

Eichorn v Eichorn
2018 NY Slip Op 30111(U)
January 22, 2018
Supreme Court, New York County
Docket Number: 155780/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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ALLEN EICHORN

Plaintiff,

Index No. 155780/2017
Motion Seq: 001

-against-

NANCY EICHORN,

Defendant.

DECISION & ORDER
ARLENE P. BLUTH, JSC

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Defendant's motion to dismiss is granted.

Background

Plaintiff and defendant are brother and sister. This dispute focuses on ownership interests in a home previously owned by their mother, Ruth. The home was located in Sea Girt, New Jersey.

In June 1999, Ruth transferred 5% interest in her home to Nancy and kept the other 95% for herself. In August 2012, in furtherance of estate planning/elder law goals, Ruth transferred the home to Allen and Nancy and kept a life estate for herself; this transaction resulted in Nancy owning 80% and Allen owning 20% of the home, subject to the life estate. Allen admits that he signed the agreement but claims that he only received the last page.

In 2015, Ruth could no longer live in the home on her own and the house was placed on the market. The house sold in October 2015 for \$1.225 million. The proceeds of the sale were divided in accordance with the terms of the 2012 life estate agreement—Ruth received 32.262% of the proceeds of the sale while Nancy and Allen received 80% and 20%, respectively, of the

remainder. After the sale, Ruth and Nancy relocated to Florida. In March 2016, both moved back to the New York metropolitan area; Ruth lived in a nursing home in New Jersey until she passed away in January 2017.

Allen commenced the instant action and alleges causes of action against Nancy for fraud and two claims for breach of contract. Allen insists that he signed only a one-page document in 2012 and that this document did not state that it was a life estate agreement transferring ownership in the home to Nancy and Allen. Allen alleges that he did not ask questions before signing this one-page document because he wanted to help his mother. Allen contends that he had no idea he was an owner of the home until July 2015 and that Nancy subsequently promised him that the proceeds of the home would be split evenly between them. Allen acknowledges that he allowed Nancy to take a \$270,000 mortgage on the home which Nancy agreed was to come out of her proceeds from the sale of the home. The \$270,000 allowed Nancy to purchase a condo in Florida for her and Ruth to live. Nancy took care of Ruth full time while they lived in Florida.

Allen alleges that Nancy concealed the terms of the life estate agreement in 2012 and that Nancy intentionally misrepresented to Allen that he should sign a single page document so that Ruth could save money on the taxes for the house. Allen contends that Nancy made false promises that the two would split the proceeds of the home evenly and that Nancy kept the money remaining from the proceeds that were left when Ruth died.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within

any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]).

A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

As an initial matter, Nancy’s claim that this Court does not have subject matter jurisdiction is denied. Although this action centers on the distribution of the proceeds from a New Jersey home, Allen alleges that certain promises were made in 2015 about a 50-50 distribution of the sale proceeds and about the life estate agreement while both Nancy and Allen were living in New York. And the life estate agreement dated in 2012 lists a Manhattan address for Nancy.

Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, L.P. v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]).

Nancy moves to dismiss Allen’s fraud claim on the ground that Allen signed the life estate agreement. Nancy attaches a copy of this agreement, which contains the signatures of Ruth, Nancy and Allen and a witness’ signature next to all three of the Eichorns’ signatures (NSYCEF Doc. No. 8 at 3). The deed (contained in the same exhibit) contains a notarized signature stating that Allen personally appeared, “executed the within instrument and to whom I

first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed” (*id.* at 11).

In opposition, Allen acknowledges that he signed the life estate agreement and claims that he did not receive a copy of the entire agreement. In the complaint, Allen alleges *inter alia* that Nancy concealed all of the details about the life estate agreement including the purpose for signing it, the fact that it would transfer an ownership interest to Allen and that it would help Ruth (*see e.g.*, NYSCEF Doc. No. 1, ¶ 159).

The Court finds that Allen failed to state a cause of action for fraud. The allegations in the complaint and in Allen’s affidavit in opposition relating to fraud make little sense— Allen essentially argues that Nancy committed fraud because Allen did not read (or attempt to read) the entire agreement. Even assuming that Allen only received the last page of the life estate agreement, the text on this last page clearly begins in the middle of a sentence (NYSCEF Doc. No. 8 at 3). And following that sentence is paragraph 8, which obviously means there was more to the document. Allen also signed on page three— therefore, there must have been a page one and a page two. Allen also fails to sufficiently explain why the Court should ignore the notary’s signature on the last page of the deed.

There was nothing false about the life estate agreement— it states that Allen would get a 20% ownership stake in Ruth’s home. For some reason, Allen claims that he did not make any effort to learn about what he was signing. He may have simply trusted Nancy to explain the details, but that does not state a cognizable cause of action for fraud. There is no allegation that Nancy is a lawyer or other professional with estate planning expertise that would give him any

reason to rely on her representations as to the ramifications, tax or otherwise, of the life estate agreement.

The Court also observes that prior to this agreement, Allen had a 0% interest in the home— the house was previously divided between Ruth (95%) and Nancy (5%). It is unclear how Allen can show damages by signing an agreement that raised his ownership interest from 0% to 20% and reserving a life estate for Ruth. Whether Allen might have received more after his mother passed away is immaterial because the house sold in 2015— before Ruth died. Without this agreement, Allen would have received nothing from the sale of the home.

To the extent that Allen's fraud claim is based on Allen's agreement to sign the closing documents or to allow Nancy to take a mortgage on the home before it was sold in 2015 (that permitted Ruth and Nancy to move to Florida), the fraud claim also fails. There were no misrepresentations of fact relating to these events. Nancy signed a mortgage promissory note on the home for \$270,000 to help buy a place for her and Ruth in Florida. Allen's contention that he did not know the value of Ruth's life estate in the home prior to the sale is immaterial. Allen could have withheld his consent for the sale of the home but he did not; besides, if he withheld consent, he would have received nothing at that time.

Allen's reference to a September 2015 phone call in which Nancy encouraged Allen to sign the closing documents for the sale of the home and where she allegedly promised that the proceeds would be split evenly (NYSCEF Doc. No. 1, ¶ 117) does not save the fraud claim because they do not establish *justifiable* reliance. Allen admits that he spoke with Nancy's real estate attorney, who confirmed that Nancy would receive money from selling her 80% interest and Allen would receive the proceeds from the sale of his 20% interest (*id.*). Although Allen

claims that Nancy assured him that it would be 50/50 split (an allegation that Nancy denies), that does not explain why Allen would believe his sister over his sister's real estate attorney—an expert in this field. Besides, the document was clear, and Allen was entitled to 20%.

Even assuming that this September 2015 phone call took place as Allen alleges, that Nancy knew her statements to Allen were not true and that he relied on her characterizations when signing the closing agreement, Allen still has not shown that he suffered damages. The life estate agreement from 2012 already provided that he had a 20% ownership stake in the home—refusing to sign closing documents relating to a sale of the home would not bump his stake up to 50%. If Allen refused to sign, then the home would not sell. In that case Allen would not have received the approximately \$166,000 from the sale (*see* NYSCEF Doc. No. 1, ¶ 123[F]).¹

The fact that Ruth may have (as alleged by Allen) created a transfer account for Ruth's proceeds from the sale of the home and that Nancy was named as the sole beneficiary of this account upon Ruth's death also does not establish a cause of action for fraud against Nancy. Ruth was entitled to create accounts and distribute her proceeds from the sale of the home as she wished. Alleging that Nancy coerced her mother into taking these actions does not support a claim that *Allen* relied upon a material misrepresentation of fact by Nancy.

¹To the extent that Allen argues that had he withheld his consent to sell the house, he could have shaken down his mother and sister for more than his 20% because they wanted to move to Florida, that does not state a cause of action for fraud either.

Breach of Contract

The elements of a claim for breach of contract “include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426, 913 NYS2d 161 [1st Dept 2010]).

Allen offers two theories for breach of contract in the complaint. The first alleges that there was a contract in which Nancy agreed that 50% of the proceeds of the sale of the home was to be paid to Allen upon the death of Ruth. Allen insists that this 50% included Ruth’s share of the proceeds that remained when Ruth passed away.

Nancy insists that any such contract would be void because it would violate the statute of frauds.

Allen claims that the statute of frauds does not apply because the contract was for the payment of money, not the transfer of an ownership interest in the home. Allen also claims, in the alternative, that text messages from Nancy constitute a writing sufficient to satisfy the statute of frauds.

General Obligations Law § 5-703(1) provides that:

“An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this subdivision does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.”

As an initial matter, Allen's claim that Nancy promised a 50/50 split relating to the proceeds from the sale of Ruth's home must be in writing. The proceeds from the sale is based on Allen's ownership stake (or interest) in real property. An oral promise to change ownership interest in real property does not satisfy the statute of frauds.

The complaint states that "the aforesaid contract is evidenced by a writing from Nancy Eichorn to Allen Eichorn, in particular the text message Nancy Eichorn sent to Allen Eichorn" (NYSCEF Doc. No. 1, ¶ 183). Here, a review of this purported writing— the text messages between Nancy and Allen— does not support Allen's claim of the existence of a contract for a 50/50 split (NYSCEF Doc. No. 23). In fact, the only reference in the text messages to a 50/50 split is a text from Allen in July 2015 in which he states, after apparently realizing that he had a 20% stake in the home, that "What's up with that??? We are brother and sister, 50/50 like Dad said, is how I see it. . ." (NYSCEF Doc. No. 23 at 8). Nancy does not agree to split the proceeds from the home 50/50 in reply. Instead she observes that "The life estate agreement 80/20 purely for Medicaid purposes" (*id.*). While Allen might be upset that Nancy apparently did not understand the effect of the life estate agreement, that does not constitute the existence of a contract. Simply put, there is no promise in the text messages or in the voicemails left by Nancy on Allen's phone (*see* NYSCEF Doc. No. 24) that shows that there was a contract. Allen may have believed that it was Nancy's intention that he receive 50%, but that does not establish a cause of action for breach of contract. Because the text messages and the voicemail do not show what Allen contends they do— a writing evidencing a contract— Allen's second cause of action is dismissed.

Allen also alleges a breach of contract claim based on *inter alia* Allen's exclusion by Nancy from selling the home, overvaluing Ruth's life estate interest in the home, and preventing Allen from ensuring that repairs were made to the home after Superstorm Sandy in October 2012.

Nancy argues that this cause of action should be dismissed because it fails to allege how Nancy breached the life estate agreement. Nancy maintains that dissatisfaction with the results of the sale of the home does not mean a contract was breached.

The Court dismisses the third cause of action on the ground that it fails to state a cognizable claim. There are no facts alleged to support Allen's contention that any contract, including the life estate agreement, was breached by Nancy. In fact, Allen admits that he received 20% of the remainder of the proceeds from the sale of the house (NYSCEF Doc. No. 1, ¶ 123[C]). Although Allen contends that the percentage of the proceeds given to Ruth's life estate (32.262%) was "overvalued," that does not allege a cause of action for breach of the life estate agreement by Nancy.

Summary

This unfortunate family disagreement turns on Allen's failure to make any effort to comprehend the actions taken by Nancy and Ruth in the years leading up to his mother's death. The documents submitted by Allen in opposition show that he had no clear understanding of the what the life estate agreement meant or how the sale of the home was affected by the life estate agreement. Although Allen insists that he would have signed anything because he trusted his sister— certainly a laudable admission— that does not absolve him of the effects of the life estate agreement or the sale of the home. In both instances, Allen gave his consent— he cannot now void these two occurrences simply because he does not think they were fair.

Besides, what Allen thinks is fair is irrelevant. Ruth decided what she wanted to do with her house. At first she decided to give Nancy 5% then, a few years later, she decided to do an 80-20 split and reserve a life estate for herself. Put another way, in doing her estate planning, Ruth decided to go from giving her son no interest in the house to giving her son a 20% interest. If he thought it was unfair, he should have read the agreement and spoken to his mother at that time; maybe she would have increased his share, maybe she would have maintained it and maybe she would have cut him out entirely. The fact is that it was Ruth's asset and she had every right to divvy it up as she saw fit. Allens's attempt to undo Ruth's decision by claiming shenanigans by Nancy is without merit.

To the extent that Allen seeks to amend his complaint, that request is denied because Allen did not cross-move (or make a separate motion) for that relief.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint is granted.

This is the Decision and Order of the Court.

Dated: January 22, 2018
New York, New York



ARLENE P. BLUTH, JSC
HON. ARLENE P. BLUTH