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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
Chancery Division
Docket No. C-189-17

MARIE ANDRADE

Plaintiff

v.

Decision

GUSTAVO ANDRADE

Defendant

FILED

DEC 11 2018

Jeffrey R. Jablonski, P.J.Ch.

Decided: December 11, 2018

Henry Walentowicz for the Plaintiff, Maria Andrade, (Celentano, Stadtmauer & Walentowicz, LLC, attorneys).

John V. Salierno for the Defendant, Gustavo Andrade (Salierno Law, LLC, attorneys).

JEFFREY R. JABLONSKI, P.J. Ch.

Introduction:

Juana Maria Andrade, the Plaintiff, owned 170 New York Avenue, Jersey City, New Jersey. On September 19, 2012, Ms. Andrade deeded the property to her son, Gustavo Andrade, the Defendant. In that deed, she reserved a life estate with Mr. Andrade as the remainder. Ms. Andrade now sues Mr. Andrade to void that transfer and alleges

that she was the victim of undue influence impermissibly exerted by her son.

Procedural history:

Ms. Andrade filed a complaint and an order to show cause on December 19, 2017, seeking a judgment to transfer the real estate from Mr. Andrade to her and seeking damages, fees, and costs. On March 20, 2018, the Hon. Barry P. Sarkisian, P.J. Ch. (now ret.), denied the requested emergent relief, dissolved the order to show cause, and ordered that the matter proceed in the "normal course" according to a case management scheduling order. Judge Sarkisian did however restrain Mr. Andrade from disposing of the property until further court order. Mr. Andrade answered the complaint on April 11, 2018. This court tried the matter on November 14, 2018.

The Parties' contentions:

In support the relief requested, Ms. Andrade argues that she was the victim of Mr. Andrade's undue influence and that the pressure that he exerted upon her forced her to transfer the premises to him. Specifically, she argues that a confidential relationship existed between Mr. Andrade and herself and that suspicious circumstances were present that rendered the property transfer infirm. The relationship and the actions of Mr. Andrade, Ms. Andrade believes, creates a presumption that the transfer was

made as a result of undue influence—a presumption that Ms. Andrade argues cannot be clearly and convincingly overcome by Mr. Andrade.

In opposition, Mr. Andrade argues that the transfer was not the product of any undue influence and that the facts established at trial demonstrated that the parties “dealt on terms of complete equality.”

Findings of Fact:

Maria Andrade is 79 years of age and lives at 170 New York Avenue, Jersey City, New Jersey. She has 4 children: Hazel, Edgar, Gustavo, and Grace. The siblings are estranged from each other.

In 1974, Ms. Andrade and her husband, Luis, purchased the property. Luis Andrade died in 1993. Ms. Andrade still remains in these premises. The property has three floors. Ms. Andrade lives on the first, and the second and third are rented to tenants. Until March 2018, Gustavo lived in the basement of the premises. Hazel, after having been involved in an abusive relationship, was given financial assistance by her mother. Mr. Andrade paid \$100.00 per week in rent for his occupancy. Although no receipts were provided to substantiate these payments, Mr. Andrade testified that the amounts were recorded on his mother’s personal calendar. During his occupancy, Mr. Andrade completed substantial repairs to the property for which he did not seek compensation for his labor.

Ms. Andrade however, purchased the materials from the "house account" for those endeavors.

According to Mr. Andrade, Ms. Andrade has some physical ailments that are consistent with her age: gastritis, arthritis, and high blood pressure. However, Ms. Andrade remains in good health and there are no concerns about Ms. Andrade's mental acuity. As Mr. Andrade noted in his deposition and as he reaffirmed at trial, "she's pretty stern. She has a very strong character."

The property in question has been the subject of other inter-family transfers. On November 20, 1991, Ms. Andrade and her husband deeded the property to their daughter, Hazel Brennan. The deed was recorded on December 11, 1991. Four years later, on November 16, 1995, Ms. Brennan returned ownership of the property to Ms. Andrade by deed for \$1.00. That deed was recorded on November 22, 1995.

On September 10, 2010, Ms. Andrade consulted Jorge Batista, Esq., an attorney who, at Ms. Andrade's request, drew a deed to re-convey the property to Hazel Smith for \$1.00. However, at Ms. Andrade's request, that deed was not recorded and title remained with Ms. Andrade.

On September 19, 2012, Ms. Andrade deeded the property to Gustavo Andrade for nominal consideration. That deed was recorded on October 5, 2012. Notably, the transfer of ownership created a life estate in Ms. Andrade with Mr. Andrade as the remainder.

According to her testimony, Ms. Andrade did not reveal her actions to anyone other than her daughter.

After the transfer, Mr. Andrade reported the rental income from the house on his tax returns and claimed Ms. Andrade as a dependent. Mr. Andrade, despite having a daughter himself, executed a will naming Ms. Andrade as his beneficiary and his sister, Grace, as his contingent beneficiary and executrix.

Pertinent Legal Principles:

The issue presented in this matter is whether the facts support the Plaintiff's requested conclusion that she was the victim of undue influence improperly asserted against her by Mr. Andrade.

To succeed, Ms. Andrade must initially satisfy her burden of proving that a confidential relationship existed between herself and her son, and that this relationship was coupled with suspicious circumstances concerning the transfer. If Ms. Andrade establishes these elements by a preponderance of the credible evidence, the transfer would be presumed to have occurred by undue influence. Mr. Andrade would then have the burden of disproving this fact clearly and convincingly. Petruccio v. Petruccio, 205 N.J. Super. 577, 581 (App. Div. 1985); see In re Rittenhouse's Will, 19 N.J. 376, 378-79 (1955); Estate of Stockdale, 196 N.J. 275 (2008).

Proof of a claim by a preponderance of the evidence requires that "a litigant . . . establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2004) (quoting Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1) (2005)). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263, 274-75 (1958). To prevail, a Plaintiff must provide evidence that "must demonstrate that the offered hypothesis is a rational inference, that it permits the trier of fact to arrive at a conclusion grounded in a preponderance of probabilities according to common experience." Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 574-75 (1958). "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads [a factfinder] to find the existence of the contested fact is more probable than its nonexistence." 2 McCormick on Evidence §339 (Strong ed., 5th ed. 1999).

Clear and convincing evidence is evidence that represents a 'a firm belief or conviction as to the trust of the allegations sought to be established.'" In re Purrazzella, 134 N.J. 228, 240 (1993). Clear and convincing evidence is evidence that produces "a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct,

weighty in terms of quality, and convincing as to cause [a factfinder] to come to a clear conviction of the truth of the precise facts in issue. Model Jury Charges (Civil) 1.19 "Burden of Proof-Clear and Convincing Evidence) (approved Apr. 1988, rev. August 2011). It "requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes [a factfinder] to be convinced that the allegations sought to be proved are true." Ibid.

Credibility assessments are key to a decision as to whether a Plaintiff has satisfied a burden of proof. Central to any determination in all litigation (and in this case in particular) is a consideration of the credibility of the witness testimony as to all issues presented. The ultimate outcome of this case centers squarely on the credibility assessments that this court is required to make. After an opportunity to hear the case, to see and observe the witnesses, and to hear each witness testify, this court has a unique perspective to evaluate the credibility and overall reasonableness of each witness' testimony. Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). Guidance as to credibility findings is provided by the model jury charges. Factfinders are instructed to consider the witness' interest in the case outcome; the accuracy of the witnesses' recollection; and the witnesses' ability to know what he or she was talking about. Model Jury Instructions (Civil)

1.12(L) "Credibility" (Approved November 1998). Additional consideration should be given to contradictions and changes in the witness testimony and the witnesses' demeanor. Ibid. Finally, common sense and overall reasonableness provide substantive lenses through which facts can, and should, be assessed. Ibid.

The principles represent the jurisprudential underpinnings of the cause of action under which the Plaintiff seeks relief: unjust enrichment. Undue influence is a "mental, moral, or physical exertion of a kind and quality that destroys the free will of the transferor by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets." Haynes v. First Nat'l State Bank, 87 N.J. 163, 176 (1981); Estate of Stockdale, 196 N.J. 275, 302-03 (2008). It denotes conduct that causes the transferor to accept the "domination and influence of another" rather than follow his or her own wishes. Id. at 303 (quoting In Re Neuman, 133 N.J. Eq. 532, 534 (E&A 1943)). Actionable influence must

be such as to destroy the [transferors] free agency and to constrain him to what he would not otherwise have done in the disposition of his worldly assets . . . The coercion exerted upon the [transferor's] mind must be of a degree sufficient to turn the [transferor] from disposing of his property according to his own desires by the substitution of the will of another which he is unable to resist or overcome.

In Re Livingston, 5 N.J. 65, 73 (1950).

Undue influence has been recognized as a "pernicious tort that has been referred to as a 'species of fraud.'" Haynes, 87 N.J. at 176 (quoting In re Estate of Neuman, 133 N.J. Eq. at 534. "Undue influence is exerted where [one] is coerced to do that which [she] would not have done if left to [herself]." In re Livingston, 5 N.J. at 73. However, "[n]ot every influence is undue influence. Each case . . . must be governed by the particular facts and circumstances . . . to determine if the coercion exerted was undue." Ibid. Mere persuasion, suggestions, or the possession of influence and the opportunity to exert it are not enough for a finding of undue influence. In re Will & Testament of Liebl, 260 N.J. Super. 519, 528 (App. Div. 1992). The influence must be such that it destroys the transferor's free agency and causes her to dispose of property not be his own desires, but instead by the will of another, which the testator is unable to overcome." Id. at 528-29.

As noted previously, the initial burden of proving undue influence falls on the party who contests the validity of the transfer. Here, the Plaintiff possesses the initial burden of proving, by a preponderance of the evidence, that a confidential relationship exists between the transferor and transferee. Petruccio, 205 N.J. Super at 581. If that relationship is then coupled with suspicious circumstances, the burden of proof shifts to the Defendant to establish that the transfer was not performed

with undue influence- a burden that must be proven by evidence that is clear and convincing. Haynes, 87 N.J. at 183.

In considering the existence of a confidential relationship in terms of the proof of undue influence, the inquiry is fact sensitive. Generally, parent and child relationships are "among the most natural of confidential relationships." Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 401 (App. Div. 2007). However, the mere existence of family ties does not create . . . a confidential relationship. Ibid; see also Pascale v. Pascale, 113 N.J. 20, 34 (1988). The test for measuring the existence of a confidential relationship is "whether the relations between the parties are of such a character of trust and confidence as to render it reasonably certain that the one party occupied a dominant position over the other than the consequently, they did not deal on terms and conditions of equality." Ostlund, 391 N.J. Super. at 402. The factors to be considered in determining whether a confidential relationship is present include (1) whether trust and confidence between the parties actually exist; (2) whether they are dealing on terms of equality; (3) whether one side has superior knowledge of the details and effect of a proposed transaction based on a fiduciary relationship; and (4) whether one side has exerted over-mastering influence over the other or whether one side is weak or dependent." Suspicious circumstances, for burden shifting

purposes, need only be slight. Rittenhouse's Will, 19 N.J. at 379.

Conclusions of Law:

Central to the conclusions to be made in this litigation is an assessment of the credibility of each witness. Having watched and considered the testimony of both Mr. Andrade and Ms. Andrade, this court concludes that any credibility determinations favor Mr. Andrade's position as opposed to that of Ms. Andrade.

As the court considered the substance of the testimony as well as the way that it was presented by each witness, this court noted that Ms. Andrade's testimony was halting at times and that her recollection of the events was less than consistent. She was often confused in her responses especially during her cross examination as to the nature of her accounts, the account holders, and responsible parties. The overall reasonableness of the position that she took about the rent being charged by her to Mr. Andrade after 23 years of rent-free occupancy, her assertions that she has not paid taxes for 30 years, and the change of position that she took about the initial lack of a last will and testament to the existence of one in which all 4 children were to be favored, are suspect. Counsel for Ms. Andrade led his client through much of her testimony. However, when Ms. Andrade was asked the few open-ended questions presented to her, she rarely answered

directly and frequently offered more information than was requested.

Her testimony contrasts with Mr. Andrade's. As opposed to his mother, Mr. Andrade testified directly and politely. He knew what he was talking about, made good eye contact, and provided prompt and direct answers to all questions asked of him on both direct and cross. His tone remained even through each examination. He had an accurate recollection of the events. His testimony was detailed and he did not impermissibly embellish it. He did not avoid any question and was more than willing to answer any question placed to him. His testimony at trial lacked any contradiction and was consistent with that which he provided in his deposition testimony months before trial. Overall, Mr. Andrade's testimony fair, reasonable, and, consequently, much more credible than that provided by Ms. Andrade.

Therefore, considering this conclusion and considering the facts in light of the pertinent legal principles, this court makes these legal conclusions:

- A. Other than proving that Mr. Andrade was the son of Ms. Andrade, there is no evidence of any confidential relationship between Ms. Andrade and Mr. Andrade at the time of the deed's transfer.**

It is undisputed that Mr. Andrade and Ms. Andrade have a

familial relationship as mother and son. However, the facts considered considering the pertinent factors and tempered with the favorable credibility determinations supporting Mr. Andrade only support a finding that the evidence is, at best, in equipoise, that there was a confidential relationship between the parties. The evidence does not demonstrate that Mr. Andrade possessed any dominant position over his mother, nor that he had a controlling influence over her. The evidence was, instead, to the contrary. The testimony provided persuades the Court that Ms. Andrade was a shrewd person who was aware of the nature and objects of her bounty, and made deliberate decisions about the disposition of her real property for calculated purposes.

Ms. Andrade noted that in 1991 she moved the property into her daughter Hazel's name in order to protect that asset from any loss "to the government." After the property was returned to her in 1995, she made another decision to transfer the property to her son. Both times, she was certainly aware (if not ultimately misinformed) about the reasons why she was taking the action that she did. Mr. Andrade testified at his deposition and at trial that he did ask Ms. Andrade to transfer the property to him. However, there is a conspicuous lack of evidence presented to demonstrate that those requests were made in such a way as to force the asset's transfer. Ms. Andrade did not testify that she was in any way threatened by Mr. Andrade. There is no testimony that Mr.

Andrade coerced or bullied Ms. Andrade to relinquish title to the premises. Similarly, there is no evidence that Mr. Andrade attempted to withhold any love, affection, nor services that he had been providing to his mother in order to compel the decision that she made approximately 6 years before this lawsuit. Although Ms. Andrade testified that she helped her son, specifically with regard to her payment of his car repair bill and his child support obligations, there was nothing else elicited at trial nor during depositions that would characterize the relationship as one founded on trust and confidence. Both parties were able to, and did, live independently from each other and there was no proof that demonstrated that Ms. Andrade was so dependent upon the presence and involvement of her son for her own livelihood. There is no credible evidence to suggest anything other than Mr. and Mrs. Andrade co-existed in on equal terms. Interesting, the evidence suggests the contrary that Ms. Andrade, from the assistance that she provided to Mr. Andrade without any request for repayment, herself stood in a more dominant position over her son. There was no evidence presented that Mr. Andrade had any superior knowledge of the details and effect of the proposed transaction based on a fiduciary relationship.

At bottom, there was no evidence presented that would even suggest that Mr. Andrade had exerted any "over mastering influence" over Ms. Andrade or that Ms. Andrade was either "weak or dependent"

to establish a confidential relationship between the two. Ostlund, 391 N.J Super. at 402.

B. Ms. Andrade has not provided credible evidence to establish that that the transfer was made under suspicious circumstances.

Ms. Andrade has similarly failed to show that the transfer took place under any suspicious circumstances. While there only needs to be a modest showing of a slight suspicion, the record reflects that there has been no credible evidence presented to satisfy this preliminary burden.

Specifically, the direct evidence presented at trial and in the deposition revealed that Ms. Andrade initiated the transfer that was requested since it was designed to permit her to retain control over the property until she died. The fact that she transferred the property and reserved a life estate in herself satisfied that need. Ms. Andrade testified that she continues to manage the property by collecting rents and paying the taxes and insurance due as a veritable owner under the authority that she retained for herself in 2012. This fact was confirmed by Mr. Andrade. Ms. Andrade was in complete control of the disposition of her property from the initial transfer in 1991, to the retransfer in 1995, to the requested transfer in 2010, and to the subject transfer in 2012. Similarly, the allegations that the attorney somehow engaged in inappropriate contact and discussions

with Ms. Andrade, or that he did not made certain recommendations, is not supported by this record. The testimony, rather, reveals that Ms. Andrade's chose Mr. Batista to draw and to record the deed because of Mr. Batista's familiarity with the family coupled with his ability to communicate with him.

This court is not persuaded that the circumstances surrounding the transfer can be considered as suspicious for the Plaintiff to establish her burden of proof.

C. Notwithstanding these conclusions, the facts demonstrate that Mr. Andrade otherwise would have clearly and convincingly met his burden that the transfer was not unduly influenced.

The record facts demonstrate that Mr. Andrade met his burden of proving clearly and convincing that there was no undue influence surrounding the property transfer. There were no facts presented as to any mental, moral, nor physical exertion of a kind and quality that demonstrate that Ms. Andrade's will was overborne by the actions of Mr. Andrade. The opposite, rather, is true.

The record evidence demonstrates that Ms. Andrade freely exercised her ability to transfer the property to her son. There was no evidence presented that Mr. Batista in any way acted improperly by being influenced to take an adverse action against Ms. Andrade by his actions. That attorney was selected by Ms. Andrade, rather than Mr. Andrade, because of Mr. Batista's prior

involvement with Ms. Andrade and her family. Based on the credibility determinations that I made and the observations as to her testimony, it was clear to this court that the transfer of the premises to Mr. Andrade was to compensate him for the work performed on the premises and for the benefit of his mother. Ms. Andrade indicated that although she would pay for materials, Mr. Andrade performed the work. That work was substantial and involved almost a complete renovation of the premises. It was a reasonable (and uncontroverted) position that Ms. Andrade would seek to reward her son for the work that he contributed to this asset, particularly since Ms. Andrade provided similar assistance to her other children.

Mr. Andrade also provided love, affection and support to his mother as demonstrated by his continued presence at the premises despite the other 3 children's departure from it. Although there was no proof of any influence exerted by Mr. Andrade over the creation of the deed drawn by Mr. Batista, the transfer certainly respected Ms. Andrade's desire to retain ownership responsibilities of the household. This was achieved with the reservation of the life estate. Similarly, if the intent of Mr. Andrade were as nefarious as Ms. Andrade wishes this court to believe, Mr. Andrade would have chosen a less aggrandizing disposition of the property. Rather than taking the property following Ms. Andrade's death for himself, he named the Plaintiff

as his beneficiary if he were to predecease his mother, and his younger sister as his contingent beneficiary and executrix. No provisions in his will have been made to favor his own offspring with the value of the house.

Except for a reservation of a life estate, Ms. Andrade took identical action in 1991 when she transferred the property to her daughter, and in 2012 when she again spoke with Mr. Batista about an unrecorded re-transfer of the property to Hazel, and then the ultimate decision to place the house with her son.

The facts, considered in a totality, demonstrate clearly and convincingly that the transfer was not based on any undue influence exerted by Mr. Andrade over Ms. Andrade.

Conclusion:

Ms. Andrade has not satisfied her burden of proof that she and Mr. Andrade shared a confidential relationship and that there were suspicious circumstances surrounding the transfer of the premises to him. These conclusions notwithstanding, Mr. Andrade has proved that the transfer was proper and was not the product of undue influence.