AMENDED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

SCAN

PRESENT: HON. WILLIAM R. LaMARCA
Justice

MICHELLE CONNOLLY and JAMES CONNOLLY,

Plaintiffs,

-against-

THERESA KELLY,

Defendant.

Motion Sequence #003, #4
Submitted January 22, 2008

INDEX NO: 11422/06

The following papers were read on these motions:

Notice of Motion.....1
Affirmation in Support.....2
Memorandum of Law in Support.....3
Notice of Cross-Motion.....4
Affirmation in Reply.....5
Reply Memorandum of Law.....6

The Court, *sua sponte*, recalls its order of March 26, 2008 to correct a printing error on page 15 and substitutes the following order in its place, *nunc pro tunc*:

Requested Relief

Defendant, THERESA KELLY, moves for an order, pursuant to CPLR §3212, granting her partial summary judgment dismissing plaintiffs' First Cause of Action which seeks to reform a Deed so as to remove a life estate, dismissing the Second Cause of Action for breach of an oral contract, and granting defendant's First Counterclaim for, *inter*

alia, exclusive possession of real estate. The plaintiffs, MICHELLE CONNOLLY and JAMES CONNOLLY, oppose the motion and cross-move for partial summary judgment reforming the deed to remove a life estate and dismissing the defendant's First Counterclaim for exclusive possession. The motion and cross-motion are determined as follows:

Background

This proceeding demonstrates the fragility of family relationships which result from the failure to anticipate the weakness of human nature. The relevant facts are simple.

The defendant acquired her home at 163 Garden Street, Garden City, NY in 1970. After raising her family there, she found herself alone in a large home which was costly to maintain. She considered selling the home and moving to Queens, but reached an agreement to sell the home to her daughter, MICHELLE CONNOLLY, and her daughter's husband, JAMES CONNOLLY, the plaintiffs herein. Sometime in 2000, before any transfer of title, the plaintiffs moved into the home with the defendant, and undertook initial plans to expand the house to accommodate the plaintiffs and their child, along with the defendant.

By document, dated June 6, 2001, the parties agreed in writing to transfer title from the defendant to the plaintiffs for the amount of $200,000.00, all of which was to be paid by a purchase-money mortgage in that amount, for a term of 30 years at a rate of 6% per annum. Of some note is the fact that the home was estimated to have a fair market value of $357,000.00 as of July 2000.

Title was conveyed, by deed dated June 13, 2001, and the purchase-money mortgage was executed simultaneously. While the contract was silent as to the issue of a life estate, the deed includes the following language: "SUBJECT TO THE LIFE ESTATE OF THE GRANTOR, THERESA KELLY". Among the circumstances surrounding the insertion of this statement is that all parties to the transaction were represented by a single attorney. The defendant sought the advice of another attorney, who suggested the insertion of the life estate language.

According to the deposition testimony of the defendant, the life estate language did not initially appear in the deed at the time of closing, but was inserted before she signed it. The plaintiff, MICHELLE CONNOLLY, also testified to the fact that the life estate language did not initially appear on the deed, but was inserted at the closing. JAMES CONNOLLY's testimony was that the subject of a life estate was discussed in the last five or ten minutes of the closing, and that he was advised by the attorney that this was inserted to protect him and his wife from claims by any other children after the defendant's death, but that it was specifically requested by the defendant.

Sadly, as time went by, friction among the parties made the joint living arrangements intolerable. By notice, dated March 24, 2006 ,defendant advised her daughter and son-in-law that she was terminating their "tenancy/license" and that, unless they vacated the premises by April 30, 2006, she would commence summary proceedings to remove them from the premises. The response was commencement of the instant action by the plaintiffs against the defendant by Summons and Verified Complaint, filed on July 18, 2006.

After reciting the previous facts, the Complaint states that "(t)he inclusion of the Life Estate was a mutual mistake of the parties as it was never contemplated nor was it ever explained to the Plaintiffs what the significance of the language [sic.] until the relationship fractured". The Complaint goes on to allege that the plaintiffs have paid all expenses attendant to the occupancy of the home, and that the defendant has paid none. It further alleges that plaintiffs expended $287,000.00 for major renovations at the dwelling.

The Complaint further refers to an oral contract under which the defendant allegedly agreed to provide child-care services to the plaintiffs' children, without charge, and that this was an agreement upon which the defendant's right to remain at the premises without charge was based, and which agreement she has breached. In April 2005 the defendant, through an attorney, first asserted her right to exclusive occupancy and possession of the residence.

The plaintiffs' two (2) causes of action follow the above recited factual allegations. The first is for rescission and reformation of the Deed so as to remove the "Life Tenancy." The second alleges breach of the contract to provide child-care services, for which the plaintiffs claim to have sustained damages of $25,000.00.

Defendant's Verified Answer acknowledges the existence of a sale of the premises to the plaintiffs for $200,000.00 and that the plaintiffs sold their home on Clinton Street, denies the essential allegations of the complaint, raises eight (8) affirmative defenses, and interposes two (2) counterclaims. The Court notes that a motion by defendant for a preliminary injunction directing the plaintiffs and their children to vacate the subject residence pending the hearing and determination of this action was denied, by Short Form Order dated January 5, 2007, but the temporary restraining order enjoining and restraining

the plaintiffs from touching or moving any of defendant's personal property, including her car, and from altering her phone service and/or the heating and air-conditioning service to her room, locking her out of the subject property or following her person, was extended pending the further order of the Court. The instant motion and cross-motion followed. The Court will first deal with defendant's motion to dismiss plaintiffs' First Cause of Action, which seeks "reformation of the deed to reflect the true relationship of the parties and remove the purported Life Tenancy from the Deed". This requires analyses of the terms "rescission" and "reformation."

Rescission

A contract entered into under a mutual mistake of fact is generally subject to rescission. *Gould v Board of Education of the Sewanhaka Central High School District, et al.,* 81 NY2d 446, 599 NYS2d 787, 616 NE2d 142 (CA1993). In *Gould,* plaintiff had obtained tenure as a teacher in the New York City School System in 1965. Some years later, she applied for a position as a teacher at Sewanhaka, and was accepted as a probationary teacher for a three-year period. Shortly before the expiration of the three years, she was advised that the Superintendent would recommend to the Board that the probationary appointment be terminated. After discussing the matter with the Superintendent, plaintiff submitted her resignation in time for it to be acted on before the expiration of three years. She was advised that if she did so, there would be no reference to the negative tenure recommendation in her file. The resignation was accepted.

Unbeknownst to both plaintiff and the Superintendent, Education Law § 3012(1)(a) reduced the maximum probation period for a formerly tenured teacher from three (3) to two (2) years. Consequently, Gould was, in fact, a tenured teacher by estoppel at Sewanhaka

when the resignation was submitted. The Court stated that "(a)lthough the Superintendent and the Board had constructive knowledge of the facts pertaining to petitioner's 1965 tenure from the information contained in her application, they were presumably not cognizant of the legal implications of continuing to employ petitioner beyond September 1, 1988 when her two years of probation ended". Citing *Matter of Lindsey v Board of Educ.*, 72 AD2d 185, 424 NYS2d 575 (4th Dept. 1980) and *Matter of Dwyer v Board of Educ.*, 61 AD2d 859, 402 NYS2d 67 (3rd Dept. 1978), the Court further stated that "(i)t is of no legal significance that respondents did not know that petitioner's continued employment would enable her to acquire tenure by estoppel . . . ". *Gould v Board of Education of the Sewanhaka Central High School District, supra* (*citations omitted*). The *Gould* Court concluded that the discussion between the Superintendent and the petitioner, and the subsequent actions of the petitioner submitting her resignation, and its acceptance by the Board, were all premised on a mistake of fact - - that is, that the petitioner was a probationary employee, when, in fact, she received tenure by operation of law after two (2) years. The determination of the Supreme Court, which reinstated the petitioner as a tenured teacher, with back pay and benefits, was reinstated.

However, rescission will generally not be granted when there is a mutual mistake of law. This equitable remedy is available only when the mistake of law on the part of one party is accompanied by inequitable conduct, including non-disclosure, or positive fraud on the part of the other. In *Grasso v De Melik,* 114 NYS2d 884, 1952 NY LEXIS 1586 (Supreme NY, County, Breitel J., 1952), the plaintiff sought rescission of a contract to purchase real estate on the ground that the seller had misrepresented the amount of

"legally collectible" rents. The term related to the amount collectible under applicable rent control regulations, and constituted a mixed question of law and fact. The Court held that a false statement in this regard, knowingly made to induce a sale, is actionable under law and equity.

Of more recent vintage is *The Symphony Space, Inc. v Pergola Properties, Inc., et al.*, 88 NY2d 466, 646 NYS2d 641, 669 NE2d 799 (1996). The factual background of the case is rather complex, but it involved a below-market sale and leaseback of the income producing portion of the building. At the heart of the ultimate dispute was an option to re-purchase the property from the grantee during any one of three stated "Exercise Periods". When one of the triggering events occurred, one of the defendants served the plaintiff with a notice of default and announced its intention to exercise the option to re-purchase. The plaintiff initiated a Declaratory Judgment action claiming that the option agreement violated the New York State Rule against Perpetuities as found in Estates Powers and Trusts Law § 9-1.1(a)(2).

After a lengthy discussion of the history and impact of the rule on commercial properties, the Court concluded that the option agreement in question was, in fact, invalid as a violation of the statute. Among the arguments propounded by the defendants was that the original sale of the property to the plaintiff should be rescinded because of the mutual mistake of the parties with respect to the validity of the option to re-purchase. But the Court concluded that rescission was inappropriate. The Court further determined that the language of Civil Practice Law and Rules §3005, which ostensibly might provide solace to the defendants, did not. The language of the statute, which is somewhat bedeviling, is as follows: "When relief against a mistake is sought in an action or by way of defense or

counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact". Rather than equate all mistakes of law with mistakes of fact, the statute removes technical objections in instances where recoveries can otherwise be justified by analogy with mistakes of fact. *The Symphony Space, Inc. v Pergola Properties, Inc., et al., supra*, at 484 — 485, citing *Mercury Mach. Importing Corp. v City of New York,* 3 NY2d 418, 165 NYS2d 517, 144 NE2d 400 (CA1957).

The Court concluded that "the parties' mistake amounts to nothing more than a misunderstanding as to the applicable law, and CPLR 3005 does not direct undoing of the transaction". *The Symphony Space, Inc. v Pergola Properties, Inc., et al.,* at 485, *supra.* Quoting *David D. Siegel, Practice Commentaries, McKinney's Cons. Laws, § 3005,* C3005:1, p. 621, Court stated that CPLR §3005 "does not permit a mere misreading of the law by any party to cancel an agreement". Rather, as Professor Siegel states,

> "(i)t really leaves the matter to the court to determine whether the particular law mistake is sufficiently analogous to a fact mistake to justify a judicial result to which the fact mistake would lead. It does not permit a mere misreading of the law by any party to cancel an agreement. It if did, the courts would be flooded with application to get out from under because one party assumed its right to be of a kind and quality greater than it was. As long as the mistake has not been induced by the other party's misrepresentation– which would justify an outright fraud claim and obviate reliance on CPLR 3005 anyway– resort to CPLR 3005 may be misplaced. Poor advice, for example, from the party's own attorney, to whatever extent it may affect a threatened criminal prosecution, will rarely be ground to void a civil transaction, which would only penalize the innocent adverse party.

David D. Siegel, Practice Commentaries, McKinney's Cons. Laws, § 3005, supra.

Reformation

In order to obtain reformation of a written instrument it must be shown that "the parties came to an understanding but, in reducing it to writing, through mutual mistake, or

through mistake on one side and fraud on the other, omitted some provision agreed upon, or inserted one not agreed upon." *William P. Pahl Equipment Corp, et al. v Kassis, et al.*, 182 AD2d 22, 588 NYS2d 8 (1st Dept. 1992). "It is not a mechanism to interject into writings terms or provisions not agreed upon or suggested by one party but rejected by the other." . . . "The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties", . . . and "(t)he proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." *William P. Pahl Equipment Corp, et al. v Kassis, et al.*, *supra*, (internal quotations and citations omitted).

In *John John, LLC v Exit 63 Development, LLC, et al.*, 35 AD3d 538, 826 NYS2d 656 (2d Dept. 2006), the Court refused to reform a contract, and reiterated that the purpose of reformation is to "restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties" and that "(t)o reform a contract based on mistake, a plaintiff must establish that the contract was executed under mutual mistake or a unilateral mistake induced by the defendant's fraudulent misrepresentation". (internal quotations and citations omitted). *Cf., Carla Realty Co. v County of Rockland,* 222 AD2d 480, 635 NYS2d 67 (2d Dept. 1995), lv. to appeal denied, 88 NY2d 808, 647 NYS2d 713, 670 NE2d 1345 (CA 1996). In that case the reformation of a deed was directed where the deed neglected to include an easement in favor of the Grantor and his assignee, where it appeared that such was the clear intention of both the Grantor and Grantee.

Here the Court is called upon to determine whether there was a factual mistake, or a legal mistake so analogous to one of fact that rescission or reformation is appropriate, or whether it was nothing more than a mutual mistake as to the applicable law, in which case rescission of the agreement or reformation of the deed, to strike therefrom the life estate, would be unwarranted. The Court is persuaded that the error was mutual, but was based upon a failure of both sides to appreciate the full legal implication of the term "life estate". As such, the case is more closely analogous to the situation in *The Symphony Space, Inc. v Pergola Properties, Inc., supra.,* than that in *Gould v Board of Education of the Sewanhaka Central High School District, supra.*

Both parties wanted the defendant to be able to remain in her home after the conveyance of title. The defendant specifically requested that language giving her a life estate be inserted in the deed at the closing. What neither party recognized, is that the clear and unambiguous language of the deed imported an exclusivity of possession in favor of the defendant. The circumstance is analogous to the failure of the parties in *The Symphony Space, supra*, to recognize that the option to re-purchase violated the Rule against Perpetuities. Only, in the case at bar, the language gave the holder greater, rather than less, legal entitlement than was understood at the time of its insertion. While it appears that there was a mistake of law on the part of the plaintiffs, no positive fraud or inequitable, unfair or deceptive conduct can be shown on the part of the defendant to warrant equity's intervention. *See, Grasso v De Melik, supra.*

Life Estate

The use of the term "life estate" gives the holder more than the right of possession; rather, it conveys the right of use as well. *Matter of Strohe,* 5 Misc.3d 1028A, 799 NYS2d 164 (Surrogate Ct. Nassau Co. 2004) and cases cited therein. The real substance of a life estate consists of the holder's right to exclude all others from the possession of the subject property for the duration of his or her own life. In general terms, such an estate, by its very nature, terminates upon the death of the life tenant. *In re Estate of Carley,* 249 AD2d 542, 672 NYS2d 131 (2nd Dept. 1998). Typically, the holder of a life estate also assumes the burdens attendant to ownership. Unfortunately for the plaintiffs in this case, the purchase-money mortgage clearly imposes those obligations upon them, as mortgagors.

Based upon a careful reading of the submissions herein, the motion by the defendant to strike the First Cause of Action for reformation of the deed is granted and the life estate shall remain. Additionally, based on the foregoing, the cross-motion by the plaintiffs for summary judgment reforming the deed to demonstrate that there is no life estate is denied.

Breach of Oral Contract

The second aspect of the defendant's motion to dismiss concerns the Second Cause of Action for the alleged breach by the defendant of an oral contract to provide child-care services to the plaintiffs. The substance of the claimed agreement is set forth in ¶ 6 of the Verified Complaint. It states as follows:

> 6. Plaintiffs and Defendant came to an oral agreement in which Plaintiffs would purchase to own and reside in the Premises at 163 Garden Street, Garden City, New York, make

> the repairs necessary for the house to maintain its viability for a discounted price in return for which defendant [sic.] would transfer title to Plaintiffs, provide child care services, and be permitted to reside with the Plaintiffs rent free.

While this may well have been the intention of the parties, it is not set forth in the contract of sale, much less stated to survive delivery of the deed. In the absence of such a provision, all prior claims are merged in the deed, which is silent on the subject. *Rothstein v Equity Ventures, LLC,* 299 AD2d 472, 750 NYS2d 625 (2d Dept. 2002).

Separate and apart from its merger in the deed, such an oral agreement is barred by the Statute of Frauds, codified in General Obligations Law § 5-701, which provides as follows:

> a. Every agreement, promise or understanding is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or understanding:
>
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime.

The language of the complaint makes it clear that the oral agreement to provide child care services was not to be completed within one year. ¶ 37 alleges "(d)efendant incurred no housing or living expenses from October 2001 until July 2002 while she continued to provide child care services". ¶ 41 recites that "(i)n or about April 2004 defendant ceased providing child care services for plaintiffs claiming it was too exhausting". Lastly, in ¶¶ 55 — 56, the plaintiffs seek damages in the amount of $25,000 for the cost of child-care services from April 2004 to the date of the complaint, July 9, 2006.

After a careful reading of the submissions herein, the Court concludes that, even if the oral agreement were not merged in the subsequent deed, it is barred by the Statute

of Frauds as not being capable of completion within one year of its making. Therefore, the defendant's motion to dismiss the Second Cause of Action for Breach of Contract is granted.

As to Exclusive Possession

In the cross-motion, plaintiffs seek an order dismissing the defendants' First Counterclaim. The counterclaim alleges that the defendant is entitled to judgment ordering that the defendant recover exclusive possession of the subject premises and that plaintiffs vacate same, and for monetary damages for rent for the time plaintiffs have refused to vacate.

As the holder of a life estate, the defendant is entitled to exclusive possession. With respect to rent for the period during which the plaintiffs have remained after being served with a notice to vacate, the Court declines to make such an award. The plaintiffs, fee owners, have resided in the home at the sufferance of the defendant, without demand for rental payments. In fact, it is clear that, pursuant to the terms of the purchase-money mortgage, and the understanding of the parties, the plaintiffs have been, at least since June 2001, paying the indebtedness on the mortgage, insurance premiums, real estate taxes, etc. They have also expended a claimed $278,000.00 to renovate the home. The defendant is not, in the absence of a written agreement to the contrary, entitled to rental payments in addition to the foregoing. Therefore, the defendant's cross-motion for an order directing that the plaintiffs vacate the premises is granted, but that portion of the application for rental payments is denied.

The Court fully recognizes that this is not a satisfactory resolution, probably for either party. The plaintiffs, in particular, if the order directing them to vacate is enforced,

will find themselves without a home for themselves and their children while they are saddled with the obligations to pay the mortgage and expenses attendant to the subject premises. The defendant, on the other hand, will find herself in a home which, if it was too large to manage before the extension paid for by her daughter and son-in-law, will be all the more so now. The defendant's contact with her grandchildren will undoubtedly be far less than it was before, and the plaintiffs will continue to be required to incur expenses for child-care services, and will likely deprive their children of the benefit of a relationship with their grandmother.

Sadly, "(r)eformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties". *George Backer Management Corp. v Acme Quilting Co.*, 46 NY2d [redacted] NYS2d 135, 385 NE2d 1062 (1978). While the parties are at liberty to restruct[redacted]reement as to living arrangements, the Court does not enjoy that luxury. The Court's role is limited to interpreting the documents and applying the applicable law.

Conclusion

Based on the foregoing, it is hereby

ORDERED, that the motion by the defendant for partial summary judgment dismissing the First Cause of Action is granted; and it is further

ORDERED, that the motion by the defendant for partial summary judgment dismissing the Second Cause of Action is granted; and it is further

ORDERED, that the motion by the defendant for an order granting the defendant exclusive possession of the premises and directing the plaintiffs to vacate the premises is granted; and it is further

ORDERED, that the portion of defendant's motion seeking rental payments for the time during which the plaintiffs have remained in the premises since the notice to vacate is denied; and it is further

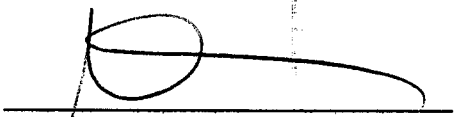
ORDERED, the plaintiffs' cross-motion for reformation of the deed so as to strike the reference to a life estate is denied; and it is further

ORDERED, that plaintiffs' cross-motion for summary judgment dismissing the First Counterclaim is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 1, 2008



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