Schwartz v Bourque
2017 NY Slip Op 31621(U)
June 14, 2017
Surrogate's Court, Nassau County
Docket Number: 2013-376098/B
Judge: Margaret C. Reilly
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[* 1]

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Brenda Schwartz,

Plaintiff,

DECISION

-against-

File No. 2013-376098/B
Dec. No. 32110

Christine Bourque, as Executrix of the Estate of DOROTHY WINTERSALER, and Christine Bourque, Individually,

Defendants.

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HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion..	1
Attorney Affirmation in Support of Motion with Exhibits..	2
Movant Affidavit in Support.	3
Notice of Cross Motion.	4
Affirmation in Opposition to Motion and in Support of Cross Motion with Exhibits..	5
Affirmation in Reply and Opposition to Cross Motion.	6

This action regarding title to real property was commenced in Supreme Court, Nassau County, against Dorothy Wintersaler, and was transferred here by order of the Supreme Court after her death and the appointment of her executor. The plaintiff now moves the court for an order granting summary judgment on the complaint; the defendant opposes the motion and cross-moves for or an order granting summary judgment dismissing all of the plaintiff's claims.

This action involves three generations of women in one family and one parcel of real property in Nassau County where they all resided together. The property was the residence

of the decedent Dorothy Wintersaler, who became the sole owner of the property after the death of her husband in 1970. Dorothy's daughter Brenda Schwartz is the plaintiff. Brenda's daughter Christine Bourque is the defendant, both individually and as the executor of the estate of Dorothy, her grandmother, who died on April 15, 2013.

As alleged in the complaint and/or Brenda's affidavit in support of her motion for summary judgment, Brenda has lived in the premises for her entire life. It is also alleged that after the death of Dorothy's husband in 1970, Dorothy was unable to keep current on the real estate taxes, utilities, and other carrying charges on the property and that Brenda assumed the responsibility for all of those expenses as well as for a "total house renovation in 1975." Brenda avers that she was concerned that despite her financial investment in the property, she had no ownership interest or contractual assurance that she could remain living there. She approached Dorothy about her concerns which led to the execution of an agreement on November 21, 1978 (the 1978 Agreement). The 1978 Agreement recognized Dorothy's inability to pay the carrying charges on the property and also recognized the desire of Brenda and her husband to have a residence at the property and at the same time provide aid to Dorothy. The 1978 Agreement then provides that Brenda and her husband agree to pay all carrying charges on the property and in return Brenda and her husband are permitted to reside at the property for as long as they desire. In addition, the 1978 Agreement contains this provision:

> "3. DOROTHY WINTERSALER, agrees, provided BRENDA SCHWARTZ and ROBERT SCHWARTZ have continuously maintained the promises outlined in paragraph 1 of this agreement, to name BRENDA SCHWARTZ in her Last Will and Testament and thereby give, devise and

> bequeath the premises . . . to BRENDA SCHWARTZ in fee simple absolute, subject to any existing mortgage at the time of her death."

Brenda avers that as time passed, and her financial stake in the premises continued to increase, she was concerned that she did not have any current ownership interest in the property. Ostensibly as a result of that concern, Brenda and Dorothy executed another agreement, this one dated August 22, 1984 (the 1984 Agreement). The 1984 Agreement provides, that in consideration of Brenda's past payment of the carrying charges on the property and her promise to continue to do so in the future, Dorothy would convey to Brenda one-half of all of Dorothy's right, title, and interest in the property. A deed was executed simultaneously with the 1984 Agreement from Dorothy to Dorothy and Brenda, as joint tenants with right of survivorship, and duly recorded.

On October 19, 2012, Dorothy executed a second deed by which she purported to convey her remaining one-half interest in the property to Christine, thereby severing the joint tenancy between Dorothy and Brenda that was created upon Dorothy's execution of the deed attendant to the execution of the 1984 Agreement.

Christine argues that the 1984 Agreement was intended to and did, in fact, supersede the 1978 Agreement. Although the 1984 Agreement and the deed executed simultaneously with it created a joint tenancy with right of survivorship between Dorothy and Brenda, Christine argues that there is no language in the 1984 Agreement that restrained Dorothy from conveying her remaining one-half interest in the property. Conversely, Brenda argues that the 1984 Agreement did not, nor was it intended to, supersede the 1978 Agreement which, Brenda argues, is still in full force and effect. All it did, Brenda contends, is give her

a present one-half interest in the property without affecting Dorothy's promise to leave the property to Brenda in her will.

"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 162 [1990]). There is no suggestion in this case that at the time the 1978 Agreement was entered into that the language was intended to mean anything other than what it says, that is, that assuming Brenda continued to pay all the carrying charges on the home, Dorothy would devise the property to Brenda in her will. The issue in the case therefore is not what Dorothy and Brenda intended by the 1978 Agreement; that is evident. What is at issue is whether they intended the 1984 Agreement to supersede the 1978 Agreement.

"Where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement" (*Northville Industries Corp. v Fort Neck Oil Terminals Corp.*, 100 AD2d 865, 867 [2d Dept 1984]). Here, the 1984 Agreement contains no express language indicating that the parties intended that the 1984 Agreement supersede the 1978 Agreement.

But, as Christine's attorney has pointed out, "even in the absence of an integration and merger clause, under New York law, a subsequent contract regarding the same subject matter

supersedes the original contract" (*Kreiss v McCown De Leeuw & Co.,* 37 F Supp2d 294, 301 [SD NY 1999]).

However, a later contract will not supersede an earlier contract unless either: (1) the later contract contains definitive language reflecting the parties' intent to supersede the earlier contract, or (2) the two contracts deal with precisely the same subject matter (*Globe Food Services Corp. v Consolidated Edison Co.,* 184 AD2d 278 [1st Dept 1992]; *CreditSights, Inc. v Ciasullo,* 2007 US Dist LEXIS 25850 *18, 2007 WL 943352 *6 [SD NY 2007]).

Here, the 1984 Agreement contains no language that could be construed to indicate that the 1984 Agreement was intended to supersede the 1978 Agreement. The only issue for determination then is whether the two agreements deal with "precisely" the same subject matter. Christine argues that both agreements deal with "precisely" the same subject matter, that being what consideration Dorothy would provide to Brenda in recognition of Brenda's past payments toward the carrying charges on the property and her promise to continue making those payments in the future. Brenda argues that the two agreements do not deal with "precisely" the same subject matter because the earlier agreement was intended to assure Brenda that the property would be hers upon Dorothy's death while the later agreement was intended to provide her with a current interest in the property without affecting the earlier agreement. Both arguments are plausible but only one can prevail.

> "To determine if a particular provision is superseded by a provision in a subsequent contract, the Court considers: (1) whether there is an integration and merger clause that explicitly indicates that the prior provision is superseded; (2) whether the two provisions have the same general purpose or

> address the same general rights; and (3) whether the two provisions can coexist or work in tandem"(*Blumenfeld Dev. Group, Ltd v Forest City Ratner Cos., LLC,* 50 Misc3d 1221[A] n 11, *quoting A&E TV Networks, LLC v Pivot Point Entertainment, LLC,* 2013 U.S. Dist. LEXIS 43755 * 32, 2013 WL 1245453 [SD NY 2013] [applying New York law] [internal citations omitted]).

Here, there is no integration and merger clause, and while the two agreements appear to address the same general rights, it is clear that there is nothing that would prevent the two agreements from coexisting or working in tandem. The first agreement provides Brenda with an enforceable expectation that she will become the owner of the property in fee simple absolute at the time of Dorothy's death. The second agreement merely grants Brenda a present interest in the property.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, Brenda has made out a prima facie case for summary judgment that the two agreements are not mutually exclusive and may both be enforced as written. The burden therefore shifts to Christine to lay bare her proof in the form of admissible evidence in opposition to Brenda's prima facie showing and

thereby raise an issue of fact that would require a trial (CPLR 3212[b]; *DiGiaro v Agrawal,* 41 AD3d 764, 767 [2d Dept 2007]). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose" (*Gilbert Frank Corp. v Federal Ins. Co.,* 70 NY2d 966, 967 [1988]).

Although not addressed by either of the parties, the 1978 Agreement is clearly a contract to make a testamentary disposition and satisfies all the criteria necessary to establish an enforceable agreement, that is, the agreement is in writing and subscribed by the party to be charged (EPTL § 13-2.1 [a]). Moreover, this agreement identifies the specific property that is to be the subject of the testamentary disposition, precluding Dorothy from making an alternate disposition either during lifetime or upon death (*see Blackmon v Estate of Battcock,* 78 NY2d 735, 740 [1991]; *Matter of Murray,* 84 AD3d 106, 114 [2d Dept 2011] [holding that even where an agreement is enforceable, the promisor retains the right of testation except as to specific property that is the subject of the promise]). Finally, summary judgment may be granted in an action against the estate of a decedent for failure to honor a promise to make a testamentary disposition (*Matter of Hennel,* 133 AD3d 1120 [3d Dept 2015] [holding that summary judgment was properly granted to petitioner on claim that decedent breached agreement to convey real property free of mortgage]).

In her motion for summary judgment, Brenda does not address each of her 11 causes of action separately, but rather addresses causes of action #1 and #2 under Paragraph A; cause of action #3 is addressed in Paragraph B; causes of action ##4 through 9 are all addressed in Paragraph C; cause of action #10 is not addressed at all in the motion for

summary judgment; and cause of action #11 is addressed in Paragraph D.

With this predicate, the court will now address the motion for summary judgment as applied to each cause of action seriatim.

The first cause of action

The first cause of action is against Christine as executor for Dorothy's purported breach of the 1978 Agreement. "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*143 Bergen Street, LLC v Ruderman,* 144 AD3d 1002, 1003 [2d Dept 2016]). As set forth above, the court is satisfied that the plaintiff Brenda has established a prima facie case for summary judgment on the first, third, and fourth elements, the existence of a contract, Dorothy's breach of the contract by conveying her interest in the property during lifetime to Christine and not to Brenda by will, and damages resulting from the breach. As to the plaintiff's performance pursuant to the contract, Brenda offers no evidence other than her own statement that she fulfilled her obligations under the contract. Regardless of whether Brenda's fulfillment of her obligations under the contract is viewed as a condition precedent to Dorothy's obligation to devise the property to Brenda in her will or not, the motion must fail.

If Brenda's compliance is not a condition precedent, the motion fails because to be entitled to summary judgment the plaintiff must submit proof in evidentiary form sufficient to entitle her to a directed verdict (*Friends of Animals, Inc. v Associated Fur Manufacturers,*

Inc., 46 NY2d 1065, 1067 [1979]). Again, Brenda has offered no evidence in admissible form that she complied with her obligations under the contract, an essential element of a breach of contract action.

If Brenda's compliance is a condition precedent, CPLR 3015 (a) controls and it does not *require* the plaintiff to plead the performance or occurrence of a condition precedent but places the burden on the defendant to plead with specificity in the answer that the condition precedent has not been met (*CAB Assoc. v State of New York,* 14 AD3d 639 [2d Dept 2005]). Here, neither the general denial in the answer nor the affirmative defense raised in the answer meet the statute's requirement of specificity. However, although not required to do so, where, as here, the plaintiff alleges in the complaint that all conditions precedent have been satisfied with particularity, the statutory requirement that the denial be made with specificity and particularity is not applicable (*Allis-Chalmers Mfg. Co. v Malan Construction Corp.,* 30 NY2d 225, 233 [1972]). In other words, if the complaint is specific about having met any conditions precedent, a general denial by the defendant is sufficient to place plaintiff's performance in issue and the burden is on the plaintiff to establish that all conditions were fully met (*Carr v Birnbaum,* 75 AD3d 972, 973 [3d Dept 2010]). Here, the complaint alleges that "[f]rom November 21, 1978 through April 15, 2013, Plaintiff complied with the terms of the 1978 Agreement by paying for all bills associates [*sic*] with the maintenance and upkeep of the Premises." Plaintiff having specifically plead that all the conditions precedent were fulfilled, the defendant's general denials were sufficient to place the plaintiff's performance in issue and as indicated above, the plaintiff has failed to offer any proof of the

claim that she paid all expenses associated with the upkeep of the premises.

Accordingly, there being unresolved questions of fact, the plaintiff's motion for summary judgment on the first cause of action is **DENIED** and the defendant's cross motion to dismiss the first cause of action is also **DENIED**.

The second cause of action

The second cause of action is against Christine as executor for breaching the 1984 Agreement by executing the October 19, 2012 deed whereby Dorothy conveyed her remaining interest in the property to Christine. The 1984 Agreement provides that in consideration of Brenda's past payment of the carrying charges on the property and her assumption of the payment of those expenses in the future, "the Grantor hereby agrees to convey this date one-half of the all the grantor's right, title and interest in" the premises. On that date Dorothy executed a deed conveying one-half of her interest in the property to Brenda. The complaint seeks to have the court read the two Agreements as one such that the breach of one constitutes a breach of the other. As indicated above, the court has already determined that the 1978 Agreement was not superseded by the 1984 Agreement and that both Agreements can coexist and work in tandem. The 1978 Agreement contains the promise of a devise to Brenda of the property in Dorothy's will. The 1984 agreement is silent regarding Dorothy's remaining interest in the property. Although the deed from Dorothy as grantor to Dorothy and Brenda as grantees is "as joint tenants with right of survivorship," Brenda offers no authority for the proposition that a conveyance by one person to herself and another as joint tenants with right of survivorship constitutes a promise not to sever the joint

tenancy. In fact, the law is to the contrary. Real Property Law § 240-c provides, in part, "In addition to any other means by which a joint tenancy with right of survivorship may be severed, a joint tenant may unilaterally sever a joint tenancy in real property without consent of any non-severing joint tenant or tenants by: (a) execution and delivery of a deed that conveys legal title to the severing joint tenant's interest to a third person . . ." If the October 19, 2012 conveyance to Christine constitutes a breach of contract, it is of the 1978 Agreement, not the 1984 Agreement.

Accordingly, the plaintiff's motion for summary judgment on the second cause of action is **DENIED** and the defendant's cross motion seeking dismissal is **GRANTED**.

The third cause of action

The third cause of action is against Christine as executor for unjust enrichment. Unjust enrichment is a claim in quasi-contract (*Georgia Malone & Co., Inc. v Rieder,* 19 NY3d 511, 516 [2012]). Here, the court has already found the 1978 Agreement to be a valid and existing contract, precluding recovery in quasi-contract. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Island Rail Road Company,* 70 NY2d 382, 388 [1987]; *accord Corsello v Verizon N.Y., Inc.,* 18 NY3d 777, 790 [2012] ["An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim"]).

Accordingly, the plaintiff's motion for summary judgment on the third cause of action is **DENIED** and the defendant's cross motion to dismiss this cause of action is **GRANTED**.

The fourth through ninth causes of action

The fourth and fifth causes of action are against Christine as executor alleging that Dorothy's execution and delivery of the October 19, 2012 deed conveying her remaining half interest in the property to Christine constituted a breach of the 1978 Agreement and seek application of Debtor and Creditor Law §§ 275 and 276 to vacate the deed. The seventh and eighth causes of action are against Christine individually and similarly allege that Christine's acceptance of the deed from Dorothy conveying Dorothy's remaining half interest in the property constituted a breach of the 1978 Agreement and seek application of Debtor and Creditor Law §§ 275 and 276 to vacate the deed. The sixth and ninth causes of action are, respectively, against Christine as executor and Christine individually and seek an award of attorneys' fees pursuant to Debtor and Creditor Law § 276-a.

As a threshold matter, "[a] creditor does not have to reduce a claim to a judgment to avail himself or herself of the right to set aside a fraudulent conveyance" (*Finkelman v Greenbaum,* 14 Misc 3d 1217[A], 2007 NY Slip Op 50063[U], *6 [Sup Ct, Nassau County 2007], *citing Bernheim v Burden,* 253 App Div 232 [2d Dept 1938]).

Debtor and Creditor Law § 275 provides,

> "Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."

Debtor and Creditor Law § 276 provides,

> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay,

> or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Ordinarily, the burden of proof is on the party challenging a conveyance to establish that the conveyance by the debtor has rendered the debtor insolvent or that the transaction was not for fair consideration (*Joslin v Lopez,* 309 AD2d 837, 838 [2d Dept 2003]). However, once the petitioner establishes that the transfer was made for no consideration, the initial burden to establish solvency is on the transferor (*Shelly v Doe,* 249 AD2d 756, 757 [3d Dept 1998]). In fact, where the transfer is made without consideration, a rebuttable presumption arises of insolvency and fraudulent transfer and the burden is on the transferee to overcome the presumption (*Chen v New Trend Apparel, Inc.,* 8 F Supp3d 406, 445 [SD NY 2014]).

As to the actual fraudulent intent envisaged by Debtor and Creditor Law § 276, the courts recognize the difficulty of proving actual fraudulent intent and permit the pleader to rely on "badges of fraud" (*Wall Street Assoc. v Brodsky,* 257 AD2d 526, 529 [1st Dept 1999]). Among these "badges of fraud" are: a close relationship between the parties to the transfer; inadequate or no consideration; the transferor's knowledge of the creditor's claim; and retention of the property by the transferor after the conveyance (*id.*). In *Machado v A. Canterpass, LLC* (115 AD3d 652, 653-654 [2d Dept 2014]), the trial court granted the plaintiff's motion for summary judgment to set aside transfers of real property as fraudulent conveyances under the Debtor and Creditor Law. In affirming, the Appellate Division held that the "badges of fraud" extant in the case constituted clear and convincing evidence of

intent to hinder, delay, or defraud the plaintiff's ability to collect on her claim against the defendant. The court noted that the subject conveyances were made shortly after the plaintiff gave notice of her intent to sue on a personal injury claim, the transfers were without consideration, and the principals of both the transferor and transferee corporations were the same people. Here, Dorothy and Christine had a close family relationship; the conveyance was without consideration, as set forth explicitly in the deed; the deed was executed only days after the plaintiff's filing of the original summons and complaint in Supreme Court, evincing that Dorothy was aware of Brenda's claim when the transfer was made; and Dorothy continued to reside in the property after the conveyance to Christine. The court notes that the only explanation given by defendants for the transfer is that Dorothy had the right to do so and they thus failed to offer any legitimate explanation for the conveyance, rendering the defendants' actual fraudulent intent "readily inferrable" (*Machado v A. Canterpass, LLC,* 115 AD3d 652, 654 [2d Dept 2014]).

Accordingly, the plaintiff's motion for summary judgment on the fourth, fifth, seventh, and eighth causes of action is **GRANTED** and the cross motion to dismiss those causes of action is **DENIED**.

Debtor and Creditor Law § 276-a provides an award of attorneys' fees for the plaintiff against the defendants where actual intent to defraud has been established under Debtor and Creditor Law § 276. Relying on the "badges of fraud" extant in this case and relevant case

law (*Machado v A. Canterpass, LLC,* 115 AD3d 652, 654 [2d Dept 2014]), the court has determined that Brenda is entitled to judgment under Debtor and Creditor Law § 276 on grounds of actual fraud.

Accordingly, the plaintiff's motion for summary judgment on the sixth and ninth causes of action is **GRANTED** and the defendant's cross motion to dismiss is **DENIED**. Plaintiff's attorney is directed to prepare and serve an affirmation of legal services for all services rendered with regard to this action within 30 days of the date hereof.

The tenth cause of action

The tenth cause of action is not addressed in the motion papers.

The eleventh cause of action

The eleventh cause of action is against Christine individually for tortious interference with contract. "Tortious interference with contract requires the existence of a valid contract between plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.,* 88 NY2d 413, 424 [1996]). Here, Brenda has failed to establish as a matter of law that Christine was aware of the 1978 Agreement at the time the October 19, 2012 deed was executed or that Christine intentionally procured Dorothy's breach of that agreement. Furthermore, to state a cause of action for tortious interference with contract the plaintiff must allege not merely the defendant's intentional procurement of the third party's breach

of the contract, but also must specifically allege that the contract would not have been breached but for the defendant's conduct (*Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC* (82 AD3d 1035, 1036 [2d Dept 2011]). The amended petition fails to include that allegation. Therefore, the plaintiff's motion for summary judgment on the eleventh cause of action is **DENIED** and the cross motion to dismiss that cause of action is **GRANTED**.

This matter will appear on the court's calendar for conference on June 26, 2017, at 10:00 a.m. A hearing will be necessary to take the plaintiff's proofs with regard to her satisfaction of her obligations under the 1978 Agreement and to fix a reasonable attorney's fee for Brenda's attorneys. The conference will address both of these issues.

Settle order.

Dated: June 14, 2017
Mineola, New York

E N T E R:

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HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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