

Picard v Fish

2015 NY Slip Op 32586(U)

June 8, 2015

Supreme Court, Albany County

Docket Number: 3548-14

Judge: Gerald William Connolly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

HERMAN W. PICARD, III and DAVID E. PICARD,

DECISION AND ORDER
Index No.: 3548-14

Plaintiffs,

-against-

JEANNE PICARD FISH and BIERNACKI PROPERTY
MANAGEMENT LLC, HECTOR L. DeJESUS and
ARELIS M. DeJESUS,

Defendants.

Albany County Clerk
Document Number 11854120
Rcvd 06/16/2015 11:54:47 AM



(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Thomas D. Latin, Esq.
Sheehan Green Golderman & Jacques, LLP
Attorneys for Defendant Jeanne Picard Fish
54 State Street, Suite 1001
Albany, New York 12207

Steven D. Farer, Esq.
Farer & Schwartz, P.C.
Attorneys for Plaintiffs
12 Century Hill Drive
Latham, New York 12110

Paul J. McGeough, Esq.
Fidelity National Law Group
Attorneys for Biernacki Property Management LLC
350 Fifth Avenue, Suite 3000
New York, New York 10118

Connolly, J.:

Defendant Jeanne Picard Fish moves for an order pursuant to CPLR 3211(a)(5) dismissing the plaintiffs' Amended Complaint upon the grounds that the statute of limitations has expired and that it does not state a cause of action, and, further, for an order pursuant to CPLR 6514 vacating and cancelling the notice of pendency filed by plaintiff on July 9, 2014. Defendant Biernacki Property

Picard v. Fish, et al.
Index No.: 3548-14

Management, LLC (“Biernacki”) has moved for an order dismissing plaintiffs’ amended complaint for lack of standing and on statute of limitations grounds and similarly seeks an order pursuant to CPLR 6514 vacating and cancelling the notice of pendency filed by plaintiff on July 9, 2014. Plaintiffs oppose the motions.

In this action, plaintiffs, who, along with defendant Jeanne Picard Fish (“Fish”), are the children of Herman and Alice Picard, are seeking, *inter alia*, rescission of a deed of property from Alice Picard to defendant Fish that occurred within Ms. Picard’s lifetime, as such property was allegedly devised to plaintiffs and defendant Fish as beneficiaries of a Trust created by virtue of the will of Alice Picard. Plaintiffs allege in their amended complaint, *inter alia*, that Herman Picard, Jr. conveyed to himself and Alice Picard, as tenants by the entirety, a parcel of real property situated in the Town of New Scotland by deed dated January 22, 1952. Herman Picard, Jr. died on March 7, 1974 leaving Alice Picard as sole surviving tenant and Alice Picard executed a Last Will and Testament in 1977 pursuant to which all of her assets, including the real property, were left in trust for the benefit of the children until they reached fifty years of age. Further, pursuant to such Last Will and Testament, defendant Fish was nominated as Executrix of her estate. Alice Picard died on April 29, 1997 and plaintiffs assert that the Last Will and Testament of Alice Picard was never probated.

By deed dated February 3, 1988 the real property at issue was conveyed by Alice Picard to defendant Fish. Plaintiffs assert that at the time of the execution of the 1988 Deed, Alice Picard was unduly influenced and coerced by defendant Fish into such execution. Plaintiffs assert that at the time of the execution of the deed, Ms. Picard was suffering from dementia, was legally blind, incompetent and lacked the capacity to execute a deed. Plaintiffs assert that they continued to work

Picard v. Fish, et al.
Index No.: 3548-14

in and devote efforts in the business conducted on the premises after the death of their father (Amended Complaint, ¶23) under the belief that a portion of the premises was being devised to them as beneficiaries of the Will of Alice Picard and that the will would be probated. They assert that defendant Fish never advised them that the premises had been conveyed to her and affirmatively concealed such facts. Plaintiffs assert that in 2010 defendant Fish listed an 8 acre portion of the premises for sale and when questioned by plaintiff David Picard, was told that “we” don’t use it and if we sell it we would be able to benefit financially. Plaintiffs assert that without their knowledge a portion of the premises was conveyed by defendant Fish to defendant Biernacki Property Management LLC (“Biernacki”) and a portion was conveyed to defendants Hector and Arelis DeJesus by deeds. The plaintiffs assert that in 2013, when plaintiff Herman Picard attempted to take a tractor from the premises to utilize on other real property, defendant Fish told him he did not own a third of it and had no right to use it. Plaintiffs assert that, at such time they checked the online records of the Albany County Clerk and discovered the 1988 deed transfer.

Plaintiffs have alleged the following three causes of action in their amended complaint: (i) pursuant to RPAPL Article 15, declaratory judgment relief that the conveyance from Alice Picard to defendant Fish was void *ab initio* and without legal force and effect and accordingly, title to the premises is vested in the plaintiffs and defendant Fish as tenants in common free and clear of claims of any other party, (ii) for a judgment rescinding the deed of the property at issue to defendant Fish on the grounds of fraudulent conduct and concealment by defendant Fish that was allegedly not discovered by plaintiffs until 2013; and (iii) imposition of a constructive trust and a declaration that Defendant Fish holds title to the subject premises as trustee for such defendant and the plaintiffs.

First Cause of Action

The first cause of action is brought pursuant to Article 15 of the RPAPL asserting that the

Picard v. Fish, et al.

Index No.: 3548-14

conveyance from Ms. Picard to defendant Fish and the subsequent conveyances were void *ab initio*, and, accordingly, title is vested in the plaintiffs and defendant Fish as tenants in common. It appears from the face of the complaint that plaintiffs make such argument on the grounds that at the time of the execution of the 1988 deed, Alice Picard, the deceased grantor, was suffering from dementia, legally blind, incompetent, and lacked the capacity to execute a deed. Plaintiffs allege that Alice Picard was unduly influenced and coerced by defendant Fish into executing the deed and that such undue influence continued until her death. Effectively, plaintiffs are seeking rescission of the 1988 deed.

Defendant Biernacki asserts that such cause of action must be dismissed as plaintiffs lack standing to sue on behalf of the decedent's estate as they have not received letters of administration and appear to be suing to rescind the deed on behalf of the allegedly incompetent deceased grantor. Defendants Biernacki and Fish also assert that the cause of action should be dismissed on statute of limitations grounds as the statute of limitations to rescind a deed based upon the ground of undue influence is equitable in nature and accordingly, is six years from when the deed is executed.

To dismiss a cause of action pursuant to CPLR §3211(a)(5) on the ground that it is barred by the Statute of Limitations, a defendant bears the initial burden of establishing *prima facie* that the time in which to sue has expired (*see Morris v Gianelli*, 71 AD3d 965, 967 [2nd Dept 2010]). If such showing is made the burden shifts to the plaintiffs to aver evidentiary facts establishing that the case falls within an exception (*see Minichello v N. Assur. Co. of Am.*, 304 AD2d 731, 732 [2nd Dept 2003]). “As a general rule, the contracts of persons of unsound mind who have not been judicially declared incompetent or ‘before office found’ are voidable to the extent that, subject to certain conditions, they may be disaffirmed by him or her, if the other party knew or was put on notice of

Picard v. Fish, et al.
Index No.: 3548-14

the disability, but they are not void, and they remain in full force and effect until disaffirmed. Such contracts are voidable only at his or her election on recovering from the disability, or at the election of his or her committee, personal representative, or heirs, and on such election being made, an action either at law or in equity may be brought or defended for the restoration or retention of his or her property” (NY Jur 2d, Infants and Others Persons Under Disability § 144; *see also Verstandig v. Schlaffer*, 296 N.Y. 62 [1946]).

Such a cause of action is vested in the deceased grantor and not in the plaintiffs personally (*see Dyckman v Dyckman*, 230 AD288 [2nd Dept 1930]). Further, actions for rescission are governed by the six-year statute of limitations contained in CPLR §213(1). In the absence of undue influence, an action to rescind begins to run once the deed is executed (*see generally, Hosseiniyar v Alimehri*, 48 AD3d 635 [2nd Dept 2008]). To the extent, however, it can be argued that the deceased grantor was under a disability, the deceased grantor died in 1997 and pursuant to CPLR §208, at most the action to rescind on the basis of undue influence needed to have been commenced within ten years after the date of her death. The cause of action would thus be barred at the time of its commencement (*see Dyckman v Dyckman*, 230 AD 288 [2nd Dept 1930]).

Accordingly, as to the statute of limitations the burden shifted to the plaintiffs to aver evidentiary facts establishing that the case falls within any further exception to the Statute of Limitations (*see Savarese v. Shatz*, 273 A.D.2d 219 [2nd Dept 2000]). Plaintiffs assert that an exception to the statute of limitations exists on the grounds of equitable estoppel. “Under this doctrine, a defendant is 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

Picard v. Fish, et al.
Index No.: 3548-14

of action and the institution of the legal proceeding (*see, Reiner v Jaeger*, 50 AD3d 761 [2nd Dept 2008]). “A defendant may be estopped from pleading the Statute of Limitations where a plaintiff was induced by fraud, misrepresentation, or deception to refrain from timely commencing an action. Where concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship . . . which gave the defendant an obligation to inform him or her of facts underlying the claim. Equitable estoppel will not toll a limitations statute, however, where a plaintiff possesses ‘timely knowledge’ sufficient to place him or her under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable Statute of Limitations” (*Gleason v. Spota*, 194 AD2d 764 [2nd Dept 1993][internal citations and quotations omitted]).

As to the statute of limitations, the Court notes that defendant Fish is a fiduciary as she is the executor of her mother’s will (*see Matter of Brennan*, 112 AD3d 1248 [3d Dept 2013]). While plaintiffs seek rescission of the deed, the Court notes that such requested relief is equitable and depending upon the evidence submitted by the third-party purchasers as to their status as a bona-fide purchaser for value, the Court can fashion other equitable relief in lieu of rescission, including, *inter alia*, relief with respect to the proceeds of the sale of such property by defendant Fish (*see generally, Spodek v. Riskin*, 150 AD2d 358 [2nd Dept 1989]). The Court notes that both the familial relationship between plaintiffs and defendant Fish and the fiduciary relationship as executor of their mother’s estate, which has not been probated in the almost twenty years since her death, alleges a sufficient confidential relationship with respect to such cause of action. Plaintiffs allege that defendant Fish asserted that she was holding the property at issue in trust pursuant to their mother’s

Picard v. Fish, et al.
Index No.: 3548-14

will for the benefit of plaintiffs and such defendant and that plaintiffs continued to work and devote time and efforts in the business conducted on the premises, with plaintiff Herman Picard continuing to work there until 2010, based upon the “belief and representation” that a portion of the premises were being devised to them as beneficiaries of their mother’s estate. Further, they assert that it was not until 2013 that they were alerted to the fact that the property was not in fact held in trust as part of the estate’s assets (*see Marini v Lombardo*, 79 A.D.3d 932 [2nd Dept 2010]).

Similarly, as to the issue of standing, while defendant Biernacki alleges that plaintiffs do not have standing as they have not sought to be named as personal representatives of the estate, it would be inequitable under the circumstances, as pled by the plaintiffs, where defendant Fish was the executor of the will, to dismiss plaintiffs causes of action where defendant Fish did not seek to probate the will and allegedly affirmatively concealed the fact that the premises did not constitute an asset of the estate. The Court notes that there is no argument that plaintiffs are not heirs of Ms. Alice Picard’s estate. Accordingly, based upon the facts as alleged in the amended complaint, which the Court must accept as true and in favor of plaintiffs at this juncture, defendants’ motions to dismiss such cause of action is denied.¹

The Second Cause of Action

Plaintiffs also seek a judgment to rescind the deed on the grounds of defendant Fish’s alleged fraudulent conduct which plaintiffs allege was not discovered by plaintiffs until 2013 when

¹ To the extent defendant Fish asserts that as the transfer of the land was made via a 1988 deed by Ms. Picard directly to Defendant Fish, Fish was not acting in a fiduciary capacity and did not stand in such capacity to Ms. Picard, the amended complaint alleges that Ms Picard made and executed her deed in 1977 and defendant Fish was nominated as Executrix of her Estate and Trustee of the Trusts created thereunder.

Picard v. Fish, et al.
Index No.: 3548-14

defendant Herman Picard took a tractor from the premises to use on other real property and was told to return it immediately as he was not the owner of any portion of the land. Where rescission is sought on the ground of fraud, the Statute of Limitations is six years from the commission of the fraud or two years from when the plaintiff discovered or should have discovered the fraud, whichever is later (*CPLR 213[8]*; see *Hoffman v Cannone*, 206 AD2d 740 [3d Dept 1994]).

Defendant Biernacki argues, *inter alia*, that plaintiffs have failed to adequately plead a cause of action for fraud and based upon a review of the complaint, such cause of action must be dismissed. Plaintiffs seek rescission of the 1988 deed based upon alleged fraud and fraudulent concealment with respect to actions their sister took with respect to them, however, they have failed to allege fraud by defendant Fish in her procurement of the 1988 deed from their mother. Accordingly, plaintiffs have failed to state a cause of action for which relief may be granted (*see generally*, CPLR §3016(b)).²

Third Cause of Action

As to the third cause of action, plaintiffs seek imposition of a constructive trust with respect to the subject premises and a declaration that defendant Fish holds title to the subject premises as trustee for defendant and the plaintiffs. Causes of action to impose a constructive trust are governed by a six-year statute of limitations and begin 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

² The Court notes that defendants have not alleged a cause of action for fraud in which they seek damages based upon their sisters alleged fraudulent concealment or fraud with respect to actions by and among her and them (nor have they alleged a cause of action for unjust enrichment or conversion).

Picard v. Fish, et al.
Index No.: 3548-14

discovered (*see, Reiner v Jaeger*, 50 AD3d 761 [2nd Dept 2008]). Where, as here, the constructive trustee is alleged to have wrongly acquired the property, the accrual date is deemed to be the date of the alleged wrongful transfer of the property which would have been in 1988.

Accordingly, the burden is shifted to the plaintiffs to aver evidentiary facts establishing that the case falls within an exception to the Statute of Limitations (*see Savarese v. Shatz*, 273 AD2d 219 [2nd Dept 2000]). Based upon the above discussion of equitable estoppel, the Court finds that such exception exists and will not dismiss the third cause of action. While plaintiffs seek rescission of the deed, imposition of a constructive trust is equitable and depending upon the evidence submitted by the third-party purchasers as to their status as a bona-fide purchaser for value, a constructive trust can be imposed upon the proceeds of the sales by defendant Fish (*see generally, Spodek v. Riskin*, 150 AD2d 358 [2nd Dept 1989]). The Court notes that both the familial relationship between plaintiffs and defendant Fish and the fiduciary relationship as executor of their mother's estate, which has not been probated in the almost twenty years since her death, alleges a sufficient confidential relationship with respect to such cause of action. Plaintiffs allege that defendant Fish asserted that she was holding the property at issue in trust pursuant to their mother's will for the benefit of plaintiffs and such defendant and that plaintiffs continued to work and devote time and efforts in the business conducted on the premises, with plaintiff Herman Picard continuing to work there until 2010, based upon the "belief and representation" that a portion of the premises were being devised to them as beneficiaries of their mother's estate. Further, they assert that it was not until 2013 that they were alerted to the fact that the property was not in fact held in trust as part of the estate's assets (*see Marini v Lombardo*, 79 AD3d 932 [2nd Dept 2010]). Accordingly, based upon

Picard v. Fish, et al.
Index No.: 3548-14

the facts as alleged in the amended complaint, which the Court must accept as true and in favor of plaintiffs at this juncture, defendants' motions to dismiss such cause of action is denied.

Based upon the circumstances of this case, including the fact that a Notice of Pendency has been filed with the plaintiff, the Court orders an immediate conference with respect to the instant action.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED that the motions of defendants Jeanne Picard Fish and Biernacki Property Management, LLC are each granted solely as to the second cause of action and are in all other respects denied; and it is further

ORDERED that the parties appear for a conference on Friday, June 26, 2015 at 1:30 PM in Chambers , located at the Albany County Courthouse, 16 Eagle Street, Room 219, Albany, New York.

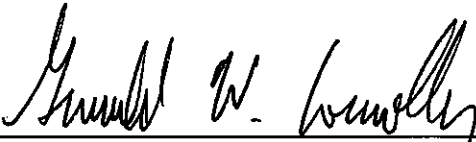
This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for the plaintiffs. A copy of this Decision and Order together with all other papers are being forwarded to the Albany County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the County Clerk shall not constitute

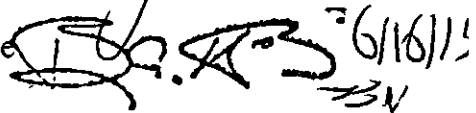
Picard v. Fish, et al.
Index No.: 3548-14

entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.
ENTER.

Dated: June 8, 2015
Albany, New York



Gerald W. Connolly
Acting Supreme Court Justice 

Papers considered:

1. Notice of motion dated January 13, 2015; Affidavit of Thomas D. Latin, Esq. dated January 13, 2015; accompanying exhibits A-C; Memorandum of Law of the Defendant Jeanne Picard Fish;
2. Notice of motion dated February 18, 2015; Affirmation in Support of Motion to Dismiss of Paul McGeough, Esq. dated February 18, 2015 with accompanying exhibits A-D; Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Complaint;
3. Memorandum of Law in Opposition to Motion of Jeanne Picard Fish to Dismiss the Complaint; Memorandum of Law in Opposition to Motion of Biernacki Property Management, LLC to Dismiss the Complaint; Affidavit of Herman W. Picard, III dated February 6, 2015; Affidavit of David E. Picard dated February 6, 2015;
4. Defendant Biernacki Property Management's Reply Memorandum of Law.