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IN THE SUPREME COURT OF FLORIDA
CASE NO: 65,499

FILED
FEB 23 1985
CLERK, SUPREME COURT
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Chief Deputy Clerk

SUSAN M. STREGACK, as)
Personal Representative)
of the Estate of MANUEL)
MOLDOFSKY, Deceased,)
)
Petitioner,)
)
vs.)
)
SALLY D. MOLDOFSKY,)
)
Respondent.)
_____)

PETITIONER'S REPLY BRIEF ON THE MERITS

Review from the Third District Court
of Appeal Case 83-1725 and 83-1754

An Appeal from Dade County Circuit Court
Case No.: 82-9188 (CP 04) and 83-13648
(CA-11) Judge Edmund Newbold and Judge
Milton Friedman

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STATEMENT OF CASE AND FACTS

The ingenuous reply on behalf of Sally Modofsky to the statement of the Case and Facts requires a limited response.

Sally sought rehearing after the Probate Court Order and her deposition was taken on May 3, 1983, and formerly filed on July 6, 1983. (R-115) Sally in the General Jurisdiction was bound by her allegations and the Rules of Civil Procedure requirement to plead with particularity so that her attorney's persistence that a general allegation is sufficient to even create an issue is presumptuous. An examination beyond that level shows there is no admissible evidence to sustain Sally's position. Sally was a woman who had been already involved with inheritance from a Husband and parent when she considered marriage with Manuel. (D-14) It was she who sought the Antenuptial Agreement, and Manuel concurred. (D-13) She kept her financial data separate. (D-35)

While there may be no independent evidence as to when Manuel signed it, the agreement bears a date and recital prior to marriage and Sally asserted affirmatively in her General Jurisdiction Complaint (R 180-192) that it was signed before the marriage.

If Respondent did not receive copy of the will until December 15, 1982, she had constructive, if not actual or implied, notice of the same prior to that date, by the recording in the Public Records. The preliminary notice listed gross not net value and included the assets received by Sally. Form DR-301 per F.S.

Chapter 198. The probatable estate is of course a different matter.

The statement that the Personal Representative had knowledge of the assets from date of death is incorrect. Many records were contained in a safe in the apartment building occupied by Sally. Only after appointment would Sally surrender the safe and its contents. The only witness to Sally's lack of knowledge, is herself. Even she says that he sold his Brooklyn property for \$44,000.00 in cash (D-47).

However, there is nothing to corroborate any of Sally's allegations as to lack of knowledge in the record and it is refuted by the instrument itself which says Manuel owned real and personal property.

The language "complete lack of financial worth" is an invention of Sally's lawyer. Sally knew he had a house in Brooklyn (she even moved there six months after marriage), she knew he had a job and job benefits, she knew he had personal property, but she didn't tell him, nor he tell her the value or extent of any property according to her. (D-44)

The argument "that he had nothing" made by Sally's lawyer excluded the house and \$10,000.00 Manuel gave Sally in 1973, and the payment of a certain other joint expenses.

Even any prior verbal language would have merged in the Pre-Nuptial Agreement and the attempt to void it after death on the basis of prior oral communications would be barred by Statute of Frauds, the Parole Evidence Rule, the Rule of Merger and laches.

Sally knew there were assets when Manuel died some of which had gone to her and some of which were Susan's. Her statement is simply, I never knew he had that much money (D-45). Even in 1973 her initial response to her attorney's question: "Did you know what his assets were in 1973, was "I don't know, I don't know if I saw anything because sometime I saw some papers". (D44-45)

POINT I

DOES SECTION 732.702 FLORIDA STATUTE (1983)
WHICH ELIMINATES THE NEED FOR FAIR DISCLOSURE FOR
A VALID ANTE-NUPTIAL AGREEMENT IN THE PROBATE CONTEXT,
PRECLUDE THE SURVIVING SPOUSE FROM CHALLENGING SUCH AN
AGREEMENT ON THE GROUNDS OF FRAUDULENT NON DISCLOSURE

Sally's lawyer says "he chose instead to falsely represent that he had no assets". Such denies the written language of the agreement prepared at Sally's request, by Sally's lawyer, knowing that Manuel would do nothing for her. The pleading of Sally is thus sham, for it avoids the facts, and alleges to non admissible evidence.

Therefore, the question should be whether fraudulent non-disclosure; or fraudulent disclosure is an exception to the statutory exclusion. In this case there is a general disclosure, i.e., real and personal property, but no specific disclosures, i.e., identify, descriptions and value of independent assets. Any oral representations would be merged in the written document. Coercion or undue influence were not asserted and are not applicable.

A statement (while not factually applicable here) that I have no assets and will therefore make no disclosures is not a basis under the Statute to set aside the agreement. Common sense indicates that non-disclosure not being an element, the reason or basis for the same does not render the issue any more relevant or admissible.

An argument might be made, although we suggest that it not be accepted, that if disclosure by identification and value of assets were entered into that was substantially incomplete or false, and the

agreement provided some benefit to the less favored survivor, that such fraudulent disclosure would justify a rectification, but even that would not stand where as here there is a complete mutual waiver.

A study of Del Veccio and other disclosure requirements all underline that the basis of requiring disclosure, is that in the absence of a fair settlement the inadequate disclosure or lack of disclosure amounts to fraud on the party with the lack of resources. Sally would not even disclose on deposition her present assets but did disclose she had assets at time of marriage which she failed to disclose.

The Legislature intended to preclude attacks made on disclosure in the Probate Context. The language is complete and absolute. The Statute is part of the Probate Code.

Common sense says that Manuel reaped no benefit. Indeed, Sally now seeks a benefit that she knew she didn't have for more than 16 years.

The argument that a false disclosure is a nullity belies what is an actionable false disclosure contrasted with puffing, which is an expression of opinion that may not be generally acted upon. In not all cases will a false statement of fact be actionable. Like most irrelevant facts, the truth or falsity of the same have no bearing in an action in which they are not admissible.

The standard of Rescission by Fraud requires not only a fraudulent statement, but an intent to deceive and have another act on the same, and an actual reasonable reliance on the same and an action in

detriment thereto, and damage. Since Sally waived all and Manuel did the same, Sally surrendered nothing. Since Sally insisted on the contract, she cannot now hold against it. Since the question of disclosure would not have changed the results, the waiver provision is applicable by Sally's own admission that she knowingly entered into marriage on the basis of a waiver.

Sally's attorney insist there are no statutes legalizing fraud. Yet the very statute of frauds precludes trial of certain true causes. The Statute of Frauds and the Statutes of Limitations also preclude the litigation of some claims of fraud. While strictly speaking the statement is correct that they "do not legalize fraud", yet pragmatically not every case of fraud is actionable.

The argument that the language in re: Estate of Roberts "or otherwise improperly obtained" allows actions on fraudulent non-disclosure is not correct. The language clearly relates to signature and other matters excluding disclosure. For example duress while akin to coercion is one. Also, if the Husband was a bigamist, capacity could be argued. Misrepresentation might be argued as to the nature of the document i.e. this is an acknowledgment of marriage license and not an Ante-Nuptial Agreement. None of these were presented to the trial court and none are remotely connected with this case.

The opinion in Estate of Roberts clearly when read in para materia excludes disclosure as an element to be considered in determining validity, and the Bar has generally relied on the same in its document drafting of Pre-Nuptial Agreements.

The convulated argument that simple non-disclosure would not constitute actionable fraud but that where a party undertook to disclose facts, that then he is required to make complete disclosure, goes against the intent and language of the statutory modification of Del Vecchio. If such is correct then it could be argued that any simple statement, ie. I have a house in North Carolina or I invest in the market or I only have a cabbage patch doll would constitute fraudulent non-disclosure.

The law is not intended to be ridiculous or engage in pedantic absolute legal conception.

The relief sought by Sally is rescission of the Ante-Nuptial Agreement by reason of "fraudulent non-disclosure" in the Probate Context after 16 years of marriage.

It is fundamental that an action for rescission, based upon failure to disclose material information must allege sufficient facts to demonstrate existence of a duty to disclose such facts. Smith v. Holley 363 So. 2d 594 (Fla. 4th DCA 1978). It is axiomatic that circumstances constituting fraud or mistake must be stated with particularity Fla. R. Civ. P. 1.130(b) and where the allegations are general and not specific the action should be dismissed. Van Meter v. Bank of Clearwater, 276 So. 2d 241 (Fla. 2nd DCA 1973). Fraud cannot be inferred or deduced from non-performance of acts which by law the person accused of fraud is not required to do whatever may be his motive, design or purpose. State Board of Medical Examiners v. Morlan, 147 Fla. 695, 3 So. 2d 402 (Fla. 1941).

In an action based on fraud and deceit one of the elements is reliance. American International Land Corp. v. Hanna, 323 So. 2d 567 (Fla. 1976).

Further, the representations must be aimed at promoting the other party to act. Arnold v. Weck 368 So. 2nd 269 (Fla. 4th DCA 1980). Here the wife is the insistent party for the agreement.

An intent to deceive is also necessary and the facts and circumstances that constitute fraud must be pled with certainty, clarity, directness and particularity. Tampa Farm Service, Inc. v. Cargill, Inc., 356 So. 2d 347 (Fla. 2nd DCA 1975), Resulting injury from justifiable reliance is necessary. Shelban v. Richardson, 445 So. 2d 1147 (Fla. 4th DCA 1984). All essential elements must be pled, and the facts and circumstances of the fraud must be stated. Peninsular Fla. District Council v. Pan Am, Inv. 450 So. 2d 1231 (Fla. 4th DCA 1984).

As the orders recite, Sally had no other particular facts to add beyond her general allegations. Her pleadings considered in a light favorable to her were insufficient to constitute actionable fraud under any circumstances.

Even past that hurdle, the admitted 16 year span, the 1973 payment of \$10,000.00 and the recitals of the Pre-Nuptial agreement preclude an avoidance whether on the grounds of laches or by statutes of limitations on the face.

§95.11(3) Fla. Stat. (1980) provides for a four (4) year Statute of Limitations, subsection (j) provides for "a legal or equitable

-action founded on fraud". Subsection (1) provides for "An action to rescind a contract". §95.11(6), Fla. Stat. (1980). Laches applies the legal Statute of Limitations to equitable causes. This statute provides as follows:

(6) Laches-Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law.

§95.11(5)(d), Fla. Stat.(1973)'s language concerning discovery of fraud is presently eliminated. In Mathews v. Mathews, 222 So.2d 285 (Fla. 2nd DCA 1969) The Court stated:

"And this three year limitation must be strictly construed against the party bringing suit, to such extent that the words "discovery * * * of the facts" used in said §95.11(5)(d) "must be defined by [an] objective and not subjective standard and means knowledge of facts which would have been discovered in exercise of due diligence"; also that the "question of whether plaintiff should have discovered [the] basis for his cause of action for fraud was one of law to be determined by [the] court". Azale Meats, Inc. v. Muscat, D.C.Fla. 1965 246 F.Supp. 780 (reversed on other grounds, 5 Cir., 386 F.2d 5).

It is thus apparent that the legislature in lengthening the period of limitations, removing the discovery of facts requirement, and providing that laches bar an action "regardless of lack of knowledge of the person sought to be held liable... and whether the person sought to be held liable is injured or prejudiced by the delay," was acting consistent with the intent of removing disclo-

sure in a Probate Context as to an Ante-Nuptial waiver or agreement or non-disclosure of any nature as a basis to set aside a Pre-Nuptial Agreement. Further, after a marriage of 4 years the action for rescission would be time barred.

For those reasons the opinion of the Third District should be quashed, and the Orders of Trial Court be affirmed. The Court should confirm that non-disclosure or insufficient disclosure for whatever reason cannot avoid a Pre-Nuptial agreement. In the alternative, the Court should limit a claim of avoidance based on fraudulent disclosures to cases where 1) the avoidance is sought within the 4 year Statute of Limitation for actions based on fraud and 2) the fraud consists of fraudulent written representations and 3) there is no complete waiver.

POINT II

BASED ON THE PROBATE PROCEDURES
THE CLAIM WAS PROPERLY BARRED

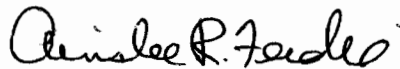
The Point has been argued in the principal brief. The Petitioner also points out that the 16 year marriage also results in that if the action were otherwise proper Sally's claims would still be barred on the basis of §95.11, Fla.Stat. (1973), whether as a limitation or laches on the face of the pleadings, since she seeks to rescind an Antenuptial Agreement referred to in the Last Will and Testament.

CONCLUSION

The legislature fully intended by enacting Florida Statute 732.702 to eliminate disclosure as a requirement and factor in Antenuptial Agreements in the Probate Context.

In the present review the court should reverse the majority opinion under review and adopt Judge Barkdull's dissent, and direct the reinstatement of the Orders of Judge Newbold and Judge Friedman in the Circuit Court. The court should adopt the reasoning of Coleman v. Estate of Coleman, 439 So. 2d 1016 (Fla. 1st DCA, 1983) and Ellis First Nat. Bank of W. Pasco v. Dowing, 443 So. 2d 337 (Fla. 2nd DCA 1982). Such position is further supported by State Board of Medical Examiners v. Morlan, 147 Fla. 695, 3 So. 2d 402 (Fla. 1941).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
Petitioner's Reply Brief on the Merits was mailed this 27th day
of February, 1985 to SHORENSTEIN & LEWIS, Attorneys for the
Respondent, 799 Brickell Plaza, #702, Miami, Florida 33131-2704.

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