Marinello v Marinello
2020 NY Slip Op 32923(U)
September 3, 2020
Supreme Court, Kings County
Docket Number: 517780/18
Judge: Lawrence S. Knipel
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At an IAS Term, Part COMM 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of September, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

----------X Index No. 517780/18

GEORGE MARINELLO,

Plaintiff,

- against -

MARIA MARINELLO AND AMELIA MARINELLO,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	26-67;69-86;116-137
Opposing Affidavits (Affirmations)	139,117-137;87-115;141-143,146-165
Reply Affidavits (Affirmations)	169,172,141-143,146-165;166-168
Memoranda of Law	138,140,144-145,170-171;86;138,144-145

Upon the foregoing papers, in motion sequence (mot. seq.) two, plaintiff George Marinello (George or plaintiff) moves for an order: (1) pursuant to CPLR 3212 (b), for summary judgment on the claims in the complaint; (2) setting a hearing date to determine plaintiff's damages; (3) for attorney's fees and costs; and (4) directing defendants to

return plaintiff's one-third interest in the subject UBS brokerage account to be held in escrow pending the conclusion of this action. In mot. seq. three and mot. seq. four, respectively, defendants Amelia Marinello (Amelia) and Maria Marinello (Maria) (collectively defendants) cross-move for an order, pursuant CPLR 3212, for summary judgment dismissing all causes of action against them. Maria also moves, pursuant to 22 NYCRR 130-1.1, for costs and/or sanctions against plaintiff.

Background

Prior to her death in September of 2012, Angelina Marinello (Angelina), the parties' mother, was the sole owner of a UBS brokerage account valued in excess of $800,000 (the UBS account). On December 27, 2010, Angelina purportedly executed a "Transfer on Death Agreement" (TOD) naming Maria and Amelia beneficiaries of the UBS account and transferring it to her daughters upon her death (the 2010 TOD agreement). The 2010 TOD agreement form contained the following pre-printed statement in bold font: "This transfer on death agreement must be notarized in the acknowledgement form below." The 2010 TOD agreement was notarized by Maria, who is an attorney as well as a notary public. While George acknowledges that Angelina was the sole owner of the account and that he was not named as a beneficiary, George contends that the 2010 TOD agreement is invalid because it was either: (1) improperly executed by Maria on behalf of Angelina, (2) not actually executed on December 27, 2010, or (3) that Angelina was fraudulently coerced into executing the TOD while she

was cognitively impaired by Alzheimer's disease.[1]

On December 31, 2010, four days after the 2010 TOD agreement was allegedly signed, Maria sent an email to George stating that a UBS representative, Paul Namm (Namm) would be visiting Angelina on January 4, 2011 and bring Angelina papers to designate Maria and Amelia as beneficiaries on the UBS account, and invited George to the meeting. Namm testified that on January 4, 2011, he met with George and Angelina at her home and brought TOD forms to discuss with Angelina, but left without any forms being signed. Namm testified that he explained the purpose of a TOD to Angelina as a way to name beneficiaries, and also explained the purpose of a power of attorney to Angelina at that time. Namm also testified that during the meeting, there was a proposal to split the UBS account three ways, with George's share to be used to pay Angelina's living expenses and care, however, the proposal was not executed in his presence. Namm did not see the TOD agreement in 2010 or 2011, but testified that he possibly first saw it in 2012. Namm testified that he had a discussion with his assistant, Carol Hammond, regarding the date of the form and about Maria notarizing it. According to Namm, Hammond spoke to a UBS compliance officer about it, and in May or June of 2012, questioned whether an interested party can notarize a TOD agreement. A UBS official

[1] Angelina's medical records, submitted by George and Amelia, show that as of September 23, 2011, Angelina had a history of dementia, and as of July 2, 2012, that Angelina had an Alzheimer's diagnosis and was being treated with several medications. In a January 5, 2011 email exchange between Amelia and Maria discussing Angelina's medications, Amelia notes that Angelina was taking Lexapro and Aricept, Alzheimer's and/or dementia medication. However, none of the parties have submitted any affidavits of medical experts with regard to Angelina's cognitive or mental capacity or condition in the two years leading up to her death.

told her "scan it in and let the back office decide."

George has submitted several additional emails between the parties that are of relevance to this action. On April 25, 2011, George sent an email to Namm inquiring whether Maria ever told him to send a power of attorney letter for the UBS account to be split into three different accounts, as Maria allegedly claimed to George. On April 25, 2012, Maria sent an email to George stating: "Took mom to wound center yesterday and her dementia is very bad." On May 8, 2012, Maria and Amelia, as co-trustees of their father's trust, by their attorney, wrote to George's attorney in that action advising him that George "has agreed to relinquish and renounce any interest in the USB brokerage account of Angelina Marinello."

On or about May 11, 2012, per Maria's request, Hammond sent another TOD form to Maria for Angelina to sign. At his deposition, Namm did not recall why Maria made that request or why it was necessary when the 2010 TOD agreement was purportedly signed two years ago. In addition, attached to the TOD form that Hammond sent in 2012, she included a sheet, stating: "The Transfer on Death document must be completed and signed by Angelina on page 2. Her signature must be notarized on page 3." Namm also testified that in his knowledge and experience, an agent under a power of attorney could not execute a TOD agreement on behalf of the principal. Namm also testified that during his limited interaction with George, George never expressed anything that would indicate that he believed Angelina had diminished mental capacity or failed to understand the nature of what was going on.

On May 13, 2012, Angelina executed a UBS Power of Attorney form giving Maria power of attorney with respect to the account.[2] Also on May 13, 2012, Angelina executed another TOD agreement naming Maria and Amelia as beneficiaries to the UBS account (the 2012 TOD agreement). This time, Maria's signature was notarized by Joseph Napoli (Napoli), Maria's husband, and, according to George, also a disbarred attorney.

On May 14, 2012, Maria emailed George, stating: "She [mother] was very bad mentally yesterday and today." On May 15, 2012, Maria returned the executed power of attorney and the 2012 TOD agreement form to Hammond, and stated in her cover letter : "Please note that [Angelina] has difficulty with her signature." UBS registered the power of attorney on May 21, 2012, but did not register the 2012 TOD agreement. Subsequently, on June 15, 2012, UBS registered the 2010 TOD agreement.

Angelina died on September 21, 2012, leaving a will bequeathing her residuary estate equally to her children, George, Amelia and Maria. Letters testamentary were issued on February 19, 2013. In *In re Marinello* (index No. 2012/4057/A, Sur Ct, Kings Cty May 20, 2013, Lopez-Torres, J.), the Surrogate's Court action, the court declined to entertain George's petition regarding beneficiary designation of the USB account and held that this is to be properly brought in Supreme Court, not the Surrogates court.

On or about June 12, 2013, George commenced an action against Maria, Amelia, Namm and UBS in this court under index Number 10790/2013 alleging conversion,

[2] A January 5, 2011 email from Maria to George states that at some point, Angelina had revoked Maria's power of attorney, and that Angelina would have to sign a new one so that Maria could issue checks for Angelina's expenses on her behalf. A May 3, 2012 internal UBS email states that the prior power of attorney was removed in October of 2010.

conspiracy to convert, breach of fiduciary duty, bad faith, unjust enrichment, monies had and received, and a declaratory judgment with respect to Angelina's UBS account. On or about August 8, 2013, plaintiff filed an amended complaint to include fraud as an additional cause of action. On November 7, 2013, the court ordered UBS to transfer two-thirds of assets/securities/funds in the UBS account to Amelia and Maria (one-third each) with one-third to remain in the account. On March 5, 2014, the court ordered that the remaining one-third shall remain frozen, but that Maria and Amelia may sell the stock in it to avoid diminution. The case was then marked off the calendar, and by order dated August 4, 2017, the court denied plaintiff's motion to restore in light of the pending Surrogate's Court litigation and the fact that discovery in this case should have been completed long ago. George appealed that decision to the Appellate Division, and on August 30, 2018, George commenced this action against Maria and Amelia for fraud, bad faith, unjust enrichment, moneys had and received, declaratory judgment, and undue influence in order to preserve the his rights before expiration of the statute of limitations. On April 10, 2019, the Appellate Division restored the 2013 action. By order dated May 3, 2019, the court consolidated this case with the 2013 action for all purposes into this case, and the 2013 action was restored for the purpose of consolidation.

Parties' Contentions

George's Contentions

George argues that 2010 TOD agreement is fraudulent and therefore not in effect, and that as a result, the assets in the account should flow through Angelina's will, which

would entitle him to one-third share of the account. George contends that either Maria signed both the 2010 and the 2012 TOD agreements herself or Angelina was mentally infirm when she executed them. In that regard, George submits that there would be no reason for Namm to visit Angelina on January 4, 2011 with TOD forms, just one week after the 2010 TOD agreement was allegedly already executed, if the 2010 TOD agreement was legitimate. George also points to Namm's testimony that he did not know anything about the 2010 TOD agreement until June, 2012. Moreover, George argues that Amelia cannot explain why the 2010 TOD agreement was not registered with UBS for 18 months after it was dated, and that Maria offers two different versions of what happened to the 2010 TOD agreement: (1) at her deposition in the Surrogate's Court proceeding, Amelia testified that she found the 2010 TOD agreement in a bookcase in her apartment in early 2012; and (2) In her affidavit in support of her motion to dismiss and in opposition to this motion, Maria stated that "When I located that TOD form many months later, I mailed it to UBS."

George further contends that there is no reason that Maria would have filed the 2012 TOD agreement with UBS if the 2010 TOD agreement was validly executed. In addition, George argues that Maria and Amelia's May 8, 2012 letter to George, wherein they propose to assign George's one-third interest in the UBS account, demonstrates Maria and Amelia's recognition that he had such interest an that the 2010 TOD agreement was ineffective.

George also argues that the sequence of events in this case demonstrates that the

2010 TOD is ineffective. To that end, George points to the fact that the May 13, 2012 power of attorney was registered by UBS on May 21, 2012, eight days later, but the 2012 TOD agreement was not registered. George argues that this suggests that the 2010 TOD agreement was signed in May or June of 2012 and then presented to UBS in June of 2012, and that this document, along with the May 13, 2012 documents, are a fraud upon George, the court and UBS. Moreover, George alleges that Maria had power of attorney for Angelina since July 2010, and owed her a duty of loyalty over her own financial interests that comes with being a fiduciary. George submits an email showing that Maria's power of attorney had been revoked in October, 2010, so that in May 2012, Maria contacted UBS and requested a new power of attorney document and a new TOD. George argues that Maria then arranged for Angelina to sign both documents on May 13, 2012, and returned the signed documents to UBS on May 15, 2012, advising them that Angelina had difficulty with her signature. George argues that Maria either had her mother sign the documents when she was mentally incapacitated, as Maria had admitted, or that she signed Angelina's name and notarized her signature, and this time, had her husband, Napoli, a disbarred attorney, witness same. George argues that the court should give no credence to anything Maria alleges. In support of his contention that Maria may have forged Angelina's signature on the TOD, George submits emails from Maria where she admitted that she signed her name on checks. He also alleges that she has been signing the mom's name on checks for years, even after her death.

George also submits that he has received copies of UBS statement accounts for

Angelina's accounts as far back as October, 2011, which state that copies were to be sent to three interested parties (his sisters and himself), which allegedly demonstrate that he was a one-third beneficiary of the account. He also claims that in 2011, Maria tacitly acknowledged his one-third interest in the account, by stating "if you want your share of the stocks to be applied to the rent[3] owed."

In addition, George asserts that the 2010 TOD agreement was invalid because UBS required that TODs be acknowledged, and the fact that Maria, an interested party, notarized the document, invalidates it. George argues that notwithstanding the existence of the 2010 agreement, his sisters attempted to create a second TOD document making themselves the sole beneficiaries of Angelina's UBS account. George claims these documents are problematic because Maria and Amelia knew that Angelina suffered from dementia and/or Alzheimer's disease at the time. In that regard, Angelina's medical records purportedly show that as early as September, 2011, Angelina had been diagnosed with severe dementia, and as early as January, 2011, she was taking Aricept and Namenda to treat those conditions. George also points to Maria's April 25, 2012 email sent just weeks before the 2012 TOD agreement and the new power of attorney was executed wherein Maria stated that Angelina's "dementia was very bad." George contends that this is fraud. George argues that the court must have had its own concerns about Angelina's mental capacity, because on May 19, 2016, the court ordered that

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[3] Maria contends that George received a financial windfall because he was using their deceased father's commercial property for his business for years without paying rent to Angelina, and that as a result, was not entitled to one-third share of the UBS account, as the rent could have gone to paying Angelina's expenses.

should Amelia or Maria move for summary judgment, the motion must include medical records and medical expert affidavits relevant to the issue of Angelina's capacity at the time that Amelia executed both the 2010 and the 2012 TOD agreements.

Amelia's Contentions

Amelia contends that she did not discuss the UBS account with Angelina and only became aware that she was a designated beneficiary on the UBS account until after Angelina's death, after which time she and Maria provided a TOD beneficiary affidavit to UBS. Amelia states that she was not present when Angelina executed the 2010 TOD agreement as she was living in Florida at the time, and further states that she did not discuss it with her sister or George. She claims that there was no prior TOD agreement or beneficiaries on the UBS account. She also alleges that she never discussed the UBS account, including beneficiary designation, with Angelina.

Amelia contends that George was admittedly never a party to Angelina's UBS account, nor did she bequeath it to him, nor was he a party to the TOD agreement, and, therefore, as a matter of law, George lacks standing to challenge their validity, and all of his claims on Angelina's property are not viable as a matter of law. Angelina states that George was not named a beneficiary to the UBS account because he was the sole legatee of two valuable pieces of commercial real estate originally owned by their father, which George has allegedly used rent-free for over a decade for his business.

Amelia also argues that George cannot argue that he believed Angelina was mentally incapacitated, as he testified at his deposition he interacted with her between two

to three times a week over the preceding 10-15 years, that she was capable of reading and understanding newspapers, and that "she was all there."

Amelia further argues that George says virtually nothing about Amelia in his affidavit, which supports her contention that she was not involved in decision-making with regard to the 2010 TOD agreement.

Maria's Contentions

Maria contends that she was present when Angelina signed the 2010 TOD agreement and observed Angelina execute it. She denies that Angelina's signature is a forgery. To her knowledge, there was no prior TOD agreement or designation of beneficiaries on the UBS account. Maria asserts that UBS never objected to the 2010 UBS agreement when it was submitted or any time thereafter, up until the time that George threatened litigation. Maria states that on July 31, 2010, Angelina gave her power of attorney over the UBS account, and at that time, Angelina discussed her desire to leave the account to her and Amelia.

Maria denies influencing Angelina in any way to sign the 2010 TOD agreement. Maria claims that the existence of the TOD was not disclosed to George because Angelina wished to avoid conflict with George, as he was intimidating, manipulative and violent to family members, and because of Angelina's advanced age, she sought to avoid confrontations with George. Maria contends that Angelina was unhappy with George for many reasons, one of which being that George allegedly told Angelina that the did not want to pay rent on his father's commercial properties anymore because he was paying

for college for two daughters. Maria argues that in reality, George did not have financial difficulty, and was using what was to be Angelina's rental income for his own personal expenses. Maria states that during the meeting with Namm on January 4, 2011, after observing a confrontation between George and Amelia, Angelina did not want to deal with any further confrontation or intimidation from George, and decided not to tell George or Amelia that she had signed the TOD when Maria saw her on December 27, 2010. Maria denies that the family agreed on January 4, 2011 that the UBS account would be split into three accounts. Maria also denies that Angelina ever told her that she wished to leave George part of the UBS account, or that she gave Namm instructions to do so.

Maria states that while Namm testified that the 2010 TOD was scanned into their system on June 15, 2012, she believes that she mailed it to UBS earlier than that, but she does not state when she did so.

Maria also contends that while she notarized the 2010 TOD agreement, there is no requirement that it be notarized to be effective. Maria alleges that she did so because her mother was 93 years old and had difficulty walking, so it was not possible to take her outside to a notary, and that she notarized her signature as she had done with other documents in the past.

Discussion

Standing

Both Amelia and Maria argue that George does not have standing to bring this

action because he was neither an owner nor a beneficiary of the UBS account. While Amelia asserted standing as an affirmative defense in her answer, Maria did not. As a result, Maria has waived any defense with respect to George's standing (*see* CPLR 3211 [e]; *Matter of Fosella v Dinkins*, 66 NY2d 162, 167-168 [1985]; *Dougherty v City of Rye*, 63 NY2d 989 [1984]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]).

George contends that he has standing despite having no ownership interest in the account nor named as a beneficiary, since if the 2010 TOD agreement is shown to be invalid, the account would go to the estate and he would receive one-third. George argues that Maria and Amelia contradicted this.

A plaintiff may not proceed with an action absent standing (*see Stark v Goldberg*, 297 AD2d 203, 204 [1st Dept 2002]). "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation" (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (*id.*). "The rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003]). In order to maintain standing, a party must allege an "injury in fact – an actual

legal stake in the matter being adjudicated," which "ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution" (*see Society of Plastics*, 77 NY2d at 772 [internal quotation marks omitted]).

"[O]*n* a plaintiff's summary judgment motion, or at trial, where a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief" (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59 [2d Dept 2015]; *see also Green Tree Servicing, LLC v Molini*, 171 AD3d 880, 881 [2d Dept 2019]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814 [2d Dept 2016]; *Wachovia Mtge. Corp. v Lopa*, 129 AD3d 830, 830-831 [2d Dept 2015]). "However, on a defendant's motion for summary judgment, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (*LGF Holdings*, 139 AD3d at 814; *see also Blostein v Bauer*, 218 AD2d 912, 913 [2d Dept 1995] [on a motion challenging petitioner's standing, the burden of proof is on the movant]). "The prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations made by the plaintiff in the pleadings" (*LGF Holdings*, 139 AD3d at 814). Defendants fail to demonstrate their prima facie entitlement to summary judgment as a matter of law dismissing the complaint for lack of standing when they fail to eliminate questions of fact as to whether the plaintiff had standing (*id.*).

Amelia argues that this case is analogous to cases where courts have held that a plaintiff has no standing to seek a declaration of rights under a contract to which they are

not a party (*see e.g. Williams v Sidley Austin Brown & Wood, L.L.P.*, 11 Misc 3d 1064 (A), 2006 NY Slip Op 50381 (U) [Sup Ct NY County 2006, Fried, J.]; *Baker v Latham Sparrowbush Assoc.*, 129 AD2d 667 [2d Dept 1987], *lv. denied* 70 NY2d 606 [1987] ["Special Term properly dismissed the plaintiff's complaint on the ground that she had no standing to bring an action for a declaratory judgment regarding the validity of a provision in a real property lease to which she is not a party"]; *Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404 [1st Dept 2017] [defendant CAP, a party to litigation but not a party to the subject contract, lacked standing to enforce the contract]; *OneBeacon Am. Ins. Co. v Colgate-Palmolive Co.*, 123 AD3d 222, 227 [1st Dept 2014] ["Colgate lacks standing to state a claim against NICO for breach of the underlying policies because NICO is not a party to those contracts"]; *Arrow Louver & Damper Div. of Arrow United Indus. v New York City Tr. Auth.*, 106 AD2d 533 [2d Dept 1984] [no standing where subcontractor was not a third-party beneficiary under a contract between an owner and a prime contractor]; *85 Fifth Ave. 4th Floor, LLC v I.A. Selig, LLC*, 45 AD3d 349, 350 [1st Dept 2007] [plaintiff purchaser did not have standing to sue cooperative board for withholding consent to sell seller's apartment, as plaintiff was not the third-party beneficiary of the lease between seller and cooperative]; *Leist v Goldstein*, 305 AD2d 468, 469 [2d Dept 2003] [plaintiff, as contract vendee of shares in a cooperative corporation, was not a party to the proprietary lease between the corporation and the contract vendor and had no standing to enforce the terms of the proprietary lease against defendant cooperative corporation]).

However, a TOD is not a contract between the owner of securities and the beneficiaries, nor is it akin to a lease or insurance policy, and, therefore, the cases cited by defendants involving contractual relationships are not analogous to the case at bar. Rather, any contract established upon registration of the 2010 TOD agreement is between Angelina and UBS, not between Angelina and her daughters (*see* EPTL 13-4.9 [a] ["A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this part and is not testamentary"]; EPTL 13-4.8 [b] ["By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part."]). While Maria and Amelia are the stated beneficiaries to the 2010 TOD agreement, they are not contracting parties, as they did not bargain for or give up anything to receive a benefit. None of the cases cited by defendants involve the circumstances similar to the case at bar, where if George's allegations that the TOD designation was fraudulently executed were credited and the TOD was rendered invalid, Angelina's UBS assets would go to her estate, and entitling George to one-third share.

Moreover, in protecting the registering entity against claims to a security by an estate, creditors, distributes, legatees and others, the EPTL contemplates cases such as this one, where there is a dispute between the rights of beneficiaries and other claimants to the ownership of a security (*see* EPTL 13-4.8 [c], [d]). EPTL 13-4.8 (d) states: "The protection provided by this part to the registering entity of a security does not affect the

rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds." This language gives support to plaintiff's argument that he has standing to bring this action.

In re Green ex re. Estate of Nicholas R. Doman (16 Misc 3d 1113 (A), 2007 NY Slip Op 51407 [U] [Sur Ct, Suffolk Cty June 26, 2007], *affirmed* 58 AD3d 625, 627 [2d Dept 2009], *lv. denied* 12 NY3d 715 [2009]), cited at length by defendants, is inapposite. That unpublished case, which has not been cited by any subsequent published opinions, involved a Surrogate's Court proceeding to invalidate decedent's deceased husband's inter vivos trust, brought by the decedent's children against decedent's stepchild, the trustee and sole beneficiary of the trust. The court held that the decedent's children's only interest in the trust would be to bring it back into the decedent's estate as contemplated by SCPA 2103, and that they lacked standing to bring such a proceeding because they were not fiduciaries. The court further held that beneficiaries to an estate do not have an independent cause of action to recover assets withheld from an estate.

In re Green, however, is about capacity to sue, which "concerns a litigant's power to appear and bring its grievance before the court" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]) rather than standing, as evidenced by the court's holding that "while [decedent's children's] argument that the estate fiduciary could not bring such an application against himself as trustee is valid, there is no adequate explanation for petitioners' failure to seek limited letters of administration pursuant to SCPA 702 for this purpose" (*id.*). That case is also in a different court brought by

plaintiffs on behalf of an estate, not on behalf of their individual interests. By contrast, George brings this case not on behalf Angelina's estate, but in his individual interest.

Likewise, *Schneider v David*, 169 AD2d 506 (1st Dept 1991), cited by Amelia, concerns capacity to sue rather than standing (*see Schneider*, 169 AD2d at 507). In *Sharrow v Sheridan*, 91 AD3d 940 (2d Dept), *lv. denied*, 19 NY3d 802 (2012), also cited by Amelia, plaintiff commenced an action against his sister and mother, alleging that his sister used duress and undue influence to cause his mother to transfer her assets to the sister, frustrating his mother's intent to bequeath her assets equally among the two children. In dismissing the case based on the plaintiff's lack of standing, the court held that while his mother was alive, she had the absolute right to change her intentions regarding the distribution of assets, and that plaintiff's interest as his mother's "potential heir" was "a potential, speculative interest" (*see Sharrow*, 91 AD3d at 941). That is not the case here, as Angelina is deceased and George was an heir to her estate, and *Sharrow* is not controlling. Here, as recognized by the court in the related Surrogate's Court proceeding, "any dispute regarding the propriety of the change in designation of the USB account would appear to be a dispute between living parties, whose relief is properly sought in Supreme Court" (*In re Marinello*, index No. 2012/4057/A, Sur Ct, Kings Cty May 20, 2013, Lopez-Torres, J.).

In sum, George plainly has a tangible, rather than merely speculative interest, in the determination of whether the 2010 TOD agreement is fraudulent, because if his allegations were found to be true by a trier of fact, the TOD would be invalidated and the

assets would go to Angelina's estate, of which George has been bequeathed a one-third share (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d at 812). If the court accepts Amelia's argument, it would mean that, in practical terms, only Maria and Amelia would have standing to bring an action with respect to the validity of the 2010 agreement because they are the stated beneficiaries. However, as beneficiaries, they would have not reason to challenge the form's validity. Moreover, while UBS would also have standing as a party to the TOD to question its validity, there is no apparent reason for UBS to bring such an action. It cannot be the case that George lacks standing in both Surrogate's Court and this court to challenge the TOD's validity and thus left without a remedy to adjudicate this claim. Accordingly, the court finds that Amelia has not met her burden of demonstrating, prima facie, that George lacks standing bring this action (*see LGF Holdings*, 139 AD3d at 814; *Blostein*, 218 AD2d at 913.

Summary Judgment

The court next turns to the analysis of whether the parties have met their respective burdens on summary judgment with respect to each of George's causes of action. A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion without

regard to the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *J.P. Morgan Mortgage Acquisition Corp. v Kagan*, 157 AD3d 875, 876 [2d Dept 2018]).

Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the non-moving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

Declaratory Judgment

George contends that the 2010 TOD agreement should be deemed a nullity because Angelina was either coerced into executing the document when she was not of sound mind, or because it was forged and improperly executed by Maria. George also submits that as an interested party, Maria improperly notarized Angelina's signature. In that regard, George argues that EPTL 13-4.7 requires that "on proof of death of all owners *and compliance with any applicable requirements of the registering entity.*" According to George, this requires compliance with UBS's acknowledgement requirement, as printed on the form. George further argues that Angelina's express desire was to split the UBS among her three children.

In response, defendants argue that notarization is merely a formality and is not required by statute, because a TOD is not testamentary pursuant to EPTL 13-4.9 (a). Maria also denies forging Angelina's signature of improperly influencing her to sign the 2010 TOD agreement. Amelia further argues that George also offers no admissible evidence in support of summary judgment. She argues that George's argument that Angelina wanted her accounts to be split three ways is only based on his own "say-so" and is barred by the Dead-Man's Statute, CPLR 4519. She also argues that his references to medical records are barred by the absence of competent medical evidence, and also that plaintiff does not submit any medical expert witness opinion regarding Angelina's mental capacity. Amelia also argues that Namm's testimony is hearsay because he did not sign his deposition transcript.

New York's Transfer-on-Death Security Registration Act (TODSRA), EPTL 13-4.1 et seq., provides the statutory scheme under which an owner of securities can automatically transfer the securities to a designee upon the owner's death, without the securities passing through probate (*see Arroyo-Graulau v Merrill Lynch Pierce, Fenner & Smith, Inc.*, 135 AD3d 1 [1st Dept 2015]). "Under TODSRA, the registering entity has the sole right to establish the terms and conditions under which it will receive and implement requests to register securities in beneficiary form (EPTL 13-4.10[4])" (*Arroyo-Graulau*, 135 AD3d at 6).

> "A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registration in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary."

(EPTL 13-4.10 [a]). Any unilateral action of an owner to designate a beneficiary in the event of death is not by itself sufficient (*Arroyo-Graulau*, 135 AD3d at 6).

In the instant matter, even though a notarization may not be required pursuant to statute, pursuant to EPTL 13-4.10, UBS as a registering entity has the power to impose an acknowledgement of notarization requirement on its TOD form in order to satisfy its legitimate concern about the conditions and identities that may be relevant to execution of

[4] *EPTL 13-4.10 (a) provides, in pertinent part: "A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registration in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary."*

their TOD form. That UBS required its TOD form to be notarized is supported by: (1) the express language on the pre-printed UBS TOD form, stating, in bold font: "This transfer on death agreement must be notarized in the acknowledgement form below;" and (2) the 2012 cover letter from Namm's secretary, Hammond, to Maria, attaching a blank TOD form, wherein Hammond advised Maria that Angelina's signature must be notarized.

In addition, a party to a record is disqualified from taking an acknowledgment of an instrument (*see People ex rel. Conklin v Board of R.R. Commrs.*, 105 AD 273 [3d Dept 1905]; *see also Fonvil v Morse*, 172 AD3d 1453 [2d Dept 2019] [petitioner, who sought to invalidate designating petitions as candidates in a primary election, could not validly notarize affidavits of service whereby jurisdiction over the opposing parties were purportedly were acquired, and those affidavits of service therefore were rendered nullities]; *Braunfotel v Feiden*, 172 AD3d 1451, 1543 [2d Dept 2019] [election candidate could not validly notarize signature affidavits on behalf of her own candidacy, as the affidavits could be used in judicial proceeding to prove that the collected signatures were valid, and the candidate was an interested party in the outcome of the proceedings]; *Sumkin v Hammonds*, 177 Misc 2d 1006 [Dist Ct Nassau County 1998] [acknowledgement taken by a person with financial interest in the instrument is a nullity]; *Homar v American Home Mortg. Acceptance, Inc.*, 2012 NY Slip Op 33724[U], Sup Ct Orange County June 25, 2012, Bartlett, J.; *Brodsky v Board of Mgrs. Of Dag Hammarskjold Tower Condominium*, 1 Misc3d 591, 596 [Sup Ct, NY County 2003] ["It has generally been held that an acknowledgment before a party to the instrument is a

nullity"]).

Moreover, the New York State Department of State, Division of Licensing Services, produces an overview of the Notary License Law, which states in the section entitled "Notary Public – Disqualifications:"

> "A notary beneficially interested in the conveyance by way of being secured thereby is not competent to take the acknowledgement of the instrument. In New York the courts have held an acknowledgement taken by a person financially or beneficially interested in a party to conveyance or instrument of which it is a part to be a nullity."

In addition, Executive Law § 135-a(2) provides that "a notary public . . . who in the exercise of the powers, or in the performance of duties of such office shall practice any fraud or deceit, the punishment for which is not otherwise provided for by this act, shall be guilty of a misdemeanor." Violation of this section is equivalent to professional misconduct by an attorney (*see Matter of Bunting*, 10 AD3d 146 [2d Dept 2004]; *Matter of Dempsey*, 142 AD2d 254 [2d Dept 1988]; *Matter of Facey v Department of State*, 132 AD2d 698 [2d Dept 1987]).

Here, UBS may validly require its TOD forms to be notarized. Given the prohibition against an interested person from notarizing a document in which they have an interest, defendants have not met their burden on summary judgment of showing that the 2010 TOD agreement was validly notarized by Maria.

Maria argues that the fact that UBS finally registered the 2010 TOD agreement without contest demonstrates that the notarization is valid. However, the record demonstrates that Hammond, Namm's assistant, raised the issue with UBS,

demonstrating that at the very least, she had concerns about the notarization. In addition, the fact that there was an almost eighteen month lag between the execution of the document and its registration by UBS, and Maria's differing explanations for the delay, raises questions about whether UBS had concerns about it and what steps were taken internally to vet the form and its execution.

Even if the 2010 TOD agreement was properly notarized, questions of fact exist as to whether Angelina signed the document, and if she did, whether she was of sound mind at that time. The court notes that defendants have failed to submit medical expert affidavits (and Maria has failed to submit any medical records) relevant to the issue of Angelina's capacity when she executed both the 2010 and the 2012 TOD agreements, as directed by the court in its May 19, 2016 order. Therefore, the court cannot evaluate whether or not Angelina was mentally infirm when she purportedly executed those documents. However, the court notes that Angelina's medical records submitted by George and Amelia suggest that she was diagnosed with Alzheimer's and was on medication. Emails from 2010 submitted by George show that Angelina was taking dementia and/or Alzheimer's medication in 2010. Yet, Amelia contends that despite her mother's age, she was in charge of her own affairs, and Amelia believes that Angelina was "fully cognizant" when she executed the 2010 TOD agreement. However, George has submitted emails from Maria suggesting that Maria was aware that her mother was mentally infirm. Maria notes that while George argues that Angelia may have been mentally incapacitated in 2010, he testified at his deposition that Angelina "was all

there." At the very least, Anglina's medical records raise a question of fact as to Angelina's capacity at the time she executed the 2010 TOD agreement, which was the agreement ultimately registered by UBS. As such, defendants have failed to eliminate any questions of fact as to Angelina's mental capacity, and their summary judgment motions are denied. Nor has George met his burden of establishing that the 2010 TOD agreement was forged or that Angelina was mentally incapable of making the designation. While George has submitted a letter from Maria to UBS in May of 2012 noting that Angelina had trouble with her signature, this is not conclusive proof that she could not sign her documents or that her signature was forged. These remain questions of fact for trial.

In addition, with respect to defendants' argument that Namm's transcript is inadmissible, George notes that Namm's transcript was forwarded to his counsel for signature but was never returned, and that CPLR 3116 permits plaintiff to use the transcript as though it were signed. As such, defendants have failed to establish that Namm's testimony is inadmissible.

Fraud

Turning to George's remaining causes of action, to establish a prima facie case for fraud, a plaintiff must establish that: (1) defendant made a material misrepresentation of fact, (2) such representation was false and known to be false by defendant, (3) defendant intended to deceive plaintiff, (4) plaintiff believed and justifiably relied on the statement and was induced to engage in a certain cause of conduct; and (5) plaintiff sustained

pecuniary loss as a result of the reliance (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY 2d 413, 421 [1996]). The elements of fraud are narrowly defined and require proof by clear and convincing evidence, and not every misrepresentation or omission rises to the level of fraud (*see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 349-350 [2019]).

George contends that he has clearly established his cause of action for fraud. George submits that at the end of the meeting with Namm on January 4, 2011, Namm testified that the three siblings agreed to a one-third each TOD account. This is allegedly supported by: (1) a January 5, 2011 email exchange between Maria and George wherein Maria stated "more than what your 1/3 of the stock account is," (2) an April 20, 2011 email wherein Maria states "If you want your share of the stocks to be applied to the rent owed," and (3) June 26, 2012 email, stating "remember, any money left was supposed to go 3 ways." The agreement was further evidenced by defendants' then attorney, who sent George May 8, 2012 letter asking plaintiff to execute an assignment of his rights, title and interest in his mother's UBS account.

George further contends that the January 4, 2011 agreement was undermined by the material misrepresentations of defendants in that defendants claim that their mother signed a TOD agreement on December 27, 2010, yet the defendants continued to tell George that he was entitled to his one-third share of the account. George asserts that his sisters claimed that the TOD was effective, but continued to tell George that he had a

share through as late as May, 2012. George contends that the 2010 TOD agreement was hidden from him until after his mother's death, despite his sister's claim that he had a one-third interest in the UBS account in order to induce reliance. George contends that he justifiably relied on defendants' actions. George also argues constructive fraud, in that the 2010 TOD agreement was purportedly signed on December 27, 2010 but remained in Maria's possession for approximately another 18 months because she forgot she had it, or misplaced it, allegedly found it in "early 2012," and then sent it to UBS. According to George, this is incredible.

George further argues that Maria was appointed as attorney-in-fact for their mother in July, 2010 and that any action she took with regard to the UBS account should be scrutinized especially when it benefitted Maria (*see Gordon v Bialystoker Ctr.*, 45 NY2d 692, 698-699 [1978] ["Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled"]; *see also Matter of Greiff*, 92 NY2d 341, 345 [1998] ["where parties to an agreement find or place themselves in a relationship of trust and

confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed (or to the proponent of the party's interest, as in this case) to disprove fraud or overreaching"]).

George further argues that the May 2012 TOD document is invalid as fraud ab initio or voidable fraud, based on the fact that the medical records show that Angelina had advance stage Alzheimer's and Maria's acknowledgement on April 25, 2012 in an email three weeks before executing the 2012 TOD agreement that Angelina's dementia was very bad.

In response, defendants argue that George has failed to prove his fraud claim because he has failed to establish that there was any material representation of fact made by anyone about anything material upon which he relied, to his detriment, which is an essential element of a fraud claim. Amelia argues that nor is there falsity, scienter, reliance or injury, let alone clear or convincing evidence thereof. Amelia further argues that to the extent that George's allegations are based on the failure to provide George with information, this is not actionable where there is no special duty on the part of anyone to provide him with information (*see Manda Int'l Corp. v Yager*, 2016 NY Slip Op 04091, 139 AD3d 594, 595 [1st Dept 2016]). Amelia also asserts that she had no knowledge of, or involvement with the 2010 TOD agreement until after Angelina died, and made no representations to George about it. She asserts that it was a matter between her and UBS. Amelia also contends that there is no evidence that Amelia or Maria forged the TOD. Maria argues that she could not have misrepresented George's interest because he

admittedly never had any interest in the UBS account.

Here, George has failed to meet his burden of establishing all of the elements of a fraud claim. However, defendants have also failed to meet their burden of disproving the elements, and questions of fact preclude the grant of summary judgment with respect to the fraud claim to either plaintiff or defendants. While Maria admits that Angelina decided not to tell George and Amelia that about the 2010 TOD agreement's execution on December 27, 2010, the court has questions about the timing and the reasons behind this decision. Maria states that the decision was made on or about January 4, 2011, after George's alleged bad behavior at the meeting. However, as noted by George, there is a question as to why Namin was invited to bring the TOD forms to Angelina on January 4, 2011 in the first place if there was a valid TOD agreement already executed on December 27, 2010. Although Amelia states that she did not know about the 2010 TOD agreement when it was executed, that statement is self-serving and a question of fact also exists as to whether Amelia knew about the TOD and worked with Maria in making a material misrepresentation of fact about the TOD agreement that was intended to deceive George.

Bad Faith

A plaintiff may allege bad faith as part of its contract claim, but bad faith does not provide an independent basis for recovery (*see Tevdorachvili v Chase Manhattan Bank*, 103 F Supp 2d 632 [US Dist Ct, ED NY 2000] [cause of action "by virtue of the contractual relationship between plaintiff and Chase [Bank], Chase owed plaintiff an implied duty of good faith and fair dealing" found redundant, as a plaintiff may allege bad

faith as part of its contract claim, but bad faith does not provide an independent basis for recovery]; *Quail Ridge Associates v Chemical Bank*, 162 AD2d 917, 919 [3d Dept 1990], *appeal dism'd*, 76 NY2d 936 [1990]; *see also Acquista v New York Life Ins. Co.*, 285 AD2d 73, 81 [1st Dept 2001] [bad faith not an independent cause of action in the context of a first-party insurance claim]). However, there is a cause of action for bad faith with respect insurance coverage (*see e.g. DiBlasi v Aetna Life and Cas. Ins. Co.*, 147 AD2d 93, 98 [2d Dept 1989] ["A bad faith case is established where the liability is clear and the potential recovery exceeds the insurance coverage. The carrier cannot be held liable if its decision not the settle was the result of an error of judgment on its part or even by a failure to exercise reasonable care . . .there is a cause of action only if the decision to not to settle within the policy limits was made in bad faith, meaning in gross disregard of its insured's interests"]; *see also Peck v Chase Manhattan Bank, N.A.*, 190 AD2d 547 [1st Dept 1993] [recognizing commercial bad faith claim against a bank]).

Defendants argue that bad faith claim only arises in matters involving contract. Amelia contends that there is no independent cause of action for bad faith under New York law. Amelia argues that this cause of action is non-existent and repetitive. Amelia also contends that she had no involvement with executing the 2010 TOD agreement, and therefore she could not have acted with bad faith. George contends that there are many types of contracts, including a quasi contract, which applies in absence of an express agreement, and is a legal obligation imposed in order to prevent a party's just enrichment.

The court finds that George has not met his burden of establishing a bad faith

claim. Nor have defendants met their burden of disproving the existence of such claim, as the questions of fact previously discussed herein preclude the award of summary judgment to any party on this claim.

Unjust Enrichment; Monies Had and Received

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). "It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). To establish a claim for unjust enrichment, a party must show that (1) the other party was enriched, (2) at the other's party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what it is seeking to recover (*see Mandarin Trading*, 16 NY3d at 182).

A cause of action for monies had an received is a contract implied in law and based upon quasi contract (*see Parsa v State of New York*, 64 NY2d 143, 148 [1984]; *Gargano v Morey*, 165 AD3d 889, 891 [2d Dept 2018]). "[I]t is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another" (*Parsa*, 64 NY2d at 148). "The remedy is available "if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass" (*id.* [internal quotation marks omitted]). A plaintiff establishes this cause of action where: (1) the defendant received money belonging to the plaintiff; (2) defendant

benefitted from receipt of the money; and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money (*see Gargano*, 165 AD3d at 891).

Defendants contend that the existence of a valid and enforceable written contract precludes recovery for unjust enrichment and monies had and received where the claim is quasi-contractual (*see Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]). Defendants argue that George cannot assert a breach of contract claim because he was not a party to any contract, including the TOD agreement, but even in the absence of a claim for breach of contract, there is no claim in quasi contract where a written agreement, such as the 2010 TOD agreement, exists (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 802 [2012]). Maria also asserts that she was not enriched at George's expense because George never had any interest in the UBS account. Amelia contends that she had no involvement in the TOD, and that therefore there is no unjust enrichment claim. Amelia also alleges that George's claims for unjust enrichment and for monies had and received fail because generically allege, without proving, that defendants unjustly enriched themselves at George's expense.

Neither plaintiff nor defendants have met their prima facie burden with respect to the unjust enrichment or monies had and received claims. In addition, as with the other claims, the same questions of fact discussed, *supra*, preclude a grant of summary judgment in favor of any party. If George's allegations concerning execution of the TOD

agreement are credited, a trier of fact can find that defendants benefitted, by receiving one-half, rather than one-third, interest in the UBS account the defendant received money belonging to the plaintiff.

Undue Influence

Defendants argue, correctly, that undue influence is not a cause of action but grounds for rescission of a contract (*see Spinella v Constantino*, 2011 NY Slip Op 52219 [U], 33 Misc3d 1232 (A) [Sup Ct Kings Cty 2011], *citing Hosseiniyar v Alimehri*, 48 AD3d 635 [2d Dept 2008]). Accordingly, to the extent that George asserts undue influence as a separate cause of action, this claim is dismissed. George may, however, assert this as grounds for rescission of the 2010 TOD agreement, as the court has held, *supra*, that George has standing to bring causes of action with respect to execution of the 2010 TOD agreement.

Rule 19-a of the Rules of the Commercial Division of the Supreme Court, 22 NYCRR 202.70, R.19-a

Finally, Amelia contends that all of the facts in her statement of material facts should be deemed admitted for the purposes of deciding her motion because George has failed to submit a counterstatement of material facts pursuant to Rule 19-a of the Rules of the Commercial Division of the Supreme Court, 22 NYCRR 202.70, R.19-a ("[e]ach statement of material fact by the movant . . . must be followed by citation to evidence submitted in support of . . . the motion.)". Rule 19-a of the Rules of the Commercial Division of the Supreme Court, 22 NYCRR 202.70 states that the court may direct a

movant to file a separate, numbered statement of material facts upon which the movant contends there is not genuine issue to be tried (Rule19-a [a]). In such cases, the opposing papers shall include a correspondingly numbered paragraph responding to each numbered paragraph of the statement of the moving party (Rule 19-a [b]). Each numbered paragraph of the statement of material facts shall be deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph of the opposing party (Rule 19-a [c]). The Kings County Supreme Court Commercial Division Rules direct that all summary judgment motions be accompanied by a statement of material facts as set forth in the Uniform Rules, 22 NYCRR 202.70 (g), Rule 19-a, but do not specifically require a counterstatement (*see* Kings Cty. Comm. Div. R. 15).

Courts have held that an opposing party's failure to provide a fully supported counterstatement of disputed facts in opposition to a movant's summary judgment motion does not require the court to deem defendants' statement of material facts admitted, but gives the court discretion to do so (*see Crouse Health System, Inc. v City of Syracuse*, 126 AD3d 1336, 1338 [4th Dept 2015]; *Abreau v Barkin and Associates Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]). Here, while it would have been the better practice for George to submit a counterstatement either admitting or denying each of the Amelia's statements of material fact, as previously noted, there is sufficient evidence in the record to raise triable issues of fact, and the court is not compelled to grant summary judgment solely on the basis of blind adherence to the procedure set forth in Rule 19-a (*see Al Sari v Alishaev Bros, Inc.*, 121 AD3d 506 [1st Dept 2014]; *Abreau*, 69 AD3d at 421; *Slattery Skanska Inc.*

v American Home Assur. Co., 67 AD3d 1, 12 [1st Dept 2009]; *Hiller v Buel*, 33 Misc3d 1213 [A], 2011 NY Slip Op 51914 [U] [Sup Ct, Kings Cty 2011], Schmidt, J.). Rather, the court has reviewed George's statement in support of his motion and in opposition to defendants' motions, and has found that George has raised issues of material fact precluding summary judgment in favor of defendants.

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion, mot. seq. two, for an order, two, for an order pursuant to CPLR 3212, granting him summary judgment on the claims in the operative complaint and for other relief is denied in its entirety; and it is further

ORDERED that defendants' motions, mot. seq. three and mot. seq. four, for an order pursuant to CPLR 3212, for summary judgment dismissing all causes of action against them and other relief, is granted to the extent that plaintiff's cause of action for undue influence is dismissed. The remainder of the relief sought in the motions is denied.

The court has reviewed the parties' remaining contentions and finds them to be without merit. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

Justice Lawrence Knipel