

**Manning v Lavoie**

2015 NY Slip Op 32491(U)

December 30, 2015

Supreme Court, Suffolk County

Docket Number: 09-42253

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 1/29/15 (#008)  
MOTION DATE 4/16/15 (#009)  
ADJ. DATE 4/30/15  
Mot. Seq. # 008 - MD  
# 009 - XMD

-----X  
MARIE MANNING, as Executrix of the Estate  
of FREDERICK VIGLIETTA, deceased,  
  
Plaintiff,  
  
- against -  
  
ALAIN LAVOIE and STELLA LOUISE  
LAVOIE,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 29 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 21; Answering Affidavits and supporting papers   ; Replying Affidavits and supporting papers 22 - 26, 27 - 29; Other Memoranda of Law; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendants for summary judgment dismissing the complaint against them is denied; and it is

**ORDERED** that the cross motion by plaintiff for, *inter alia*, summary judgment on the complaint is denied.

Frederick Viglietta ("Viglietta") commenced this action pursuant to Real Property Law Article 15 to compel the return of real and personal property allegedly converted by his daughter and her husband, defendants Stella Lavoie and Alain Lavoie. Viglietta and his wife, Stella Viglietta, held title to premises known as 5 Jeffrey Lane, Lake Success, New York, as tenants by the entirety until she passed away in May 2000. Following a hospitalization for illnesses and accident-related injuries, Viglietta allegedly agreed to let defendants live at his residence rent-free if they promised to help take care of him

and to manage his financial affairs. The complaint alleges, among other things, that defendants forged Viglietta's signature in connection with a fraudulent sale of his residence; that defendants used the proceeds of the sale and money taken from his bank account and safety deposit box to purchase their current residence and other personal items; that defendants did not include his name on the deed to the new residence; that defendants refused to let him back into the residence following an accident that required his hospitalization; and that defendants unlawfully cashed his pension and social security checks while he was at a rehabilitation facility. Simultaneous with the commencement of this action, Viglietta filed a notice of pendency against defendants' residence, known as 50 Annadale Road, Commack, New York. On December 17, 2009, defendants joined issue by filing an answer with counterclaims. Defendants' counterclaims includes causes of action for defamation and an award of punitive damages based on harm to their reputation.

By Order dated August 1, 2011, this Court denied a motion by defendants to dismiss the complaint and cancel the notice of pendency against the Commack residence. On February 27, 2012, this Court issued another Order partially granting a motion to dismiss defendants' counterclaims to the extent that the counterclaims based on defamation and an award of punitive damages were dismissed. However, by Order dated November 12, 2013, the Court deemed the February 27, 2012 Order a nullity pursuant to CPLR 1015, noting that Viglietta's counsel notified it, nearly one month after the Order was issued, that Mrs. Viglietta had died on February 7, 2012. The November 2013 Order also denied a motion by Marie Manning, substituted as plaintiff herein, to extend the notice of pendency filed against defendants' property, which had expired on October 22, 2012. Conversely, the Court granted a cross motion by defendants seeking cancellation of the expired notice of pendency and a subsequent notice of pendency that had been filed in the name of the deceased plaintiff on September 19, 2012.

Defendants now move for summary judgment dismissing the complaint against them on the grounds that testamentary and documentary evidence establishes, as a matter of law, that they did not convert any of Viglietta's property, forge his signature, or exercise any undue influence over him. In particular, defendants assert that information contained in Viglietta's tax return and closing statements related to the sale of his home in Lake Success provide indisputable proof that he was paid good and valuable consideration for the transfer of the property, and that he did so willingly. Defendants' submissions include, *inter alia*, affidavits by Viglietta's tax preparer, real estate attorney, and the notary public who allegedly witnessed his signature in connection with the sale of the Lake Success property, as well as copies of the transcripts of the parties' deposition testimony, Viglietta's tax returns for 2000 through 2002, and a petition for bankruptcy Viglietta filed in New Jersey on July 29, 1998. Plaintiff opposes the motion and cross-moves for summary judgment on the claim for imposition of a constructive trust against defendants' property in the sum of \$189,500, together with statutory interest since June 2009. Alternatively, plaintiff seek an order awarding a money judgment against defendants for the sum \$95,000, together with statutory interest since October 2000. Plaintiff argues, *inter alia*, that defendants' motion violates the rule against successive summary judgment motions, that the motion duplicates arguments previously rejected by the Court, and that it fails to eliminate significant triable issues from the case, including, among others, triable issues as to whether defendants failed to pay the deceased plaintiff the full amount of \$68,750 due at the closing, and whether defendant Stella Lavoie

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exercised undue influence over Viglietta, who was suffering from Parkinson's disease and depression at the time he allegedly agreed to sell defendants the Lake Success property.

The affidavit by defendant Stella Lavoie states, in relevant part, that she was present at the closing for the sale of the Lake Success property, and that her father voluntarily agreed to its sale. The affidavit states that the Lavoies made a payment in cash and obtained a mortgage in excess of \$500,000 to complete the purchase, and though she could not recall whether the deceased plaintiff was present at the closing, Ms. Lavoie believed that the deceased plaintiff granted attorney Sheldon Feinstein a power of attorney to complete the transaction.

The affidavit by Gloria Boyd states that on October 6, 2000, Viglietta requested that she acknowledged his signature on the bargain and sale deed transferring ownership of the Lake Success property to defendant Alain Lavoie. The affidavit also states that Ms. Boyd personally observed Viglietta sign the deed, and that, based on her long-time friendship with him, she agreed to deliver it to a title company on his behalf.

The affidavit by Sheldon Feinstein states that he refreshed his recollection of the events surrounding the sale of the Lake Success property by reviewing documents related to the sale of the Lake Success property, and that, to the best of his refreshed recollection, he was authorized to represent both parties to the transaction at the closing. The affidavit states that a power of attorney notarized by Gloria Boyd authorized him to represent Viglietta, and that, to the best of his recollection, Viglietta fully consented to the sale of the premises. The affidavit further states that the sale of the property was an "arms-length" transaction; that the sales price of the property was \$625,000; and that Alain Lavoie made a down payment and obtained a mortgage in the sum of \$525,000 to complete the purchase.

The affidavit by John Halpin states, in pertinent part, that he handled Viglietta's tax affairs for over 25 years, including his personal income taxes for 2000 through 2003, and that beginning 2001 and thereafter, the deceased plaintiff informed him that he could no longer claim real estate tax deductions related to his Lake Success property, because it had been sold to Alain Lavoie. According to Halpin, these changes were reflected in tax returns he prepared on behalf of the deceased plaintiff, as well as on tax returns he prepared on behalf of the Alain and Stella Lavoie, who were also his clients. The affidavit further states that Viglietta sold the property to his son-in-law to obtain money he needed to pay off federal tax liens levied against him – including possible liens that would have been placed against said property – because of unpaid payroll taxes.

Initially, the Court notes that invocation of the Dead Man's Statute is expressly limited by statute to "the trial of an action or the hearing upon the merits of a special proceeding" (CPLR 4519). It "precludes a party or person interested in the underlying event from offering testimony concerning a personal transaction or communication with the decedent" (*Matter of Rosenblum*, 284 AD2d 820, 821, 727 NYS2d 193 [2001], *lv denied* 97 NY2d 604, 735 NYS2d 493 [2001]; *see* CPLR 4519). While evidence otherwise excludable under the statute should not be used to establish entitlement to summary judgment (*see Phillips v Kantor & Co.*, 31 NY2d 307, 313, 338 NYS2d 882 [1972]), such evidence is sufficient to defeat a motion for summary judgment, so long as it is not the sole evidence proffered (*see*

*Phillips v Kantor & Co.*, *supra* 314; *see Marszal v Anderson*, 9 AD3d 711, 713, 780 NYS2d 432 [3d Dept 2004]). Nevertheless, the Dead Man's Statute does not bar the introduction of documentary evidence against a deceased's estate on a summary judgment motion, so long as "the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased" (*Miller v Lu-Whitney*, 61 AD3d 1043, 1045, 876 NYS2d 211 [3d Dept 2009], quoting *Acevedo v Audubon Mgt.*, 280 AD2d 91, 95, 721 NYS2d 332 [1st Dept 2001]). Likewise, statements of a decedent are not rendered inadmissible under the Dead Man's statute when offered in opposition to a motion for summary judgment (*see Lauriello v Gallotta*, 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; *Rosado v Kulsakdinun*, 32 AD3d 282, 284, 820 NYS2d 239 [1st Dept 2006]; *Beyer v Melgar*, 16 AD3d 532, 533, 792 NYS2d 140 [2d Dept 2005]).

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (*Altieri v Golub Corporation*, 292 AD2d 734, 741 NYS2d 126 [2002]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 497 NYS2d 557, 404 NE2d 718 [1980]).

To establish a *prima facie* case for fraud, a plaintiff must submit proof that: (1) the defendant made a representation as to a material fact; (2) such representation was false; (3) defendant intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff sustained pecuniary loss (*see Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 488, 836 NYS2d 509 [2007]). "Forgery is defined by the common law to be the fraudulent making of a writing to the prejudice of another's rights, or the making *malo animo* of any written instrument for the purpose of fraud and deceit. Forgery may [also] be committed by fraudulently procuring the signature of another to an instrument which he has no intention of signing" (*Marden v Dorthy*, 160 NY 39, 53, 54 NE 726 [1899]). "It is clear from these definitions that 'forgery' is but one species of 'fraud' " (*Piedra v Vanover*, 174 AD2d 191, 194, 579 NYS2d 675 [2d Dept 1992]). Conversion, on the other hand, takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*see State of New York v Seventh Regiment Fund*, 98 NY2d 249, 746 NYS2d 637 [2002]). "Two key elements of conversion are (1) plaintiff's possessory

right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50, 827 NYS2d 96 [2006]).

A party seeking to invalidate a transaction on the basis of undue influence must produce evidence that a defendant's influence "amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [plaintiff] to do that which was against his [or her] free will and desire, but which he [or she] was unable to refuse or too weak to resist" (*Hearst v Hearst*, 50 AD3d 959, 961-962, 857 NYS2d 596 [2d Dept 2008], quoting *Matter of Walther*, 6 NY2d 49, 53, 188 NYS2d 168 [1959]). The burden of proving undue influence rests with the party asserting its existence (see *Matter of Connelly*, 193 AD2d 602, 597 NYS2d 427 [2d Dept 1993]). "However, if a confidential relationship exists, the burden is shifted to the beneficiary of the transaction to prove the transaction fair and free from undue influence" (*Matter of Connelly*, *supra* at 603). "A confidential relationship is one that is 'of such a character as to render it certain that [the parties] do not deal on terms of equality. Such inequality may occur from either one party's superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence or from the other's weakness, dependence, or trust justifiably reposed on the stronger party' " (*Matter of Bonczyk v Williams*, 119 AD3d 1124, 1125, 990 NYS2d 304 [3d Dept 2014], quoting *Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 698-699, 412 NYS2d 593 [1978]).

The doctrine of unjust enrichment invokes an "obligation imposed by equity to prevent injustice" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142, 879 NYS2d 355 [2009]). "The essential inquiry in [an] action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182, 919 NYS2d 465 [2011]). A constructive trust may be imposed to prevent unjust enrichment. Imposition of a constructive trust is warranted when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest (see *Sharp v Kosmalski*, 40 NY2d 119, 386 NYS2d 72 [1976]). In determining whether to impose a constructive trust, a court looks to four factors: the existence of a fiduciary or confidential relationship, a promise, a transfer in reliance thereon, and an unjust enrichment (see *Depena v Schocker*, 83 AD3d 885, 922 NYS2d 119 [2d Dept 2011]; *Berger v Berger*, 81 AD3d 765, 916 NYS2d 626 [2d Dept 2011]). However, these elements are simply guidelines and are not to be applied rigidly in pursuing the goal of preventing unjust enrichment (see *Matter of Wiczorek*, 186 AD2d 204, 587 NYS2d 755 [2d Dept 1992]). Indeed, the third element may be satisfied where the party seeking to impose the trust has no prior interest in the property but does contribute funds, time or effort to the property in reliance on a promise of an interest therein (see *Moak v Raynor*, 28 AD3d 900, 814 NYS2d 289 [3d Dept 2006]; *Heness v Hunt*, 272 AD2d 756, 708 NYS2d 180 [3d Dept 2000]; *Lester v Zimmer*, 147 AD2d 340, 542 NYS2d 855 [3d Dept 1989]).

Although defendants met their initial burden on the motion by submitting evidence that the Viglietta voluntarily sold Alain Lavoie the Lake Success property, and took steps, including the signing

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of the deed transferring ownership and executing a power of attorney to Sheldon Feinstein, to effectuate such sale (*see Crawford v Smith*, 130 AD3d 968, 14 NYS3d 474 [2d Dept 2015]; *Matter of Eastman*, 63 AD3d 738, 880 NYS2d 157 [2d Dept 2009]; *Scaturro v Sutera*, 57 AD3d 1283, 870 NYS2d 143 [3d Dept 2008]; *Whitehead v Town House Equities, Ltd.*, 8 AD3d 367, 780 NYS2d 15 [2d Dept 2004]), in opposition plaintiff submitted evidence raising significant triable issues warranting denial of the motion, including whether Stella Lavoie exercised undue influence over Viglietta, whether Viglietta voluntarily transferred the Lake Success property to Alain Lavoie, and whether an agreement existed between Viglietta and the Lavoies entitling him to retain an interest in the Commack residence (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*; *see also Crawford v Smith*, *supra*; *Matter of Kotick v Shvachko*, 130 AD3d 472, 14 NYS3d 8 [2d Dept 2015]; *Brown v Graziano*, 51 AD3d 962, 857 NYS2d 511 [2d Dept 2008]). In particular, plaintiff submitted an affidavit executed by Viglietta prior to his death wherein he states, among other things, that he agreed to let defendants and their children live in his Lake Success home rent free, and that while they were there he permitted his daughter to assume authority of his financial affairs, as he was suffering from symptoms of Parkinson disease. According to Viglietta's affidavit, he agreed with his daughter's suggestions to sell the Lake Success property and purchase a bigger home in Commack where they could all live more comfortably, and that he believed that the Commack residence was purchased in his name. The affidavit states that pursuant to an agreement between himself and his daughter, an apartment was constructed on the new residence to allow his care giver to live with him. It further states that after being admitted into a rehabilitation center following an accident, his daughter refused to let him back into the Commack residence and took title to the home and all of his remaining assets.

Plaintiff also submitted an affidavit by Viglietta's care giver, Elsa Albayero, wherein she states that she believed that the Lake Success home belonged to Viglietta until he and his daughter both informed her that it would be sold to facilitate the purchase of a bigger home in Commack. According to Albayero's affidavit, Viglietta and his daughter requested that she move into a rent-free apartment that would be added to the Commack residence in exchange for caring for Viglietta, who had been suffering from symptoms of Parkinson disease. The affidavit further states that following Viglietta's recovery in a post-accident rehabilitation center, Alain Lavoie forcefully refused to let either herself or Viglietta back into the Commack residence. Accordingly, defendants' motion for summary judgment dismissing the complaint against them is denied.

In light of the existence of these triable issues, as well as plaintiff's failure to include copies of the pleadings with her moving papers, the Court also denies plaintiff's cross motion for summary judgment on the complaint (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*).

Dated: December 30, 2015

  
 Hon. Joseph Farneti  
 Acting Justice Supreme Court

\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION