

Sheppard v Sheppard
2022 NY Slip Op 31895(U)
June 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 521298/2020
Judge: Wayne P. Saitta
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Defendants move to dismiss this partition action and to cancel the lis pendens on the properties. Plaintiffs cross-move for summary judgment partitioning the property and awarding Plaintiffs and Defendant IRA BARRY SHEPPARD each a third interest in the properties.

The partition action is based on the claim that these four properties were part of the estate of Dr. English at the time of her death.

Dr. English's will provided that her personal property be divided among her children and that the residue of her estate be divided in three equal parts to go to her sons IRA BARRY SHEPPARD, JOHN SHEPPARD, and Michael Sheppard, as beneficiaries.

The will provided that each share of the estate be held in a separate trust for the benefit of each beneficiary and IRA BARRY SHEPPARD was named as trustee.

The will further provided that the trustee at his discretion pay net income from the shares to the beneficiaries; and pay the principal and any accumulated interests to the beneficiaries upon the earlier of the death of IRA BARRY SHEPPARD, or his attaining the age of fifty-five years (55) whichever occurred earlier.

Plaintiffs argue that the properties were part of Dr. English's estate and pursuant to the terms of the will should be sold and the proceeds distributed to the beneficiaries and their heirs along with any accumulated income.

At issue in this dispute is whether the properties were in fact part of Dr. English's estate. Defendants dispute this and allege that the properties were transferred to Defendant IRA BARRY SHEPPARD before Dr. English's death.

392 Adelphi Street

The property at 392 Adelphi Street was transferred by Dr. English to IRA BARRY SHEPPARD by a deed dated December 20, 1999, and recorded March 9, 2000. The deed was executed 12 years before Dr. English's death on December 18, 2011.

Plaintiffs' counsel alleges on information and belief that the deed is a forgery, but offers no evidence to call into question the signature of Dr. English which was acknowledged by a notary.

Plaintiffs' counsel's affirmation is insufficient to raise a question of fact as to the validity of the deed to IRA BARRY SHEPPARD. 392 Adelphi Street was not part of Dr. English's estate at the time of her death, and not properly part of this action.

375 Stuyvesant Avenue

In 1975, Dr. English transferred the property located at 375 Stuyvesant Avenue to the 375 Stuyvesant Avenue Realty Corporation. In 1990, Josephine English as President of the 375 Stuyvesant Avenue Realty Corporation transferred the property to Witte English. In 1994, Witte English in turn conveyed the property back to the 375 Stuyvesant Avenue Realty Corporation.

The 375 Stuyvesant Avenue Realty Corporation was dissolved by the NYS Secretary of State on August 26, 1996, and revived on August 23, 2002. The corporation was again dissolved on October 29, 2009. The 375 Stuyvesant Avenue Realty Corporation was not revived after 2009 and was dissolved at the time of Dr. English's death.

On April 27, 2010, IRA BARRY SHEPPARD incorporated a new entity under the name 375 Stuyvesant Avenue Realty Corporation. He did not pay the corporations back taxes to revive the old 375 Stuyvesant Avenue Realty Corporation.

Filing a new corporation with the same name did not operate to vest in him title to the property owned by the original 375 Stuyvesant Avenue Realty Corporation.

Despite being dissolved the original 375 Stuyvesant Avenue Realty Corporation retained title to the property (§ *Business Corporation Law* §1006; *Matter of Sullivan* 31 AD3d 651 [2d Dept 2006]). There is no evidence that the property was ever transferred after dissolution by the original 375 Stuyvesant Avenue Realty Corporation (*see Business Corporation Law* §1006 [a][1]). The title to the property remained in the original 375 Stuyvesant Avenue Realty Corporation at the time of Dr. English's death.

However, it is unclear from the record whether the original 375 Stuyvesant Avenue Realty Corporation was part of Dr. English's estate at the time of her death or whether ownership of that corporation was transferred before her death. Therefore, summary judgment granting partition or dismissing the action is inappropriate as to 375 Stuyvesant Avenue.

40 Greene Avenue

The 375 Stuyvesant Avenue Realty Corporation acquired title to the property located at 40 Greene Avenue on September 9, 1980, and retained title to the property at the time of Dr. English's death. As discussed above, the dissolution of the 375 Stuyvesant Avenue Realty Corporation did not divest it of title to the property and the filing of a new corporation with the same name did not vest title in the new corporation or in IRA BARRY SHEPPARD.

For the same reasons, summary judgment granting partition or dismissing the action is inappropriate as to 40 Green Avenue.

54 Green Avenue

The property at 54 Green Avenue was transferred by a deed dated July 14, 1975, to 50 Greene Ave Inc. That corporation was dissolved in 1981, revived in 1987, and dissolved again on December 23, 1992. The corporation remain dissolved at the time of Dr. English's death.

On October 1, 2014, after Dr. English's death, the property was purportedly transferred by 50 Greene Ave Inc. to 54 Greene Avenue JV LLC. The 2014 deed was signed by IRA BARRY SHEPPARD as sole shareholder of the corporation.

However, there are questions of fact as to who owned the corporation at the time of Dr. English's death and whether the property was part of her estate. For these reasons, summary judgment granting partition or dismissing the action is inappropriate as to 54 Green Avenue.

Defendants raise two other grounds to dismiss the action. First, that Plaintiff JOHN SHEPPARD entered into a stipulation of settlement in two prior cases, one in Supreme Court and one in Surrogates Court, that involved his claims to the four properties in this action. Second, that Plaintiff JANNIL SHEPPARD lacks standing.

JOHN SHEPPARD agreed to discontinue his claims to these properties, cancel the notices of pendency filed against the properties, and gave a general release of any claim against the Defendants in return for a payment of \$2,000 and a share in the net profits of the future development of the four properties.

Although the stipulation of settlement and general release covered JOHN SHPEEARD's claims against these Defendants for his interests in these properties, he argues that the stipulation should not be enforced because it is the product of fraud and undue influence.

JOHN SHEPPARD alleges that he was presented with the settlement already prepared at a meeting with IRA BARRY SHEPPARD and several other family members including Daniel Sheppard Jr. and Tarik Sheppard. He alleges that IRA BARRY SHEPPARD told him that if he signed the settlement, he would receive his 1/3 share of his mother's estate.

He further alleges he did not understand the agreement and he was not given an opportunity to consult with the attorney representing him in the cases being settled. He further alleges that when he left the meeting without signing the settlement, he was chased by Daniel Sheppard Jr. and Tarik Sheppard and brought back to the meeting. He states that he felt threatened by his half-brother Daniel Sheppard Jr. and was afraid that Daniel Sheppard Jr. would physically hurt him if he did not sign the agreement.

JOHN SHEPPARD alleges he was threatened and pressured into signing the settlement without being able to consult his lawyer. JOHN alleges that IRA lied to him and told him that the settlement would mean he would get 1/3 of estate.

IRA BARRY SEPPARD contests these allegations and states that the settlement was the product of several conferences attended by JOHN SHEPPARD and his attorney Victor Worms Esq., and that the terms of the Settlement Agreement were discussed and negotiated by and between the parties and their respective attorneys.

Plaintiff has raised sufficient questions of fact as to whether the settlement agreement was a product of fraud or duress.

Here, Defendant IRA BARRY SHEPPARD had a confidential relationship with JOHN SHEPPARD as his brother. Additionally, as executor of his mother's estate, and trustee of the trust created by Dr. English's will, IRA BARRY SHEPPARD owed a fiduciary duty to JOHN SHEPPARD as a beneficiary of the trust created by the will.

Defendants allege that JOHN SHEPPARD has struggled with alcohol abuse most of his adult life and that he has a high school education, but has never held a job.

If a confidential relationship exists, the burden is shifted to the beneficiary of the transaction to prove the transaction fair and free from undue influence (*Robinson v Day*, 103 AD3d 584 [1st Dept 2013]; *Feiden v Feiden*, 151 AD2d 889, 891 [3d Dept 1989]).

It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (*see Vega v Restani Construction Corp*, 18 NY3d 499 [2012]; *Sillman v Twentieth Century–Fox Film Corp.*, 3 NY 2d 395 [1957]).

Accepting Plaintiff's version of events as true, a reasonable jury could conclude that the settlement agreement was the product of fraud or duress. Whether Plaintiff's or Defendant's version of events that led to the signing of the settlement is correct is a matter for a trier of fact to resolve.

Plaintiff JANNIL SHEPPARD did not sign the settlement, so his claims are not barred by the agreement.

Defendants argue that JANNIL SHEPPARD lacks standing to bring this action because he has not received Letters of Administration to the Estate for Michael Sheppard. His claim is not as beneficiary under Dr. English's will but as the sole son of Michael Sheppard, who was a beneficiary under the will and who post deceased Dr. English.

Absent extraordinary circumstances, even a party who is the sole beneficiary of the estate cannot act on behalf of the estate or exercise ... fiduciary's rights with respect to estate property" (*Stallworth v Stallworth*, 138 AD3d 1102 [2d Dept 2016]; *Jackson v. Kessner*, 206 AD2d 123, 127 [1st 1994]). The appropriate avenue is to be appointed a

representative pursuant to the requirements of the EPTL (*see e.g. Matter of Peters v Sotheby's Inc.*, 34 AD3d 29, 34 [1st 2006]).

While JANNIL SHEPPARD has not yet been awarded letters of administration as sole distributee of the estate of Michael Sheppard, he submitted a copy of his application for Letters of Administration and Letters of Temporary Administration dated August 18, 2020, before this action was commenced.

Here, Plaintiffs allege that Defendants transferred estate property by use of an entity they created using the same name of the dissolved corporation that owns that property.

Further, they allege that Defendant IRA BARRY SHEPPARD filed a false inventory of assets with Surrogates Court which omitted properties that were part of the estate.

The fraudulent transfer of trust property, as is alleged here, if true, would be the type of special circumstance that would constitute an exception to the rule that a beneficiary cannot bring suit on behalf of an estate (*See McQuaide v Perot*, 223 NY 75 [1918]; *Lewis v DiMaggio*, 115 AD3d 1042 [3d Dept 2014]; *Pailthorpe v Tallman*, 87 NYS2d 822, 834 [Sup Ct 1949] , *affd*, 276 AD 823 [4th Dept 1949]).

However, as the Surrogates Court has not yet made a determination on JANNIL SHEPPARD's application, it is appropriate to stay determination on whether JANNIL has standing to bring this action until the Surrogates Court has ruled.

WHEREFORE, it is hereby ORDERED that that part of Defendants motion to dismiss the action as to JANNIL SHEPPARD, on the grounds that he lacks standing, is stayed until the Surrogates Court has made a determination on his application for Letters of Administration; and it is further

ORDERED that Defendants' motion as to JOHN SHEPPARD is denied except to the extent that the complaint is dismissed solely as to the property located at 392 Adelphi Street; and it is further

ORDERED that Plaintiffs' cross-motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

E N T E R:



JSC