

Brestin v Estate of Brestin
2016 NY Slip Op 32098(U)
July 14, 2016
Supreme Court, Queens County
Docket Number: 25246 2012
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

LEWIS R. BRESTIN,
Plaintiff,

Index
No. 25246 2012

-against-

Motion
Date April 19, 2016

THE ESTATE OF MADDY LABIANCA
BRESTIN, etc., et al.,
Defendants.

Motion
Cal. No. 16

Motion
Seq. No. 6

The following papers numbered 1 to 14 read on this motion by defendants The Estate of Maddy LaBianca Brestin a/k/a Maddy LaBianca a/k/a Madda M. Brestin, by her executor, Mark LaBianca (Estate of Maddy LaBianca), Mark LaBianca, individually (Mark LaBianca), and Joseph LaBianca, pursuant to CPLR 3212 for partial summary judgment in their favor dismissing with prejudice the fifth cause of action in plaintiff’s complaint dated December 18, 2012 seeking to enforce a purported postnuptial agreement and dismissing plaintiff’s demand for “legal fees” in that complaint, and for partial summary judgment in their favor dismissing with prejudice the twelfth and thirteenth causes of action in plaintiff’s complaint dated July 26, 2011, seeking to enforce a purported postnuptial agreement and dismissing plaintiff’s demand to recover “legal fees” in that complaint.¹

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1-6
Answering Affidavits - Exhibits	7-11
Reply Affidavits	12-14

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

1. Plaintiff’s separate actions under Index No. 18955/11 and 25246/12 were consolidated under this Index No. 25246/12.

In this action by plaintiff seeking to enforce an agreement, an accounting and other relief, defendants Estate of Maddy LaBianca, Mark LaBianca and Joseph LaBianca seek partial summary judgment dismissing plaintiff's causes of action for breach of contract against defendant Estate of Maddy LaBianca and cause of action to impose a constructive trust against defendant Joseph LaBianca, as well as, plaintiff's claims for legal fees.

On March 26, 2002, plaintiff and the decedent, Maddy LaBianca (Maddy), entered into a Postnuptial Agreement (Agreement) "with the intention of maintaining and furthering their marital relationship," wherein each agreed, among other things, to waive their rights to share in the other's estate in consideration of the following:

- a) Plaintiff agreed to promptly execute a will or revocable trust which shall provide for the benefit of Maddy, if she survives plaintiff, that a trust shall be created for Maddy for her lifetime under which she would receive the net income, and said trust would have as its sole asset the premises located at 173-31 Jamaica Avenue, Jamaica, New York.
- b) Plaintiff also agreed Maddy would receive one-half of all net proceeds of the sale of plaintiff's interest in plaintiff's various dental practices at the time of plaintiff's death or at the time of sale during plaintiff's lifetime.
- c) Maddy agreed to promptly execute a will or revocable trust for the benefit of plaintiff, if he shall survive Maddy, that a trust shall be created for plaintiff for his lifetime under which he would receive the net income, and said trust would have as its sole asset the premises located at 112-29 201st Street, Hollis, New York.
- d) Maddy and plaintiff further agreed that properties known as 555 Lake Avenue, St. James, New York, 221-17 Jamaica Avenue, Queens Village, New York, 113-11 Jamaica Avenue, Richmond Hill, New York, and 206-01 Jamaica Avenue, Queens Village, New York, would be owned by them as tenants in common and the properties known as condominium apartment no. 6-A-3, the Wiltshire House, Palm Beach County, Florida and apartment 19-D of 269-10 Grand Central Parkway, Floral Park, New York would be owned by them as tenants by the entirety.

Maddy and plaintiff affirmed that, in negotiating the Agreement, they fully disclosed to the other all of their respective income, assets, debts and liabilities, and represented that they were satisfied that full disclosure had been made, and that they had entered into the Agreement with full knowledge of the financial affairs of the other.

Plaintiff set up a revocable trust on March 26, 2002, and placed the property located at 173-31 Jamaica Avenue, Jamaica, New York into the trust by deed, dated April 17, 2002. Thereafter, on December 19, 2002, plaintiff executed a mortgage in the amount of \$525,000.00 on that property located at 173-31 Jamaica Avenue, Jamaica, New York, which monies he avers were used to improve the property located at 113-11 Jamaica Avenue, Richmond Hill, New York, which he and Maddy owned as tenants in common.

Maddy also set up a revocable trust on March 26, 2002. In September of 2009, Maddy transferred the property located at 112-29 201st Street, Hollis, New York, which she had agreed to place into that trust, to herself and one of her sons, defendant Joseph LaBianca, jointly. Maddy died on April 24, 2011.

Pursuant to the terms of the Agreement, if at the time of his or her death, plaintiff or Maddy fails completely or in part to make the aforesaid provisions by Will or Revocable Trust Agreement, Maddy or plaintiff, respectively, shall have a creditor's claim against plaintiff's or Maddy's estate or Revocable Trust Agreement for the full amount of the value of the asset that was to either be placed in trust and/or distributed outright as provided in the Agreement.

In his complaint, plaintiff alleges, among other things, that defendant Estate of Maddy LaBianca breached the Agreement by Maddy's failing to place the property located at 112-29 201st Street, Hollis, New York into the Trust, and instead transferring that property to herself and defendant Joseph LaBianca. Plaintiff claims that, in light thereof and pursuant to the terms of the Agreement, he is entitled to the value of that property. Plaintiff also alleges that defendant Joseph LaBianca has been unjustly enriched by such transfer and seeks to impose a constructive trust over that Hollis property.

Defendants Estate of Maddy LaBianca, Mark LaBianca, and Joseph LaBianca seek partial summary judgment dismissing the causes of action for breach of the Agreement and to impose a constructive trust over the property located at 112-29 201st Street, Hollis, New York. Defendants Estate of Maddy LaBianca, Mark LaBianca, and Joseph LaBianca also seek partial summary judgment dismissing plaintiff's claims for legal fees.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). Furthermore, the court's function on a motion

for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), or credibility assessment (*see Ferrante v American Lung Association*, 90 NY2d 623 [1997]). Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Generally, a postnuptial agreement “which is regular on its face will be recognized and enforced by the courts in much the same manner as an ordinary contract” (*Levine v Levine*, 56 NY2d 42, 47 [1982]). However, “[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith” (*Christian v Christian*, 42 NY2d 63, 72 [1977]; *see Matter of Greiff*, 92 NY2d 341 [1998]; *Manes v Manes*, 277 AD2d 359 [2000]). As such, courts have thrown their “cloak of protection” over postnuptial agreements, “and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity” (*Christian v Christian*, 42 NY2d at 72; *see Infante v Infante*, 76 AD3d 1048 [2010]).

Because of the fiduciary relationship between spouses, postnuptial agreements “are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract” (*Levine v Levine*, 56 NY2d at 47; *see Kabir v Kabir*, 85 AD3d 1127 [2011]; *Cardinal v Cardinal*, 275 AD2d 756 [2000]). To warrant equity’s intervention, no actual fraud need be shown, for relief will be granted if the agreement is manifestly unfair to a spouse because of the other’s overreaching (*see Christian v Christian*, *supra*; *see also Barchella v Barchella*, 44 AD3d 696 [2007]; *O’Malley v O’Malley*, 41 AD3d 449 [2007]). A postnuptial agreement may be set aside if its terms evidence a bargain so inequitable “that no reasonable and competent person would have consented to it” (*Bright v Freeman*, 24 AD3d 586, 588 [2005]; *see Infante v Infante*, *supra*; *Santini v Robinson*, 68 AD3d 745 [2009]). A spouse seeking to set aside a postnuptial agreement has the initial burden of establishing a fact-based, particularized inequality (*see Petracca v Petracca*, 101 AD3d 695 [2012]). Once this burden is met, the burden shifts to the proponent of a postnuptial agreement to disprove fraud or overreaching (*id.*).

In moving for partial summary judgment dismissing plaintiff’s causes of action for breach of contract and to impose a constructive trust, defendants Estate of Maddy LaBianca, Mark LaBianca and Joseph LaBianca contend that the Agreement should not be enforced due to plaintiff’s fraud and overreaching in its execution, that is, that at the time the Agreement was entered into by plaintiff and Maddy, plaintiff was actively participating in a Medicaid

fraud scheme involving his dental practice, which he failed to disclose to Maddy. According to defendants Estate of Maddy LaBianca, Mark LaBianca, and Joseph LaBianca, this alleged scheme involved the plaintiff's operation of mobile dental clinics with Nations Management Group, Inc. (Nations), and Globe Management Group, Inc. (Globe), businesses operated by Osmin Ferran, Jr. (Ferran), a person previously convicted of Medicaid Fraud in the State of Florida whose name appears on the Federal Register as a person excluded from the Medicaid Program because of that conviction.

An action commenced in 2005 by the State of New York against Ferran, as the criminal defendant, and plaintiff, his dental business partner, Marina Bonaparte, and their business entities, Lewis Brestin, DDS, P.C., Dental Wagon, LLC (Dental Wagon), Dental Wheels, LLP (Dental Wheels), Richmond Hill Dental Associates, P.C., Jamaica-Queens Dental Health Care, P.C., and Alternative Medicine Care of Queens, as the civil defendants (the State action), resulted in a \$15,631,145.50 judgment for restitution of overpayment of public funds received in violation of Executive Law § 63-c, entitled "Action by the people for illegal receipt or disposition of public funds or other property," known as the "Tweed Law." The funds recovered were for Medicaid payments from May 28, 2002, the date Dental Wagons and Dental Wheels began billing Medicaid, to February 10, 2005, the date of the New York arrest of Ferran, who was on the Medicaid Exclusion Register.

Defendants Estate of Maddy LaBianca, Mark LaBianca, and Joseph LaBianca, claim that plaintiff's participation in a Medicaid fraud scheme with Ferran at the time of execution of the Agreement created a drastically different portrayal of plaintiff's financial situation, making him appear more prosperous than he was, and giving plaintiff a vastly stronger negotiating position over Maddy. As such, defendants Estate of Maddy LaBianca, Mark LaBianca, and Joseph LaBianca seek dismissal of plaintiff's causes of action based on the Agreement which they contend should be set aside based on plaintiff's fraud and overreaching.

Defendants Estate of Maddy LaBianca, Mark LaBianca, and Joseph LaBianca further contend that the Agreement should not be enforced against defendant Estate of Maddy LaBianca because plaintiff's mortgaging the property to be placed in Trust for Maddy known as 173-31 Jamaica Avenue, Jamaica, New York after the Agreement was entered, removed equity in that real property, and was a bad faith breach of the Agreement.

Plaintiff, in opposition to the branches of the motion for partial summary judgment dismissing the causes of action for breach of contract and to impose a constructive trust, denies any Medicaid fraud scheme, and asserts that the Agreement should be enforced as there was no fraud or overreaching in its execution. Plaintiff also asserts that Maddy was aware of and agreed to his mortgaging of the property located at 173-31 Jamaica Avenue,

Jamaica, New York, in order to fund renovations on the parties' other property at 113-11 Jamaica Avenue, Richmond Hill, New York, and that the renovations have dramatically increased the value of Maddy's interest in the property at 113-11 Jamaica Avenue, as well as, the rental income therefrom. In support thereof, plaintiff submits, among other things, his own affidavit, the affidavit of his former dental office manager, Dityamatty Seubarran, and the affirmation of Paul J. Mahoney, an Assistant Deputy Attorney General in the Medicaid Fraud Control Unit of the Office of the New York State Attorney General.

Plaintiff avers that there was no fraud scheme or finding of fraud against him in the State action; that the operation of a mobile dental clinic was legal; that the judgment against him arose from working with and paying referral fees to someone on the Medicaid Exclusion List; and that he did not know Ferran was on that list until Ferran's arrest in April of 2005.

Paul J. Mahoney, Esq., affirms that plaintiff was one of the non-criminal defendants in the State action and that the Judgment against plaintiff was for recovery of public funds obtained by plaintiff and the other defendants in that action without right pursuant to Executive Law § 63-c, which statute is not based on intent. Mahoney also affirms that the only claim in the State action based on intent was against the criminal defendant therein, Ferran.

In addition to plaintiff's contention that there was no Medicaid fraud scheme with respect to the mobile dental operations, plaintiff claims that Maddy was aware of and involved in the mobile dental operations. Plaintiff avers that at the time of negotiations with Ferran in early 2002, Maddy had suggested that they contact an attorney by the name of Marvin Lifshitz, Esq., to advise them regarding the mobile dental clinic and its marketing, and to make a search of excluded providers. Plaintiff also avers that Marvin Lifshitz, Esq., advised them that they could properly enter into the agreement with Ferran and his businesses, Nations and Globe, and that Ferran was not on any Exclusion List at that time. Plaintiff further avers that Maddy was involved in the marketing of the mobile dental clinic, drawing up business cards for Dental Wheels and Dental Wagon, creating flyers to be distributed in neighborhoods where the mobile clinics would operate and organizing Community events in those neighborhoods with free refreshments, tooth brushes and educational material on proper oral care health care.

Plaintiff's former office manager, Dityamatty Seubarran, avers that she was present at a meeting of plaintiff, Dr. Marina Bonaparte, and Maddy, at which there was a discussion of the operation of a mobile dental office, and that Maddy suggested they contact an attorney Marvin Lifshitz to discuss any legal points. According to Seubarran, after they decided to begin the mobile operations, Maddy designed business cards for Dental Wagon and Dental Wheels, created flyers for distribution in neighborhoods where the buses would treat patients

and deposited checks received from Medicaid into the accounts of Dental Wagon and Dental Wheels. Seubarran also avers that she was present at a meeting of plaintiff, Dr. Marina Bonaparte, and Maddy concerning a building in Richmond Hill, Queens, where they were going to open a new dental office. Plaintiff suggested and Maddy agreed that the only place they could get the money to renovate that building was to mortgage the building where they worked, located at 173-31 Jamaica Avenue, Jamaica, New York.

In this case, viewing this evidence in the light most favorable to plaintiff, triable issues of fact exist which preclude the granting of partial summary judgment dismissing plaintiff's fifth and twelfth causes of action for breach of contract against defendant Estate of Maddy LaBianca and thirteenth cause of action against defendant Joseph LaBianca to impose a constructive trust (*see Alvarez v Prospect Hosp., supra; see also Phillips v Kantor & Co., 31 NY2d 307 [1972]*). These issues of fact, which are based on the conflicting evidence submitted by the parties, include whether the Agreement should be enforced, or set aside on the basis of fraud or overreaching; whether plaintiff misrepresented the value of his dental practices in order to induce Maddy to enter into the Agreement; whether Maddy's reliance on any such misrepresentation was justifiable; whether Maddy was aware of and involved in the mobile dental operations with Ferran; and whether Maddy was aware of and agreed to the mortgaging of the property at 173-31 Jamaica Avenue, Jamaica, New York and use of funds therefrom to renovate the property at 113-11 Jamaica Avenue, Richmond Hill, New York.

In light of the foregoing, the branches of the motion of defendants Estate of Maddy LaBianca, Mark LaBianca and Joseph LaBianca for partial summary judgment dismissing plaintiff's fifth and twelfth causes of action for breach of contract against defendant Estate of Maddy LaBianca and thirteenth causes of action to impose a constructive trust against defendant Joseph LaBianca are denied.

The branch of the motion of defendants Estate of Maddy LaBianca, Mark LaBianca and Joseph LaBianca for partial summary judgment dismissing plaintiff's claim for legal fees against them, however, is granted.

It is well-settled that attorneys' fees are considered an incident of litigation and unless authorized by statute, court rule or written agreement of the parties, are not recoverable (*see Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487 [1989]*).

Defendants Estate of Maddy LaBianca, Mark LaBianca and Joseph LaBianca, here, met their initial burden of demonstrating that there is no statute, court rule or written agreement of the parties authorizing an award of legal fees in this case.

Plaintiff, in opposition to this branch of the motion, failed to meet his burden of presenting competent evidence to establish the existence of a triable issue of fact.

Accordingly, the branch of the motion of defendants Estate of Maddy LaBianca, Mark LaBianca and Joseph LaBianca for summary judgment dismissing plaintiff's claim for legal fees against them is granted. The remaining branches of the motion are denied.

Dated: July 14, 2016

J.S.C.