

Matter of Chimsanthia (Scott)
2019 NY Slip Op 33887(U)
November 21, 2019
Surrogate's Court, New York County
Docket Number: 2017-4536/F
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
DATA ENTRY DEPT.
Date: November 21, 2019

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In the Matter of the Application of Nittaya Chimsanthia and
Jonathan Sokolow, as Preliminary Executors of the Estate of

JOSEPH D. SCOTT, JR.,

DECISION and ORDER
File No.: 2017-4536/F

Deceased,

Pursuant to SCPA 2103 to Compel Turnover of Decedent's
Property Held by Theresa Scott and Joseph Scott, Sr.

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M E L L A, S.:

The following papers were considered in deciding the motions:

<u>Papers considered</u>	<u>Numbered</u>
Notice of Motion, dated April 18, 2019, by Respondents To Dismiss The Turnover Proceeding, together with Affirmation, dated April 18, 2019, of Brett M. Collings, Esq., Attaching Exhibits A through D	1, 2
Memorandum of Law in Support of Motion to Dismiss, dated April 18, 2019	3
Affirmation, dated July 12, 2019, of Donald L. Citak, Esq., in Opposition To Motion to Dismiss, and Affidavit of Nittaya Chimsanthia, dated July 12, 2019, Attaching Exhibit 1	4, 5
Petitioners' Memorandum of Law in Opposition to Motion to Dismiss, dated July 12, 2019	6
Reply Affirmation, dated September 20, 2019, of Brett Collings, Esq., Attaching Exhibits A through C	7
Reply Memorandum of Law, dated September 20, 2019, in Further Support	8
Petitioners' Sur-Reply Memorandum of Law, dated October 4, 2019, in Further Opposition (allowed on consent, with court approval)	9

At the call of the calendar on October 11, 2019, the court denied respondents' motion to dismiss this turnover proceeding (SCPA 2103) commenced by the preliminary executors of the estate of decedent Joseph Scott, Jr. The petition, as amplified by the affidavits submitted on the

motion, adequately states claims for constructive trust, unjust enrichment and conversion (CPLR 3211[a][7]; *Matter of Alpert*, 234 AD2d 150 [1st Dept 1996]; *Schaffer v Schaffer*, 17 Misc 2d 592 [Sup Ct, Kings County 1959]; *Matter of Keegan*, 114 NYS2d 217 [Sur Ct, Westchester County 1952]). Moreover, movants' documentary evidence did not utterly refute the allegations underlying these claims to justify dismissal (CPLR 3211[a][1]; *Matter of Linder*, 153 AD3d 1343 [2d Dept 2017]).

The statute of frauds (GOL 5-703), movants assert, bars enforcement of the alleged oral agreement as to the disposition of real property on Cliff Road in Amagansett (the "Cliff Road Property") to decedent and his spouse, which forms the heart of the turnover allegations here, but the statute of frauds does not bar a court from imposing a constructive trust, if four elements are adequately alleged: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment (*Panetta v Kelly*, 17 AD3d 163, 165 [1st Dept 2005], *leave to appeal dismissed* 5 NY3d 783 [2005]). At oral argument, movants did not deny the existence of a confidential relationship between themselves as parents and their child, the decedent, in this instance (*see Schaffer*, 17 Misc 2d at 593, *citing Wood v Rabe*, 96 NY 414 [1884]). Moreover, they failed to demonstrate that the allegations by petitioners could not satisfy the other usual elements of constructive trust,¹ in light of the requirement on motions to dismiss for failure to state a claim that the court accept the allegations as true and give petitioners' allegations the benefit of every favorable inference (*see Castelloti v Free*, 165 AD3d 535 [1st Dept 2018]; *Marec v Lynch*, 289 AD2d 541 [2d Dept 2001]).

¹ Although the circumstances under which a court can impose a constructive trust has "no unyielding formula," the usual factors are alleged to be present here (*see Plotnikoff v Finkelstein*, 105 AD2d 10, 18 [1st Dept 1984] [dissent]).

The petition states that decedent agreed to sell a certain Long Island property of his own, known in this proceeding as the Woodbine Property, and to transfer the proceeds thereof to respondents, upon respondents' promise to convey the Cliff Road Property to him and his spouse, and further, that decedent, before his death on November 26, 2017, made three payments totaling \$410,000 (\$55,000 in May of 2014; \$165,000 in July of 2014; and \$190,000 in June of 2017) to respondents, and that he did in fact sell the Woodbine Property, and that decedent and his spouse moved themselves as well as furnishings and personal belongings (which respondents to this day, it is alleged, improperly retain) from the Woodbine Property to the Cliff Road Property. These allegations suffice to set forth a claim of constructive trust (*Hernandez v Florian*, 173 AD3d 1144 [2d Dept 2019]).

In the alternative, petitioners also adequately pled unjust enrichment² and conversion,³ in case the Cliff Road Property and decedent's personal property therein cannot be transferred to decedent's executors, that is, these claims seek return of the monies paid to respondents or the cash value of the personal property.

The November 2013 deed to the Cliff Road Property, under which decedent was added as respondents' co-tenant with right of survivorship, which amendment was, on its face, made without consideration, does not conclusively negate the alleged promise to transfer the property

² To state a claim for unjust enrichment, a party must show: (1) that 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 (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). This alternative theory seeks recoupment of amounts paid, not specific performance of the agreement.

³ To state of claim for conversion, there must be allegations of "an unauthorized assumption and exercise of the right of ownership over personal property belonging to another to the exclusion of the owner's rights" (*Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP*, 130 AD3d 1543, 1545 [4th Dept 2015] [citation omitted]). Such allegations have been made here regarding monies and personal property retained.

to decedent and his spouse thereafter; nor do decedent's own tax filings "utterly refute" petitioners' allegations that decedent and his family could have maintained the Cliff Road property as a residence (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). The deed does not demonstrate that the 2013 change to add decedent was the sum total of the agreement with his parents because it could have been, as petitioners allege, an initial or preliminary step in their agreement. Likewise, the reliance on decedent's tax filings, which listed a Manhattan address as his residence, as opposed to one at the Cliff Road Property, was insufficient to make out an estoppel against a party who has taken an inconsistent factual position from those made to the taxing authorities (*see generally Anonymous v Anonymous*, 156 AD3d 412 [1st Dept 2017]; *Zemel v Horowitz*, 11 Misc 3d 1058[A], 2006 NY Slip Op 50276[U] [Sup Ct, NY County]). A person may have more than one residence (*see Glenbriar Co. v Lipsman*, 11 AD3d 352, 353-53 [1st Dept 2004]; *Yaniveth R. v LTD Realty Co.*, 27 NY3d 186 [2016]).

The final documents relied upon by movants are invoices for roof and water-damage repair and utilities as well as copies of canceled checks for payments from respondents. The reasons for their making such payments are contested by petitioners, but, in any event, the payments do not conclusively refute the central allegations of the petition, such as the \$410,000 in payments, and therefore do not sufficiently support dismissal.

Accordingly, respondents' motion to dismiss this turnover petition for failure to state a claim and as barred by documentary evidence was denied.

Discovery demands should be made promptly, and, in any event, no later than January 14, 2020, and all discovery in this matter concluded no later than May 14, 2020, unless stayed or

extended by stipulation of all parties filed prior to the expiration of a deadline or by further order of the court.

This decision, together with the transcript of the October 11, 2019 proceedings, constitutes the order of the court.

Dated: November 21, 2019



S U R R O G A T E