Ramirez
2014 NY Slip Op 31337(U)
May 22, 2014
Surr Ct, New York County
Docket Number: 2008-4276
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY
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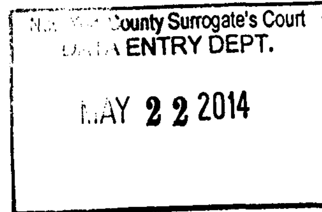
Petition of the Public Administrator of
the County of New York as Temporary
Administrator of the Estate of

File No. 2008-4276

ISMAEL RAMIREZ,

Deceased,



to Declare Null and Void a Deed dated
May 8, 2008, and for Related Relief
Pursuant to SCPA §2103.
--X

A N D E R S O N , S.

In this contested proceeding to void a deed and for related relief, petitioner, the Public Administrator of the County of New York as temporary administrator of the estate of Ismael Ramirez, moves for summary judgment against respondents Alberto Gonzalez ("Alberto") and Luisa Gonzalez ("Luisa") on the petition's first, second and fourth claims. Specifically, the Public Administrator asks the court to 1) declare a Warranty Deed dated May 8, 2008, transferring title to 544 West 49th Street, New York City ("the building"), from decedent to Alberto, null and void; 2) declare that title to the building is vested in decedent's estate; and 3) direct respondents to turn over to petitioner all rents and other income they have collected from the building from the date of the deed to the present, with statutory interest. The petitioner also seeks an accounting.

Ismael Ramirez died intestate on August 16, 2008. It is undisputed that Luisa had been his long-time girlfriend and that Alberto is her son, but not decedent's.

The subject deed, signed on May 8, 2008, by "Luisa Gonzalez POA for Ismael Ramirez," as grantor, purports to transfer the premises to Alberto for the sum of ten dollars. In the Real Property Transfer Report, which was filed with the deed, Luisa and Alberto certify that the full price paid for the building was ten dollars and that the transfer of title was between "relatives or former relatives." The sole issue before the court is whether Luisa had authority under the power of attorney to deed the building to Alberto.

The power of attorney used by Luisa was a New York Statutory Short Form Durable General Power of Attorney valid as signed on January 16, 2008, some seven months before decedent's death. Luisa was appointed to act alone as attorney-in-fact. A handwritten "X" appears next to, and the initials "IR" are inserted in, the brackets next to lettered items A through P on the form, thus authorizing the attorney-in-fact to participate in specified transactions. These include a gift-giving power denoted by the letter "M" which authorizes the attorney-in-fact to make "gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate $12,000 to each of such persons in any year." An illegible signature appears next to a handwritten X at the end of the document, which is acknowledged by a notary public.

Summary judgment will be awarded if the movant tenders

sufficient proof in admissible form to establish entitlement to judgment as a matter of law and the objectant does not come forward with evidence raising at least one material factual issue (*Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions" fail to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

It is undisputed that the power of attorney allows Luisa to make gifts of only $12,000 a year to a limited set of decedent's relatives (of which Alberto was not one) as set out in item "M." It is undisputed that the building, a 20-unit residential building with monthly rent rolls of approximately $14,000, was valued at $1,850,000 on the New York City Tax Assessment Roll for the tax year 2008-09. Respondents also do not dispute the ten-dollar purchase price listed on the deed and the Real Property Transfer Report. On its face, the gift-giving power granted to Luisa by item "M" of the power of attorney did not authorize the transaction in question, both because Alberto did not fall within the list of permissible persons entitled to receive gifts and because the gift far exceeded the permissible gift value.

In opposition to this motion, respondents assert that decedent wanted to gift the property to Alberto. They argue that decedent intended to give the building to them and that Luisa was

carrying out his wishes in using the power of attorney to transfer the building to Alberto. Alberto states in his affidavit that decedent suffered a stroke in 1995, that his health slowly deteriorated thereafter, and that in the last few years of his life, Luisa and Alberto assisted him personally and in managing the property. Alberto further states that decedent expressed his desire to transfer the property to them (and that he later accepted Luisa's request that it be transferred solely to Alberto). Alberto asserts that he provided the power of attorney form and that decedent signed it "giving [Luisa] complete authority to take all acts for him regarding his personal finances and the real estate business," including the transfer of the property according to his wishes. Respondents also submit an affidavit of a tenant in the building who states, without reference to any specific time or context, that he "could remember [decedent] telling me of his wishes that the building stay with his family Luisa and Alberto so that all his tenants would be taken care of ...." Without explicitly so stating, Alberto's affidavit suggests that decedent believed that the power of attorney authorized Luisa to make a gift of the property and that decedent intended to so provide. Even if this is true, it does not avail respondents.

Under both statutory and case law, the gift-giving provision in a power of attorney is limited by its explicit terms. The

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statute specifically allows additional language to be utilized to modify or expand the gift-giving powers in a Statutory Short Form Power of Attorney (General Obligations Law §5-1503). However, in the absence of such additional language, the limitations of item "M" are binding on the agent (*Matter of Ferrara,* 7 NY3d 244, 252-53 [2006]). The power of attorney signed by decedent is not ambiguous as to the gift-giving power which he bestowed. It clearly limits the size of gifts that can be made and the narrow class of permissible recipients. Indeed, as defined by General Obligations Law § 5-1502M in effect at the relevant time, item "M" gave the attorney-in-fact only a limited gift-giving power, as follows:

> "[t]o make gifts on behalf of the principal to the principal's spouse, children and other descendants, and parents ... only for purposes which the agent reasonably deems to be in the best interest of the principal ... provided that no person may be the recipient of gifts in any one calendar year which, in the aggregate, exceed [$12,000], unless the statutory short form power of attorney contains additional language pursuant to section 5-1503 of the general obligations law authorizing gifts in excess of said amount or gifts to other beneficiaries."

The court cannot look beyond the unambiguous language of the power of attorney to determine whether the grantor actually had a different and more expansive intent. In the absence of language which is susceptible to differing interpretations, there is no occasion for the court to examine decedent's intent beyond its expression in the power of attorney, notwithstanding respondents'

request that the court do so. As the Court of Appeals has noted, the legislature, in including a gift-giving power in the General Durable Power of Attorney, "sought to empower individuals to appoint an attorney-in-fact to make annual gifts consistent with financial, estate or tax planning techniques and objectives - not to create gift-giving authority generally, and certainly not to supplant a will" (*Matter of Ferrara,* 7 NY3d 244, 253 [2006]).

Luisa's claim that she was decedent's common law wife does not confer authority to transfer decedent's property to Alberto.[1] It is undisputed that Luisa and decedent had a long and loving family-type relationship lasting for 40 years or more until his death, and that her son Alberto was a part of that relationship. However, the property was in decedent's name alone, and even if Luisa and decedent had been married, the power of attorney would not have conferred upon her the power to make gifts of more than $12,000 to any person, nor to make any gifts to Alberto, who was not decedent's relative.

Although the thrust of respondents' position is that decedent intended to make a gift to them, they make a secondary argument that years of living together and sharing responsibility

[1]Common law marriages cannot be contracted in New York (*People v Heine*, 12 AD2d 36 [2d Dept 1960], *aff'd,* 9 NY2d 925 [1961]), and Luisa failed to assert that she and decedent established a common law marriage in a jurisdiction which permits such marriages, which would be a necessary predicate to its recognition in New York (*Mott v Duncan Petroleum Trans.*, 51 NY2d 289, 292 [1980]).

for the property constituted after-the-fact consideration for the transfer. Respondents provide no evidence of any such agreement with decedent, much less that if there had been any such contract, the value of services they provided (which are not specifically identified or quantified) would have constituted adequate consideration for the valuable asset in question. Further, as noted above, references to a transfer for consideration are at cross-purposes with their premise in this proceeding that decedent intended to make a gift to them.

Respondents fail to raise a material issue of fact to dispute that Luisa lacked authority to make the transfer under the power of attorney. Accordingly, summary judgment is granted to the Public Administrator on her first and second claims.

With respect to the movant's fourth claim, asking for the turnover of all rents and income of the subject building since May 8, 2008, with interest, respondents dispute whether there is any such income or, if there is, the amount due, in view of their claims that they have made expenditures for the building which are payable from such income, as well as having other claims against the estate. Accordingly, the Public Administrator's right to any relief on this issue must await an accounting by respondents for the period of their stewardship of the building.

Settle decree.

SURROGATE

Dated: May 22, 2014