

**Brown v Sawicki**

2012 NY Slip Op 31480(U)

May 15, 2012

Sup Ct, Suffolk County

Docket Number: 2006-02064

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK**  
**TRIAL TERM PART XXI - COUNTY OF SUFFOLK**

**EDWARD T. BROWN Individually And As  
 Executor Of The Estate Of THOMAS W.  
 BROWN,**

Plaintiff,

- against -

**STANLEY SAWICKI Individually And As  
 Executor Of The Estate Of VICTOR GRAZIANO  
 As Surviving Tenant By Entirety Of  
 JACQUELINE GRAZIANO,**

Defendant

Index No.: **2006-02064**

Calendar No.: **2009-00759-EQ**

Trial Date: **February 7, 2012**

HON. JEFFREY ARLEN SPINNER, Justice Of The Supreme Court:

This is an action sounding in equity, commenced by the filing of a Notice of Pendency, Summons and Verified Complaint on January 20, 2006. Plaintiff sued Defendant, seeking a reconveyance of certain real property, alleging a lack of consideration for the conveyance, imposition of a constructive trust upon the real property and recovery of reasonable use and occupancy thereof. The matter had originally been claimed for a jury trial but at the time of commencement of the trial, the parties waived a jury, instead proceeding to a bench trial. Both parties were represented by very capable and well respected counsel, both of whom were fully prepared to try the matter and who competently did so.

The essential facts in this matter are not in dispute. Plaintiff's Decedent THOMAS W. BROWN, was the owner, in fee simple, of real property known and described as 36 5<sup>th</sup> Street, West Islip, Town of Islip, New York and designated as District 0500 Section 457.00 Block 03.00 Lot 030.000 on the Land & Tax Map of Suffolk County (the "Property"). Decedent had obtained fee title to the Property by Deed dated June 23, 1964 which was recorded with the Suffolk County Clerk on July 3, 1964 in Liber 3370 of Conveyances, Page 356. On May 16, 1990, Decedent caused to be prepared a Last Will & Testament whereby he devised all but the sum of \$ 5,000.00 of his estate to Plaintiff EDWARD T. BROWN, who was one of his sons. Thereafter and on September 19, 2002, Decedent executed a Deed (the "2002 Deed"), for no consideration, wherein he conveyed the Property to VICTOR GRAZIANO and JACQUELINE GRAZIANO as Tenants By The Entirety, reserving unto himself a Life Estate. This Deed was recorded with the Clerk of Suffolk County on October 7, 2002 on Liber 12213 of Conveyances, Page 359. It is this 2002 Deed that brings these parties to Court.



Decedent THOMAS W. BROWN (known as "Tom") was a widower, his wife having passed away in 1960. Decedent's sister Rose had been friendly with JACQUELINE GRAZIANO (then known as JACQUELINE SAWICKI) when all of them had lived in Brooklyn. After Decedent purchased the Property, Ms. Sawicki (called "Jacky") moved into the dwelling as well. She resided upstairs while he occupied the ground floor of the home. Decedent and Jacky kept company with each other though testimony indicates that there was no romantic relationship between them; apparently their relationship was purely platonic. She accompanied him to family functions and holiday celebrations. For many years, Decedent has expressed to his son, Plaintiff EDWARD T. BROWN (known as "Teddy") that he was concerned about what would happen to Jacky if he predeceased her. Teddy assured his father that he would act in accord with his wishes; that is, Jacky could stay in the house so long as she lived. Apparently, this was discussed between father and son no less than fifteen occasions over a twenty year period and according to Plaintiff's testimony, he fully intended to honor his father's wishes.

Plaintiff called Stephen Kretz Esq. as his first witness. Attorney Kretz testified that Decedent had been a long time client of his law firm and a close friend of his late partner. Attorney Kretz had an extensive conference with Decedent which resulted in his drafting of the May 16, 1990 Will. According to the testimony, Tom came to the office with Jacky and "he seemed concerned about her well-being and he seemed solicitous of her needs." The Will made no provision for Jacky, the only two legatees being Tom's two sons. Attorney Kretz testified that sometime in 2001, Tom and Jacky appeared at his office without prior notice or an appointment. Tom stated that he "needed something" while Jacky stated that Tom wanted to convey title to the Property to her. Attorney Kretz took Decedent aside, out of Jacky's presence and explained what Jacky had requested whereupon Decedent stated "That's not what I want to do, I didn't know that's what she wanted." He opined that Decedent, though quite elderly, seemed competent, aware and oriented. Attorney Kretz did not prepare a Deed nor any other instrument for Decedent. The Court is acquainted with Attorney Kretz, is aware of his excellent reputation and completely credits his testimony, finding it to be wholly credible and completely above reproach.

Plaintiff then testified on his own behalf. As Executor of the estate of Decedent, he waived the so-called Dead Man's Statute [see CPLR § 4519]. As is relevant to this determination, he had discussed the Will with his father and he understood that he was designated as Executor thereof and that the entire estate (save for a \$ 5,000.00 bequest to his brother) was intended for him. He knew that Jacky resided rent-free in Decedent's house and that they kept company together. He stated that he and his father had often discussed Decedent's wishes that Jacky be allowed to stay in the house if he predeceased her. He stated that these discussions occurred repeatedly over a twenty year period, continuing right up to the time of his demise. Although he accepted Jacky without question, he did not care for her husband Victor Graziano. He testified that his father and Victor did not get along at all. In order to assist with daily activities of living, Decedent had an aide, Andrea Simmons, known as Angie, who helped him from about 2001 until his death on February 24, 2005. According to Plaintiff, Angie telephoned him in December of 2004, stating that she "had a problem with Victor." Victor Graziano told Angie that she could no longer park her car near the house because he "didn't want blacks there," further stating that "I pay the taxes here and I can throw anyone I want out of here." Sensing that something was amiss, Plaintiff telephoned Attorney Kretz who searched the land records and discovered that on September 19, 2002 Decedent had executed a Deed, for no consideration, conveying fee title to the Property to Victor and Jacky and retaining unto himself a life estate. That Deed was recorded on October 7, 2002 in Liber 12213 of Conveyances, Page 359. The Deed was prepared by Attorney Joseph Leshen who died prior to trial of this cause; however, a transcript of his



testimony, pursuant to CPLR Article 31, was received into evidence. Plaintiff then telephoned his father and told him what he had discovered, saying “Pop, what did you do? Do you realize you gave away the house?” to which Decedent replied “No, I didn’t. What are you talking about?” Plaintiff then contacted the District Attorney who assigned an investigator who, after interviewing the attorney who employed the late Attorney Leshen, stated that he “got amnesia” and that Plaintiff’s recourse would be to contact an attorney and proceed with a civil suit. The Court found his testimony to be credible, understanding that as Plaintiff, he was an interested witness, see *Noseworthy v. New York* 298 NY 76 (1948).

Plaintiff then called Andrea Simmons as a witness who testified, in relevant part, that Decedent was “very pleasant and trusting of others” and that she assisted him at his home for approximately three years on a substantially full time basis. She helped with his daily activities including cooking, taking him shopping, taking him to the doctor, taking him to the marina to watch boats, etc. According to her testimony, once her duties became almost full time, Jacky stopped coming downstairs except to have Decedent sign checks, some in blank, that she would bring to him. According to her, Tom and Victor did not get along at all and although Victor occasionally spoke to Decedent, he was “not nice.” She stated that the only reason Tom allowed Victor to stay in the house was out of respect for Jacky. She understood that Tom owned the house and described an incident where she saw Jacky have him sign some papers; her impression was that “he signed something he wasn’t supposed to sign and didn’t mean to do” and upon seeing her there, Jacky told her bluntly to mind her own business. After Jacky left, she told Decedent “I think you signed your house away” to which he replied “Jacky wouldn’t do that.” She then urged Decedent to contact Plaintiff but he told her that Jacky wouldn’t allow him to use the telephone and stated “Teddy knows the house goes to his daughter who needs a house” (apparently referring to Plaintiff’s widowed daughter). She stated that Decedent told her this on more than one occasion, usually informing her that Jacky could stay in the house so long as she lived but that it was ultimately intended to go to his granddaughter (“It goes to the girl, she has a kid and her husband died, she needs a house”). The Court found her to be a credible witness.

Plaintiff also called Denise Florio, Plaintiff’s daughter. She testified that her grandfather told her that if he died, Jacky would be allowed to stay in the house but that the house was intended for her sister Laura whose husband had died in a snowmobile accident in 2003. She also had spoken with Jacky and told her that the agreement with Decedent was that Jacky could stay in the house so long as she was able to care for herself. Like the preceding two witnesses, this witness was determined to be credible by the Court.

In opposition, Defendant first called Gloria Conklin, a respite worker from Federation of Organizations. She testified, in relevant part, that she provided respite services for Decedent three hours thrice weekly for approximately five years, mostly consisting of meal preparation and walks outside the home. She stated that Tom had expressed to her that he “didn’t want Jacky in the street” and that he wanted her to “have a place to stay.” Although she insisted that she knew nothing about the Deed to the Property, she said that Decedent wanted the house in Jacky’s name and that one day she arrived to find him dressed in a suit, prepared to go to an attorney to deed the house to her. In contradiction to all other testimony adduced during the trial, she stated that Tom and Victor “got along together,” that they “attended Baptist Church together” and that “He loved Victor and wanted Victor to have the house” though she conceded that her knowledge of this was not firsthand (and hence, inadmissible hearsay). She also engaged in what could best be described as unprovoked and inexplicable *ad hominem* and gratuitous attacks on Andrea Simmons, asserting that Angie had stolen property from Victor and that Angie wanted to “take Victor for his money.” At some point prior



to the trial of this matter, she had executed an Affidavit dated June 26, 2006 which appeared to contain statements that were in direct contradiction to her sworn trial testimony. Upon being confronted with these discrepancies, she blandly stated that she did not read the Affidavit before signing it (see Pimpinello v. Swift & Co. 253 NY 159 [1930]). The Court did not find this witness to be at all credible.

Defendant finally called Richard O'Donnell to the stand who testified that he was both a long time neighbor and a friend of Decedent. His testimony did little more than cast untoward aspersions upon Plaintiff and his relationship with Decedent and upon Angie, stating that "she's not exactly rememberin' what happened.". He admitted that he was emotionally interested in the outcome of this action.

After careful consideration of all of the testimonial evidence and the exhibits introduced at trial and having been afforded the opportunity to evaluate and assess the demeanor and credibility of the witnesses who appeared herein, the Court makes findings of fact and conclusions of law as hereinafter set forth.

The Plaintiff demands reconveyance of the Property, claiming that the 2002 Deed was procured through the use of some fraud or, alternatively, the imposition of a constructive trust thereon. Distilled to its essence, this action falls within the purview of Article 15 of the Real Property Actions and Proceedings Law as one to determine conflicting claims to real property. That having been said, it appears that the elements of Plaintiff's claim effectively invoke the provisions of Real Property Law § 265. In order for Plaintiff to prevail, it must be proven that the execution of the 2002 Deed was either the product of undue influence or some other malfeasance on the part of Jacqueline Graziano or that she breached or otherwise exploited an existing confidential relationship.

As a threshold matter, the burden of establishing undue influence is clearly placed upon the proponent of the claim, Allen v. LaVaud 213 NY 322 (1915). Where the proponent successfully establishes, by the proper quantum of admissible proof, that there exists a confidential relationship, the burden is then shifted to the opponent to demonstrate that the transaction at issue is free of improprieties and is not otherwise tainted, Gordon v. Bialystoker Center & Bikur Cholim 45 NY 2d 692 (1978).

A careful examination of all of the evidence adduced clearly and unequivocally demonstrates that there was a long standing confidential relationship between Thomas W. Brown and Jacqueline Graziano. Thus, Plaintiff has indubitably met his *prima facie* burden of demonstrating entitlement to the relief sought herein. Therefore, Plaintiff is entitled to a declaration that the 2002 Deed is void *ab initio* and is entitled to a reconveyance of the Property, Russell v. Russell 128 AD 2d 515 (2<sup>nd</sup> Dept. 1987), *appeal dismissed* 70 NY 2d 783 (1987), Loiacono v. Loiacono 187 AD 2d 414 (2<sup>nd</sup> Dept. 1992).

As to Defendant, he has failed to sustain his statutory burden, thereby compelling the Court to order judgment in favor of Plaintiff. However, Plaintiff has failed to adduce sufficient proof as to the claim for recovery of use and occupancy. In view of Plaintiff having established his right to the relief sought, viz., a reconveyance and nullification of the 2002 Deed, the Court need not address the claim respecting the imposition of a constructive trust.

It is, therefore,

ORDERED, ADJUDGED and DECREED that the Deed dated September 19, 2002 purporting to convey property known as 36 Fifth Street, West Islip, Town of Islip, New York, District 0500, Section 457.00, Block 03.00, Lot 030.000, which was recorded with the Clerk of Suffolk County on October 7, 2002 in Liber 12213 of Conveyances at Page 359 is null, void and of no force and effect, in fact or at law; and it is further

ORDERED, ADJUDGED and DECREED that any and all subsequent conveyances flowing therefrom are likewise null, void and of no force and effect, in fact or at law; and it is further

ORDERED, ADJUDGED and DECREED that the ESTATE OF THOMAS W. BROWN is the owner, in fee simple absolute, of the real property described herein and is entitled to exclusive possession thereof; and it is further

ORDERED, ADJUDGED and DECREED that the Defendant, his successors, assigns, heirs and any and all others claiming any interest by, under or through said Defendants, subsequent to the filing of the Notice of Pendency herein shall be and are hereby forever foreclosed, barred and estopped from and of any and all claims of and to any estate or interest in or to the real property described herein; and it is further

ORDERED, ADJUDGED and DECREED that within thirty (30) days following the date of entry hereof, Defendant shall execute a Deed, in recordable form, sufficient to convey to Plaintiff the real property described herein; and it is further

ORDERED, ADJUDGED and DECREED that the Sheriff of Suffolk County shall be and is hereby authorized, empowered and directed to execute such Deed as aforesaid upon the default of Defendant; and it is further

ORDERED, ADJUDGED and DECREED that any relief not expressly granted shall be and the same is hereby denied.

The real property affected by this determination is described as follows:

All that certain plot, piece or parcel of land, with the buildings and improvements thereon created, situate, lying and being at East Babylon, in the Town of Islip, County of Suffolk and State of New York, known and designated as Lots Nos. 65, 66, 67, 68 in Block 23, on the Map of "Pinelake at East Babylon, property belonging to the Babylon Lands Inc., situate in the County of Suffolk, N.Y." filed in the Suffolk County Clerk's Office on October 29, 1926 as Map No. 52.

Said real property is known as and by the street address of 36 Fifth Street, West Islip, Town of Islip, New York 11795, District 0500 Section 457.00 Block 03.00 Lot 030.000.



Plaintiff's counsel is directed to settle a Judgment consistent with this determination within fourteen (14) days from the date of entry hereof.

This shall constitute the decision, judgment and order of this Court.

Dated: May 15, 2012  
Riverhead, New York

  

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**HON. JEFFREY ARLEN SPINNER, J.S.C**

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