

SUPERIOR COURT OF NEW JERSEY

ELLEN L. KOBLITZ
PRESIDING JUDGE, GENERAL EQUITY



BERGEN COUNTY JUSTICE CENTER
HACKENSACK, NJ 07601
(201) 527-2607

August 19, 2009

Martin Flumenbaum, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, New York 10019-6064

Christopher L. Weiss, Esq.
Ferro Labella & Zucker LLLC
The Landmark Building
27 Warren Street, Suite 201
Hackensack, New Jersey 07601

Benjamin Clarke, Esq.
DeCotiis, Fitzpatrick, Cole & Wisler LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666

**Re: Estate of Claudia Cohen v. Robert Cohen and James Cohen
C-134-08**

Please find enclosed the Court's opinion of August 19, 2009. Mr. Weiss should submit an order in conformity with this opinion.

The remaining portion of this trial shall commence on November 9, 2009.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Koblitz".

Ellen L. Koblitz, P.J.Ch.

ELK: lar

cc: Joseph Castiglia, Esq.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

ESTATE OF CLAUDIA L. COHEN, by
its Executor, RONALD O. PERELMAN,
and SAMANTHA PERELMAN

Plaintiff(s)

v.

ROBERT COHEN and JAMES S.
COHEN

Defendant(s)

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

BERGEN COUNTY

DOCKET No. BER-C-134-08

OPINION

Decided: August 19, 2009

Martin Flumenbaum, Esq., Theodore V. Wells, Esq., Roberta Kaplan, Esq. (Paul, Weiss, Rifkind, Wharton & Garrison LLP), Zulima Farber, Esq., Gregory Wild, Esq., and Jeffrey J. Wild, Esq. (Lowenstein Sandler PC), counsel for Plaintiffs, Executor, Ronald O. Perelman and Samantha Perelman.

Christopher L. Weiss, Esq., Russell T. Brown, Esq. (Ferro Labela & Zucker LLC), Robert Gold, Esq., Mitchell Epner, Esq., Lewis Ziropiannis, Esq. (Wilson Sonsini Goodrich & Rosati, Professional Corporation), counsel for Defendant/Counterclaim Plaintiff Robert Cohen.

Benjamin Clarke, Esq., Frank Huttler III, Esq., and Russell Passamano, Esq. (DeCotiis, Fitzpatrick, Cole & Wisler, LLP), counsel for Defendant James Cohen.

KOBLITZ, P.J.Ch.

This is the Court's fourth opinion in this complex litigation. This opinion deals with Counts II through VIII of an amended complaint which essentially seeks to void *inter vivos* transfers of property by Robert Cohen ("Robert") to his son James Cohen ("James"). Robert is an 84-year-old largely self-made multi-millionaire who is terminally ill with a particularly insidious variant of Parkinson's disease, Progressive Supranuclear Palsy ("PSP"). Due to his

physical infirmities, Robert is unable to move his body, has trouble swallowing and great difficulty articulating understandable language. Robert receives superb medical care and round-the-clock assistance which permits him to live at home. Robert is a graduate of West Point and a strong-willed, decisive individual, even as he suffers the effects of a horrible disease. He lives in Englewood, New Jersey and Palm Beach, Florida with his wife of many years, Harriet, who is disabled with Alzheimer's disease.

Robert and Harriet had three children. Their middle child, Michael, died at age 41 in 1997 leaving Robert one grandchild, Michael Spencer. The Cohen's oldest child and only daughter, Claudia, ("Claudia" when referencing the individual, the "Estate" when referencing her estate) was a successful popular journalist and loving daughter who died from cancer at age 56 in 2007, leaving Robert one grandchild, plaintiff Samantha Perelman ("Samantha"). Samantha was initially represented by her father as her guardian; however, Samantha turned 18 during the course of this litigation and chose to go forward with the litigation on her own accord. Shortly before her death, Claudia changed the executor of her estate from her old friends, the Hesses, to her ex-husband and close friend, Ronald O. Perelman ("Perelman"), the self-made multi-billionaire father of Samantha. As executor of Claudia's estate and guardian of their daughter, Samantha, Perelman filed this litigation, funding it from Claudia's estate of sixty million dollars. Samantha is the primary beneficiary of the estate.

Robert was the principal owner of the family business called Hudson Group ("Hudson"). His third, youngest, and only surviving child, 51 year-old co-defendant James has participated in the family business for his entire career. James and his wife have four children. In 2008, a part of Hudson was sold to Advent International, a private equity firm, for over six hundred million dollars.

Plaintiffs filed a complaint, consisting of seven counts, on April 7, 2008. Plaintiffs initially claimed that Robert made enforceable promises to divide his estate equally among his children and that these promises entitled Samantha to her mother's share of Robert's estate. This Court later allowed plaintiffs to file an amended complaint specifying the time period of the alleged promises as prior to September 1, 1978, the date when New Jersey enacted N.J.S.A. 3B:1-4, preventing enforcement of a subsequent oral promise to make a bequest. The amended complaint also added an eighth count, alleging James fraudulently told Claudia he would take care of her and Samantha.

The trial in this matter proceeded in segments. Initially, plaintiffs raised the issue of Robert's current capacity to conduct the trial, alleging he was incompetent and needed a guardian ad litem ("GAL"). After a seven week trial, during which numerous expert and lay witnesses testified, the Court determined in an oral opinion, put on the record on June 1, 2009 and hereby incorporated into this opinion, that Robert was functionally competent and did not need a GAL. Subsequently the Court heard evidence with regard to Robert's purported promises and determined in an oral opinion, put on the record on June 15, 2009, and hereby incorporated into this opinion, that no pre-1978 enforceable promise to bequeath Claudia a certain share of his estate was clearly and convincingly demonstrated by plaintiffs. Thus, Count I was dismissed with prejudice.

On April 22, 2009, plaintiffs also filed an incapacitation complaint against Robert with the Surrogate's Court. This Court dismissed that complaint in an oral opinion, put on the record June 26, 2009, finding that Robert did not lack capacity. That June 26, 2009 opinion is hereby incorporated into this opinion.

Plaintiffs have obtained Robert's testamentary documents through discovery. Robert changed his will after his son Michael died to divide his assets roughly equally between James and Claudia and again after Claudia died to leave the great bulk of his estate to his son James, although Robert does leave Samantha millions of dollars worth of assets in his most current will, written after this litigation began.

The viability of Counts II through VIII of the amended complaint is currently before the Court. For the reasons explained below, all remaining counts of the amended complaint are dismissed.

Count II alleges James tortiously interfered with Robert's pre-1978 promises to Claudia. Since the Court has ruled that the plaintiffs did not meet their burden of showing by clear and convincing evidence that Robert made an enforceable pre-September 1, 1978 promise, a claim of interference with such a promise must fail. A party cannot interfere with a non-existent or unenforceable promise. Therefore, Count II is dismissed with prejudice.

Counts III and IV pertain to the assets Robert transferred to James in a series of business transactions. The plaintiffs allege these assets were wrongfully transferred to James in violation of Robert's promise to Claudia. Count III alleges James controls or possesses assets that rightfully belong to the Estate, while Count IV alleges James has been unjustly enriched by those same assets. The Court ruled that no pre-September 1, 1978 promise by Robert to leave an equal share of his estate to Claudia exists. Therefore, neither Count III nor Count IV can be maintained. Without "the promise," the assets at issue cannot be deemed to belong to the Estate. Thus, neither Samantha nor the Estate has any current property right to any assets transferred from Robert to James.

Both sides acknowledge that assets worth many millions of dollars have been transferred from Robert to James. Count V of the complaint alleges that these *inter vivos* transfers were the result of undue influence by James. Robert and James argue that, pursuant to New Jersey case law, Robert is the only individual with standing to argue that he has been subjected to undue influence by his only living child, James.

For the purposes of this decision, and as plaintiffs argue, the Court will assume that Robert is in a weakened state and that he has a special relationship with James as those terms are defined in the New Jersey case law dealing with undue influence. Pascale v. Pascale, 113 N.J. 20, 30-34 (1988). In Pascale, the New Jersey Supreme court reinstated the trial court's decision dismissing the father's action to set aside a transfer to one of his sons. The Court noted that "an adult donor is generally presumed to be competent to make a gift." Id. at 29. The Supreme Court reiterated the definition of undue influence as "that sort of influence that prevents the person over whom it is exerted from following the dictates of his own mind and will and accepting instead the domination and influence of another...In respect of an *inter vivos* gift, a presumption of undue influence arises when the contestant proves that the donee dominated the will of the donor, or when a confidential relationship exists between donor and donee" (citations omitted), or when a physically or mentally weakened donor makes a gift of virtually all his assets leaving the donor unable to maintain himself. Plaintiffs here do not allege that Robert has insufficient wealth to maintain himself and his disabled wife for the rest of their lives.

Count V alleges James exercised undue influence over his father, with whom he shared a confidential relationship, and who suffers from a debilitating disease making him susceptible to exploitation or manipulation. Plaintiffs insist that even though this Court determined after a seven week trial that Robert was competent and did not need a guardian, he is still vulnerable to

undue influence with respect to the complex financial transactions at issue here, because of his weakened physical and mental state. Robert maintains that since he is alive and competent, only he may assert a claim of undue influence.

Robert persuasively argues that he should not be stripped of his right to dispose of his property however he chooses. He has been found by this Court to have the capability to direct this litigation on his own behalf and to have general capacity. An unusual aspect of this case has been the ability of Robert's heirs to see his will prior to his death. Several of Robert's wills were used as part of his defense, as well as to elucidate his estate planning. These testamentary documents were provided to plaintiffs through discovery. It is very unusual for the beneficiaries to know exactly what they will be receiving under a testator's will, or how the wills have changed through the years, as wills are typically kept private and not revealed until after the testator has died. Robert may yet decide to change his will, since he has the capacity to change it at any time. James and Robert may enter into other financial transactions before Robert dies, so it is premature to evaluate which party profited from the transactions or what the motivation for those transactions might be. If Robert is satisfied with his business transactions with his son, Samantha should not be permitted to mount a challenge to those transactions on the basis of undue influence while Robert is still alive. The wills Robert wrote after the death of Claudia leave the bulk of his estate to James, thus supporting the argument that the *inter vivos* transfers are a part of an estate plan. Samantha and the Estate argue that they need to protect Robert's assets so that Samantha (Robert's granddaughter) can upset his will and obtain those assets (from Robert's son James) after Robert's death. Such an intrusion into an individual's financial affairs should not be encouraged by the courts when that individual has been found not to lack capacity nor suffer from any form of ill-treatment or neglect.

Robert understands that his former son-in-law and granddaughter are alleging undue influence by his son James and stated so during video-taped deposition testimony which was played during trial. Robert also stated that "Jimmy is a good kid" and that this case is "bullshit."

Robert always intended for his children to inherit his assets. He also provided for them financially while they were alive. He gave 45% of his home in Palm Beach, valued at \$45 million dollars, to a company owned by his three children. He arranged to continue payments to Claudia equivalent to the term alimony Perelman was paying when that term expired. (Unfortunately, Claudia died before those payments from her father began.) Robert has consistently provided for his children. The transactions with James and his current will are completely consistent with Robert's past actions and are not surprising, nor do they favor one child over another. Rather than leave a large portion of his considerable assets to Samantha, one of his six grandchildren (whose father is extremely wealthy), Robert, at this time, chooses to leave the bulk of his estate to his only living child, James, who helped amass Robert's fortune by working with Robert in the family business. Given his intention to leave James his business assets, to the extent these *inter vivos* transfers were gifts, they could well be viewed as a method to avoid the payment of estate taxes upon Robert's death.

The decision of the Appellate Division in Casternovia v. Casternovia, 82 N.J. Super. 251 (1964), establishes the groundwork for this Court to dismiss the undue influence claim. There, the Appellate Division rejected plaintiffs' undue influence claim against their mother and brother to rescind an *inter vivos* transfer of property from the mother to their brother, contrary to a claimed longstanding intention by the parents to leave their estate equally to all three children. In affirming the Trial Court's entry of summary judgment, the Appellate Division held that "if the donor is alive and competent, no such action as asserted here will lie." *Id.* at 256. The Appellate Division further held that:

A child possesses no interest whatever in the property of a living parent. He has a mere intangible hope of succession. His right to inherit the property of his parent does not even exist during the lifetime of the latter. Such right arises on the parent's death, and entitles the child to take as heir or distributee nothing except the undivided property left by the deceased parent.

In so far as his children are concerned, a parent has an absolute right to dispose of his property by gift or otherwise as he pleases. He may make an unequal distribution of his property among his children with or without reason. These things being true, a child has no standing at law or in equity either before or after the death of his parent to attack a conveyance by the parent as being without consideration, or in deprivation of his right of inheritance.

When a person is induced by fraud or undue influence to make a conveyance of his property, a cause of action arises in his favor, entitling him, at his election, either to sue to have the conveyance set aside, or to sue to recover the damages for the pecuniary injury inflicted upon him by the wrong. But no cause of action arises in such case in favor of the child of the person making the conveyance for the very simple reason that the child has no interest in the property conveyed and consequently suffers no legal wrong as a result of the conveyance.

Id. at 256-57.

This Court agrees with Robert that under these facts the only person who may bring an undue influence claim while a competent donor is alive is that donor. Plaintiffs have found no New Jersey case holding to the contrary. Under current New Jersey case law, the only persons having the right to bring an action to unwind an *inter vivos* transfer claimed to be the product of undue influence are: (i) the donor himself (See, e.g., Pascale, supra; Oachs v. Stanton, 280 N.J. Super. 478 (App. Div. 1995)); or (ii) the guardian of that donor so long as the donor is alive (See, e.g., In re Niles, 176 N.J. 282, 289 (2003)); or (iii) the executor or beneficiary of the donor's estate if the donor is deceased (See, e.g., In re Estate of Stockdale, 196 N.J. 275, 306 (2008)). The facts presented here do not persuade this Court to make new law in this state by allowing an attack on the choice of a living donor, with capacity, to transfer his assets prior to death. Robert is not incapacitated, and as long as Robert has capacity he may both alter his will and transfer his assets.

Count V of the complaint is therefore dismissed.

Plaintiffs concede that Counts VI and VII fail based on the Court's finding that no enforceable promise exists. In these counts plaintiffs claim that the transfer of business assets from Robert to James without proper consideration will leave Robert's estate, upon Robert's death, insufficient to fulfill his promise to Claudia. Count VI alleges fraudulent conveyance, while Count VII alleges constructive fraudulent conveyance under New Jersey fraudulent transfer law.

Based upon the Court's June 15, 2009 dismissal of Count I of the amended complaint, finding no enforceable promise, plaintiffs acknowledge that they lack standing to plead claims for actual fraudulent conveyance and constructive fraudulent transfer. Therefore, the Court dismisses Counts VI and VII with prejudice.

Plaintiffs maintain in Count VIII that James committed fraud by purportedly promising Claudia he would take care of her and Samantha through the family business and failing to do so. Plaintiffs claim that Claudia relied on James' promise causing her not to inquire into the various transactions between James and Robert which diminished Robert's business, thus depriving Claudia and Samantha of their rightful shares. James responds that these transfers were corporate restructurings that gradually increased James' ownership interest in the family businesses as part of Robert's overall estate plan. Since Claudia did not have any ownership interest or any testamentary expectation of receiving any interest in the family businesses, these inter vivos transfers could not be fraudulent or part of James' scheme to defraud Claudia or her Estate.

The essential elements of a fraud claim are: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichart Co. Realtors, 148 N.J. 582, 610 (1997).

This claim fails on many grounds. First, the promise is too vague, non-specific and non-factual to be relied on. Statements communicating James would "take care of Claudia," or "look out for Samantha" do not constitute the material misrepresentation of a presently existing or past

fact. Ocean Cape Hotel Corp. v. Mesefield Corp., 63 N.J. Super. 369, 380 (App. Div. 1960) (“the alleged fraudulent representation must relate to some past or presently existing fact and cannot ordinarily be predicated on matters in futuro”); Anderson v. Modica, 4 N.J. 383, 391-92 (1950) (“to be actionable, fraud must relate to a present or pre-existing fact and cannot ordinarily be predicated on representations which involve things to be done in the future”); Alexander v. CIGNA Corp., 991 F. Supp. 427, 435 (D.N.J. 1997), aff’d, 172 F.3d 859 (3d Cir. 1998) (“Statements as to future or contingent events, to expectations or probabilities, or as to what will or will not be done in the future, do not constitute misrepresentations, even though they may turn out to be wrong.”).

Additionally, since these statements are so vague and non-specific, James cannot be deemed to have known or believed them to be false. Furthermore, Claudia died before she would have been able to realize any inheritance from Robert. Samantha is the beneficiary of tens of millions of dollars in life insurance on Robert’s life, and the beneficiary of a tens of millions of dollars “second to die” life insurance policy on Claudia’s and James’ lives. Samantha also receives several specific bequests under Robert’s will including a 30.5 carat diamond ring and a fully furnished apartment in New York City. Samantha’s reception of these assets arguably would fulfill the concept of being “taken care of” to the extent that such a concept can be quantified.

Testimony also revealed that neither Claudia, nor her daughter Samantha, had any reasonable expectation of receiving any of the family businesses from her father as part of his testamentary plan. Samantha testified that Robert’s estate plan was to leave his business assets to James and to leave Claudia cash. Samantha’s testimony is consistent with the deposition testimony of Claudia’s accountant, Alan Dlugash (“Dlugash”), in which he stated, “The essence was . . . that with two children, with the other child [James] who was going to be getting the lion’s share of the business assets, she [Claudia] would be getting hers in the form of more of these types of assets [discussing an annuity that would provide Claudia with \$1 million per year].” Dlugash Tr., April 17, 2009, 67-68. Robert named James the CEO and president of the

Hudson companies in 1997, and he also designated James the heir to the family businesses as part of his Living Trust in July 1997. Claudia performed her own due diligence by dispatching her accountant, Dlugash, to speak with Robert about his testamentary plan. This discussion made clear that Claudia would be receiving cash or other assets, not any business interests. DSK Enterprises, Inc. v. United Jersey Bank, 189 N.J. Super. 242, 251 (App. Div. 1983) certif. denied, 94 N.J. 598 (1983) (“[I]f a party to whom representations are made nevertheless chooses to investigate the relevant state of facts for himself, he will be deemed to have relied on his own investigation and will be charged with knowledge of whatever he could have discovered by a reasonable investigation.”). Thus, Claudia could not have reasonably relied on James’ alleged misrepresentations.

Thus, none of the required elements of fraud exist here and Count VIII of the amended complaint is also dismissed.

For the reasons stated above, Counts II through VIII of the amended complaint are dismissed. Robert's counterclaim against the Estate for the return of a \$10 million loan to Claudia may proceed to trial.