

Davanzo v Lajara

2020 NY Slip Op 34671(U)

September 15, 2020

Supreme Court, Nassau County

Docket Number: Index No. 605280/2020

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ELEANOR DAVANZO,

TRIAL/IAS PART 33
NASSAU COUNTY

Plaintiff,

-against-

Index No.: 605280/2020
Motion Seq. No.: 01
Motion Date: 07/13/2020

NICOLE DANA LAJARA,

Defendant.

The following papers have been read on this motion:

	<u>Papers Numbered</u>
<u>Order to Show Cause, Affidavit, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition, Affidavit and Exhibits</u>	<u>2</u>
<u>Affirmation in Further Support and Exhibits</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves for an order granting a stay during the pendency of the above-captioned proceeding prohibiting defendant, her agents or attorneys, and any and all other person or persons claiming or having any interest in plaintiff's assets, from distributing, expending, paying out or in any other way disposing of or interfering with any of the property, funds, or money which belonged to plaintiff on or before March 19, 2019, in the Edward Jones account ending in 8813. Defendant opposes the motion.

In support of the motion, counsel for plaintiff submits, in pertinent part, that, "[i]n sum and substance, Defendant is in possession of Ms. DaVanzo's life savings, money which is directly traceable to the Edward Jones account of Defendant ..., and if Defendant removes said funds from the reach of Ms. DaVanzo, Ms. DaVanzo will not likely to be able to ever recover the

money and will suffer irreparable harm.... Ms. DaVanzo has established intent to defraud, complaint (*sic*) with CPLR § 6201(3). Ms. DaVanzo has established that while she was in a state of diminished capacity, her daughter, Nicole Dana Lajara, whom she trusted, fraudulently divested Ms. DaVanzo of all of her financial and real property possessions on the false pretense that it was the only way to receive long-term care.... Exhibit 2 shows that in March 2019 all the assets in Ms. DaVanzo's Edward Jones account ending in 8813 were transferred to an Edward Jones internal account ending in 9316. Exhibit 3 shows that the Edward Jones account ending in 9316 belongs to defendant Nicole Dana Lajara. Assuming the facts as alleged are true, Defendant will have no defense to the causes of action of Constructive Trust, Unjust Enrichment, or Fraud in the Inducement. Defendant has demonstrated the lengths to which she is willing to go to obtain and maintain possession of Ms. DaVanzo's assets.... Even presented with the facts that Ms. DaVanzo never received, nor wants, Medicaid services, Defendant's response was that there was 'no way' she was going to give the assets back to her mother. Now that litigation is underway and (*sic*) Defendant is alerted to the possibility of having to disgorge the money transferred to her account at Edward Jones. If Defendant is able to quickly move the Edward Jones money out of the reach of Ms. DaVanzo, even if Ms. DaVanzo obtains judgment in her favor, Ms. DaVanzo will likely be left with an uncollectible judgment. On the other hand, if Defendant succeeds on the merits in this matter, any harm to Defendant from a mere injunction prohibiting her (*sic*) utilizing the money transferred to her Edward Jones account will be *de minimus*. The balance of the equities thus favor Ms. DaVanzo." See Plaintiff's Affirmation in Support Exhibits 1-3.

Plaintiff also submits an Affidavit in Support of the Order to Show Cause. See Plaintiff's Affidavit in Support.

In opposition to the motion, counsel for defendant asserts, in pertinent part, that, “[a]s a preliminary matter, Plaintiff’s order to show cause must be denied, as Plaintiff’s complaint is not verified, and the affidavit submitted in support of the order to show (*sic*) lacks any factual support, and refers to said unverified complaint.... Additionally, Plaintiff fails to cite any case law or statute in support of the relief requested. Plaintiff’s only argument made is pursuant to CPLR § 6201, that ‘the defendant, with intent to defraud his creditors... has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts...’ Plaintiff fails to state any facts in which Defendant engaged in any of the above acts. Plaintiff’s bare boned conclusory allegations that Plaintiff has establish (*sic*) intent to defraud is insufficient for this court to issue a temporary restraining order. Nicole Lajara, the plaintiff’s daughter comes to Court with clean hands, never with the intent to hurt, or take advantage of her mother. This Court should be aware that Defendant had a power of attorney given to her by her mother even before the alleged transfers occurred, and has been given access to her mother’s bank accounts. Moreover, the Condo (*sic*) referred to in the Plaintiff’s papers was transferred into Defendant’s name, while Plaintiff maintains a life estate, and as per the Plaintiff’s own exhibits attached in support of her order to show cause, the money that Plaintiff transferred into Defendant’s name is still in the account with the exception of a few dollars removed and put to the side for her mother’s use. Therefore, Plaintiff cannot establish that Defendant engaged in any of the acts enumerated by CPLR § 6201.”

Counsel for defendant further contends, in pertinent part, that, “[n]ever was there ill intent on the part of the Defendant, nor was there any coercion, fraud, duress or anything other than assisting her mother in carrying out her plan for estate planning and Medicaid due to her health situation and in the event she needed further care.... Plaintiff in her complaint is seeking a

return of her Condo (*sic*) and her assets, however in order to undo the transfer, Plaintiff needs to prove lack of capacity and/or undue influence. Plaintiff does not claim undue influence or lack of capacity. In addition, there is no affidavit from Plaintiff's lawyers or the account manager at Edward Jones that she didn't want to do these transfers. Moreover, there is no evaluation from doctors or medical records to show that she lacked capacity after the 2018 stroke. It is clear from the facts, that Plaintiff's counsel failed to do his due diligence before starting this action. Plaintiff has a monthly income from pension and social security. Defendant recently became aware that Plaintiff went and leased a car. Defendant is worried that Plaintiff is not in a proper state of mind, and she is afraid for her to drive.... In the instant matter, the Plaintiff fails to articulate any factual support for the elements of a constructive trust. As such Plaintiff's order to show cause must be denied as Plaintiff is unlikely to have success on the merits. The Plaintiff failed to detail the promise that existed between the Plaintiff and Defendant. The Plaintiff alleges that she agreed to transfer her Condo (*sic*) and Edward Jones's assets to Defendant in order to qualify for Medicaid; however she has provided no evidence of any agreement. The Plaintiff also failed to present any factual assertion that a promise was made between Plaintiff and Defendant. Case law on constructive trusts generally requires an express or implied promise between the parties, which the Plaintiff fails to allege here. The Plaintiff makes no such assertion. There was not one scintilla of proof that an express promise was made between the parties concerning the Condo (*sic*) contrary to the terms of the deed. As such, because the Plaintiff has not provided any factual support to establish any promise between the named parties, the Plaintiff cannot state a claim for a constructive trust. Lastly, to plead the element of 'unjust enrichment', the Plaintiff must argue that the Defendant '...has received a benefit, the retention of which would be unjust.' [citations omitted]. In this matter, Plaintiff has failed to articulate any 'unjust enrichment' that

has occurred or might occur in the future. Defendant is Plaintiff's only child, and had access to Plaintiff's bank accounts and had a power of attorney prior to the transfers alleged in the Complaint. Additionally, Plaintiff provides no account of how the Defendant will be unjustly enriched by the transfer of the Condo (*sic*) into Defendant's name. Plaintiff retained a life estate, and there are no other siblings to cut off. Defendant doesn't want Plaintiff to have any financial issues, and if Plaintiff needs money to cover her expenses, she will give such money to Plaintiff. Moreover, as per the Plaintiff's own exhibits attached in support of her order to show cause, the money that Plaintiff transferred into Defendant's name are still in the account. Plaintiff's claimed harm (loss of assets from Edward Jones account) can be remedied by an award of money damages in an amount determined by his Court. Plaintiff's account value can be quantified and 'injuries compensable in money and capable of calculation, [even] with some difficulty,' are not irreparable. [citation omitted]. See Plaintiff's Affirmation in Support Exhibits 1-3.

Defendant also submits her own Affidavit in opposition to the motion. See Defendant's Affidavit of Merit.

"To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits; (2) irreparable injury absent a preliminary injunction; *and* (3) a balancing of the equities in the movant's favor (emphasis added)." *Greystone Staffing, Inc. v. Warner*, 106 A.D.3d 954, 965 N.Y.S.2d 599 (2d Dept. 2013) quoting *Yedlin v. Lieberman*, 102 A.D.3d 769, 961 N.Y.S.2d 186 (2d Dept. 2013). See also CPLR § 6301; *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990).

"The remedy is considered a drastic one which should be used sparingly." *Town of Carmel v. Melchner*, 105 A.D.3d 82, 962 N.Y.S.2d 205 (2d Dept. 2013). A movant must satisfy each requirement with "clear and convincing evidence." *County of Suffolk v. Givens*, 106 A.D.3d

943, 967 N.Y.S.2d 387 (2d Dept. 2013). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court. *See Butt v. Malik*, 106 A.D.3d 849, 965 N.Y.S.2d 540 (2d Dept. 2013); *1650 Realty Associates, LLC v. Golden Touch Management, Inc.*, 101 A.D.3d 1016, 956 N.Y.S.2d 178 (2d Dept. 2012).

“To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts.” *Matter of Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dept. 2005). *See also Abinanti v. Pascale*, 41 A.D.3d 395, 837 N.Y.S.2d 740 (2d Dept. 2007).

To sustain their burden of establishing irreparable harm, “the plaintiff is required to show that the irreparable injury to be sustained is more burdensome to him than the harm that would be caused by the defendant through the imposition of the injunction.” *Lombard v. Station Square Inn Apartments Corp.*, *supra*. *See also Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 588 N.Y.S.2d 424 (2d Dept. 1992).

Finally, plaintiff must demonstrate that the balancing of equities favors provisional relief. Plaintiff must show that “the absence of a preliminary injunction would cause it greater injury than the imposition of the injunction would inflict upon the defendant.” *Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, 42 A.D.3d 420, 839 N.Y.S.2d 791 (2d Dept. 2007); *Laro Maintenance Corp. v. Culkin*, 255 A.D.2d 560, 681 N.Y.S.2d 79 (2d Dept. 1998).

Based upon the papers and arguments before the Court, the Court finds that plaintiff has failed to meet her burden, as described above, in order to obtain the requested preliminary injunction.

Therefore, plaintiff's motion for an order granting a stay during the pendency of the above-captioned proceeding prohibiting defendant, her agents or attorneys, and any and all other person or persons claiming or having any interest in plaintiff's assets, from distributing, expending, paying out or in any other way disposing of or interfering with any of the property, funds, or money which belonged to plaintiff on or before March 19, 2019, in the Edward Jones account ending in 8813, is hereby **DENIED**.

It is further ordered that a Preliminary Conference is scheduled to be held on October 29, 2020, by the filing of a Proposed Preliminary Conference Order. The parties are hereby directed to the court website (<http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml>) where they will find a fillable PC form with instructions on how to fill it out and when and how to return it. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

Dated: Mineola, New York
September 15, 2020

ENTER:

DENISE L. SHER, A.J.S.C.

ENTERED
Sep 22 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE