Matter of Argondizza
2015 NY Slip Op 30281(U)
March 2, 2015
Surrogate's Court, New York County
Docket Number: 2012-3991/B
Judge: Rita M. Mella

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Proceeding for Turnover of Property in the Estate of

JEANNINE SHANLEY ARGONDIZZA,

Deceased.

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DECISION
File No.: 2012-3991/B

M E L L A, S.

The following papers were considered in deciding Respondent's pre-Answer motion to dismiss this turnover proceeding:

Papers	Numbered
Amended Petition for Turnover of Property	1
Respondent's Notice of Motion to Dismiss, Affirmation with Exhibits A – P, and Memorandum of Law in Support	2, 3, 4
Petitioners' Affirmation in Opposition to Motion to Dismiss	5
Respondent's Reply Affirmation with Exhibits A – C	6
Petitioners' Supplemental Briefing with Exhibits A – B	7
Respondent's Supplemental Memorandum of Law	8
Respondent's Second Supplemental Memorandum of Law	9
Petitioners' Second Supplemental Briefing	10

This proceeding for turnover was commenced by Leo Shanley and Agnes Shanley ("Petitioners"), the children of Decedent Jeannine Argondizza, in their capacity as Limited Administrators of her estate. Petitioners seek relief against Christopher Argondizza ("Respondent"), Decedent's surviving spouse and Petitioners' stepfather.

In lieu of answering, Respondent filed the instant motion to dismiss the petition arguing that the proceeding is barred by the applicable statute of limitations (CPLR 3211[a][5]) and that the petition fails to state a claim upon which relief may be granted (CPLR 3211[a][7]). Respondent also seeks costs and sanctions, maintaining that the petition is frivolous and intended to harass (22 NYCRR § 130-1.1). For the reasons stated below, Respondent's motion to dismiss is granted in part and denied in part.

BACKGROUND

Decedent died on January 27, 2010, survived by Respondent and the Petitioners. No representative was appointed for Decedent's estate until 2013, when Petitioners sought and were granted limited Letters of Administration for the purpose of investigating and pursuing claims relating to ownership of the cooperative apartment where Decedent lived with Respondent at the time of her death.

Decedent and Respondent were married in 1993, although they had been living together since 1978 in the apartment that is at the center of this litigation.[1] Decedent and Respondent owned the apartment as tenants in common until the year before Decedent's death.[2]

In or around 2007, Decedent began suffering from dementia and, on February 17, 2008, she executed a Power of Attorney naming Respondent her agent. Petitioners allege that Respondent explained to co-Petitioner Leo Shanley that "the purpose of the Power of Attorney was to take care of Decedent's affairs because of [her] ill health and her possible need for long-term care, which could cause a significant lien or encumbrance upon the family's assets including the [a]partment." (Am Pet ¶ 36.)

On May 29, 2009, Respondent, as Decedent's attorney-in-fact, transferred her interest in the apartment to himself. A letter dated July 24, 2008, signed by Decedent and Respondent and addressed to the managing agent of the cooperative housing corporation authorized the transfer

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[1] Decedent first lived in the apartment with her former husband, and Petitioners grew up there.

[2] The shares of stock allocated to the apartment were purchased sometime before Respondent and Decedent were married, and the lease and shares were in Respondent's and Decedent's names. Respondent states that he provided all the money for the purchase, but that he directed that Decedent's name be listed as owner together with his.

of stock certificates for the apartment from Decedent's and Respondent's names to Respondent's name alone. Petitioners allege that, when Respondent transferred the property to himself, he did not inform Petitioners, and at the time of the transfer, Decedent was suffering from dementia and could not have been aware of the transaction (Am Pet ¶¶ 41 and 42).

Whether Decedent died testate is disputed. Petitioners allege that Decedent and Respondent executed a joint will and that, under it, the apartment was left to the survivor of Decedent and Respondent and, upon both their deaths, to Petitioners, in equal shares.[3] They also allege that Respondent has concealed or destroyed this instrument in order to keep the apartment and deprive Decedent's estate and Petitioners of their interest. For his part, Respondent testified under oath[4] that in 2004, he and Decedent executed a writing that addressed their wishes with respect to the disposition of this apartment upon their deaths, and that it provided for the survivor of Decedent and Respondent to have the apartment or, if both of them died at the same time, for Petitioners to own it, in equal shares. Respondent also asserts that the writing was to be a living trust, but it was never funded. The nature of the writing executed by Decedent and Respondent and its provisions remain disputed because what became of this document is also in question, and neither the original nor a copy has been produced by either side.[5]

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[3] Indeed, Petitioners allege that at the time Decedent named Respondent her agent under the Power of Attorney, Respondent reminded Mr. Shanley that "he and Decedent had produced Joint Wills that would ensure that the [a]partment and anything that they owned would be left to [Petitioners]." (*Id.* ¶ 39.)

[4] In a previous proceeding, Petitioners had sought to compel Respondent to produce a will of Decedent's and the court directed Respondent to appear for an examination under oath (SCPA 1401). Such examination took place on February 25, 2013.

[5] Petitioners maintain that the document was kept in Decedent and Respondent's home, and that Respondent would have had unfettered access to it. Respondent offers various

DISCUSSION

I. Motion to Dismiss

A. Statute of Limitations: CPLR 3211(a)(5)

Respondent maintains that this turnover proceeding is time-barred because it sounds in conversion and replevin, and thus subject to the three-year statute of limitations for such claims.[6] However, where, as here, a turnover petition alleges fraud, raises claims grounded in contract or quasi-contract, or seeks imposition of a constructive trust or other equitable relief, the limitations period relevant to such claims—six years from the commission of the wrong or two years from the time it was discovered or should have been discovered—applies (CPLR 213[1], [2], and [8]; *Matter of Kraus*, 208 AD2d 728 [2d Dept 1994]; *Matter of Witbeck*, 245 AD2d 848, 850 [3d Dept 1997]; *Matter of Bellingham*, 132 AD2d 973 [4th Dept 1987]). Petitioners having commenced this proceeding less than six years from May 29, 2009, the date of the allegedly wrongful transfer of Decedent's interest in the apartment to Respondent's name, the proceeding is timely (*Matter of Dinizulu*, NYLJ, Jan. 17, 2014 at 40 [Sur Ct, Queens County]; *see also* CPLR 210 [death of a claimant before the expiration of the applicable statute of limitations does not shorten a limitations period which would otherwise have more than one year left to run]).

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explanations: that Decedent held on to the document, that, when he was compelled by this court to produce Decedent's will, he looked for it in the apartment and could not find it, and, at one point, that co-Petitioner Leo Shanley had the document.

[6]A claim of conversion would have accrued either at the time Respondent transferred Decedent's shares of stock in the apartment to himself on May 29, 2009 (CPLR 203) or, taking as true Petitioners' allegations that Decedent was suffering from dementia and was incapacitated at the time of the transfer, upon Decedent's death on January 27, 2010 (CPLR 208). Applying either accrual date, an action for conversion would be time-barred because this proceeding was not filed until August 29, 2013—three years and eight months after Decedent's death.

Respondent's motion to dismiss this petition on statute of limitations grounds is, therefore, denied.

B. Failure to State a Claim: CPLR 3211(a)(7)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are to be afforded a liberal construction. The court accepts as true the facts as alleged in the petition, accords Petitioners the benefit of every possible inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Whether a petitioner can ultimately establish his or her allegations is not part of the calculus in determining a motion to dismiss (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). However, where allegations are too vague, consist of bare legal conclusions or factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to consideration as true on a motion to dismiss (*Ullmann v. Norma Kamali, Inc.*, 207 AD2d 691 [1st Dept 1994]; *Levin v. Isayeu*, 27 AD3d 425 [2d Dept 2006]).

Although it asserts seven grounds for relief,[7] the petition rests on three theories: 1) that Decedent and Respondent executed a joint will or mutual wills[8] - which Respondent has concealed or destroyed - and the court should direct that the apartment be disposed of in a manner consistent with the provisions of the will or wills (that is, that the court should "declare"

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[7] Those are: constructive trust, unjust enrichment, fraud, constructive fraud, wilful misconduct, breach of contract and breach of implied covenant of good faith and fair dealing.

[8] Respondent claims only one original writing was created while co-Petitioner Leo Shanley maintains that he observed two identical original instruments in Decedent's and Respondent's possession. If Petitioners' allegations are credited, Decedent and Respondent might have executed mutual wills, and not, as Petitioners reference, a joint will.

that Respondent has a life estate in the apartment, and that, upon Respondent's death, the apartment is left to Petitioners); 2) that Respondent violated the contractual obligations created by Decedent's and Respondent's joint/mutual will by asserting sole and absolute ownership of the apartment after Decedent's death, and that the court must hold Respondent to his obligation to perform under the contract by declaring that Respondent's interest in the apartment is limited to a life estate with remainder to Petitioners, and grant damages for Respondent's breach; and 3) that through wilful misrepresentations made to co-Petitioner Leo Shanley, Respondent caused Decedent to execute a Power of Attorney and then, in an act of self-dealing, transferred Decedent's interest in the apartment to himself while having a duty as Decedent's agent to fulfill her wishes with respect to the apartment as expressed in the joint/mutual will that Respondent destroyed or concealed, and that all this misconduct on Respondent's part entitles Petitioners to damages as well as the equitable relief of declaring that Respondent owns a life estate in the apartment with remainder to Petitioners.

Thus, every theory of recovery explicitly or implicitly advanced by Petitioners relies to some degree on the existence of an unrevoked, binding writing or writings executed by Decedent and Respondent setting forth the disposition of their ownership interests in the apartment following their deaths. A significant pitfall to Petitioners' reliance on any alleged agreement between Decedent and Respondent as a basis for the manner of disposition of Decedent's interest in the apartment is the superseding event of the transfer of such interest to Respondent prior to Decedent's death (*see Matter of Cohen*, 83 NY2d 148 [1994]; *see also Blackmon v. Estate of Battcock*, 78 NY2d 735 [1991]; *Glass v. Battista*, 43 NY2d 620, 624 [1978]). Only by setting aside the 2009 transfer—and thus reclaiming Decedent's interest in the apartment—would any

agreement about the disposition of that interest, including one contained in a testamentary instrument of Decedent's, have any legal significance (EPTL 3-4.3 [revocatory effect of a conveyance on property previously disposed of by will]; *Matter of Brann*, 219 NY 263 [1916]; *Matter of Hill*, 43 Misc 3d 483 [Sur Ct, Queens County 2014]; *LaBella v. Goodman*, 198 AD2d 332, 333 [2d Dept 1993]).

Even if the petition could be read to allege that Decedent owned an interest in the apartment at the time of her death, Petitioners' reliance on the existence of a joint or mutual will faces a second major hurdle: neither the original nor any copy of any instrument has been produced. Petitioners may not rest on this unproduced instrument to survive a motion to dismiss because, as they concede, they have failed to allege that the instrument was in fact duly executed, not revoked, and that at least two credible witnesses can clearly and distinctively prove its provisions (SCPA 1407; EPTL 3-2.1).[9]

Another significant flaw in Petitioners' claims resting solely on such an instrument or instruments is that there is no allegation regarding the presence - in the instrument or elsewhere - of the additional clear and unambiguous provisions or statements required where, as here, it is claimed that a will is joint or mutual and includes an agreement not to revoke (EPTL 13-2.1[b] [joint wills]; *see Rastetter v. Hoenninger*, 214 NY 66 [1915] [mere existence of a joint will does not establish an agreement not to revoke]; *see also Oursler v. Armstrong*, 10 NY2d 385 [1961];

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[9] That the "lost" instrument may be a trust agreement and not a will would not change this conclusion. Proving the existence of a trust requires establishing: that there is a designated trustee, delivery of the res by the settlor(s) to the trustee with the intent of vesting legal title in the trustee, as well as conformity with EPTL 7-1.17 (*see Matter of Marcus Trusts*, 2 AD3d 640 [2d Dept 2003]; *see also Orentreich v. Prudential Ins. Co. of America*, 275 AD2d 685 [1st Dept 2000]). Here, there are no allegations that any of the shares of stock allocated to the apartment were transferred to the trustee of any trust.

Glass, 43 NY2d at 624; *Matter of Bainer*, 71 AD2d 728 [3d Dept 1979] [judicial policy has been one of great reluctance to restrict the ambulatory nature of a will]; *Schloss v. Koslow*, 20 AD3d 162 [2d Dept 2005] [discussing the requirement of a clear agreement not to revoke as applied to mutual wills]; *Matter of Thompson*, 309 AD2d 1013, 1015 [3d Dept 2003]; *Matter of Lubins*, 250 AD2d 850, 851 [2d Dept 1998]; *see also* EPTL 13-2.1[a][2] [contracts to make a testamentary provision of any kind]). Two consequences flow from the absence of such an agreement: first, Respondent was at liberty to change his testamentary plan at any time, including after Decedent's death; second, nothing prohibited Decedent from transferring her interest in the apartment to Respondent in 2009, prior to her death (*see Blackmon*, 78 NY2d at 739 [even following due execution of a will, the testator retains authority to dispose of his or her property during life]; *Glass*, 43 NY2d at 624). Plainly, even assuming that Decedent made a promise not to revoke a joint testamentary disposition, she was free to change such disposition during her life with the consent of Respondent, the only person to whom she made the promise.

Petitioners maintain that they should not be penalized for not producing a document that was not in their possession and that the nature of this instrument is a question for the trier of fact. The court disagrees. It is not the failure to produce a document that is dispositive on this motion to dismiss, but the failure to allege those elements necessary to the claims and conclusions asserted in the petition. An allegation that Respondent is at fault for the unavailability of any instrument, be it a will or some other legally binding document, would not result, even if proven true after trial, in the probate of a lost will or the enforcement of a purported agreement to dispose of property upon death absent proof of the above-described requirements. On the strength of only Petitioners' conclusory allegations, the court cannot reasonably infer that Decedent died

possessed of a duly executed, unrevoked last will and testament, joint or mutual will containing the terms alleged in the petition.

Petitioners' claims are also fatally flawed because the relief they seek, the imposition of a constructive trust leaving Respondent with only a life estate interest in the entire apartment with the remainder interest to Petitioners, is not the result that would follow if a will of Decedent's were to be probated at this time.[10] For, if Decedent died possessed of a one-half interest in the apartment, only that interest could be the subject of her testamentary disposition, and not the entire asset as Petitioners claim. In other words, it is not possible for a will of the Decedent's to turn Respondent's one-half interest in the apartment into a life estate in the entire asset.

Additionally, since Respondent is alive, the petition has not alleged—nor could it—that he has violated any obligation that he may have to leave the apartment to Petitioners when he dies. In other words, in the absence of an allegation that Respondent to date has been unjustly enriched, there is no basis for the constructive trust that Petitioners seek (*see Matter of Cohen*, 83 NY2d 148 [no need to invoke the equity power of the court when there is no showing that the respondent was unjustly enriched by a transaction]). Petitioners' entitlement, if any, to this equitable relief against Respondent must await his death and must be premised on Respondent's breach of his purported agreement to make a will giving the apartment to Petitioners[11] (*Glass*, 43 NY2d at 625 [survivor husband breached agreement in joint will with wife by executing a

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[10] Nor would this result follow if this asset were to pass via intestacy to Decedent's distributees. In such a case, Respondent would be entitled to a share of Decedent's one-half interest in the property (EPTL 4-1.1[a][1]).

[11] It should be noted that Petitioners would be entitled to this relief in their individual capacities, not as representatives of Decedent's estate. They have brought this proceeding only in their representative capacities.

subsequent will with terms other than those agreed upon]; *Rastetter*, 214 NY at 73; *Blackmon*, 78 NY2d at 741 ["the survivor [of a pair executing joint or mutual wills] is bound to the terms of the will and may not make a different testamentary disposition or inter vivos gift that would defeat the purpose of the joint will agreement."]; *Matter of Halbert*, 28 Misc 3d 1233[A] [Sur Ct, Sullivan County 2010] ["An agreement to make a Will is enforceable only after the death of the obligor."] [referencing *Brown v. Brown*, 12 AD3d 176 [1st Dept 2004]]; Harris New York Estates: Probate Administration & Litigation § 8:6 [6th ed.] [equity will impress a constructive trust on the estate of a decedent who breaches an agreement to make a specific testamentary disposition]).

In sum, even affording the petition the most liberal reading, the facts alleged do not support the legal theory that Petitioners are entitled to equitable relief consistent with the terms of the lost or destroyed joint will allegedly executed by Decedent and Respondent promising to leave the apartment to Petitioners. Thus, the petition fails to state the claims of constructive trust and unjust enrichment. Nor do the factual allegations support the theory that the purported lost or destroyed joint will was an irrevocable contract or that Decedent and Respondent had entered into a contract not to revoke their joint will and, for that reason, the claims for breach of contract and breach of implied covenant of good faith and fair dealing are not properly stated in the petition (*Schloss*, 20 AD3d at 166 [no express statement that the provisions are intended to constitute a contract between the parties]; *Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 NY2d 475, 482 [1989] ["unless a court can determine what the agreement is, it cannot know whether the contract has been breached . . . ."]; *Matter of Hitt*, 1993 WL 13715548 [Sur Ct, New York County]; *Matter of Camac*, 2 Misc 3d 894, 896 [Sur Ct, Bronx County 2004]; *see Rubin v.*

Irving Trust Co., 305 NY 288, 298 [1953]; *Matter of Pascale*, NYLJ, May 16, 1997 at 36, col 4 [Sur Ct, Bronx County]).

To the extent that wilful misconduct survives as a stand-alone ground for relief,[12] this claim falls because the petition fails to allege that Decedent's estate has sustained any damages as a result of Respondent's "wilful" act of destroying or concealing the joint wills, claiming instead that it is Petitioners who have been damaged. Accepting as true Petitioners' claim that Respondent destroyed the joint wills, Respondent has yet to reap a benefit that he would not have gotten had the wills been produced: he would still be entitled to have possession of the apartment during his life.

For similar and additional reasons, the petition fails to state a valid claim for fraud or constructive fraud. Most significantly, there are no allegations in the petition that Decedent, the one person in a position to act regarding the apartment, relied on misrepresentations Respondent made to her. Petitioners fail to allege how Decedent's estate was or could have been damaged by misrepresentations Respondent made to co-Petitioner Leo Shanley, on which he allegedly relied (CPLR 3016[b]; *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Furthermore, any claim of injury by Petitioners resulting from Respondent's alleged fraud would belong to them in their individual capacities, and are not cognizable in a turnover proceeding, which is aimed at returning assets to a decedent's estate (*see Matter of Boatwright*, 114 AD3d

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[12] Wilful misconduct is treated in New York as a defense to an exculpatory contract insulating a tortfeasor from responsibility for acts of ordinary negligence (*see* PJI 2:10A and commentary; *see also Seminara v. Highland Lake Bible Conference*, 112 AD2d 630, 633 [3d Dept 1985]). The existence of no such contract has been alleged in this case (*compare Coco Invs., LLC v. Zamir Mgr. River Terrace, LLC*, 26 Misc 3d 1231[A] [Sup Ct, New York County 2010]).

856, 859 [2d Dept 2014]).

Discharging this court's duty in this motion to dismiss of affording the allegations a very liberal reading, one claim remains: that Respondent breached his fiduciary duty to act in good faith and in Decedent's best interest when, using the Power of Attorney, he transferred Decedent's one-half interest in the apartment to himself in contravention of Decedent's specific intent for disposition of her interest in the apartment (*see Matter of Ferrara*, 7 NY3d 244 [2006]; *Matter of Audrey Carlson Revocable Trust*, 59 AD3d 538, 540 [2d Dept 2009] [even where broad gift-giving authority granted to attorney-in-fact, he or she must exercise that authority in the best interests of the principal]). If so, Decedent's estate was damaged to the extent of loss of her one-half interest by the transfer. Entitlement to equitable relief for such injury, as alleged in the petition, states a claim, and one that was timely asserted (*see Kaufman v. Cohen*, 307 AD2d 113, 118 [1st Dept 2003] ["[w]here the relief sought [on breach of fiduciary duty claim] is equitable in nature, the six-year limitations period of CPLR 213[1] applies."]).

CONCLUSION

For the foregoing reasons, Respondent's motion to dismiss the petition for failure to state a claim is granted in part and denied in part. The balance of the motion is denied. Respondent is directed to serve and file a verified answer on or before March 16, 2015. Petitioners' verified reply, if any, shall be served and filed by March 26, 2015.

Clerk to notify.

Dated: March 2, 2015

SURROGATE