

**Schirmer v Piazza**

2019 NY Slip Op 30638(U)

March 11, 2019

Supreme Court, Kings County

Docket Number: 512692/2015

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 11<sup>th</sup> day of March 2019.

PRESENT:

HON. LARA J. GENOVESI,  
J.S.C.

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CYNTHIA L. SCHIRMER, as guardian of the property of DEBRA PIAZZA SHAEFER A/K/A DEBRA SHAEFER A/K/A DEBRA ELLY PIAZZA,

Index No.: 512692/2015

Plaintiffs,

DECISION & ORDER

-against-

BARBARA PIAZZA A/K/A BARBARA ZINGAROPOLI, JOHN PIAZZA A/K/A JOHN H. PIAZZA, ESTATE OF JOHN F. PIAZZA, 81 REAL ESTATE CORP., and MELROSE CREDIT UNION,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
Other Papers: \_\_\_\_\_

Papers Numbered:  
\_\_\_\_\_  
1-2  
\_\_\_\_\_  
3, 4-5  
\_\_\_\_\_  
6, 7, 8  
\_\_\_\_\_

### ***Introduction***

Upon the foregoing papers, plaintiff Cynthia L. Schirmer, as guardian of the property of Debra Piazza Shaefer (plaintiff) moves, pursuant to CPLR 3212, for summary judgment against defendants Barbara Piazza, John Piazza and Estate of John F. Piazza. Plaintiff further moves for an order extending her time to file a note of issue.

### ***Background Facts and Procedural History***

On December 20, 2012, John F. Piazza (the decedent) died and was survived by three children, defendants Barbara Piazza (Barbara), John Piazza, and plaintiff Debra Piazza Shaefer (plaintiff). At the time of his death, the decedent owned a single-family house in Hopatcong, New Jersey (the New Jersey Property) as well as a two-family home located at 664 51st Street in Brooklyn (the Brooklyn property). Prior to his death, the decedent executed a will which nominated Barbara as executrix. Among other things, the will left the decedent's estate to be shared equally among the three children.

On May 6, 2013, Barbara and John Piazza executed a deed to the Brooklyn property as sole surviving distributees of the decedent to themselves as joint tenants with rights of survivorship. On or about August 15, 2014, Barbara and John Piazza deeded the Brooklyn property to defendant 81 Real Estate Corp. (81 REC) for consideration in the sum of \$980,000.00. 81 REC then took out a mortgage loan on the Brooklyn Property in the sum of \$445,000.00 from defendant Melrose Credit Union (Melrose).

On May 22, 2015, Barbara probated the will in New Jersey. In the application for probate, Barbara stated under oath that she and John Piazza were the decedent's sole living heirs and next of kin. The decedent's will has never been probated in New York.

On or about August 5, 2015, plaintiff commenced an action against Barbara and John Piazza in New Jersey Chancery court which sought a partition of the New Jersey property and alleged that, by virtue of the decedent's will, Debra was entitled to an undivided one-third interest in this property. On October 16, 2015, plaintiff commenced the instant action in Kings County Supreme Court against Barbara and John Piazza, as well as 81 REC and Melrose seeking to cancel, vacate, set aside and rescind the deeds to the Brooklyn property that were executed after the decedent's death. In particular, the complaint alleges that, by virtue of the decedent's will, Debra possessed a one-third interest in the Brooklyn property and that Barbara and John Piazza acted fraudulently in conveying this interest without Debra's knowledge or consent. The complaint further seeks, among other things, partition of the Brooklyn property. Barbara and John Piazza as well as Melrose served answers to the complaint in this action. However, 81 REC failed to appear or answer and, in an order dated January 30, 2017, the Hon. Devin Cohen granted plaintiff's motion for a default judgment against 81 REC.

Following the commencement of the two actions, Barbara and John Piazza answered the New Jersey complaint, discovery was conducted, and a trial was held on August 29, 2016. At the trial, Barbara sought, for the first time, to introduce a codicil to the will in which the decedent purported to disinherit Debra. However, the New Jersey trial judge refused to consider the codicil since as Barbara failed to identify Debra as a next of kin and failed to submit the codicil when the will was probated in May of 2015. On September 2, 2016, the New Jersey trial judge issued an order and final judgment ruling that, under the will, the decedent's residuary estate was to be divided equally

between the three children and that the New Jersey property was to be sold. The order and final judgment further directed that one-third of the proceeds from the sale were to be paid to plaintiffs and that the remaining two thirds were to be held in escrow pending the outcome of the instant litigation in Brooklyn. In particular, the order directed that if a judgment is entered in favor of plaintiff in the instant action and there is not sufficient property to satisfy the judgment, any unsatisfied portion of the judgment was to be paid to plaintiff out of the escrow money. The order also directed that, if there was no judgment in plaintiff's favor in this action, or if a judgment in favor of plaintiff could be satisfied from assets in New York, the escrow money was to be paid equally to Barbara and John Piazza. No appeal was taken from the New Jersey court's order and final judgment.

On September 30, 2016, Barbara filed an order to show cause and complaint in New Jersey Superior Court seeking to amend probate of the decedent's estate to include the codicil and for a trial to determine its validity. On the return date, the court denied the order to show cause as a collateral attack on the September 2, 2016 order and final judgment which Barbara and John Piazza failed to appeal. This ruling was affirmed by the Superior Court of New Jersey, Appellate Division in a decision dated September 13, 2018. In so ruling, the Appellate Division found that the Chancery court properly found that it was too late for Barbara to probate the 2007 codicil since more than six months had elapsed since testamentary letters were issued and Barbara herself omitted reference to Debra when she probated the will. The Appellate Division further ruled that Barbara's subsequent attempt (in the order to show cause) to amend probate was barred by the

doctrine of collateral estoppel since the codicil was rejected in the Chancery case and no appeal was taken from this ruling.

Plaintiff now moves for summary judgment against Barbara and John Piazza under her partition claim so that she may receive the full value of her one-third interest in the Brooklyn property. In so moving, plaintiff maintains that she is entitled to summary judgment under the doctrines of full faith and credit and res judicata. Specifically, plaintiff maintains that the New Jersey court rulings and judgment, which refused to consider the purported codicil and found that plaintiff was the rightful heir to one-third of the decedent's estate, are entitled to full faith and credit in New York. Plaintiff further notes that, under applicable New Jersey law, there are three elements to res judicata: (1) that the prior judgment be valid, final and on the merits, (2) that the parties in the later action be identical to, or in privity with, those in the prior action, and (3) that the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. According to plaintiff, all of these elements have been met in the instant matter.

In opposition to plaintiff's motion, Barbara and John Piazza argue that the motion is premature since as an appeal was pending of the denial of their order to show cause to amend probate. In this regard, the court notes that at the time the defendants' opposition papers were submitted, the New Jersey Appellate Division had yet to issue its decision affirming the lower court's ruling.

In addition to the Piazza defendants, Melrose submitted opposition to plaintiff's motion in which it notes that neither the complaint nor plaintiff's motion seeks relief

against it, as Melrose was only named as a party in the action for notice purposes.

Accordingly, Melrose maintains that, in the event the court grants plaintiff's motion for partition, its mortgage must be paid from the proceeds of the partition sale pursuant to RPAPL 961. Melrose further maintains that, because 81 REC gave it a \$445,000 mortgage<sup>1</sup>, the property sold for \$980,000 at the time the mortgage was issued, and real estate values have appreciated since 2014, the funds left from the sale after the payment of Melrose's mortgage will be more than enough to cover the value of plaintiff's alleged one-third interest in the Brooklyn property. Melrose also notes that, to the extent the funds remaining from the sale of the Brooklyn property after payment of the mortgage are insufficient to fully cover plaintiff's one-third interest in the property, plaintiff could look to the funds currently being held in escrow from the sale of the New Jersey property pursuant to the directive in the New Jersey order and judgment.

In further opposition to plaintiff's motion, Melrose argues that its lien on the Brooklyn property is not void under the doctrine of res judicata since it was not a party to the New Jersey actions upon which plaintiff's instant summary judgment motion is based. Further, Melrose maintains that, even if the court sets aside the deeds issued to the Piazza defendants and 81 REC as against plaintiff's one-third interest in the Brooklyn property, Melrose's mortgage will remain unaffected as a lien encumbering the entire property. In this regard, Melrose notes that it has been named for notice purposes only and the complaint does not seek to set aside Melrose's mortgage.

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<sup>1</sup> As of March 12, 2019, the mortgage had a balance of \$417,948.56.

In reply to Melrose's opposition papers, plaintiff argues that the deed upon which Melrose's mortgage is based is void ab initio, and therefore, the lien does not attach against plaintiff's one-third interest in the Brooklyn property. In this regard, plaintiff notes that Barbara and John Piazza purported to deed the entire property to 81 REC when they only possessed a two-thirds interest in the property. According to plaintiff, the absence of her signature on the deed amounted to a forgery, which cannot convey good title with respect to plaintiff's interest in the Brooklyn property. By the same token, plaintiff maintains that plaintiff's interest in the property is not encumbered by the Melrose mortgage since a mortgage based upon a forged deed or a deed obtained by false pretenses is invalid.

On October 31, 2018, the parties appeared in court for oral argument on plaintiff's motion. At that time, plaintiff presented the court with a copy of the September 13, 2018 New Jersey Appellate Division ruling. Thereafter, the court issued an order granting plaintiff's request to supplement her motion papers in response to the appellate court ruling. The order further provided that Melrose was to provide case law as to the definition of successors in interest and whether it is a bona fide purchaser.

In her supplemental papers, plaintiff reiterates her argument that the doctrine of collateral estoppel and the New Jersey court rulings bar Melrose from relitigating the issue of whether the mortgage lien held by Melrose attaches to plaintiff's one-third ownership interest in the Brooklyn property. In particular, plaintiff notes that the New Jersey courts have already determined that she holds a one-third interest in the decedent's estate and to relitigate this issue in New York would run the risk of inconsistent rulings.

In addition, plaintiff argues that, although Melrose was not involved in the New Jersey litigation, it shares a common interest with the Piazza defendants since they all had an interest in validating the fraudulent deeds they executed. Plaintiff also notes that the doctrine of collateral estoppel is flexible. Plaintiff further argues that Melrose is not a bona fide encumbrancer for value because its mortgage lien is based on a fraudulent/forged deed. In particular, plaintiff contends that, when Barbara and John Piazza purported to deed the entire fee interest in the Brooklyn property to 81 REC, they only held two-thirds interest in the property. Thus, plaintiff maintains that the deed was effective, but only with respect to the two-thirds interest that they held in the property, and it was not effective with respect to plaintiff's one-third interest. According to plaintiff, it necessarily follows that when 81 REC took out a mortgage loan on the property, it only encumbered the two-thirds interest which the Piazzas deeded to 81 REC. Finally, plaintiff argues that Melrose is not a good faith encumbrancer because the absence of any estate proceeding for the decedent put Melrose on constructive notice of any possible claims, including plaintiff's claim regarding her one-third interest in the decedent's estate.

In its own supplemental papers, Melrose again notes that plaintiff's motion papers did not seek to vacate Melrose's mortgage. Instead, plaintiff only sought this relief after it received Melrose's opposition papers. Accordingly, Melrose maintains that plaintiff is not entitled to this relief against it. Melrose further notes that the New Jersey courts never ruled on the validity of the codicil, but simply refused to consider it because Barbara Piazza waited too long before attempting to probate the codicil. In any event,

Melrose argues that the doctrine of collateral estoppel may not be applied to defeat its mortgage lien on plaintiff's one-third interest in the Brooklyn property. In particular, Melrose notes that, at the time Barbara and John Piazza deeded the property to 81 REC and 81 REC took out the mortgage loan with Melrose, there was no judgment in the New Jersey actions, and in fact, the New Jersey actions had yet to be commenced. As a result, Melrose maintains that there is no privity between it and 81 REC and the Piazza defendants, which is necessary for collateral estoppel to apply. In this regard, Melrose points to case law which stands for the proposition that an assignee is not privity to a judgment where the succession to the rights affected thereby takes place prior to the institution of the suit against the assignor. As a final matter, Melrose contends that, the fact that plaintiff obtained a default judgment against the mortgagor 81 REC does not affect Melrose's right to defend against plaintiff's claim that the lien does not attach to plaintiff's one-third interest in the Brooklyn property.

### *Findings and Rulings*

"The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823 [1984]). Here, the issue of whether or not plaintiff possessed a one-third share in the decedent's estate was raised in the New Jersey Chancery court proceeding and definitively resolved in plaintiff's favor and against the Piazza defendants. As part of this determination, the Chancery court ruled that the codicil belatedly presented by Barbara

Piazza would not act to defeat the one-third interest in the estate that was bequeathed to plaintiff in the decedent's will. A subsequent attempt to overturn the Chancery court's judgment was rejected by New Jersey trial court and Appellate Division rulings. Under the circumstances, the doctrine of collateral estoppel applies here with respect to the Piazza defendants and precludes them from challenging plaintiff's one-third property interest in the Brooklyn property or from claiming that they were entitled to deed plaintiff's interest in the property to 81 REC. Indeed, at this time, the Piazza defendants have effectively conceded this point; the only argument that they submitted in opposition to plaintiff's motion was that it was premature since the New Jersey Appellate Division had yet to issue its ruling. However, as noted above, the Appellate Division has now ruled in plaintiff's favor.

With respect to 81 REC, the court need not reach the issue of whether or not the doctrine of collateral estoppel applies to it and precludes it from claiming that it holds title to plaintiff's one-third interest in the Brooklyn property. A default judgment was entered against 81 REC and as such, it is deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them (*see Mortgage Elec. Registration Sys., Inc. v. Smith*, 111 A.D.3d 804, 975 N.Y.S.2d 121 [2 Dept., 2013]; *see also Bank of New York Mellon Tr. Co. v. Loodus*, 160 A.D.3d 797, 76 N.Y.S.3d 89 [2 Dept., 2018]).

Accordingly, given the rulings against Barbara and John Piazza in the New Jersey actions, and by virtue of the default judgment against 81 REC, plaintiff's motion for summary judgment is granted to the extent that the May 6, 2013 and August 15, 2014

deeds are deemed null and void to the extent they conveyed plaintiff's one-third interest in the Brooklyn property.

The main issue in this case is whether or not Melrose's mortgage lien on the Brooklyn property attaches to plaintiff's one-third share of the property. In this regard, the court initially notes that plaintiff's motion papers did not seek any relief against Melrose. However, plaintiff and Melrose subsequently submitted supplemental papers in which they fully briefed this issue. Consequently, the court will now address the matter at hand.

As noted above, the doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue that was raised and decided against that party or those in privity with that party (*Ryan*, 62 N.Y.2d at 500, *Lamberti v. Plaza Equities, LLC*, 161 A.D.3d 837, 77 N.Y.S.3d 420 [2 Dept., 2018]). Here, it is undisputed that Melrose was not a party to either of the New Jersey actions. Further, it cannot be said that Melrose was in privity with the Piazza defendants for purposes of collateral estoppel. In particular, the Court of Appeals has held that collateral estoppel applies only to a privity arising "after the event out of which the estoppel arises. Hence, an assignee is deemed to be in privity with the assignor where the action against the assignor is commenced before there has been an assignment" (*Gramatan Home Invs. Corp. v. Lopez*, 46 N.Y.2d 481, 414 N.Y.S.2d 308 [1979]; *Kolel Damsek Eliezer, Inc. v. Schlesinger*, 90 A.D.3d 851, 935 N.Y.S.2d 83 [2 Dept., 2011]). Here, the New Jersey actions were not yet been commenced at the time the Piazza's deeded the Brooklyn property to 81 REC and 81 REC took out the mortgage loan with Melrose. Under the circumstances, the

doctrine of collateral estoppel does not apply against Melrose, and the rulings in the New Jersey actions do not preclude Melrose from asserting a mortgage lien on plaintiff's one-third ownership interest in the Brooklyn property.

Also, without merit is plaintiff's argument that she is entitled to summary judgment against Melrose since the deed that the mortgage is based is void ab initio to the extent that it attempted to convey plaintiff's ownership interest in the property. It is true that a deed is void ab initio if it is obtained by false pretenses such as when a survivor who only inherits a portion of a decedent's home conveys the entire premises to himself (*Cruz v. Cruz*, 37 A.D.3d 754, 832 N.Y.S.2d 217 [2 Dept., 2007]). It is also true that a mortgage based on such a fraudulent deed is invalid even if the mortgagee is a bona fide encumbrancer for value (*id.*). However, in the instant matter, at the time Barbara and John Piazza deeded the Brooklyn property to themselves, a codicil to the decedent's will existed which purported to disinherit plaintiff. Although the New Jersey Chancery court refused to consider this codicil, this court has already determined that collateral estoppel does not apply as against Melrose due to lack of privity. Further, the New Jersey courts never ruled on the issue of whether or not the codicil itself was fraudulent or otherwise satisfied the requirements for probate. Plaintiff failed to establish that Barbara and John Piazza obtained a portion of the deed under false pretenses to invalidate Melrose's mortgage lien on plaintiff's ownership interest in the Brooklyn property.

There is also no merit to plaintiff's claim that 81 REC's default precludes Melrose from maintaining that it has a valid mortgage lien on plaintiff's ownership interest in the Brooklyn property (*Holt v. Holt*, 262 A.D.2d 530, 692 N.Y.S.2d 451 [2 Dept., 1999]). As

a final matter, it is well settled that an encumbrancer who knows facts that would excite the suspicion of an ordinarily prudent person and fails to investigate, will not be considered a bona fide encumbrancer for value (*In re Hill*, 95 A.D.3d 889, 943 N.Y.S.2d 558 [2 Dept., 2012]). However, plaintiff failed to submit sufficient evidence to establish that Melrose was not a bona fide encumbrancer for value.

Under the circumstances, since the doctrine of collateral estoppel does not apply to Melrose, plaintiff has failed to establish, as a matter of law, that the deed that Melrose's mortgage is based is void ab initio with respect to plaintiff's interest in the Brooklyn property. Plaintiff further failed to establish, as a matter of law, that Melrose is not a bona fide encumbrancer for value. Accordingly, that branch of plaintiff's motion which seeks, in effect, to invalidate that portion of the mortgage which encumbers plaintiff's one-third ownership interest in the Brooklyn property is denied.<sup>2</sup> In light of the court's determination, that branch of plaintiff's motion which seeks leave to extend her time to file a note of issue is granted to the extent that a final compliance conference shall be held on April 1, 2019.

### *Conclusion*

Accordingly, plaintiff's motion for summary judgment against the Piazza defendants and 81 REC is granted to the extent set forth above. That branch of plaintiff's motion which seeks summary judgment against Melrose is denied as set forth above.


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<sup>2</sup> The court notes that the fact that deed that the mortgage is based was deemed null and void to the extent it conveyed plaintiff's ownership interest in the Brooklyn property does not preclude Melrose to pursue the defense that it is a bona fide encumbrancer for value (*In re Hill*, 109 AD3d 618, 619 [2013]).

That branch of plaintiff's motion which seeks leave to extend her time to file a note of issue is granted to the extent that a final compliance conference shall be held on April 1, 2019.

This constitutes the decision and order of the court.

ENTER:



Hon. Lara J. Genovesi  
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