Salerno v Salerno-Plucinik
2012 NY Slip Op 32442(U)
September 20, 2012
Supreme Court, Wayne County
Docket Number: 68028/2010
Judge: John B. Nesbitt
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

PETER T. SALERNO, JR., as Voluntary
Administrator of the Estate of
PETER T. SALERNO,

Plaintiff, ***Index No.: 68028***

2010

-vs-

PAULA SALERNO-PLUCINIK

Defendant.

APPEARANCES: HISCOCK & BARCLAY LLP
(Brian G. Manka, Esq., of counsel)
Attorneys for the Plaintiff

DEVALK, POWER, LAIR & WARNER
(Richard L. DeValk, Esq., of counsel)
Attorneys for Defendant

MEMORANDUM - DECISION

John B. Nesbitt, J.

This case involves the law of property and gifts. The plaintiff contests the transfer of certain bank deposits from the decedent, Peter Salerno, to his daughter, Paula Salerno-Plucinik, the defendant in this action. Plaintiff and defendant are siblings and the only children of the decedent. Before stating the background of the case and identifying the salient facts, an outline of the operative legal principles of law will bring context and focus to ensuing discussion.

The common law long ago crafted a jural concept of property, refined by both case law and statutory enactments. Property, both personal and real, may be owned, and with ownership, comes the right of dominion, which generally includes the right of disposition or alienation, usually by way of contract, gift, or even forfeiture. There is no issue in this case whether the decedent owned the disputed bank accounts and there is no claim that he was contractually or otherwise obligated to the defendant regarding those accounts. The issue is whether he made a gift of those accounts to the defendant. The law here is well-settled and similarly stated in the various legal encyclopedic references and respected treatises:

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62 NY Jurisprudence 2d §2 Gifts inter vivos

A gift inter vivos is a voluntary transfer of any property or thing by one to another without consideration. To be valid it must be executed, and there must be a delivery by the donor such as will place the property or thing given under the control of the donee. There must be an intent to vest title in the donee. As its name suggests, a gift inter vivos is a gift from a living person to another living person. Its effect is both immediate and irrevocable. It vests the title to the thing given indefeasibly in the donee.

62 NY Jurisprudence 2d §7 Generally

A gift must be established by clear, convincing, and satisfactory evidence. The gift need not be proved "beyond suspicion" and need not be by more than a fair preponderance of the evidence. However, the evidence must be carefully and critically scrutinized. The burden is upon the person claiming as donee. Such proof must be of great probative force, clearly establishing every element of a valid gift, by a fair preponderance. Where the intent to make a gift is evidenced in writing, slight evidence and acquiescence on the part of the donee is sufficient to establish the gift. Furthermore, it is not necessary to corroborate uncontradicted testimony.

62 NY Jurisprudence 2d §8 Subsequent declaration of donor

Subsequent declarations of a donor in the nature of admissions against interest are admissible in evidence as tending to show that a gift was made. An admission is at least some evidence as tending to show that the gift was made, although the alleged declarations of the donor made in general terms do not establish a gift as a matter of law. Declarations of the donor made at the time of delivery of the gift are admissible as part of the res gestae after the parties have shown that the donor was not acting for another person in making the gift, but subsequent declarations made long after a gift are not admissible as part of the res gestae.

62 NY Jurisprudence 2d §10 Presumptions-In light of confidential or fiduciary relationship between donor and donee

If a confidential relationship exists, even on slight evidence, the burden is shifted to the beneficiary of the transaction to prove the transaction fair and free from undue influence, as the free and voluntary act of the donor, understandingly made, and uninfluenced by fraud, duress, or coercion. The proof must be of great probative force and must clearly establish every element of a valid gift. Where the only evidence that a decedent intended to make a gift to a fiduciary is the testimony of persons with a substantial interest in the outcome of litigation over the gift, the testimony is insufficient to meet the burden.

Where the parties do not deal on terms of equality and when the circumstances suggest a substantial risk of overreaching, the donee must affirmatively demonstrate that the gift came from a willing and informed donor, untainted by impermissible influence on the part of the donee. Such

a circumstance of inequality has been said to raise a presumption that the gift was the result of undue influence.

Keeping these concepts in mind, we can turn to the facts of this case, both disputed and undisputed. The key figure in this case is Peter Salerno, a long time, if not life long, resident of the Wayne County community of Clyde. Mr. Salerno died on April 25, 2010, at the age of ninety, surviving his late wife by almost twenty years, and having retired from the Seneca Army Depot with many years of service. He was a decorated veteran of World War II, having served in the European Theater of that conflict. He is survived by his two children, Peter and Paula, who are the plaintiff and defendant, respectively, in this litigation.

So far as appears in the record, and as germane for present purposes, Mr.Salerno *(hereinafter the "decedent" or "Mr. Salerno")* entered his last years in relatively good heath and with two principal assets. The first was his real property located at 11362 Welch Road in the Town of Galen, consisting of his residence located upon 138 acres. The second were various bank accounts with the Savannah National Bank and the Lyons National Bank. The Last Will and Testament of the decedent was made on December 18, 2003, and remained unrevoked and without codicil at the time of his death. This Will provided that should decedent's son, Peter, survive him, Peter would receive his entire estate except for decedent's savings account at the Savannah National Bank. That savings account was to be divided five ways, with Paula receiving one share and four step-children receiving the remainder shares. In the event Peter predeceased his father, with Paula surviving, Paula would receive the entire estate less four fifths of the Savannah National Bank saving account going to her step-siblings. This Will was prepared by and executed under the supervision of attorney Richard C. Wunder of Lyons, New York, who also served as one of the witnesses thereto.

In August 2007, the decedent again engaged Mr. Wunder for legal services. At decedent's behest, Mr. Wunder prepared a full warranty deed transferring decedent's 11362 Welch Road property - residence and 138 acres - to the decedent's son Peter. Decedent signed the deed on August 31st and Mr. Wunder acknowledged the decedent's signature. The deed was recorded on September 11th in the Wayne County Clerk's Office and the transfer documents evidenced that the transfer was without consideration. After the transfer, the decedent remained in his long time residence, with an apparent understanding with his son that his continued use would be respected.

This gift to his son Peter was consistent with decedent's 2003 Will. Even though that Will did not specifically bequeath the real estate to Peter, it would have been part of the residuary estate, which was bequeathed entirely to Peter if he survived his father. The 2007 transfer, therefore, may be viewed as an inter vivos gift anticipating that would have been a testamentary bequest had decedent died owning the property. Why this was done was not addressed at trial, and the Court will not speculate as to the same. Nor is it important for this litigation that the reason be known. It is significant, however, that decedent's daughter Paula did become aware of the transfer not long after it occurred, because it at least partially explains the motivations behind the later bank transfers being challenged in this case and why Paula objected to Peter's plan to expend some of those funds to maintain the property that her father no longer owned.

The immediate chain of events that lead to this litigation started innocently enough on December 10, 2008, almost fifteen months to the day after the real property transfer to Peter was recorded in the Wayne County Clerk's Office. The day before, Paula had taken her father to the Savannah National Bank and he picked up a Power of Attorney form. The next day, the two returned to the bank and the Power of Attorney was executed by Mr. Salerno after full explanation by and under supervision of Patricia Stone, a trained bank employee. Paula was named attorney-in-fact in this document. Of course, this, in and of itself, was not anything out of the ordinary. Paula had been very helpful and attentive when it came to her father, and he relied upon her for assistance in keeping up with the business of daily living. While none of the disputed transfers occurred using the power of attorney, it does underscore the fiduciary like relationship between father and daughter at this time regarding his affairs.

On December 15, 2008, five days after the Power of Attorney was executed at the Savannah National Bank, Mr. Salerno experienced a fall at his home that lead to an ambulance being called and his transport to the Syracuse Veterans Administration Center. He was treated and discharged later that day with a prescription for hydrocodone, a narcotic pain killer with potential side effects that diminish capacity for sound judgment. According to his grandson, who administered the medication to the decedent, the medication had exactly that effect. Other witnesses also testified that after his return from the VA Mr. Salerno was confused, disorientated, unable to recognize certain people he knew well, or mistook them for others. This assessment was challenged by both Paula and

her husband, Paul Plucinik. The later testified at trial that he visited his father-in-law's home after lunch on December 17th when he was driving by and he saw his wife's vehicle in the driveway. Mr. Plucinik pulled in and went inside where he saw Mr. Salerno sitting at the dining room table signing a number of documents. Paula was in the process of making her father a cup of tea. After asking Mr. Plucinik whether he wanted something to drink, Mr. Plucinik testified that his father-in-law looked up in the middle of signing his name and said that he was "just trying to make things fair between Peter and Paula." The documents that were being signed, testified Mr. Plucinik, were those he identified at trial as Plaintiff's Exhibit 5. These documents were bank forms that directed that the accounts specified in the document be changed in the specified manner to the specified account holders. In each case, the bank form was completed to effect a change to an account previously opened and held by Mr. Salerno individually to one that was to be held "joint with survivorship" and the account holders to be "Peter T. Salerno, Sr. and Paula A. Salerno-Plucinik."[1] The forms collectively addressed three certificates of deposit and one savings account. Mr. Plucinik, who obviously knew his father-in-law well, testified that he noticed no discernable change in his demeanor, comportment, alertness, and cognition as historically was the case, and certainly nothing like that testified to by some of the other witnesses. After the forms were signed by the decedent on December 17th, Paula delivered them that day to the Clyde Branch of the Lyons National Bank and the changes were effected.

On December 22nd, there was an argument between Paula and her brother, Peter at their father's house. According to Paula, the argument started when Peter asked where their father's check and saving books were, so he could use the funds to purchase a furnace for the house. After Paula told Peter that the account books were under the kitchen counter, she stated that her father's funds should not be used for such expenses, as house maintenance was now Peter's responsibility, given that he was the owner. Peter was of quite a different mind about the matter, and after some heated discussion, the argument ended without any real resolution.

Whether coincidental with or precipitous of the next day's events, the December 22nd

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[1] At least one of these certificates of deposit was already a Totten trust for the benefit of Paula Plucinik.

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argument was followed the next day with Paula and her father going to the Savannah National Bank's Clyde branch. At trial, Amanda Brockman, a bank teller at this location, testified that on December 23rd, Mr. Salerno came into the bank with Paula and told Ms. Brockman that he wanted "to close [his] three CDs" and that "he wanted to give them to Paula to put in her name." Ms. Brockman testified that in such situation it is bank procedure that the intent, capacity, and free will of the donor be verified by two bank employees before the transaction may proceed. This procedure was invoked and Ms. Brockman and Ms. Stone, the head teller, spoke with Mr. Salerno about what he wished. He reiterated what he wanted to do; that is, give the CDs to his daughter, Paula. The two tellers continued to discuss the matter with Mr. Salerno and found that he "seemed fine, normal like he's always been" and that they did not have any concerns. The three CDs were then closed and the proceeds deposited in new accounts opened by and for Paula, or her contingent beneficiary. After those transfers, only a savings and a checking account remained in Mr. Salerno's name at the Savannah National Bank. Following these transactions at the Clyde branch of the Savannah National Bank, Paula and her father went over to the Clyde branch of the Lyons National Bank. At that time, Paula then closed the joint accounts created on December 17th and transferred the proceeds to accounts in her own name, or her contingent beneficiary.

On December 30th, Mr. Salerno visited the law office of Richard C. Wunder, Esq., in Lyons, New York. Mr. Wunder had represented Mr. Salerno on at least two previous occasions, the first being his 2003 Will and the second being the 2007 real property transfer to son Peter. Mr. Wunder testified that Paula had driven Mr. Salerno to his office, and while Mr. Salerno "was physically not maneuvering well, ... mentally he was fine." Mr. Salerno and Mr. Wunder discussed the 2007 land transfer to his son, and the recent CD transfers to her daughter, which were intended to be hers "solely and individually." Mr. Salerno instructed Mr. Wunder to prepare a health care proxy and also a document memorializing his dispositive intent with regard to the CDs. Based upon Mr. Wunder's discussions with Mr. Salerno, the following document was then and there dictated, typed, and submitted for Mr. Salerno's review, approval, and signature:

> This is to acknowledge that in the last several months, I have taken several steps regarding my financial status.
>
> First, about August 2008, I transferred my real property to my son, Peter T.

Salerno, Jr. This property was located in the Town of Galen and County of Wayne, and the transfer was without payment or consideration by him.

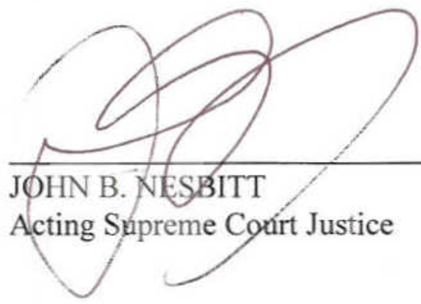
Next, in December 2008, I authorized my daughter A. Salerno-Plucinik to act in her capacity as my Power of Attorney to transfer several certificate of deposit accounts I had at the Savannah National Bank and at the Lyons National Bank (Clyde branch). It is my recollection that these accounts had been in name in trust for my daughter , Paula, or I had listed my daughter earlier as a joint owner on one or more of these accounts. I authorized my daughter to transfer these certificates of deposit into her name solely/individually. Like the transfer of the land noted above, the changing of the accounts into my daughter's name solely/individually was without payment or consideration by her. When the transfer of these accounts took place, I traveled to Savannah and to Clyde with my daughter to accomplish this.

Mr. Wunder testified that when Mr. Salerno signed the document there was "[n]o question in my mind that he was oriented and that he was in full capacity." His daughter, Paula, was not present in Mr. Wunder's office when his consultation with Mr. Salerno occurred, nor was she when the document was signed.

Largely based upon the testimony of Mr. Wunder and the two bank employees, the Court finds that the transfers plaintiff now seeks rescinded based upon a theory of tortious conversion were indeed good and valid gifts, the product of decedent's purposive, knowing, voluntary, and considered intent, without over-reaching or undue influence by defendant.

Accordingly, the complaint is dismissed.

Dated: September 20, 2012
Lyons, New York



JOHN B. NESBITT
Acting Supreme Court Justice

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