the proposed amended complaint and is denied as to the third cause of action, and the proposed amended complaint is deemed timely served upon plaintiff's service of a copy of this order with notice of entry upon the defendants as set forth herein; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendants within 20 days after the entry of this order and shall promptly file proof of service with the Clerk of the Court; and it is further

ORDERED that the motion by defendants The Anne N. McKenna Irrevocable Trust, Laura McKenna and Christine Kessler for an order dismissing the complaint, denying the plaintiff's motion to

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amend the complaint and lifting the Lis Pendens recorded on April 23, 2013 against property located at 4a Meadowbrook Drive in Huntington, New York is granted to the extent that the first and second causes of action in the complaint and the amended complaint are dismissed, and is otherwise denied; and it is further

ORDERED that the defendants shall answer or move with respect to the remaining (fourth) cause of action of the amended complaint within the time period set forth in CPLR 3012; and it is further

ORDERED that counsel and the parties to this action shall appear for a preliminary conference on December 3, 2014 at 10:00 a.m. at the Part 47 of the Supreme Court, One Court Street, Riverhead, New York.

The genesis of the instant action is an acrimonious family dispute involving the plaintiff Anne McKenna Faraldo and her sisters, defendants Laura McKenna and Christine Kessler over the financial and personal care of their now deceased mother Anne N. McKenna. It is not disputed that in or about 1958, Anne McKenna and her husband James McKenna, purchased a home located at 4a Meadowbrook Drive in Huntington Station, New York. In 1978, title to the property was transferred to Anne McKenna. In 1981, the home was placed in the names of the plaintiff, Anne McKenna, and William Gaudin, Anne McKenna's brother and the plaintiff's uncle. Gaudin died intestate in 1987. Thereafter, by quitclaim deed, recorded on August 27, 1990, plaintiff transferred her interest in the subject property to her mother for consideration of one dollar. Plaintiff now alleges that the transfer was for "personal reasons" and that her mother assured her that she could "restore ownership" at any time. She further alleges that on or about 1998, eight years later, her mother retired and sometime thereafter told her that she would leave the house to her and money to pay the taxes for three years after she died. Plaintiff alleges that, relying on that promise, she renovated the kitchen of the home.

It is undisputed that on October 21, 2005, Anne McKenna designated her daughters Laura McKenna and Christine Kessler as her health care proxies and as her attorneys-in-fact. On the same date, Anne McKenna executed a will and established The Anne N. McKenna Irrevocable Trust (the trust) with Laura McKenna and Christine Kessler, likewise, nominated as trustees, the corpus of the trust being the Huntington Station property. Plaintiff alleges that in or about December of 2006, Anne McKenna was admitted to the hospital by Christine Kessler and Laura McKenna and thereafter never returned to her Huntington home. Various legal proceedings ensued including family offense proceedings commenced against Anne Faraldo in Kings County Family Court. A writ of habeas corpus proceeding was filed by Anne Faraldo for the return of Anne McKenna to her home, and dismissed by the Honorable Lawrence Knipel in Kings County Supreme Court on February 1, 2007. In or about January of 2007, Christine Kessler and Laura McKenna commenced a guardianship proceeding on behalf of Anne McKenna in the Brooklyn Supreme Court and Faraldo filed a cross-petition. A contested hearing was held over three days, culminating to the parties' consent on May 24, 2007 to the appointment of Christine Kessler and Laura McKenna as limited co-guardians of Anne McKenna. By order, dated January 22, 2008, the Honorable Albert Tomei appointed Christine Kessler and Laura McKenna limited co-guardians of the person and property of Anne McKenna with the power to administer the estate of William Gaudin, Anne McKenna's brother and to marshal assets inherited by Anne McKenna. In addition, the limited guardians were given the power to attempt to return Anne

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McKenna to her home in Huntington Station if they were able to renovate it to be handicapped accessible. A further action commenced by Faraldo in the United States District Court, Eastern District against her sisters, mother and the guardianship court evaluator alleging violations of her constitutional rights was dismissed by order of the Honorable Sandra J. Feuerstein, dated January 23, 2008. On January 3, 2011, Anne McKenna deceased.

Plaintiff Anne Faraldo commenced this action on December 31, 2012 against her mother Anne N. McKenna; The Anne N. McKenna Irrevocable Trust; her sisters Laura McKenna and Christine Kessler individually and as attorneys-in-fact of Anne N. McKenna and as trustees of The Anne N. McKenna Irrevocable Trust, alleging a first cause of action for the imposition of a constructive trust on the property located at 4a Meadowbrook Road, Huntington Station, New York and a second cause of action for fraud. Issue was joined by the defendants' service of an answer on or about March 28, 2013. It is undisputed that on June 14, 2013, the plaintiff filed a document entitled first amended complaint (amended complaint) with the Suffolk County Clerk and served same on defendants' counsel. By notice, dated June 21, 2013, counsel for the defendants returned the amended complaint to the plaintiff, stating that the defendants deemed it a nullity, as it was not timely served within 20 days after receipt of the defendants' verified answer as required by CPLR Rule 3025.

Plaintiff now moves for an order granting leave to file an amended complaint. Defendants cross move for an order dismissing the complaint, denying the plaintiff's motion to amend the complaint and lifting the Lis Pendens recorded on April 23, 2013 against the property located at 4a Meadowbrook Drive in Huntington Station, New York. Here, although the moving papers do not contain the proposed amended complaint, defendants have submitted a copy of the proposed amended complaint in their opposition to the plaintiff's motion to amend the complaint.

At the outset, it is noted that "[a] party may not commence a legal action or proceeding against a dead person, but instead must name the personal representative of the decedent's estate" (*HSBC v Ungar Family Realty Corp.*, 111 AD3d 673, 974 NYS2d 583 [2d Dept 2013] quoting *Jordan v City of New York*, 23 AD3d 436, 807 NYS2d 595 [2d Dept 2005]). Here, the papers submitted establish that although Anne N. McKenna is named as a defendant in this action, she deceased on January 3, 2011, prior to the commencement of this action. Thus, the court does not have jurisdiction over the estate of Anne N. McKenna and the action is a nullity insofar as asserted against her (*see JP Morgan Chase Bank v Rosenberg*, 90 AD3d 713, 934 NYS2d 346 [2d Dept 2011]; *Maldonado v Law Office of Mary A. Bork*, 64 AD3d 425, 882 NYS2d 118 [2d Dept 2009]; *Jordan v City of New York supra*).

Turning first to the plaintiff's motion (002) for leave to serve an amended complaint, plaintiff seeks to interpose a first cause of action for a constructive trust, a second cause of action for conspiracy to defraud and fraud, a third cause of action for pain and suffering, and a fourth cause of action for breach of fiduciary duty. Plaintiff seeks a judgment removing the defendants from their fiduciary positions; surcharging them for breach of their fiduciary duties; compelling them to render an accounting as attorneys-in-fact, co-trustees of the trust and as administrators of the estate of Anne McKenna; an award of counsel fees; the imposition of a constructive trust on the Huntington Station property; and punitive and compensatory damages for pain and suffering. The defendants oppose the motion on the

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basis of collateral estoppel and further that the allegations in the amended complaint were known to the plaintiff when the first complaint was filed.

Generally, leave to amend or supplement a pleading “shall be freely given” (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (*see Lariviere v New York City Tr. Auth.*, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; *Gitlin v Chirinkin*, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]; *Barnes Coy Architects, P.C. v Shamoon*, 53 AD3d 466, 863 NYS2d 216 [2d Dept 2008]). Here, the first cause of action for a constructive trust and the second cause of action for conspiracy to defraud and fraud are essentially the same as the original complaint. Thus, both claims are properly pleaded in the amended complaint. The fourth cause of action of the amended complaint, alleges, among other things, that Christine Kessler and Laura McKenna violated their fiduciary duties to their mother and the beneficiaries of her estate when acting in their roles as attorneys-in-fact, guardians, and trustees of The Anne N. McKenna Irrevocable Trust. To the extent that the fourth cause of action asserts a claim against Christine Kessler and Laura McKenna for breach of their fiduciary duties and seeks an accounting in connection with The Anne N. McKenna Irrevocable Trust and their actions as attorneys-in-fact, there has been no showing of prejudice or surprise to the defendants. Thus, insofar as the proposed amended complaint asserts causes of action sounding in constructive trust, fraud and breach of fiduciary duty, it is not palpably insufficient or devoid of merit, and the defendants have not established how the inclusion of such claims would result in prejudice or surprise. Accordingly, the plaintiff’s motion for leave to serve the proposed amended complaint is granted as to the proposed first, second and fourth causes of action.

Insofar as the plaintiff seeks, by way of the amended complaint, to interpose a third cause of action for pain and suffering, the motion is denied. In support of her claim, the plaintiff recites a litany of mostly remote events, which predate the 2007 guardianship proceeding, wherein she states she was wronged by her sisters’ alleged harassment and isolation of their mother, Anne McKenna, from her, culminating in the failure to advise her of their mother’s whereabouts, her death and funeral. It is well settled that a personal injury action may be brought for the conscious pain and suffering of a decedent prior to his or her death and that recovery therefor accrues to the decedent’s estate (*see Cragg v Allstate Indemn. Corp.*, 17 NY3d 118, 926 NYS2d 867 [2011]; *Heslin v Greene County*, 14 NY3d 67, 896 NYS2d 723 [2d Dept 2010]; *Ratka v St. Francis Hospital*, 44 NY2d 604, 407 NYS2d 458 [1978]). Here, however, the plaintiff does not seek to recover for the pain and suffering of her deceased mother. Rather, she seeks to recover for her own alleged pain and suffering. Moreover, even if the court were to deem the claim as one for intentional infliction of emotional distress, it would, likewise, fail as such a claim “predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society” (*Freihof v Hearst Corp.*, 65 NY2d 135, 490 NYS2d 735 [1985]). Petty annoyances, oppressions or other trivial circumstances are “necessarily to be expected and are incidental to modern life no matter how upsetting” (*Ruggiero v Contemporary Shells, Inc.*, 160 AD2d 986, 554 NYS2d 708 [2d Dept 1990]; *see Fletcher v Insignia/Douglas Elliman*, 1 AD3d 293, 768 NYS2d 197 [1st Dept 2003]). Here, the conduct alleged by plaintiff against the defendants does not rise to the level of the atrocity or outrageousness necessary to sustain a claim of this nature (*see Howell v New York Post Co.*, 81 NY2d 115, 596 NYS2d 350 [1993]).

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Accordingly, it is concluded that the third cause of action in the proposed amended complaint is devoid of merit and patently insufficient as a matter of law.

In view of the foregoing, and subject to the defendants' motion to dismiss which is considered below, the motion for leave to amend the complaint is granted as to the first, second and fourth causes of action, and is denied as to the third cause of action for pain and suffering.

Defendants cross-move (003) for an order cancelling the notice of pendency recorded on April 23, 2013 and pursuant to CPLR 3211 (a) (1), (5) and (7) dismissing the amended complaint based upon failure to state a cause of action, documentary evidence, collateral estoppel, and the statute of limitations.

With respect to the first cause of action, an action for a constructive trust may be maintained to remedy a situation where property has been acquired under such circumstances that the record owner should not, in good conscience, retain the beneficial interest in such property (*see Sharp v Kosmalski*, 40 NY2d 119, 386 NYS2d 72 [1976]; *Quodrozzi v Estate of Quodrozzi*, 99 AD3d 688, 952 NYS2d 74 [2d Dept 2012]; *Rowe v Kingston*, 94 AD3d 852, 942 NYS2d 161 [2d Dept 2012]). In order to impose the equitable remedy of a constructive trust, generally four factors must be considered: "(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Sharp v Kosmalski, supra* at 121; *see also Rowe v Kingston, supra; Marini v Lombardo*, 79 AD3d 932, 912 NYS2d 693 [2d Dept 2010], *appeal denied* 17 NY3d 705, 929 NYS2d 97 [2011]). Here, the plaintiff alleges that on August 27, 1990, she transferred her interest in the property to Anne McKenna for "personal reasons" upon her mother's promise that she could "restore ownership" at any time.

The documentary evidence submitted by the defendants in support of the motion to dismiss the complaint utterly refutes the claim for the imposition of a constructive trust and conclusively establishes a defense to the claims as a matter of law (*see Siracusa v Sager*, 105 AD3d 937, 963 NYS2d 364 [2d Dept 2013]; *Bodden v Kean*, 86 AD3d 524, 927 NYS2d 137 [2d Dept 2011]). Here, the defendants have submitted a copy of the plaintiff's sworn cross petition in the guardianship proceeding which contradicts her allegations herein. In her cross petition, sworn to on February 22, 2007, plaintiff stated that when she and her uncle first obtained an interest in the Huntington Station property in 1978, they were "accommodation endorsers" to assist her mother in financing the property, thus, "we were not the true owners" of the property. Moreover, plaintiff averred that "[i]n 1990, Christine came up to my apartment and convinced me to have my name taken off the deed to the house. She was under the misimpression that because my name was on the deed that if something happened to my mother, I would inherit the house. So, I went to a lawyer and had him take my name off the deed." Accordingly, the documentary evidence consisting of the plaintiff's own sworn statements refute her claim for the imposition of a constructive trust, establishing conclusively that the plaintiff does not have a cause of action for a constructive trust (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 389 NYS2d 314 [1976]; *Bodden v Kean*, 86 AD3d 524, 927 NYS2d 137).

In any event, the constructive trust claim is barred by the applicable six-year statute of limitations. A claim for a constructive trust begins to run upon the occurrence of the alleged wrongful

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action giving rise to a duty of restitution (*Bodden v Kean*, 86 AD3d 524, 927 NYS2d 137; *Auffermann v Distl*, 56 AD3d 502, 867 NYS2d 527 [2d Dept 2008]), “and not from the time the facts constituting the fraud are discovered (*Tampa v Delacruz*, 77 AD3d 910, 910 NYS2d 497 [2d Dept 2010]; *Auffermann v Distl*, 56 AD3d 502, 867 NYS2d 527). Here, the date of the alleged wrongful action is measured from Anne McKenna’s alleged breach or repudiation of her agreement to transfer the property (see *Bodden v Kean*, 86 AD3d 524, 927 NYS2d 137; *Tampa v Delacruz*, 77 AD3d 910, 910 NYS2d 497; *Auffermann v Distl*, 56 AD2d 502, 867 NYS2d 527). Anne McKenna divested herself of her interest in the Huntington Station property upon her transfer of the Huntington Station property to the Anne N. McKenna Irrevocable Trust on October 21, 2005. Accordingly, as the statute of limitations on the cause of action for a constructive trust began to run on October 21, 2005, the date of the alleged wrongful transfer of the property, this action commenced on December 31, 2012 is time barred.

Regarding the second cause of action, the essential elements of a cause of action for fraud are “a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury” (*Lebovits v Bassman*, 120 AD3d 1198, 992 NYS2d 316 [2d Dept 2014]) [internal quotation omitted]. CPLR 3016 (b) requires that allegations in support of each element of fraud be stated with particularity with sufficient detail to inform the defendants of the “substance of the claims” (see *Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003]). Here, the gravamen of plaintiff’s claim of conspiracy to defraud and fraud is the alleged failure of her sisters to keep plaintiff apprised of their mother’s mental and physical condition and their isolation of their mother from the plaintiff, culminating in the failure to apprise plaintiff of Anne McKenna’s death and funeral arrangements. In addition, plaintiff alleges that the defendants conspired to take their mother’s money, confiscated her property and took their 80-year-old mother, who was not of sound mind, to a lawyer where she executed a will, established the irrevocable trust, and executed a power of attorney and health care proxy to the defendants.

Defendants move to dismiss the fraud claims on the basis of collateral estoppel, asserting that the plaintiff herein raised the identical allegations in the guardianship proceeding. A review of the plaintiff’s cross petition in the guardianship proceeding shows that the plaintiff raised the identical allegations of the defendants’ alleged isolation of their mother from plaintiff and directly challenged Anne McKenna’s competence to execute the irrevocable trust and the power of attorney. Indeed, by order disposing of the guardianship proceeding, dated January 22, 2008, the Honorable Albert Tomei, Supreme Court Justice, continued in full force and effect, all previously executed advance directives, and powers of appointment and delegation made by Anne McKenna and appointed the defendants herein as limited guardians with the power to settle the estate of Anne McKenna’s brother and secure title to the Huntington Station property, to attempt to return Anne McKenna to her home, and to seek court approval to place Anne McKenna in a nursing home. Moreover, the court has taken judicial notice of the transcript of the proceedings held before Justice Tomei on May 24, 2007 wherein the plaintiff argued that there was no need for a guardianship by virtue of the fact that Anne McKenna executed a power of attorney appointing Christine Kessler and Laura McKenna as her attorneys-in-fact. Moreover, plaintiff conceded in that proceeding that the advance directives, executed by Anne McKenna on October 21, 2005, (the same day that the Anne McKenna Irrevocable Trust was established) were made when she was competent.

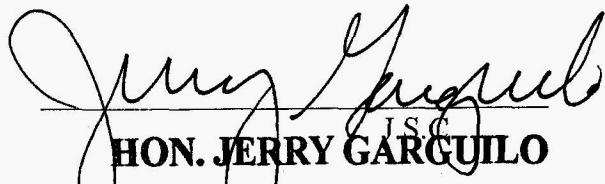
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In view of the foregoing, it is concluded that the documentary evidence establishes that the plaintiff had a full and fair opportunity and did air the same grievances alleged herein in the guardianship proceeding and it is further concluded that she does not have a cause of action for conspiracy to defraud and fraud.

In any event, the fraud claims are barred by the applicable six-year statute of limitations. A claim for a fraud begins to run six years from the date of commission of the fraud or two years from the date the fraud was or could reasonably have been discovered, whichever is later (CPLR 213 [8]; 203[g]; *Sargiss v Magarelli*, 12 NY3d 527, 881 NYS2d 651 [2009], *Raison v Lewis*, 106 AD3d 1047, 966 NYS2d 198 [2d Dept 2013]). Here, with the exception of the insufficient allegation that the defendants failed to notify her of her mother's death, the date of the alleged wrongful actions predated the guardianship proceeding and are time barred.

In view of the foregoing, the motion to dismiss the causes of action for conspiracy to defraud and fraud are dismissed. Pursuant to CPLR 603, the cause of action in the amended complaint for breach of fiduciary duty is hereby severed and continued against the defendants who shall answer or move with respect to same within the time period set forth in CPLR 3012.

Dated: October 21, 2014



HON. JERRY GARGUILO
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION