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

----------x

Proceeding for Turnover of Property in the Estate of

JEANNINE SHANLEY ARGONDIZZA,

Deceased.

----------x

DECISION
File No.: 2012-3991/B

M E L L A, S.:

The following papers were considered in deciding Respondent's motion and Petitioners' cross-motion for summary judgment:

Papers	Numbered
Respondent's Notice of Motion for Summary Judgment, Affirmation of Michael S. Kutzin in Support of Motion for Summary Judgment, with Exhibits A – M, and Affidavit of Respondent	1, 2, 3
Notice of Cross-Motion for Summary Judgment and Preliminary Injunction and in Opposition to Motion for Summary Judgment, Petitioners' Affidavit in Opposition to Motion and in Support of Cross-Motion, with Exhibits 1–16, Memorandum of Law in Opposition to Respondent's Summary Judgment Motion and in Support of Petitioners' Motion for Summary Judgment and for a Temporary Restraining Order and Preliminary Injunction Against Respondent	4, 5, 6
Reply Affirmation of Michael S. Kutzin, Esq., in Support of Motion for Summary Judgment and in Opposition to Cross-Motion for Summary Judgment and to Amend Petition, with Exhibits, Affidavit of Christopher Argondizza	7, 8
Reply Affirmation of Joseph A. Ledwidge, Esq., in Support of Cross-Motion and in Opposition to Summary Judgment Motion, with Exhibits	9

At the center of this turnover proceeding is a dispute about the ownership of the shares of stock associated with a cooperative apartment on Riverside Drive ("the apartment") in Manhattan. Following extensive litigation, including a decision by the Appellate Division, First Department, affirming this court's decision denying in part a pre-answer motion to dismiss, there remains a single claim: one for breach of fiduciary duty (*see Matter of Argondizza*, 137 AD3d

670 [1st Dept 2016]).

Now before the court are competing motions for summary judgment filed at the conclusion of discovery on this claim. Petitioners, Leo Shanley and Agnes Shanley, decedent's children and Limited Administrators of her estate, maintain in their cross-motion that they are entitled to summary determination that Respondent, Christopher Argondizza, decedent's surviving spouse and Petitioners' stepfather, breached his fiduciary duty to decedent when, as decedent's agent under a durable power of attorney, he transferred decent's one-half interest in the apartment that they had owned as tenants in common to himself. Upon such determination, Petitioners seek to reclaim decedent's one-half interest for her estate, and ask for leave to amend their petition (CPLR 3025[b]) to add a request for partition as a method of distributing the shares of stock allocated to the apartment to their rightful owners. Petitioners also seek sanctions.[1]

In his motion, Respondent asks the court for summary determination that he did not breach his fiduciary duty because the undisputed evidence shows that he carried out decedent's wishes by making the transfer and Petitioners failed to substantiate their claim for breach of such duty. Alternatively, Respondent moves for summary determination in favor of his affirmative defense that the balance of equities tips in favor of his entitlement to 100% ownership of the apartment because he provided all the consideration for its purchase. Respondent also asks that he be awarded costs.

---

[1] In addition, Petitioners sought a preliminary injunction to restrain Respondent from selling, mortgaging, or otherwise disposing of the apartment. On the record on December 16, 2016, the return date of the motions, Respondent represented that he had no intention of selling, mortgaging, or disposing of the apartment, and that he would be willing to sign an agreement that he would take no such action until further order of the court. In light of this, the court determined that it need not rule on the request for a preliminary injunction.

BACKGROUND

The events that resulted in this dispute are described in this court's March 2, 2015 decision and order determining the prior motion to dismiss this proceeding. To briefly summarize, decedent died on January 27, 2010, survived by Respondent and Petitioners as her distributees.[2] In 2013, Petitioners sought and were granted Limited Letters of Administration for the purpose of investigating and pursuing claims against Respondent relating to ownership of the apartment where decedent and Respondent had lived since the late 1970s.

Decedent and Respondent owned the apartment as tenants in common until the year before decedent's death.[3] Decedent's health began to decline in the last few years of her life, including taking a fall in 2007 that resulted in her breaking her hip and spending time in a rehabilitation facility. Apparently as a result of this incident, and in contemplation of her ongoing and future health care needs, on February 17, 2008, decedent executed a Power of Attorney ("PoA") naming Respondent her agent. Petitioners acknowledge that they were informed of the plan to execute a PoA and that it was to be used to take care of decedent's affairs in anticipation of her needing long-term medical care, including protecting assets such as the apartment from exposure to liens or encumbrances. Consistent with this plan, decedent and Respondent wrote a

---

[2] Initially, Petitioners had asserted a belief that decedent had a will, but none having been found and no petition to probate a lost will having been filed, decedent's estate assets, if any, will be distributed pursuant to the laws of intestacy.

[3] The shares of stock allocated to the apartment were purchased in 1981, more than a decade before Respondent and decedent were married, and the lease and shares were titled in Respondent's and decedent's names. Respondent states that he provided all the money for the purchase, but that he directed that decedent's name be listed as owner together with his. The record reflects that decedent had lived in the apartment since the 1960s and raised her children, Petitioners, there.

letter, which bears their signatures, to the managing agent of the cooperative housing corporation, dated July 24, 2008, directing the transfer of the stock certificate for the apartment from decedent's and Respondent's names to Respondent's name alone. On May 29, 2009, Respondent, acting as decedent's agent, transferred her interest in the apartment to himself.

DISCUSSION

On a motion for summary judgment, the court must determine whether the movant has made 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]; CPLR 3212; *Gilbert Frank Corp v Federal Insurance Company*, 70 NY2d 966, 967 [1988]). Once this showing has been made, the burden shifts to the party opposing the motion, to produce proof sufficient to establish the existence of any material issue of fact (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In determining whether summary judgment is appropriate, the court "should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility" (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]). Allegations by the party opposing the motion, however, must be "specific and detailed, substantiated by evidence in the record; mere conclusory assertions will not suffice" (*Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]), and speculation cannot serve as a substitute for evidence (*see Matter of Hatzistefanou*, 77 Misc 2d 594 [Sur Ct, NY County 1974]; *Gilbert Frank Corp.*, 70 NY2d at 967, quoting *Zuckerman*, 49 NY2d at 562).

To establish entitlement to judgment as a matter of law on their claim for breach of

fiduciary duty, Petitioners must prove the existence of a fiduciary relationship, misconduct by the fiduciary, and damages directly caused by the misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). An agent under a power of attorney has an obligation to "act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing" (*Semmler v Naples*, 166 AD2d 751, 752 [3d Dept 1990], *appeal dismissed* 77 NY2d 936 [1991] [citations omitted]). A presumption of a breach of this fiduciary duty arises when it is shown that the agent, using his authority pursuant to a power of attorney, transfers assets of the principal to the agent (*see id.*). This presumption may be rebutted by a showing that the principal intended for the transfer to take place or, in certain circumstances, that the transfer was in the best interests of the principal (*see Matter of Ferrara*, 7 NY3d 244, 253 [2006] [when power of attorney gives agent gift-giving authority, agent must use this authority in the principal's best interest]; *see also Matter of Naumoff*, 301 AD2d 802, 803–04 [3d Dept 2003] [presumption of impropriety and self-dealing can be overcome with clear showing of principal's donative intent], quoting *Semmler v Naples*, *supra*; *Matter of Kislak*, 24 AD3d 258 [1st Dept 2005]; *Matter of Audrey Carlson Revocable Trust*, 59 AD3d 538, 540 [2d Dept 2009]).

There is no dispute between the parties that on May 29, 2009, Respondent, in his role as decedent's agent, attended what Respondent describes as a closing and executed the paperwork to effectuate the transfer of decedent's interest in the shares of stock allocated to decedent and Respondent's apartment to Respondent alone. This evidence is sufficient to establish a prima facie case of breach of fiduciary duty (*see Matter of Clinton*, 1 Misc 3d 913[A] [Sur Ct, New York County 2004]; *see also Semmler v Naples*, 166 AD2d at 752 [an agent making a gift of

principal's property to himself "carries with it a presumption of impropriety and self-dealing"]).

Respondent, however, maintains that the transfer of decedent's interest was done at her direction and that it was her express wish for the shares of stock to be retitled in Respondent's name alone. In support of his assertions, Respondent submits the short form durable power of attorney executed by decedent and providing Respondent with authority to act in matters identified in letters A to P, which includes real estate transactions (A), bond, share and commodity transactions (C), and making gifts to the principal's spouse, children and more remote descendants, and parents (M). Respondent also relies on the July 24, 2008 letter from decedent and Respondent, with the subject "RE: Transfer of Stock Certificates for 131 Riverside Drive, Apartment 1B to Christopher Argondizza's name exclusively." The first paragraph of this letters states: "Pursuant to our recent conversation, please transfer stock certificates for the apartment from both [decedent]'s and [Respondent]'s names to the name of [Respondent] alone." In addition, Respondent provides the deposition testimony of Dr. Lawrence Peter Kempf, decedent's primary doctor from 2002 until her death. Dr. Kempf testified that decedent acknowledged that Respondent bought the apartment with his funds and expressed her belief that the apartment was Respondent's. Dr. Kempf further testified that decedent told him about the decision to transfer her interest in the apartment to Respondent and that she wanted him to have it, and that, in his opinion, despite her declining health in the last few years of her life, she was always able to express her wishes in that regard.

Moreover, Respondent points to what he describes as the "standard operating procedure" of retitling a residence, when one spouse requires long-term care, for Medicaid-planning purposes. In fact, courts have found that transferring assets to take advantage of eligibility for

government benefits, or for purposes of Medicaid planning, is in the best interest of the principal (*see* Bailey and Hancock, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 23A, General Obligations Law § 5–1514; *Matter of Gargani*, 48 Misc 3d 291, 301 [Sur Ct, Nassau County 2015]; *see also Matter of Shah*, 95 NY2d 148 [2000]; *see also Matter of Gershenoff*, 2 Misc 3d 847, 849 [Sup Ct, New York County 2003], *affd* 17 AD3d 243 [1st Dept 2005]; *see also Matter of Ferrara*, 7 NY3d 244, 253 [2006] [use gift-giving provision of power of attorney as part of a financial or estate plan]; *cf. Matter of Dietz*, 47 Misc 3d 1202[A] [Sur Ct, Erie County 2015] [agent must show that gift-giving pertained to financial, estate or tax planning, or that it provided some other benefit to principal]).

The court concludes that, on this record, which includes the uncontroverted showing that decedent personally requested the transfer of the shares of stock to Respondent's name and that such transfer was done for Medicaid-planning purposes, Respondent has successfully rebutted the presumption that he violated his fiduciary responsibilities (*cf. Matter of Francis*, 19 Misc 3d 536, 542 [Sur Ct, Westchester County 2008] [absent proof of decedent's intent to make gifts of her property to Respondent or his mother, Respondent's doing so as decedent's agent evidenced use of the power of attorney for his personal gain and disregard for his fiduciary duty]). Petitioners' cross-motion for summary judgment is therefore denied.

In their attempt to raise an issue of fact to defeat Respondent's motion for summary judgment, Petitioners make what are in effect two conflicting arguments. On one hand, they argue that decedent lacked capacity to direct the transfer, while, on the other, they argue that Respondent caused the transfer to take place by use of fraud and that his ownership is in contravention of decedent's intended disposition of the property upon her death.

Concerning decedent's capacity, the court notes at the outset that the incapacity of the principal does not affect an agent's authority to act pursuant to a durable power of attorney, like the one here (*see* General Obligations Law § 5-1501 [2006] ["THE POWERS YOU GRANT BELOW CONTINUE TO BE EFFECTIVE SHOULD YOU BECOME DISABLED OR INCOMPETENT"]). Thus, decedent's incapacity at the time of the transfer is not material to the question of Respondent's authority to act on behalf of decedent, his principal, at that time.[4]

In any event, the "medical records" provided by Petitioners to challenge decedent's capacity do not contain a diagnosis or the impressions of medical professionals upon examination or treatment of decedent, but are actually intake or interview notes containing information primarily supplied by decedent or Respondent. In addition, an April/May 2008 "Medical Request for Home Care" form completed by Dr. Kempf was done for the purpose of obtaining Medicaid home care services for decedent. These notations and observations indicating a dementia condition do not raise a material question of fact as to decedent's incapacity, in light of the testimony of two disinterested witnesses—Dr. Kempf and decedent's brother, Dr. Charles Morand—about their interactions and communications with decedent from which they found that nothing about her mental condition interfered with her capacity (*see Matter of Benaway*, 272 App Div 463 [3d Dept 1947] [dementia does not necessarily result in mental incapacity]; *see also Matter of Alibrandi*, 104 AD3d 1175 [4th Dept 2013] [mere dementia diagnosis not synonymous

---

[4]In their motion papers, Petitioners allude to decedent's lacking capacity at the time of the execution of the PoA. There is, however, no such allegation within Petitioners' pleadings, and, more importantly, Petitioners' sole surviving claim in this proceeding, breach of the fiduciary duty Respondent owed to decedent as her agent under this PoA, depends on the existence of the PoA. The court notes that the amended petition alleges that Petitioner Leo Shanley was present at the time the PoA was prepared for decedent's signature.

with testamentary incapacity]; *cf. Matter of Clinton*, 1 Misc 3d 913[A] [Sur Ct, New York County 2004] [summary judgment denied because of conflicting inferences from the facts regarding decedent's capacity for donative intent]).

As to their second argument, that Respondent's transfer of decedent's interest in the apartment to himself was fraudulent, Petitioners assert that the mutual understanding of decedent, Respondent, and Petitioners was that the transfer of decedent's assets, if done at all, was to protect those assets primarily for decedent's benefit and secondarily for her heirs at law.[5] In support of this argument, however, other than their conclusory, self-serving, and unsubstantiated statements, Petitioners fail to provide any reliable testimony or evidence that there was such "understanding" among the parties, including decedent, or that decedent's intent for the disposition of her property was anything other than what resulted from the transfer to Respondent. In fact, the only evidence on the record supports the conclusion that decedent was aware of the transfer and wished for it to happen, and there is no evidence whatsoever as to what decedent's testamentary wishes were, if they were, as Petitioners claim, different from her pre-death disposition of her interest in the apartment to her spouse.[6]

---

[5]Petitioners maintain that the transfer of decedent's interest in the apartment wrongfully deprived them of their interest and the home they were raised in. As explained by this court in its March 2, 2015 decision, a claim by Petitioners individually against Respondent may not be asserted by them in their fiduciary capacity and in the context of this turn over proceeding, which seeks to return assets to decedent's estate. Additionally, Petitioners do not put forth a claim that Respondent breached a fiduciary duty owed to Petitioners, nor do these facts support such a finding.

[6] Throughout this litigation, Petitioners' arguments have shifted more than once. As discussed at length in this court's March 2, 2015 decision, their theories of recovery all suffered fatal flaws, mostly owing to their unsupported assertions about decedent's intended disposition of her interest in the apartment upon her death. The surviving claim for breach of fiduciary duty was allowed to proceed and the parties engaged in full discovery. These motions, made at the

In further support of their claim of fraud, Petitioners allege that Respondent falsely told decedent that the purpose of the transfer was for Medicaid planning, when in fact such transfer was unnecessary because the apartment would have been considered an exempt resource. This argument is immaterial and unsupported. The record demonstrates that it was the belief of all the parties, including Petitioners, that this measure was necessary and best protected decedent and the value of the apartment.

Upon careful review of the record, the court finds that the evidence proffered, even that by Petitioners, shows that decedent intended the transfer of her interest to Respondent, and that all the parties believed that such transfer would be in her best interests.

CONCLUSION

For the foregoing reasons, Respondent's motion for summary determination in his favor is granted. Petitioners' motion for summary judgment and the petition for turnover are denied. The alternate relief sought by both sides need not be determined by the court, and the balance of the relief requested, relating to sanctions and costs, is denied.

This decision constitutes the order of the court.

Dated: October 13, 2017

SURROGATE

close of discovery, are Petitioners' opportunity to lay bare their proof, which they have failed to do here. Nothing presented on this record puts into question decedent's intent to transfer her interest in the apartment to Respondent. Once divested of her interest through the transfer, any expectation that, after her death, Respondent would transfer to "her estate" her former interest could amount to nothing more than a wish (*cf. Matter of Baumgarten*, NYLJ, Nov 6, 1980, at 12, col 5 [Sur Ct, Kings County]). Significantly, there is no evidence whatsoever that decedent had such a wish; in fact, Dr. Kempf's testimony indicates the opposite. Any expectation on the part of Petitioners does not establish or raise a question of fact as to whether Respondent breached his fiduciary duty owed to decedent, as her agent under the PoA.