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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK,
Acting Supreme Court Justice

BAMBI DAWN ACKERMAN,

Plaintiff,

-against-

SHEILA ACKERMAN and
GREGG ACKERMAN,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 20896/10
XXX
MOTION SUBMISSION
DATE: 4/26/12

MOTION SEQUENCE
NO. 006 & 007

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Support	X
Notice of Cross Motion/Affirmation in Opposition	X
Affirmation in Opposition to Cross Motion	X

Defendants, Sheila Ackerman and Gregg Ackerman, move pursuant to CPLR §3212 for an Order granting summary judgment and dismissing plaintiff's complaint. The plaintiff cross moves for an order directing the defendant's to jointly and severally pay the plaintiff's counsel fees pursuant to Domestic Relations Law §237.

Plaintiff commenced this action against Sheila Ackerman and Gregg Ackerman to recind the deed alleging fraud and conspiracy to commit fraud.

The plaintiff alleges that on May 5, 2010, she was defrauded into signing a deed which transferred the ownership of the residence located at 368 West Broadway, Cedarhurst, New York 11516, from she and her husband, Gregg Ackerman, to her

mother in law, Sheila Ackerman. Plaintiff alleges that she accompanied her husband, Gregg, and his mother, Sheila, to a lawyer's office to sign what she thought were tax returns, but in fact she unknowingly signed the deed to her home over to her mother in law.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez V. Prospect Hospital,* 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center,* 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York, supra.* The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy,* 35 NY2d 361 (1974).

"In order to establish a prima facie case of fraud, the plaintiff must establish (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the

plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations" (*Giurdanella v Giurdanella*, 226 AD2d 342, 343 [1996]). Here, the plaintiffs' cause of action alleging fraud appears to be one of fraud in the *factum* rather than fraud by inducement, since she is claiming she was misled by the defendants and caused to sign certain documents which turned out to be of an entirely different nature and character from what she thought she was signing (*see First Natl. Bank of Odessa v Fazzari*, 10 NY2d 394, 397 [1961]; *Whitehead v Town House Equities, Ltd.*, 8 AD3d 367, 368 [2nd Dept. 2004]; *Dalessio v Kressler,* 6 AD3d 57, 61 [2nd Dept. 2004]).

To sustain a cause of action sounding in fraud, a party must show "a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Cayuga Partners v 150 Grand*, 305 AD2d 527, 528 [2nd Dept. 2003]; *see Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461 [2nd Dept. 1982]). Fraud in the *factum*, as alleged by the plaintiff in this action, arises where a party did not know the nature or the contents of the document being signed, or the consequences of signing it, and was nonetheless misled into doing so (*see Fleming v Ponziani*, 24 NY2d 105, 111 [1969]; *Gilbert v Rothschild*, 280 NY 66, 71-72 [1939])

Here, the defendants have submitted a sworn affidavit of the defendant, Sheila Ackerman which establishes that the defendant and her late husband, Fred Ackerman, purchased the subject property in 2000, and allowed her son and his wife, Gregg and

Bambi Ackerman, to live in the subject premises with their two children. The defendant swears to the fact that she and her late husband maintained the property and paid for all major expenses associated with the property. She states that in 2008, she and her husband transferred the subject property in order to receive a clergy discount on the subject property. In 2009 her husband passed away and she sought to have the property returned to her because she felt looming uncertainty in the face of her husband's death and wanted to protect her assets. She states that the plaintiff, who was then still married to her son, appeared at the attorney's office on two separate occasions to sign the deed, and in fact refused to sign the deed on the first date because the deed contained the names of Sheila Ackerman's children. Plaintiff directed the attorney to redraft the deed because she would only sign the deed over if it contained the name of Sheila Ackerman and none of her children. She states the plaintiff voluntarily deeded the property back to her and signed the modified deed on the second occasion at the lawyer's office.

In addition the defendants have submitted the deposition testimony of the non-party witness, Howard Adelsberg, Esq., who had drafted the deed and was present when the deed was signed. Mr. Adelsberg testified that he was hired by Sheila Ackerman to draft the deed and that he explained to the ramifications of signing the deed to the plaintiff. He testified that he specifically stated she "would be at the mercy of those individuals that would be on the deed" and he told the plaintiff "that she would lose all rights in the property". He further stated that he explained to the plaintiff that is she and her husband, Gregg Ackerman, were to continue living in the home without her

name on the deed that it would not only be a landlord tenant relationship, but also in the event of a divorce, she would lose all interest in the property or claim to it. He stated that he gave her this admonition or warning outside the presence of Sheila and Gregg Ackerman on both the first time the plaintiff came to his office to sign the deed, April 15, 2010, as well as the second time Bambi Dawn Ackerman came to his office to sign the deed, May 5, 2010, which was the date the deed was actually signed.

"A] party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents" (*Martino v Kaschak*, 208 AD2d 698, 698 [2nd Dept. 1994]; *see Lavi v Hamedani,* 234 AD2d 428 [2nd Dept. 1996]). While it is true that "there are situations where an instrument will be deemed void because the signer was unaware of the nature of the instrument he or she was signing" (*Green Point Sav. Bank v Placid Life*, 272 AD2d 441, 441 [2nd Dept. 2000]), such as where "the signer is illiterate, or blind, or ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even by a stranger" (*Pimpinello v Swift & Co.*, 253 NY 159, 163 [1930]). The facts of this case establish that the plaintiff is both college educated and has attained a Master's Degree and, as such, this court must assume that the plaintiff is able to read and that she did in fact read the documents and appears to have even requested that changes be made to the documents.

The defendants have established their entitlement to judgment as a matter of law in this regard by submitting deposition testimony and an affidavit that no

misrepresentations were made to the plaintiff and that she understood the nature and consequences of the document she signed (*see Pommer v Trustco Bank*, 183 AD2d 976, 977-978 [3rd Dept. 1992]). In opposition, the plaintiff made only conclusory allegations that she was somehow tricked into executing the deed. These allegations were insufficient to raise a triable issue of fact (*see New York City School Constr. Auth. v Koren-DiResta Constr. Co.*, 249 AD2d 205 [1st Dept. 1998]). Moreover, plaintiff would further be required to demonstrate that her reliance upon those representations had been reasonable (*Stuart Silver Assocs. v Baco Dev. Corp.*, 245 AD2d 96, 98 [1st Dept. 1997]), and that is a condition which cannot be met where, as here, "a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means" (*supra,* at 98-99).

Finally, New York does not recognize civil conspiracy to commit a tort as an independent cause of action; rather, such a claim stands or falls with the underlying tort (*see Hebrew Inst. for Deaf & Exceptional Children v. Kahana*, 57 A.D.3d 734, 735 [2nd Dept. 2008]; *Salvatore v. Kumar*, 45 A.D.3d 560, 563 [2nd Dept. 2007]). "a mere conspiracy to commit a [tort] is never of itself a cause of action" (*Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]). Rather, "[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*id.*). Since the viability of the claim of civil conspiracy in this case was derivative of the underlying tort of fraud, and the claim of fraud must be dismissed, the cause of action alleging a civil conspiracy to commit fraud also must be dismissed insofar as asserted against Sheila Ackerman and Gregg Ackerman.

Accordingly, Defendant's motion to dismiss the plaintiff's complaint is GRANTED.

Based on the foregoing, the plaintiff's cross motion for an award of counsel fees is DENIED.

This constitutes the Decision and Order of the Court.

Dated: June 30, 2012

JAMES P. McCORMACK, A.J.S.C.