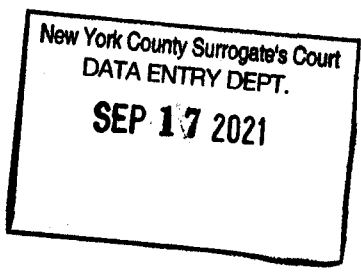


<b>Matter of Judelson</b>
2021 NY Slip Op 32038(U)
September 17, 2021
Surrogate's Court, New York County
Docket Number: 2018-3904/J
Judge: Rita M. Mella
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SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK



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In the Matter of the Petition of Roy and Mary Judelson  
for Declaratory Relief against the Preliminary Executors  
of the Estate of

DECISION and ORDER

DAVID N. “JIM” JUDELSON,

File No.: 2018-3904/J

Deceased.

-----x  
In the Matter of the Proceeding by Gregg M. Weiss as  
Co-Preliminary Executor for Declaratory Relief and for  
an Order Granting Access to Real Property in the  
Estate of

DAVID N. “JIM” JUDELSON,

File No.: 2018-3904/K

Deceased.

-----x  
M E L L A, S.:

The following papers were considered in determining these two motions to dismiss:

<u>Papers Considered:</u>	<u>Numbered:</u>
Notices of Motion to Dismiss, etc., by Co-Preliminary Executor Gregg M. Weiss, by Farrell Fritz, PC, in each of /J & /K Matters	1, 2
Affirmation, dated February 21, 2020, of Frank T. Santoro, Esq., In Support (subrecord /J), Attaching Exhibits 1 though 6	3
Affirmation, dated February 21, 2020, of Frank T. Santoro, Esq., In Support (subrecord /K), Attaching Exhibits 1 through 5	4
Memorandum of Law, dated February 21, 2020, In Support of Motion	5
Affirmation, dated August 12, 2020, of Harvey E. Corn, Esq., in Support, Attaching Exhibit 1	6
Affirmation, dated August 25, 2020, of Judd R. Spray, Esq., in Opposition, Attaching Exhibits A through D	7
Memorandum of Law, date August 25, 2020, In Opposition	8
Affirmation, dated August 27, 2020, of Diahn W. McGrath, Esq.,	9
Reply Memorandum of Law, dated October 14, 2020	10
Report, dated October 23, 2020, of Guardian ad Litem, Laurence J. Lebowitz, Esq.	11

At the call of the calendar on October 30, 2020, the court granted the motion to dismiss  
made by co-preliminary executor Gregg Weiss (Weiss or Movant) of the estate of decedent

David “Jim” Judelson. Before the court were cross-petitions, one by decedent’s son, Roy Judelson, and his spouse, Mary Judelson (Roy and Mary), seeking a declaration that an agreement made among them and decedent on September 2, 2014 (the 2014 Agreement or the Agreement) was void and unenforceable. Weiss by cross-petition sought the opposite relief, namely, a declaration that the 2014 Agreement was valid.

By its terms, the 2014 Agreement gave decedent or his estate a 70% equity interest in the cooperative shares appurtenant to the apartment in which Roy and Mary and their family have lived since 2008. The apartment was purchased, concededly, with approximately \$8.4 million of the purchase price contributed by the decedent.<sup>1</sup> The 2014 Agreement was negotiated by the parties, each with separate counsel, and the parties’ signatures on it were acknowledged before notaries public. The fiduciaries of decedent’s estate were entitled under the terms of the Agreement to demand by written notice to Roy and Mary, that the latter either opt to buy out the estate’s 70% interest or to sell the apartment and give the estate, from the proceeds of sale, the value of its interest.

Decedent died at age 89 on September 17, 2018, and, after the court appointed the co-preliminary executors, they sent such notice. In response, Roy and Mary opted to buy out the estate’s interest as set forth in the 2014 Agreement. Roy and Mary also filed their current petition in this court seeking a determination that the 2014 Agreement was void and unenforceable and that decedent’s estate has no ownership interest in the shares allocated to the apartment. Weiss countered with the cross-petition, as noted, to which Roy and Mary answered, setting forth eight affirmative defenses.

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<sup>1</sup> Decedent’s contribution represented approximately 80% of the \$10.5 million total purchase price.

Weiss moved to dismiss all these defenses pursuant to CPLR 3211(b). He also sought dismissal of Roy and Mary's petition for failure to state a claim under CPLR 3211(a)(7) and on the grounds of laches and ratification. If the motion to dismiss was granted – thus removing any and all opposition – then Weiss requested that his cross-petition be granted determining that the 2014 Agreement is valid and enforceable.

The other preliminary executor is Eva Gayer Judelson (“Eva”), who married decedent in 2015, after decedent's first spouse and Roy's mother, Maria, died in 2011. Eva answered, essentially agreeing with the Weiss cross-petition, that the 2014 Agreement should be declared valid.

During preliminary proceedings in these matters, Eva moved to add as parties all the residuary beneficiaries under the instrument propounded as decedent's will, who are decedent's children, grandchildren, and nieces. The co-preliminary executors had explained that the estate's interest under the 2014 Agreement would be the main asset in the residuary estate. This joinder motion was granted and the residuary beneficiaries who had not originally been joined were served with notice of the cross-petitions. Of them, decedent's other two children appeared through counsel, one of whom had also filed a motion to intervene, but neither have filed pleadings. One such person receiving notice of the cross-petitions was a minor, for whom the court appointed a guardian ad litem. The guardian ad litem has reported in favor of the motions to dismiss now before the court.

On the motion to dismiss the petition of Roy and Mary, which requires the court to give the non-movants the benefit of every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), Weiss satisfied his burden to support dismissal because Roy and Mary had ratified the 2014 Agreement after executing it. Key to a claim of ratification is acceptance of benefits or of a

forbearance under an agreement sought to be avoided, together with a delay of significant time before seeking relief on claims that could avoid such agreement from the time the facts underlying such claims are known (*Beutel v Beutel*, 55 NY2d 957 [1982]; *Schenck v State Line Tel. Co.*, 238 NY 308 [1924]; *Johnson v Johnson*, 191 AD2d 257 [1st Dept 1993]).

There is no question that Roy and Mary benefited from the Agreement: they secured a settlement of their dispute with decedent concerning their respective equity interests in the apartment/cooperative shares at issue and a confirmation of their continued right to reside there. From 2014, when the Agreement was executed, until 2019, when they filed their petition seeking to invalidate the Agreement, they enjoyed its benefits by avoiding a lawsuit that decedent had threatened to bring against them. Also, there is no question that, without justification, they waited until after decedent died in 2018, to raise claims that the Agreement was a nullity. By their own allegations, the facts on which they rely to avoid the Agreement are the same ones that they would have known in 2014, at or around the time of execution.

Roy and Mary in opposition have presented no allegations sufficient to negate their ratification of the 2014 Agreement. They knew of decedent's relationship with Eva, whom they characterize as a "parasitic grifter," bent on improperly draining assets from decedent for her own use or the use of her ex-spouse, Jonas Gayer, with whom, they further contend, Eva was acting in concert. There has been no showing, however, that the essential facts which underlie Roy and Mary's current petition to avoid the Agreement were somehow not known to them in 2014. Yet, despite their view that Roy's father was being taken advantage of by his new romantic partner, they inexcusably waited until death had silenced him – arguably, the primary fact witness – to assert any claims that the 2014 Agreement was invalid (*Palumbo v Norstar Bank Upstate New York*, 212 AD2d 377 [1st Dept 1995]). While the court, of course, is sensitive

to the fact that, during 2014, Roy was receiving treatments for cancer, that fact alone does not sufficiently explain the couple's four-year delay in seeking relief, during which time they continued to enjoy the benefits of their agreement with decedent. Their ratification precludes them now from seeking to avoid their obligations under the Agreement (*Stacom v Wunsch*, 162 AD2d 170 [1st Dept 1990]; *Rosen v Rosen*, 243 AD2d 618 [2d Dept 1997]; *see also Matter of Levy*, 69 AD3d 630 [2d Dept 2010]).

Even if ratification could not be considered the complete bar to the rescission relief that Roy and Mary seek, which the court holds that it is, Movant has also demonstrated that none of their other defenses has been sufficiently pled (*see Matter of American Mortgage Banking v Canestro*, 201 AD2d 407 [1st Dept 1994]; *Robbins v Grownney*, 229 AD2d 356 [1st Dept 1996]), including their purported defenses of fraud and duress, which are the third and sixth affirmative defenses, respectively, asserted in their answer (*Allen v Riese Org., Inc.*, 106 AD3d 514 [1st Dept 2013]).

Regarding fraud, Roy and Mary were required to state in detail (CPLR 3016[b]) facts indicating a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and resultant damages (*Mme. Pirie's, Inc. v Keto Ventures, LLC*, 151 AD3d 1363 [3d Dept 2017]). However, they point only to their own allegation that decedent actually had no wish to enter into the 2014 Agreement at all. They assert that the prior understanding among the three of them was that the funds from decedent for the cooperative apartment purchase were intended by him to be a gift. However, the terms of the 2014 Agreement clearly changed that understanding and, in what is typically referred to as a "merger" clause, the new agreement superseded any prior agreements regarding the subject matter, including the prior understanding that the funds from decedent were to be a gift (*W.W.W.*

*Assocs., Inc. v Giancontieri*, 77 NY2d 157 [1990]; *Vision Dev. Group of Broward County, LLC v Chelsey Funding, LLC*, 43 AD3d 373, 374 [1st Dept 2007]). In light of the deliberately negotiated 2014 Agreement, made with the aid of counsel, setting forth the understanding of the parties, the mere speculation by Roy and Mary that it may not have been what decedent desired is insufficient basis for a defense that they were fraudulently induced to execute it (*Lakeville Pace Mech. Inc. v Elmar Realty Corp.*, 276 AD2d 673, 676-677 [2d Dept 2000]; see *Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Matter of Zach*, 144 AD2d 19, 21 [1st Dept 1989]; see also *Lindenwood Dev. Corp. v Levine*, 178 AD2d 633 [2d Dept 1991]).

Just as speculative as the claims regarding their fraud defense are the bare allegations that certain correspondence received by Roy and Mary from decedent before the 2014 Agreement was executed, specifically, an email and two letters, were forged by Eva. Notably, they are not claiming that decedent's signature on the 2014 Agreement was forged, but only that certain correspondence may have been. Bald allegations of forgery of documents collateral to this Agreement are insufficient under the circumstances to survive dismissal (see *1471 Second Corp v Nat of NY Corp.*, 2014 NY Slip Op 30870(U); 2014 WL 1333661, No. 652594/2013 [Sup Ct, NY County, April 1, 2014]; *Ocampo v JP Morgan Chase Bank, N.A.*, 93 F Supp 3d 109, 119 [ED NY 2015]; see also *Danann Realty Corp. v Harris*, 5 NY2d 317 [1959]; *Regal Realty Svcs, LLC v 2590 Frisby, LLC*, 62 AD3d 498 [1st Dept 2009]).

The couple's defense as to duress in the formation and enforcement of the 2014 Agreement has even less merit. It is well established that statements threatening to take steps that would be lawful – such as disinheritance as punishment for doing or refraining from doing something against the threatening person's wishes – does not amount to duress that would vitiate a contract (*Matter of Garvin*, 210 AD2d 332, 333 [2d Dept 1994]; *Tomassetti v Falco*, 2015 NY

Slip Op 30947(U), 2015 WL 3507883, No. 508599/2014 [Sup Ct, Kings County, June 4, 2015]). Consequently, the decedent's threatening litigation or disinheritance would not be actionable (*see Beltway 7 & Properties, Ltd. v Blackrock Realty Advisers, Inc.*, 167 AD3d 100, 107 [1st Dept 2018]).

No wrongful acts or threats are otherwise specified by the couple. Instead, Roy and Mary rely on their subjective beliefs that if they failed to execute the 2014 Agreement, it would adversely affect the health and safety of Roy's father. Without discounting that they may have actually been concerned about decedent, to avoid one's own contract on the basis of duress, one must specify the wrongful conduct that precludes the exercise of one's free will (*Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 419 [1st Dept 2009]; *Shah v Mitra*, 171 AD3d 971, 976 [2d Dept 2019]), not merely speculate that some unspecified future bad act might have occurred if the agreement had not been executed (*see Morad v Morad*, 27 AD3d 626 [2d Dept 2006]). All that Roy and Mary offer in this regard is that, *i.e.*, speculation that Eva would have committed some future bad act against decedent that might have impaired his health or safety or their relationship with him. This is an insufficient basis for avoiding one's own contractual obligations under a theory of duress (*id.*; *see Garvin*, 210 AD2d at 333).

The remaining affirmative defenses sought to be interposed by Roy and Mary require little analysis. As to a claimed lack of consideration (the second affirmative defense), this is meritless because the 2014 Agreement clearly recites the decedent's funding of the apartment's purchase price, and the couple does not claim that those funds were not in fact provided by the decedent in 2008. These circumstances clearly meet the requirements set by General Obligations Law 5-1105 that "the consideration is expressed in the writing and is proved to have been given or performed" (*see Friedman v Miale*, 69 AD3d 789, 791 [2d Dept 2010]). Additionally, the

relinquishment of any claims by the decedent as set forth in the Agreement, including his right to seek judicial relief, would constitute sufficient consideration (*see Matter of Byrne v Padden*, 248 NY 243, 249 [1928]).

Roy and Mary also put forth a general defense of a lack of a “Meeting of the Minds” (the fourth affirmative defense). Putting aside that the express terms of the Agreement may reflect such “Meeting,” (*Anonymous v Anonymous*, 2 Misc 3d 1002[A] [Sup Ct, New York County 2004], *affd sub nom. Carnuccio v Upton*, 15 AD3d 212 [1st Dept 2005]), the claims Roy and Mary make in this regard are fully encompassed in the fraud, duress and lack of consideration analysis above.

Additionally, an alleged conflict of interest in decedent’s counsel (the fifth affirmative defense) is not a viable basis for avoiding the contract under the circumstances here. In 2014, in relation to the drafting and execution of the Agreement at issue, decedent was represented by the same counsel that had represented Roy and Mary in 2008 when the purchase of Unit 10E was completed, and apparently also represented Roy and Mary in other “significant” legal matters. Even granting that this circumstance amounted to a “conflict” of sorts, the standard for contract avoidance on the basis of counsel’s conflict requires both procedural and substantive unconscionability (*Gendot Assoc., Inc. v Kaufold*, 115 AD3d 794 [2d Dept 2014]). No facts indicating unconscionability have been alleged by Roy and Mary, thus requiring dismissal of this defense.

Likewise, no support is offered for Roy and Mary’s claim that the notice by the estate fiduciaries under the 2014 Agreement (*i.e.*, to purchase the estate’s interest or to sell the apartment and make the estate whole) was untimely and invalid (the eighth affirmative defense). The 2014 Agreement itself imposes no time limitation as to such notice. Moreover, in response

to this notice Roy and Mary implicitly conceded the effectiveness of the notice when they elected to buy out the estate's interest as a hedge against the possibility that a challenge might not succeed. Finally, what could be characterized as a "catch-all" defense, specifically, that, "[A]s a matter of equity and public policy," the 2014 Agreement should be declared void (the seventh affirmative defense), is unsupported by the answer's allegations apart from those that fail to support the defenses analyzed above. Consequently, it too is dismissed.<sup>2</sup>

The court also notes that Roy and Mary failed to demonstrate a need for additional discovery in that all the facts regarding ratification or the Agreement's execution were already known to or otherwise accessible by them (*see Neryaev v Solon*, 6 AD3d 510, 511 [2d Dept 2004]).

Accordingly, and consistent with the court's determination on the record in open court on October 30, 2020, the court grants the motion by co-preliminary executor Gregg Weiss and dismisses both the affirmative defenses and the petition of Roy and Mary Judelson. The cross-petition of co-preliminary executor Gregg Weiss is granted, and the September 2, 2014 Agreement at issue is declared valid and enforceable.

This decision, together with the transcript of the October 30, 2020 proceedings, constitutes the order of the court.

Dated: September 17, 2021

  
SURROGATE

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<sup>2</sup> The first "affirmative defense," the need for an appraisal, is concededly moot.