

Matter of Silverstein
2019 NY Slip Op 31080(U)
April 19, 2019
Surrogate's Court, New York County
Docket Number: 2015-2225/D
Judge: Nora S. Anderson
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application
of Richard Silverstein and Robert
Silverstein as Executors of the estate of

New York County Surrogate's Court

Date: APRIL 19, 2019

ALBERT I. SILVERSTEIN

File No. 2015-2225/D

Deceased,

for an order pursuant to SCPA 2103
directing turnover of property.

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A N D E R S O N , S .

In this turnover proceeding, respondent (decedent's surviving spouse) moves to dismiss the petition of the co-executors of decedent's estate to recover the shares and proprietary lease to a cooperative apartment which decedent had purchased individually and later transferred to himself and movant, jointly. Petitioners allege the transfer was the product of fraud, lack of mental capacity, and undue influence and thus a joint tenancy was not created.

For the reasons stated below, the motion is granted in part and denied in part.

BACKGROUND

Movant and decedent were married for 37 years, until decedent's death on April 27, 2015. Petitioners are decedent's

sons from a prior marriage. Decedent died testate. His will was executed on November 20, 1991 and was admitted to probate on June 24, 2015.

At issue in this proceeding is a cooperative apartment which constituted the marital residence of decedent and respondent. Under the terms of the will, respondent is bequeathed no interest in the apartment.

Until October 2014, the cooperative shares and proprietary lease were held in decedent's name individually. Movant alleges that on October 8, 2014, decedent transferred title of the cooperative shares and assigned the lease from sole ownership to joint tenancy. Petitioners contend the transfer was unlawful on the grounds of fraud, undue influence and lack of mental capacity.

Regarding fraud, petitioners allege that prior to his death, decedent told various people that he intended for petitioners to own the Apartment after his death and wanted movant to reside in the Apartment, until she either died or remarried. They allege that, "in executing the alleged transfer and assignment, Decedent relied upon Respondent's representation that she would not be permitted to remain in the Apartment after Decedent's death unless the Co-Op Shares were transferred and the Lease was assigned from Decedent, individually, to Decedent and Respondent, jointly." Petitioners contend that movant's

representation was a false representation of a material fact that movant knew to be false, and that she made the false representation to induce decedent to rely on it, which, they allege, he did. They allege further that decedent's reliance was "justifiable and reasonable under the circumstances," and that the estate and petitioners have suffered damages as a result.

With regard to mental capacity, petitioners state that, "At the time of the alleged transfer and assignment, Decedent was 85 years old, in poor health, suffering from diabetes, colitis, and a severe skin disorder, taking many medications, and had a severe diminished capacity." Petitioners allege further that decedent was suffering from dementia and was incompetent to understand the nature of the transfer and assignment.

With respect to undue influence, petitioners allege that decedent and movant maintained a confidential relationship, that movant had a controlling influence over decedent and that she used her controlling influence to induce him to execute the transfer and assignment. They claim that by inducing him, she substituted her will for that of decedent.

In response, movant asserts that petitioners have failed to plead the elements of fraud and undue influence with sufficient particularity and have failed to make an adequate showing of

lack of mental capacity. Thus, she seeks to dismiss the petition pursuant to CPLR § 3211(a)(7).

MOTION TO DISMISS

On a motion to dismiss a petition for failure to state a cause of action, the court must construe the pleadings liberally, accept the facts alleged as true, give the complainant every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46; *Leon v. Martinez*, 84 NY2d 83, 87-88; *Asgahar v. Tringali Realty, Inc.*, 18 AD3d 408). CPLR 3211 (a)(7) rulings address only the adequacy of the pleadings (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19). Whether a petitioner can ultimately prove the allegations is not part of the analysis (*Id.*; see also *Paolino v Paolino*, 51 AD3d 886, 887). However, bare legal conclusions are not presumed true, nor are they given every favorable inference (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704 [2d Dept 2008]).

Moreover, under SCPA § 302, "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the claim . . . and shall contain a demand for the relief sought" (SCPA § 302[2]). Where a cause of action is based on fraud or undue influence, "the circumstances constituting the

wrong shall be stated in detail" (CPLR 3016[b]). Although "unassailable proof" is not required at the pleading stage, the petition must allege the basic facts to establish the elements of the cause of action (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486).

FRAUD

The elements of a cause of action alleging fraud are (1) a false representation of a material existing fact, (2) knowledge of falsity, (3) intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559). However, "a mere recitation of the elements of fraud is insufficient to state a cause of action" (*Natl. Union Fire Ins. Co. v Robert Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 1999]). To plead fraud with the requisite particularity, the petitioner must detail the circumstances and provide factual support for the alleged wrong. Thus, CPLR 3016 (b) is satisfied only when the facts are sufficient to permit a reasonable inference of the alleged misconduct (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486).

Here, petitioners allege that movant committed fraud because she told decedent she would not be permitted to remain in the Apartment after decedent's death unless the co-op shares

were transferred and the lease was assigned from decedent, individually, to decedent and movant, jointly.

However, petitioners provide no facts to support their claim that the alleged statement was false. Nor have they offered any facts which would lead to a reasonable inference of falsity. Moreover, petitioners have offered no facts to support any of the remaining elements of fraud. Petitioners allege that movant knew the alleged statement was false. However, they fail to show that the statement itself was false and more important, they fail to put forward any facts to support their conclusion as to how movant knew (or could have known) the statement was false. Their remaining fraud allegations consist of the following:

Respondent's representation to Decedent was a false representation of a material fact. Upon information and belief, Respondent knew that her representation to Decedent was false. Upon information and belief, Respondent made the false representation to Decedent for the purpose of inducing him to rely on it. In executing the alleged transfer and assignment, Decedent relied upon Respondent's false representation. Decedent's reliance upon Respondent's false representation was justifiable and reasonable under the circumstances. Decedent's reliance upon Respondent's false representation has resulted in a detriment to Decedent, Decedent's Estate, and Petitioners.

To make out a prima facie case for fraud, "the basic facts constituting the fraud must be set forth" (*Pace v. Raisman*, 95 AD3d at 1189). Here, petitioners parrot the elements of fraud

and merely insert the phrase ". . . executing the transfer and assignment." The addition of the phrase does not provide any details "constituting the wrong" (CPLR 3016[b]). Without more, their characterization of movant's alleged statement as fraudulent is insufficient to sustain the cause of action (*Meltzer v. Klein*, 285 NYS2d 920).

Even in giving petitioners the benefit of every reasonable inference, the court finds that they have failed to plead facts sufficient to sustain the cause of action. Accordingly, the motion to dismiss the allegation of fraud is granted.

UNDUE INFLUENCE

In order to sustain a claim of undue influence, petitioners must allege facts that support a reasonable inference that the influence was undue and caused the individual "to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist" (*Matter of Walther*, 6 NY2d 49 [1959]). Here, petitioners allege that the interactions between decedent and respondent constituted a confidential relationship, that decedent had diminished mental and physical capacity, that respondent had a controlling influence over decedent and exerted her influence over him to induce him to execute the transfer and

assignment, and that by so doing, respondent substituted her will for that of decedent.

Construing the pleadings liberally, the court finds that petitioners have set forth the allegations in sufficient detail to support a reasonable inference that respondent unduly influenced decedent to effectuate the transfer and assignment of his interest in the apartment. Accordingly, the motion to dismiss the undue influence claim is denied.

CAPACITY

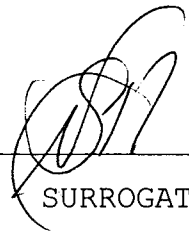
Capacity relates to an individual's mental condition at the time of the transaction (see generally, *Matter of Demaio*, NYLJ, May 2, 2014 at 33, col 2 [Sur Ct, Queens County 2014]). Petitioners allege that at the time of the transfer and assignment, decedent suffered from several illnesses, which rendered him unable to comprehend the nature of the transfer and assignment of the apartment from his sole ownership to joint ownership with respondent.

On its face, the pleading states a cause of action for lack of mental capacity. Accordingly, that branch of the motion is denied.

Petitioners' application to replead is denied based on their noncompliance with the controlling statute (CPLR 3025[b]).

This constitutes the decision and order of the court.

Dated: *April 19, 2018*



SURROGATE