

**Cheney v Wells**

2017 NY Slip Op 30021(U)

January 10, 2017

Surrogate's Court, New York County

Docket Number: 2007-1573/A

Judge: Rita M. Mella

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

New York County Surrogate's Court

JANUARY 10, 2017

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CONSTANCE JOYCE CHENEY by JAMES CHENEY,  
as Preliminary Executor of the Estate of CONSTANCE  
JOYCE CHENEY, Deceased,

Plaintiff,

DECISION

- against -

File No.: 2007-1573/A

DIANE WELLS,

Defendant.

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TRANSAMERICA OCCIDENTAL LIFE INSURANCE  
COMPANY,

Plaintiff,

- against -

DIANE WELLS and JAMES CHENEY, as  
Preliminary Executor of the Estate of CONSTANCE  
CHENEY, Deceased,

Defendants.

File No.: 2007-1573/B

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M E L L A, S.:

On the fifth day of the bench trial in these two actions transferred from Supreme Court (New York County), plaintiff and cross-claimant James Cheney, as the preliminary executor of the estate of decedent Joyce Cheney ("decedent"), failed to offer any additional evidence in support of his claims against Diane Wells, his sibling. Mr. Cheney claimed that: 1) a cooperative apartment in which Ms. Wells and decedent, their mother, had lived during life, 2) the unspecified contents of a safe deposit box, and 3) the proceeds of certain life insurance policies (or the premiums paid therefor) should properly be assets of decedent's estate and not the separate property of Ms. Wells. Mr. Cheney, who represented himself, alleged that Ms. Wells gained ownership by duress or other improper means over their mother. In support of such

claims, during the first four days of the trial, Mr. Cheney presented only the testimony of three witnesses, *i.e.*, the attorney-drafter of the will that he has offered for probate, decedent's home aide, and his own. No documents were admitted in Mr. Cheney's case in chief.

With no additional evidence from Mr. Cheney when trial was called on the fifth day, the court granted the application by Ms. Wells to consider plaintiff/cross-claimant's case concluded, and Wells then moved to dismiss all the claims and cross-claims, pursuant to CPLR 4401, for failure to make a prima facie case.

The motion was granted by the court as to the causes of action seeking the relief of severance, partition, and reformation of the cooperative apartment title transfer documents, reformation/rescission of the life insurance documents, and constructive trust. The court further granted dismissal of claims based on duress, unjust enrichment, breach of fiduciary duty, fraud and constructive trust with respect to the life insurance policies and the claims of conversion and constructive trust regarding the alleged contents of the safe deposit box. These were the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Causes of Action, and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Cross Claims.

As more fully set forth on the record, no evidence submitted by plaintiff/cross-claimant supported his allegations of duress and coercion at or around the time of the transfer of the cooperative apartment to joint tenancy with right of survivorship. Plaintiff/cross-claimant also failed to present evidence of such duress or coercion at or around the times that the various policies of life insurance were purchased or paid for. Mr. Cheney also failed to submit any evidence to substantiate the contents of the decedent's safe deposit box or that Ms. Wells took its contents.

The court thus found — as required for determination of the CPLR 4401 motion in this instance and considering the facts in light most favorable to Mr. Cheney, the non-moving party (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]) — that there was no rational process by which it could base a finding in his favor on these claims and cross-claims (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *Blum v Fresh Grown Preserve Corp.*, 292 NY 241, 245 [1944]).

To the extent that Mr. Cheney sought to rely on a confidential or fiduciary relationship between Ms. Wells and decedent for the purposes of shifting the burden to Ms. Wells to show that the cooperative apartment transfer and the insurance purchases were the free and voluntary acts of Joyce Cheney (*see Cowee v Cornell*, 75 NY 91, 100 [1878]), the CPLR 4401 motion by Ms. Wells was also granted by the court.

To prove a confidential relationship between a parent and child more must be shown than the fact of the relationship, given the “inex[tric]ably intertwined” sense of family duty and affection that is normal in such a relationship (*Matter of Walther*, 6 NY2d 49, 56 [1959]). Specifically, there must be a showing of “a mature child in control and possession of a dependent parent,” that is, one who is stricken by a disease that has affected her physically or mentally, and who relies upon or reposes trust in the child to handle her affairs (*Allen v La Vaud*, 213 NY 322, 327 [1915]).

The evidence admitted in plaintiff-cross-claimant’s case failed to support a finding that Ms. Wells and decedent were in a confidential relationship at or during the time when title to the cooperative apartment at issue was transferred to a joint tenancy with right of survivorship in Ms. Wells or when the insurance on decedent’s life was purchased designating Ms. Wells as beneficiary. The evidence submitted by plaintiff-cross-claimant concerned the time period during which decedent suffered a broken arm in early May of 2005, which was years after the gift

transactions about which plaintiff-cross-claimant complains.

Even in the period during which decedent's arm was broken — which Mr. Cheney attributes to Ms. Wells's actions, but which Ms. Wells attributes to an accidental fall — the evidence submitted by plaintiff-cross-claimant did not substantiate that decedent was dependent on Ms. Wells or that decedent was under Ms. Wells's "control and possession." Mr. Cheney's own main witness in this regard, decedent's home aide, testified as to decedent's "strong personality." Although the testimony established that Ms. Wells and decedent had lived together, and that decedent had been assisted by Ms. Wells, there was no evidence to indicate that decedent was dependent upon Ms. Wells to conduct her personal affairs.<sup>1</sup>

In other words, Mr. Cheney failed to establish that Ms. Wells had the kind of "control and possession" needed to support an inference of a confidential relationship between Ms. Wells and decedent (*Allen*, 213 NY at 327; see *Matter of Herlihy*, 18 AD2d 716 [2d Dept 1962], *aff'd* 13 NY2d 816 [1963]). Nor was any evidence submitted by plaintiff-cross-claimant that Ms. Wells had "any direct involvement in the preparation or execution" of the documents transferring the cooperative apartment or purchasing the insurance at issue (*Matter of Camac*, 300 AD2d 11, 12 [1st Dept 2002]).

Unaided by the burden-shifting which results from a confidential relationship, Mr. Cheney failed to submit evidence from which the court could rationally conclude that the complained-of transfer of the cooperative apartment or purchase of life insurance was the result of Ms. Wells's duress and coercion.

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<sup>1</sup>Although Ms. Wells held a power of attorney from decedent, it should be noted that the power was limited, and plaintiff-cross-claimant submitted no evidence of abuse of that power of attorney by Ms. Wells.

As to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> causes of action alleging battery, assault, and intentional infliction of emotional distress, the CPLR 4401 motion for judgment as a matter of law was denied. After closing arguments and deliberations on these claims, the court found that plaintiff-cross-claimant failed to satisfy his burden of proof, that being a preponderance of the evidence, on these causes of action.

The request by Ms. Wells's counsel for an order directing distribution of the insurance proceeds at issue to a segregated interest-bearing account of counsel, pending further agreement in writing between the parties or further order of the court is granted.<sup>2</sup>

Order signed.

Dated: January 10, 2017

  
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<sup>2</sup>Their client interposed no valid opposition to this procedure, stating only that this “was [her] money and [she] do[es] not want it to be sent to anyone else.” Nor did Ms. Wells propose an alternative.