

**Demetriou v Karous**

2014 NY Slip Op 31631(U)

June 16, 2014

Supreme Court, Suffolk County

Docket Number: 13-7317

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 8-23-13  
ADJ. DATE 2-4-14  
Mot. Seq. # 001 - MG

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PETE DEMETRIOU a/k/a PANAYIOTIS  
DEMETRIOU,  
  
Plaintiff,

- against -

NIKOLAS KAROUS,  
  
Defendant.

KEEGAN & KEEGAN, ROSS & ROSNER, LLP  
Attorney for Plaintiff  
315 Westphalia Avenue  
Mattituck, New York 11952

MARK H. WEISS, P.C.  
Attorney for Defendant/Third-Party Plaintiff  
6165 Jericho Turnpike  
Commack, New York 11725

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NIKOLAS KAROUS,  
  
Third-Party Plaintiff,

- against -

IZOLDA BARBAKADZE DEMETRIOU,  
ATTORNEY GENERAL OF THE STATE OF  
NEW YORK, WELLS FARGO BANK, N.A.,  
PANAYIOTIS DEMETRIOU a/k/a PETE  
DEMETRIOU AS TRUSTEE OF THE  
PANAYIOTIS DEMETRIOU a/k/a PETE  
DEMETRIOU REVOCABLE LIVING TRUST,  
and THE US DEPARTMENT OF HOUSING  
AND URBAN DEVELOPMENT,  
  
Third-Party Defendants.

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HOGAN LOVELLS US LLP  
Attorney for Third-Party Defendant Wells Fargo  
875 Third Avenue  
New York, New York 10022

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the third-party defendant Wells Fargo Bank, N.A., dated July 29, 2013, and supporting papers 1 - 32 (including Memorandum of Law dated July 29, 2013); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the defendant/third-party plaintiff Nicholas Karous, dated September 24, 2013, and supporting papers 33- 93 (including Memorandum of Law dated September 24, 2013); (4) Reply Affirmation by the third-party defendant Wells Fargo Bank, N.A., dated October 16, 2013, and supporting papers 94 - 96; (5) Other \_\_\_ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that this motion by third-party defendant Wells Fargo Bank, N.A. for an order pursuant to CPLR 3211 (a)(7) dismissing the third-party action against it is granted.

Plaintiff, Pete Demetriou a/k/a Panayiotis Demetriou (Demetriou), commenced this action on March 12, 2013 for partition of property known as 605 Ruth Road, Mattituck, New York. Demetriou and defendant/third-party plaintiff, Nicholas Karous (Karous), each own a 50 percent interest in the 605 Ruth Road property as tenants in common.

Karous commenced a third-party action alleging that Demetriou entered into a joint will with his now deceased first wife, Helen Demetriou; that the 605 Ruth Road property as well as properties located at 500 and 720 Stanley Road, Mattituck, New York were jointly owned by the Demetrious, are part of the Estate, and are subject to the terms of the joint will; and that Karous is a named residuary beneficiary of the joint will. In addition, Karous alleges that following the death of Helen Demetriou on June 27, 1998, Demetriou submitted the joint will for probate on September 28, 1998 and was appointed Executor of the Estate of Helen Demetriou; that Demetriou agreed to be bound by the terms of said irrevocable contract and has a continuing fiduciary duty to safeguard the rights and interests of all distributees and/or beneficiaries named in the will; and that all property owned by the Demetrious at the time that the joint will was probated cannot be partitioned, sold, mortgaged or disposed of in any manner. Moreover, Karous alleges that pursuant to the terms of the joint will, Demetriou possesses a life interest in his use and disposition of said property, and that the terms of the joint will require that he preserve the real and personal property owned by the Demetrious on the date that the joint will was submitted to probate so that the property may ultimately be distributed to the beneficiaries under the will.

The second cause of action of the third-party complaint refers specifically to the third-party defendant Wells Fargo Bank, N.A. (Wells Fargo) and concerns the 500 Stanley Road property. It alleges that on July 26, 2010, Wells Fargo obtained a reverse mortgage in the amount of \$870,000.00 on the 500 Stanley Road property, and that Wells Fargo knew or should have known of the existence of the joint will prohibiting Demetriou from encumbering the property with a reverse mortgage. It also alleges that the reverse mortgage violates the terms of the joint will and should be set aside; that Wells Fargo should be permanently enjoined from making any further payments to Demetriou pursuant to the reverse mortgage; that Wells Fargo should be prohibited from collecting any interest on the loan which will impair and defeat the rights of the beneficiaries under the will; that Wells Fargo should be required to provide Karous with an accounting of the reverse mortgage proceeds paid to Demetriou; and that Karous is entitled to a monetary judgment against Wells Fargo from the reverse mortgage proceeds based on his residuary beneficiary status.

Wells Fargo now moves pursuant to CPLR 3211 (a)(7) to dismiss the third-party complaint as against it on the ground that it fails to assert any cognizable claim against it. Wells Fargo explains that Demetriou executed a Home Equity Conversion Loan Agreement and gave Wells Fargo a mortgage on the 500 Stanley Road property as security for said loan. Wells Fargo asserts that there is no law requiring the vacatur of a mortgage where a mortgagee had actual or constructive notice of the existence of a will affecting the property to be mortgaged, and that Karous cannot obtain an accounting absent allegations and proof of a fiduciary relationship. Submissions in support of the motion include the summons and complaint, Karous' answer, the third-party summons and third-party complaint, the joint will, the death certificate of Helen Demetriou and the Wells Fargo adjustable rate reverse mortgage.

In opposition to the motion, Karous contends that the third-party complaint states viable claims and that he seeks a declaration pursuant to RPAPL 1501 of the rights and interest of the parties in the 500 Stanley Road property. He contends that the claim against Well Fargo is that Wells Fargo knew or should have known, based on a cursory review of Surrogate's Court records showing that Dementriou's first wife was in the chain of title, that Demetriou's title to the 500 Stanley Road property was limited to a life estate such that the reverse mortgage interest held by Wells Fargo improperly exceeded Demetriou's property interests.

In reply, Wells Fargo argues, among other things, that Karous lacks standing to assert a quiet title claim pursuant to RPAPL article 15 inasmuch as he has no current interest in the 500 Stanley Road property.

“A validly executed joint will is a proper and legally tenable means of effecting a testamentary disposition of property” (*Matter of Covert*, 97 NY2d 68, 73-74, 735 NYS2d 879 [2001]; see *Schwartz v Horn*, 31 NY2d 275, 338 NYS2d 613 [1972]; EPTL 13-2.1 [b]). “[W]here a joint will is at issue, when one of the testators dies, the survivor is bound by the terms of the joint will and is prohibited from making a testamentary disposition or inter vivos gift that would defeat the purpose or plan of the joint will, ‘for equity would be ill-served if, after one party had honored the agreement, the other party, having reaped its fruit, were at liberty to uproot it’” (*Matter of Murray*, 84 AD3d 106, 921 NYS2d 161 [2d Dept 2011], *lv denied* 18 NY3d 874, 938 NYS2d 855 [2012] quoting *Glass v Battista*, 43 NY2d 620, 624, 403 NYS2d 204 [1978]; see *Blackmon v Estate of Battcock*, 78 NY2d 735, 579 NYS2d 642 [1991]). “The compact generally involves the joint disposition of the collective property of both and not the independent disposition by each of their own” (*Blackmon v Estate of Battcock*, 78 NY2d 735, 741, 579 NYS2d 642; see *Glass v Battista*, 43 NY2d 620, 624, 403 NYS2d 204).

Upon the death of one party to the joint will, the survivor is bound by the mutual agreement that the named beneficiaries should receive the property remaining when the survivor dies (*Rubenstein v Mueller*, 19 NY2d 228, 233-234, 278 NYS2d 845 [1967]). “The survivor's right to full ownership of the collective property is transformed and modified by this joint agreement, effective upon the other's death as stated above, into but an interest during the life of the survivor with power to use the principal” (*id* at 234, 278 NYS2d 845). The Court of Appeals held that there is “a vast difference between an agreement to bequeath or devise a specific piece of property ... to named individuals and an agreement between testators that the survivor will leave his [e]ntire estate ... to particular beneficiaries” (*Schwartz v Horn*, 31 NY2d 275, 280, 338 NYS2d 613 [1972]). The Court of Appeals concluded that “in the first case, the agreement precludes an inconsistent Inter [V]ivos gift. But this does not mean that the agreement in the other case-that the entire

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estate be left to certain beneficiaries-necessarily prevents the survivor from making a gift during his lifetime, since such a gift would not necessarily defeat the purpose of the agreement” (*id.*). “In no instance, however, would a transfer-whether or not it defeats the purpose of the agreement-be prohibited when the property or its proceeds are used to meet the daily needs of the surviving testator” (*id.* at 280-281, 338 NYS2d 613; *see also Rubenstein v Mueller*, 19 NY2d 228, 278 NYS2d 845; *Di Lorenzo v Ciancio*, 49 AD2d 756, 373 NYS2d 167 [2d Dept 1975], *appeal denied* 38 NY2d 707, 382 NYS2d 1026 [1975]; *Matter of Estate of Pierce*, 135 Misc 2d 610, 516 NYS2d 406 [Sur Ct, Suffolk County 1987][property encumbered by Department of Social Services lien for public assistance to surviving spouse]).

The relevant portions of the joint will executed by Demetriou and Helen Demetriou on October 29, 1993 provide as follows:

First. ... I give, devise and bequeth all my property, real, personal or of whatsoever nature and wheresoever situate and over which I have any power of disposition, absolutely and forever, to my SPOUSE, excepting however, any interest which I may have in premises known as 605 Ruth Road, Mattituck, New York, I give and devise to CHRISTALLA PETROPOULLOU, subject to her life estate, remainder to the residuary estate.

Second, this is a joint will and may not be altered, revoked or changed by the surviving spouse after the death of the first spouse and is made in consideration of certain agreements heretofore made between husband and wife.

Third, In the event that my Spouse should predecease me, die simultaneously with me, or within six months of my death, then I give, devise and bequeath all of my property as aforesaid to my Executors, hereinafter named, and direct that they dispose of it as follows:

All of my assets, real or personal of whatsoever nature are to be sold within a reasonable period after the date of death of the second SPOUSE herein and added to any cash monies which I own or bank accounts which I may possess and the proceeds thereof, after payment of inheritance and transfer taxes and the expense of administration of my estate, be disposed of as follows: ...

The rest residue and remainder of my estate is to be divided into SIX (6) EQUAL SHARES and paid over to my nephews and nieces, per stirpes, ONE SHARE EACH to MARY GUERTIN, PETE KARROUS, MARY KARAVIAS, STEVE ORROS, NICHOLAS KARROUS and FOSTIRA RACHWALSKI.

Lastly, I hereby appoint my Surviving SPOUSE, or in the event that my SPOUSE predeceases me, then in that event, MARY GUERTIN and PETER KARROUS executor of this, my last Will and Testament, with full power and authority to sell and convey, lease or mortgage real estate, hereby revoking all former wills by me made.

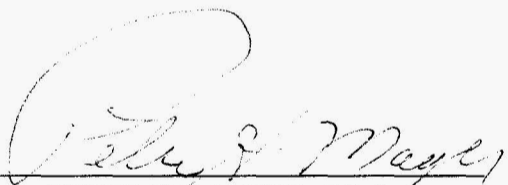
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Helen Demetriou's death certificate indicates that she died on June 27, 1998. Thereafter, Demetriou executed an adjustable rate reverse mortgage on July 26, 2010 on the 500 Stanley Road property in return for a home equity loan of the maximum principal amount of \$870,000.00.

In determining whether to dismiss pursuant to CPLR 3211 (a) (7), the court must assume to be true the facts plead, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (*Dickinson v Igoni*, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; *Tsutsui v Barasch*, 67 AD3d 896, 892 NYS2d 400 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). In determining if a pleading states a cause of action, "the sole criterion" for the Courts is whether "from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

Here, after Helen Demetriou's death, the property received by Demetriou was his but subject to an interest specifically enforceable by the named beneficiaries, including Karous, as to so much of it as he did not consume during his lifetime (*Rubenstein v Mueller*, 19 NY2d 228, 233-234, 278 NYS2d 845). Karous, as residuary beneficiary of the joint will, cannot seek to enforce the terms of the joint will during the life of the surviving spouse Demetriou (see *Rubenstein v Mueller*, 19 NY2d 228, 278 NYS2d 845; *Matter of the Estate of Donsky*, 43 Misc 2d 789, 252 NYS2d 343 [Sur Ct, 1964]). In any event, the express terms of the joint will give Demetriou, as the surviving spouse and executor, full power and authority to mortgage real estate. Thus, Karous has no standing at this juncture to seek a determination of the validity of the reverse mortgage of Wells Fargo based on the terms of the joint will or related relief of an injunction, an accounting, and monetary damages, and the third-party complaint fails to state a cause of action as against Wells Fargo based on the express terms of the joint will (see *Matter of Estate of Pierce*, 135 Misc 2d 610, 516 NYS2d 406). Therefore, the third party complaint is dismissed as against Wells Fargo, and the third-party action is severed and continued as against the remaining defendants.

Dated: 6-16-14

  
PETER H. MAYER, J.S.C.