

Matter of Morris

2020 NY Slip Op 34498(U)

July 14, 2020

Surrogate's Court, Bronx County

Docket Number: 2011-2558/A

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

July 14, 2020

ESTATE OF SAMUEL MORRIS, also known
as SAMUEL L. MORRIS, Deceased
File No.: 2011-2558/A

In this proceeding, the administrator, the decedent's son filed an order to show cause seeking, an order from the court determining the estate is entitled to the decedent's one-half share of realty located at 1771 Seward Ave. Bronx, New York ("the realty") because the decedent's signature on the 1992 deed transferring title to Dorothy Morris, the respondent herein, was forged and there was lack of consideration. The parties entered into a stipulation wherein the respondent was given time to file objections and the petitioner time to file a reply, if any. The parties further stipulated to convert the order to show cause and any objections and reply to a motion for summary judgment.

The decedent died on April 7, 2011 survived by the petitioner herein and the respondent, his daughter, as his only distributees. By decree dated February 14, 2012, the petitioner was granted letters of administration with SCPA 805 (3) restrictions in relation to the sale or disposition of any real property. On May 27, 2016 the petitioner filed an inventory of assets which included the realty. On February 17, 2017 this order to show

cause was filed seeking the aforementioned relief.

The realty in question was owned by the decedent and Daisy Harter (Daisy), as tenants in common, each having a one-half interest. After Daisy's death, the respondent was appointed executor of her estate and was bequeathed Daisy's one-half interest in the realty. On July 29, 1992, the decedent and Dorothy Morris, in her capacity as executor of Daisy's estate, transferred the deed solely to Dorothy Morris, in consideration of ten dollars.

In support of the order to show cause, the petitioner alleges that, on or about July 1, 1981, the decedent became a tenant-in-common with Daisy Harter, sharing equally in the realty. He alleges that on or about the later part of 1991, the decedent had a stroke, was paralyzed and bedridden and unable to sign the [allegedly forged] deed and alleges that the respondent's business notarized a false signature of the decedent on the deed dated July 29, 1992 transferring the realty solely to the respondent.

He further alleges that at that time, the decedent was both mentally and physically impaired and that he could not understand or comprehend the nature, purport or effect of signing the deed. The petitioner also argues that if the decedent did sign the deed, he did so without the benefit of counsel and was at a disadvantage dealing with the respondent. He concludes that the decedent's lack of capacity, lack of representation and fraud, duress and undue influence by the respondent caused the decedent to enter into a contract for sale that was patently unfair, unjust and one-sided, and without adequate consideration. The petitioner claims that he first learned about the alleged fraudulent conveyance on May 27, 2016, and therefore, the claim is timely.

In opposition, the respondent urges that the proceeding is invalid, and

requests the proceeding be dismissed and the letters of administration issued to the petitioner be revoked, for the following reasons: (1) it is barred by the statute of limitations (see CPLR §3211 [a] [5]) and the “Dead man’s Statute” (CPLR §4519); (2) the decedent’s signature can be proved through exemplars (CPLR §4536); (3) the deed dated July 29, 1992 is presumptively valid (CPLR §4538), and (4) the respondent is the sole owner of the realty.

The respondent argues this is a matter between two living persons, and thus outside the jurisdiction of this court (see *Matter of Lainez*, 79 AD2d 78, 79-80, *affd.* 55 NY2d 657). The respondent also argues that the claims predicated on the grounds of forgery or fraud are untimely, as the six-year statute of limitations began to run in 1992, when the deed was recorded; and alternatively that the two-year statute of limitations began on June 23, 2011 when the respondent was shown the alleged fraudulent deed in an Article 81 proceeding, and this time period has also expired.

The respondent further alleges that in any action to invalidate a recorded instrument, the party seeking cancellation must overcome certain presumptions. Significantly, where there is a certificate by a notary public as to the acknowledgment of the instrument, a presumption of due execution of the instrument is raised (See Real Property Law §243; see also Prince, Richardson on Evidence section 81 [10th Ed.]). In order to overcome this presumption, clear and convincing evidence as to amount to a moral certainty must be introduced by the party advancing such a position (see Albany County Sav. Bank v. McCarty, 149 NY 71 [1896]). Without introducing clear and convincing evidence, the certificate of the notary public as to the acknowledgment of a deed cannot be repudiated [see *Son Fong Lum v. Antonelli*, 102 AD2d 258 (2nd Dept 1984), *affd.*, 64

NY2d 1158 (1958)]. The respondent urges that the petitioner is unable to overcome this presumption by his own self-serving claim of forgery, which is barred by the Dead Man's Statute (CPLR §4519). The deed is also presumptively valid as an ancient document since it was recorded over 25 years ago, and as such, the deed is prima facie evidence of its contents; namely, that Dorothy Morris is the sole owner of the realty (see CPLR §4522, see also *Kings Estates. Ltd. Partnership v. Town of Chester*, 162 AD2d 802 [3rd Dept. 1990]).

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]; *Glick & Dolleck, Inc. V Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v. Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). When the movant makes out a prima facie case, the burden shifts to the party opposing the motion to produce evidentiary proof in an admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference, and issues of credibility may not be determined on the motion but must await the trial (see *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

The Surrogate's Court is one of steadily expanding jurisdiction and this court has the authority "to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires" (Matter

of Piccione, 27 NY2d 278, 288 [1982]). Actions brought by executors and administrators "attempting to wind up the administration of the estate, are cognizable in the Surrogate's Court" (see Matter of Piccione, 27 NY2d 278, 290 [1982]). For the Surrogate's Court to decline jurisdiction, it should be abundantly clear that the matter in controversy in no way affects the affairs of a decedent or the administration of his estate (see Matter of Piccione, 27 NY2d at 278, quoting Matter of Young, 80 Misc 2d 937, 939 [1975]).

The statute of limitations for claims based on common-law fraud is the greater of six years from the date the cause of action accrued or two years from the time a plaintiff discovers the fraud, or could with reasonable diligence have discovered it (CPLR §213(8)). A plaintiff will be held to have discovered the fraud, when the plaintiff has knowledge of facts from which the fraud could be reasonably inferred (see *Ghandour v. Shearson Lehman Bros.*, 213 AD2d 304, 305–306, 624 NYS2d 390 [1st Dept. 1995], *lv. denied* 86 NY2d 710, 635 NYS2d 947, 659 NE2d 770 [1995]; CPLR §203(g); see also *Bezoza v. Bezoza*, 83 AD3d 578, 921 NYS2d 247 [1st Dept. 2011]).

The law imposes upon executors, administrators or other representatives the duty of active vigilance in the collection of assets belonging to the estate (Matter of Belcher, 129 Misc 218, 220 [Sur Ct, NY County 1927]; see Matter of Schultz, 104 AD3d 1146, 1148-49 [4th Dept 2013]). A fiduciary of an estate is required to employ such diligence and prudence to the care and management of the estate assets and affairs as would prudent persons of discretion and intelligence (see Matter of Carbon, 101 AD3d 866, 868; *King v Talbot*, 40 NY 76, 85-86 [1869]). An executor or administrator is primarily charged with the duty of liquidating estate assets as soon as practicable (see

Matter of Larson, 87 Misc 2d 397, 402). The appointed fiduciary or the attorney of record is required to furnish the court with a list of assets within nine months of the date letters are issued to the fiduciary (22 NYCRR § 207.20). This is true even where a fiduciary has relied on counsel's advice, if the fiduciary has neglected his or her duty (see Matter of Rothko, 43 NY2d 305, 319-320 [1977]; Matter of Lippner, 135 Misc 2d 34, 38 [Sur Ct, Kings County 1987]; Matter of Newhoff, 107 MISc 28 589, 597 [Sur Ct, Nassau County 1980], *affd* 107 Ad2d 417 [2nd Dep't 1985], *lv denied* 66 NY2d 605 [1985]; Matter of Rogers, 322 App Div 234, 344 [2nd Dep't 1898]).

In this matter, the court's determination, which will have a direct effect on what assets constitute the estate of the decedent, is essential to winding up the decedent's estate (see Matter of Piccione, 27 NY2d at 278). Accordingly, the court has jurisdiction over the matter. Any claim predicated on common-law fraud is time barred. The statute of limitations for claims based on fraud is the greater of six years from the date the cause of action accrued or two years from the time a plaintiff discovers the fraud, or with reasonable diligence could have discovered it (CPLR §213 [8]). The cause of action accrued in 1992, when the deed was executed and recorded, and the six-year period accordingly expired in 1998.

Although the petitioner argues he was unaware of the fraudulent transfer until May 27, 2016, as administrator of the decedent's estate, the petitioner had affirmative duties to act and collect assets belonging to the estate (see Matter of Carbon, 101 AD3d 866, see King v. Talbot, 40 NY 76 [1869]). While the petitioner is entitled to bring any action within two years from when the fraud was, or reasonably could have been discovered, this time period has also long expired (see CPLR §213 [8]) . The petitioner,

while represented by current counsel, was granted letters of administration on February 14, 2012. The petitioner, in his capacity as administrator, was required to submit a list of estate assets to this court on or before November 14, 2012, or nine months after letters of administration were issued (22 NYCRR § 207.20). Here, the inventory of assets was not filed until May 27, 2016. Had petitioner acted in accordance with his fiduciary duty, it is reasonably surmised that the allegedly fraudulent deed should have been discovered on or before November 14, 2012. The two-year statute of limitations began to run on November 14, 2012 and expired on November 14, 2014. Accordingly, the petitioner's current motion filed on February 17, 2017 which raised the issue of fraud for the first time, is therefore untimely and barred by the statute of limitations.

The parties' remaining contentions either are not properly before this court or have no valid basis in which to proceed. Accordingly, this decision constitutes the order of the court denying all of the relief sought in the motion.

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE