

Fulmore v 1128 Jefferson LLC
2022 NY Slip Op 33993(U)
November 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 711/2019
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of November, 2022.

P R E S E N T:

HON. CARL J. LANDICINO, JSC

-----X

TIMOTHY FULMORE, individually and as agent
Pursuant to a Power of attorney for JUANITA
FULMORE,

Index No.: 711/2019

Plaintiff,

DECISION AND ORDER

- against -

1128 JEFFERSON LLC and JOSEPH FULMORE,

Motions Sequence #7, #8

Defendant(s).

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	80-89,
Opposing Affidavits (Affirmations).....	93-104,
Reply, Sur-Reply Affidavits (Affirmations).....	

After oral argument and upon a review of the papers, the Court finds as follows:

Plaintiff Timothy Fulmore (individually “Plaintiff Fulmore” or “Agent”) individually and as agent, pursuant to a purported power of attorney for Juanita Fulmore (“Plaintiff Mother”) ¹ brings this action against Defendant 1128 Jefferson, LLC (hereinafter “Defendant 1128”) and Defendant Joseph Fulmore to 1) void the purported sale of 1128 Jefferson Avenue, Brooklyn, New York (hereinafter “the Premises”) to 1128 Jefferson LLC, 2) restore title to the Plaintiff Juanita Fulmore, and 3) issue an Order and Judgment against Defendants for Plaintiff’s lost and damaged property. The Plaintiffs contend that the transfer of ownership was accomplished pursuant to a false Power of Attorney created by Defendant Joseph Fulmore, the Plaintiff’s brother, and that as a result the transaction was a product of fraud and the sale of the Premises must be determined to be null and void *ab initio*.

¹ It is conceded by both parties that Plaintiff Juanita Fulmore is the mother of Plaintiff Timothy Fulmore and Defendant Joseph Fulmore.

The Plaintiffs now move (motion sequence #7) for an order appointing Plaintiff Timothy Fulmore as Guardian *ad Litem* for Juanita Fulmore. The Plaintiffs point to a January 5, 2022 Order by the Hon. Lawrence Knipel, J.S.C. that directs that the Plaintiff Timothy Fulmore “shall apply for a GAL or MHL Article 81 Guardian o/o/b 2/15/22 or the action will be dismissed on further motion” (“January Order”). This Order apparently sought to clarify a prior Order by the Hon. Lisette Colon, J.S.C. dated March 6, 2020 (“March Order”). The March Order states “[m]ark off calendar for Temporary Guardian or Guardian Ad Litem appointment as to Juanita Fulmore.” Upon further application for a stay of the January Order, or in the alternative reargument, the Hon. Lawrence Knipel, J.S.C. denied that application but modified the January Order to provide that the Guardian/GAL application was to be made by April 29, 2022. (Order is dated February 14, 2022, the “February Order”). As part of this application, the Plaintiffs rely on the affidavit of Plaintiff Timothy Fulmore.

Defendant 1128 opposes the motion and cross-move to dismiss the proceeding “or, in the alternative, pursuant to CPLR 1202 for an Order appointing a Part 36 fiduciary to act as Guardian *ad litem* for the real party in interest, Juanita Fulmore, and disqualifying plaintiff Timothy Fulmore from acting as her Guardian *ad litem*, or her attorney in fact.” Defendant 1128 argues that the motion made by the Plaintiffs should be denied as deficient and that Plaintiff Timothy Fulmore is not an appropriate person to assume the duties and responsibilities of a Guardian *ad litem*. Defendant 1128 also argues that this matter should be dismissed as Plaintiff Timothy Fulmore has acknowledged that he does not have contact or communication with Juanita Fulmore who purportedly resides in California. In the alternative, Defendant 1128 argues that if the proceeding is not dismissed, then a Guardian Ad Litem should be appointed from the Part 36 list of fiduciaries.

As an initial matter, the Court denies Defendant 1128's application to dismiss this proceeding. The February Order required that Plaintiff Timothy Fulmore make application on or before April 29, 2022. Plaintiff's motion for this application was made on February 15, 2022. Defendant 1128 has provided no valid reason to dismiss this proceeding.

In general, "a guardian ad litem may be appointed by a court at any stage of an action in which an adult is incapable of adequately prosecuting or defending his or her rights." *Tudorov v. Collazo*, 215 A.D.2d 750, 750, 627 N.Y.S.2d 419, 419 [2nd Dept, 1999]. However, the appointment of a Guardian is not necessary because a person has a mental impairment, if the party "is capable of understanding the proceedings, defending her rights, and assisting counsel." *In re Barbara Anne B.*, 51 A.D.3d 1018, 1019, 859 N.Y.S.2d 248, 249 [2nd Dept, 2008]; *In re Philip R.*, 293 A.D.2d 547, 548, 740 N.Y.S.2d 421, 423 [2nd Dept, 2002].

Turning to the merits of the Plaintiffs motion (Motion sequence #7) seeking the appointment of Plaintiff Timothy Fulmore as the Guardian Ad Litem for Juanita Fulmore, the Court finds that insufficient evidence has been provided to support this application. As part of his affidavit, Plaintiff Timothy Fulmore states that "[o]n or about June 7, 2016, my mother was diagnosed with dementia and subsequently hospitalized in Brooklyn." Plaintiff Timothy Fulmore further states that "[w]hile I was away in Las Vegas, my mother was removed from the hospital and taken to stay with family members in Maryland, before ultimately being relocated to California by Defendant Joseph Fulmore." These statements raise issues regarding the ability of Plaintiff Timothy Fulmore to act as Juanita Fulmore's Guardian *Ad Litem* given her location in California. Moreover, in light of the allegations on both sides of this controversy, it would be inappropriate to appoint either party as a fiduciary. Juanita Fulmore must be provided with a neutral, non-party as her guardian.

A Guardian *Ad Litem* is not appointed to resolve issues related to the capacity of a party. See *1234 Broadway LLC v. Feng Chai Lin*, 25 Misc. 3d 476, 478, 883 N.Y.S.2d 864, 868 [Civ. Ct. 2009]. However, if the issue is in fact the capacity or competency of Juanita Fulmore to stand trial or reach a meaningful settlement, then a Guardianship pursuant to Article 81 of the Mental Hygiene Law is the appropriate application. Although “an Article 81 Guardianship is ‘longer-winded’ and is more cumbersome requiring the report of two doctors, the expense of a court appointed law guardian and annual reports, is not a reason to seek a guardian *ad litem* instead.” *In re Smith Guzman*, 11 Misc. 3d 1092(A), 819 N.Y.S.2d 851 (Kings Sup. Ct. 2006).

Notwithstanding this, all prior orders provided that the appointment could be that of a Guardian *Ad Litem*. Further, as an initial measure, although limited in authority, a GAL is appropriate. Insofar as the current location of Juanita Fulmore is uncertain, as is her current condition, the parties shall appear on January 18, 2023 at 2:30PM for a conference to determine proper appointment.

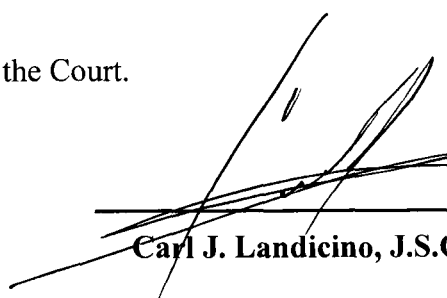
Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiffs’ motion (motion sequence #7) is denied.

Defendant 1128’s motion (motion sequence #8) is granted solely to the extent that the parties shall appear on January 18, 2023 at 2:30PM for a conference in furtherance of the Court’s holding.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


 Carl J. Landicino, J.S.C.
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