

**Atkins v Marshall**

2021 NY Slip Op 31317(U)

April 15, 2021

Supreme Court, Kings County

Docket Number: 503909/2019

Judge: Lara J. Genovesi

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This opinion is uncorrected and not selected for official publication.

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 15<sup>th</sup> day of April 2021.

P R E S E N T:

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

-----X  
EMMALEE ATKINS and KATHY SALLEY,

Plaintiffs,

Index No.: 503909/2019

DECISION & ORDER

-against-

RUBY MARSHALL, DEIDRE CRUELL,  
TRACEY SALLEY and 250 SULLIVAN LLC,

Defendants.

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

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>8-20, 50-64</u>
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	<u>66-68</u>

***Introduction***

Defendant 250 Sullivan LLC moved, motion sequence number one, to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (7). Plaintiff opposes the motion.

Plaintiff cross moves, motion sequence number 4, for leave to file an amended complaint. There is no opposition.

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***Background***

This is a family dispute related to property and seeks to quiet title, an ejectment, and alleges fraud, conversion and a constructive trust.

Woodrow and Jessie Salley had three children, defendant Ruby Marshall, plaintiffs Emmalee Atkins and Kathy Salley, and George Salley. George is deceased and his two children are defendants Deidre Cruell and Tracey Salley. In 1965 Woodrow and Jessie Salley and their daughter Ruby Marshall (Ruby) purchased 250 Sullivan Place, Brooklyn, New York. The title read as follows: "Woodrow Salley and Jessie Bell Salley, his wife, and Ruby Mae Salley". Woodrow predeceased Jesse on October 9, 1995. Jessie Salley (the decedent) died on May 7, 2016.

In 2013, the decedent and Ruby purportedly entered a deed changing their joint ownership from "tenants in common" to "joint tenants with right of survivorship". It was signed by "Jessie Bell Salley by Ruby M. Marshall, as Attorney in Fact". In 2016, after the decedent's death, Ruby transferred the deed as "surviving joint tenant" to herself in fee. Thereafter, on June 27, 2017, Ruby conveyed the real property to 250 Sullivan LLC by deed for \$1,020,000.

Plaintiffs allege in their complaint that Ruby was named on the 1965 deed and mortgage for convenience only, so the parties could obtain a mortgage. Based on this, they aver that Ruby does not have equitable title. Rather, it was always understood by the family that the house belonged to Woodrow and the decedent and not Ruby. They further contend

that the decedent did not sign the 2013 deed and the power of attorney relied on for this deed does not exist.

### *Discussion*

“To succeed on a motion to dismiss a complaint pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim” (534 *K, LLC v. Flagstar Bank, FSB*, 187 A.D.3d 971, 131 N.Y.S.3d 204 [2 Dept., 2020]). Here, the documentary evidence submitted by defendant fails to utterly refute plaintiffs' factual allegations. Notably, plaintiffs provided evidence in opposition which support the factual allegations that the power of attorney was fraudulently executed (*see* NYSCEF Doc. # 52), and that the distribution of decedent's property was not done in accordance with her will (*see* NYSCEF Doc. # 61).

Defendant 250 Sullivan LLC also moved to dismiss pursuant to CPLR § 3211(a)(7). Defendant relies on the power of attorney in arguing that plaintiffs failed to state a claim to quiet title, for ejectment, or for conversion (*see* NYSCEF Doc. # 9, Memorandum of Law at p 7).

A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law... On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any

cognizable legal theory ... When evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and the motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it

(*Domitz v. City of Long Beach*, 187 A.D.3d 853, 133 N.Y.S.3d 647 [2 Dept., 2020] [internal citations and quotation marks omitted]).

Here, plaintiffs, in opposition, raised questions of fact as to the validity of the power of attorney. Plaintiff provided the affidavit of Ruby Marshall, who swears to the following:

6. Although it appears that I signed the Power of Attorney as my name and signature are on it as a "successor" agent, I have no recollection of this act. I never would have signed a power of attorney that would be used to divest my sister and I of the property. Furthermore, I have no recollection of any meeting on February 8, 2012 when this power of attorney was allegedly signed, based on the notary date. At that time, my mother was in a nursing home. All visitors had to sign an log book to get in. This can be obtained in discovery. I believe it would show I was not there that day.

7. I have never met nor do I know Sharon Johnson who allegedly notarized my signature. I believe the log book would show that she was not there to visit my mother that day either.

8. The power of attorney states that it was prepared by a lawyer in Tennessee named Richard M. Macksoud. I do not know Mr. Macksoud nor have I ever been to his office in Tennessee. I do not know if he practices in New York. My aunt Pearlene Robinson in her annexed affidavit clearly states that she did not sign the power of attorney. I trust her recollection, so that leads me to question how and when my alleged signature got on this alleged document. I do not believe he was ever at the nursing home. If some document

was signed by my mother, my sister must have supervised it herself.

(NYSCEF Doc. # 51).

However, defendant established that plaintiffs failed to state a cause of action against 250 Sullivan for fraud and constructive trust. Assuming the facts alleged in the complaint are true and affording plaintiffs the benefit of every inference, there are no facts alleged that a confidential or fiduciary relationship existed between plaintiffs and 250 Sullivan or that 250 Sullivan made any material representations or promises to the plaintiffs. It is undisputed that the sale of the property was effectuated by defendant Ruby Marshall to 250 Sullivan, and plaintiffs only learned of it after it was completed.

*Conclusion*

Accordingly, that branch of defendant’s motion, sequence number one, to dismiss the causes of action for fraud and constructive trust against 250 Sullivan LLC is granted. The remainder of defendant’s motion is denied. Plaintiffs’ motion, sequence number four, to amend the complaint to add causes of action related to the decedent’s personal bank accounts is granted, without opposition.

The foregoing constitutes the decision and order of this Court.

ENTER:



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Hon. Lara J. Genovesi  
J.S.C.

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KINGS COUNTY CLERK  
FILED

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