

**Picard v Fish**

2014 NY Slip Op 33755(U)

December 11, 2014

Supreme Court, Albany County

Docket Number: 3548-14

Judge: Gerald William Connolly

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY


HERMAN W. PICARD, III and DAVID E. PICARD,

**DECISION AND ORDER**

Index No. 3548-14

Plaintiffs,

-against-

Albany County Clerk  
Document Number 11747215  
Rcvd 12/16/2014 11:55:06 AM 

JEANNE PICARD FISH and BIERNACKI PROPERTY  
MANAGEMENT LLC,



Defendants.

\_\_\_\_\_  
(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Thomas D. Latin, Esq.  
Sheehan Green Golderman & Jacques, LLP  
Attorneys for Defendant Jeanne Picard Fish  
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Farer & Schwartz, P.C.  
Attorneys for Plaintiffs  
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Latham, New York 12110

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350 Fifth Avenue, Suite 3000  
New York, New York 10118

Connolly, J.:

Defendant Jeanne Picard Fish moves for an order pursuant to CPLR 3211(a)(5) dismissing the first and second causes of action upon the grounds that the statute of limitations has expired, pursuant to CPLR 3211(a)(7) dismissing the third and fourth causes of action upon the grounds that they do not state a cause of action, and pursuant to CPLR 3211(a)(10) dismissing the complaint in its entirety on the grounds that the plaintiffs have failed to join a necessary party, and for an order pursuant to CPLR 6514 vacating and cancelling the notice of



pendency filed by plaintiff on July 9, 2014. Defendant Biernacki Property Management, LLC (“Biernacki”) has cross-moved for an order dismissing plaintiffs’ complaint for lack of standing and on statute of limitations grounds. Plaintiffs oppose the motions. In this action, plaintiffs, who are the sole children of Herman and Alice Picard, along with defendant Jeanne Picard Fish, are essentially seeking, *inter alia*, rescission of a deed of property from Alice Picard to defendant Fish that occurred within Ms. Picard’s lifetime as such property was allegedly devised to plaintiffs and defendant Fish as beneficiaries of a Trust created by virtue of the will of Alice Picard.

Plaintiffs and defendant Jeanne Picard Fish are the sole children of Herman and Alice Picard. Plaintiffs allege in their complaint, *inter alia*, that Herman Picard, Jr. conveyed to himself and Alice Picard, as tenants by the entirety, a parcel of real property situated in the Town of New Scotland by deed dated January 22, 1952. Herman Picard, Jr. died on March 7, 1974 leaving Alice Picard as sole surviving tenant and Alice Picard executed a Last Will and Testament in 1977 pursuant to which, all of her assets, including the real property, were left in trust for the benefit of the children until they reached fifty years of age. Further, pursuant to the Last Will and Testament, defendant Fish was nominated as Executrix of her estate. Alice Picard died on April 29, 1997 and plaintiffs assert that the Last Will and Testament of Alice Picard was never probated.

By deed dated February 3, 1988 the then remaining portion of real property was conveyed by Alice Picard to defendant Fish. Plaintiffs assert that at the time of the execution of the 1988 Deed, Alice Picard was unduly influenced and coerced by defendant Fish such execution. Plaintiffs assert that they continued to work in and devote efforts in the business conducted on the premises after the death of their father under the belief that a portion of the premises was being devised to them as beneficiaries of the Will of Alice Picard and that the will would be

probated.

Plaintiffs have alleged three causes of action in their amended complaint: (i) pursuant to RPAPL Article 15, declaratory judgment relief that the conveyance from Alice Picard to defendant Fish was void *ab initio* and without legal force and effect and accordingly, title to the premises is vested in the plaintiffs and defendant Fish as tenants in common free and clear of claims of any other party, (ii) a judgment rescinding the deed of the property at issue to defendant Fish on the grounds of fraudulent conduct and concealment by defendant Fish that was allegedly not discovered by plaintiffs until 2013; and (iii) imposition of a constructive trust and a declaration that Defendant Fish holds title to the subject premises as trustee for defendant and the plaintiffs.

Subsequent to the filing of the motions to dismiss, plaintiffs assert that they “prepared, have filed and will be serving a Supplemental Summons and Amended Complaint in this action, a copy of which is attached as Exhibit A”, which eliminated a third cause of action regarding breach of fiduciary duty and a fourth cause of action seeking partition, added a cause of action asserting fraudulent concealment and joined two additional parties as defendants, thereby, in part, addressing certain objections stated by the defendants in their motions to dismiss. Plaintiffs contend that this amendment was available as of right pursuant to CPLR §3025(a). Defendant Fish has submitted a “Memorandum of Law ... In Reply to the Opposition Submitted by the Plaintiffs” and continues to assert, *inter alia*, that “[t]here is nothing in the Plaintiff’s Amended Complaint, Complaint, or opposition papers, which saves the instant action from dismissal” (Memo of Law, pg 1). The Court is not in receipt of any reply papers from defendant Biernacki with respect to its cross-motion nor addressing the proposed amended complaint. Further, while the record indicates that the two additional proposed defendants have been served with the amended complaint, it is not clear whether they were served with either of the moving

defendants' motions to dismiss.

In determining the effect of an amended pleading on pending motions to dismiss, it has been held that the moving party has the option to decide whether its motion should be applied to the new pleadings (*see Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 AD2d 35 [1<sup>st</sup> Dept 1998])<sup>1</sup>, (which in this case defendant Fish has demonstrated, via her reply papers, that her motion to dismiss should be applied); however, defendant Fish is not the only defendant in this action. The Court, in the interests of justice, has procured the Albany County Clerk's file in this matter, and, notes that defendant Biernacki has not filed a reply with respect to its cross-motion nor addressed the amended complaint in any manner, and while the Court would ordinarily let such defendants make the determination of whether to proceed on their motions to dismiss, it faces the additional fact that two further defendants are being joined in this action who have not, based upon the record before the Court, been served with such motions. As the amended complaint differs significantly from the original complaint (*see Gurary v Rendler, et al.*, 40 Misc3d 1231(A)[Sup Ct, New York County, 2013]) and further, adds additional party defendants, the Court hereby dismisses the pending motions to dismiss as moot without prejudice to renew (*see Sholom & Zuckerbrot Realty Corp. v. Coldwell Bank Commercial Group*, 138 Misc2d 799 [Sup Ct, Queens County 1988][noting that a motion to dismiss should only be dismissed as moot due to amendments to a complaint in "those situations where the amendments make a significant change in the nature of the action").

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

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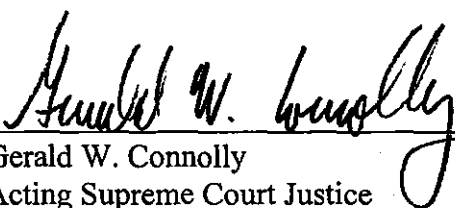
<sup>1</sup>The Court notes that in the Second Department a motion to dismiss addressed to the merits may not be defeated by an amended pleading (*see Livadiotakis v Tzitzikalakis*, 302 AD2d 369 [2<sup>nd</sup> Dept 2003]).

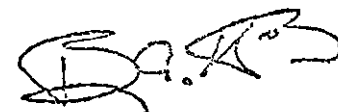
**ORDERED** that the motions of defendants Jeanne Picard Fish and Biernacki Property Management, LLC are each denied as moot, without prejudice to renew.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for the plaintiffs. A copy of this Decision and Order together with all other papers are being forwarded to the Albany County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

**SO ORDERED.  
ENTER.**

Dated: December 11, 2014  
Albany, New York

  
Gerald W. Connolly  
Acting Supreme Court Justice



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**Papers considered:**

1. Notice of Motion dated September 2, 2014 with accompanying exhibits A-D; Memorandum of Law of the Defendant, Jeanne Picard Fish, in support of the Defendant's Motion To Dismiss the Complaint dated September 2, 2014;
2. Notice of Cross-motion to Dismiss the Complaint dated September 23, 2014; Affirmation in Support of Cross-Motion to Dismiss dated September 23, 2014;
3. Affirmation of Steven D. Farer, Esq. dated September 23, 2014 with accompanying exhibits A-B; Affidavit of David Picard dated September 23, 2014; Affidavit of Herman W. Picard, III dated September 23, 2014; Affidavit of Suzanne Picard dated September 23, 2014; Memorandum of Law in Opposition to Motion of Jeanne Picard Fish to Dismiss the Complaint dated September 23, 2014;
4. Memorandum of Law of the Defendant, Jeanne Picard Fish, In Reply to the Opposition Submitted by the Plaintiffs dated October 2, 2014;
5. Affirmation in Opposition of Steven D. Farer, Esq. (re: cross-motion) dated October 3, 2014;
6. Affidavits of Service re: Amended Complaint on Arelis M. DeJesus and Hector L. DeJesus dated October 22, 2014.

