COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION
O.C. No. 807 DE of 2006
Control No. 072215

Estate of Mary Nedwood, Deceased

O P I N I O N

Introduction

A three day hearing was held to consider, inter alia, whether the conveyance of real property located at 907 North 5th Street, presently known as 908 St. John Neumann Place (hereinafter "907 North 5th Street"), should be set aside because it was procured through fraud, undue influence, and conspiracy by defendants CPH properties, Tom Cohen, David Perlman, who purchased the property, and Benjamin Nedwood, the administrator of the Estate of Mary Nedwood, who sold it.

The property in dispute was owned by Mary Nedwood, who died intestate in February 15, 1993. She was survived by her husband, Benjamin Nedwood, as well as by three grandchildren: Ikishia Purnell, Dana Nedwood and Ebony Nedwood. After Benjamin Nedwood, as administrator of his wife's estate, sold the property to CPH properties for $63,000, the grandchildren of Mary Nedwood filed a complaint asserting that the property was purchased at a price that was "at least fifty percent below the fair market value" through the undue influence of Tom Cohen and CPH Properties as well as through fraud and conspiracy by Tom Cohen, David Perlman, CPH Properties and Benjamin Nedwood. The plaintiffs also asserted a claim for negligence against Benjamin Nedwood. As relief, they seek to set aside the conveyance, to enjoin the buyers from disposing of the premises, and to order the buyers to reconvey the property back to the

estate. They also seek to surcharge Benjamin Nedwood in an amount equal to his share of the intestate estate.

The testimony of Benjamin Nedwood at the hearing proved critical. It established that Nedwood engaged in a long period of bargaining with Tom Cohen over the sale price for 907 North 5th Street; he had valid reasons to sell the property to pay for repairs and taxes; he had no illusions that the ultimate sale price would make him a rich man; he was aware that the assets would have to be shared with the grandchildren who were the beneficiaries of his estate; and he was alert to Cohen's role as a "scout" for properties to purchase and develop.

The plaintiffs' attempt to cast Nedwood as a dupe or alcoholic pawn to Cohen[1] is not supported by the record. As the administrator of his wife's estate, Nedwood had the authority to enter into an agreement of sale with CPH Properties. As administrator of his wife's estate, Nedwood—and not the purchaser of estate property—had the duty to give notice of the grant of letters of administration and the opening of an estate to the rightful heirs pursuant to Pennsylvania Orphans' Court Rule 5.6. Although Benjamin Nedwood was ordered by decree dated January 18, 2007 to file an account of his administration of the Estate of Mary Nedwood, he failed to do so. While the petitioners may have a claim for surcharge against Nedwood, their claims of undue influence, fraud, and conspiracy as against the other defendants were not supported by the record for the reasons set forth below.

[1] In their second amended complaint, for instance, the plaintiffs allege, that "Defendants Cohen and Perlman knew that defendant Benjamin Nedwood did not know the fair market value of the property and they conspired to take advantage of him because of his age, his lack of sophistication, his lack of knowledge of the fair market value of the property, and because they knew that he was generally intoxicated and was generally in a weakened condition due to the influence of alcohol and Benjamin Nedwood's reliance upon them as a result of his trust and confidence in them." Second Amended Complaint, ¶ 25.

Procedural Background

The prolonged procedural background of this action was set forth in a prior opinion but will be briefly outlined. This action was initially filed in the civil trial division, but was transferred to the Orphans' court division by decree dated June 22, 2006 after the plaintiffs filed a second amended complaint. The second complaint was filed by Ikishia Purnell, the decedent's granddaughter and administrator her estate, and Elouise Nedwood, parent and natural guardian of the decedent's minor grandchildren, Dana Nedwood and Ebony Nedwood.[2] The second complaint alleges that at the time of her death, Mary Nedwood owned property located at 907 North 5th Street in Philadelphia[3] and defendant Benjamin Nedwood, her husband, still resides there.[4]

Sometime in late 2003, the second complaint alleges, Tom Cohen, as agent of CPH Properties, became interested in acquiring the rear portion of 907 North Street property. They assert that Cohen contacted Benjamin Nedwood to pressure him over a nine to ten month period into selling the 907 North Street property.[5] In so doing, plaintiffs allege that Cohen "informed defendant Benjamin Nedwood to establish an estate and have himself appointed Administrator as the sole heir of Mary Nedwood, deceased."[6] When Benjamin Nedwood on January 9, 2004 applied for letters of administration, he filed as the "only intestate heir thus eliminating the need for renunciation by the other heirs."[7]

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[2] According to the Second Complaint, Mary Nedwood had two children, Benjamin Wayne Nedwood, who was the father of Ikishia Purnell, and Lamont Nedwood, the father of minors Dana and Ebony Nedwood. Both Benjamin Nedwood and Lamont Nedwood are deceased. Second Complaint, ¶¶ 1-3, 5.

[3] Second Complaint, ¶ 15.

[4] Second Complaint, ¶ 13-14.

[5] Second Complaint, ¶ 18-19, 26.

[6] Second Complaint, ¶ 20.

[7] Second Complaint, ¶ 21.

The plaintiffs assert that Tom Cohen, in consultation with David Perlman, eventually offered Benjamin Nedwood $65,000 for the rear portion of 907 North 5th Street -- a price which they "knew" was "at least fifty percent below the fair market value."[8] On September 2, 2004, when Benjamin Nedwood executed an agreement of sale, plaintiffs allege that Tom Cohen knew "that the Benjamin Nedwood was under the influence of alcohol."[9] Moreover, approximately six months later, Tom Cohen allegedly took further advantage of Benjamin Nedwood by unilaterally changing—and lowering--the selling price on the Agreement of Sale to $63,000. To formalize this change, he took Benjamin Nedwood to a Notary Public before whom the Agreement of Sale was re-signed on March 19, 2005.[10] According to the plaintiffs, Benjamin Nedwood "was visibly intoxicated, and only agreed to go with him to the Notary after Tom Cohen gave him $100.00 to do so."[11]

Plaintiffs assert that they did not learn until August 19, 2005 of these efforts to sell a portion of decedent's property and had not been informed that Nedwood had been named Administrator and sole heir of Mary Nedwood's Estate. At about this time, plaintiffs allege that Tom Cohen and David Perlman were informed of the existence of the other heirs.[12] Counsel for plaintiff also sent a letter to CPH Properties, L.P., David Perlman and First Partners Abstract Company asserting that Benjamin Nedwood did not have authority to enter into an Agreement of Sale or convey clear title because there were other heirs of the estate who had not received proper notice.[13]

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[8] Second Complaint, ¶ 24.
[9] Second Complaint, ¶ 26.
[10] Second Complaint, ¶ 29.
[11] Second Complaint, ¶ 30.
[12] Second Complaint, ¶¶ 32 -35.
[13] Second Complaint, ¶ 38 & Ex. D.

On August 30, 2005, plaintiffs allege, Tom Cohen picked Benjamin Nedwood up to sign some settlement papers in advance of the actual settlement even though he was visibly intoxicated.[14] The settlement took place the next day on September 1, 2005 and the property was sold to defendant CPH Properties L.P. and is now known as 908 Saint John Neumann's Place. Not until October 25, 2005 did Plaintiffs file a petition with the Register of Wills to have Benjamin Nedwood removed as Administrator. That petition was granted on November 23, 2005.[15]

As damages, the Plaintiffs claim a monetary loss of approximately $87,000 based on their assertion that the property had a fair market value of $150,00 but was sold to defendants for $63,000.[16]

Preliminary objections were filed to the Complaint by two groups of defendants: 1) the title company, First Partners Abstract Company, and 2) the purchasers, CPH Properties, L.P., David Perlman and Tom Cohen. Defendant Benjamin Nedwood did not file either an answer to the complaint nor preliminary objections. Accordingly, he was ordered to file an account of his administration of the Estate of Mary Nedwood by order dated January 18, 2007.

The remaining defendants filed preliminary objections in the nature of the demurrer. By order dated January 18, 2007, these preliminary objections were sustained, in part, and overruled, in part. The claims against the title company, First Partners Abstract Company, were dismissed. Various claims against CPH properties, David Perlman and Tom Cohen were also dismissed, while the claims premised on undue

[14] Second Complaint, ¶ 40.
[15] Second Complaint, ¶ 42.
[16] Second Complaint, ¶ 74-75 & 80.

influence, fraud and civil conspiracy remain[17] and were the focus of the three day hearing.

I. Plaintiffs Failed to Meet Their Burden of Proof that the Consummated Agreement of Sale for Real Property at 907 North 5th Street Should Be Rescinded Due to Undue Influence, Fraud or Conspiracy

A. The Plaintiffs Failed to Meet Their Burden of Proof That There Was a Confidential Relationship Between Tom Cohen and Benjamin Nedwood To Invalidate the Sale of 907 North 5th Street on the Grounds of Undue Influence

1. As Administrator of His Wife's Estate, Benjamin Nedwood had the Legal Authority to Sell 907 North 5th Street

Before addressing the plaintiffs' arguments, certain fundamental principles that were addressed in this court's January 18, 2007 opinion merit reemphasis in light of the record presented in the course of the hearing. Under the PEF code, an administrator of an estate has the legal authority to convey estate property:

> Except as otherwise provided by the will, if any, the personal representative may sell, at public or private sale, any personal property whether specifically bequeathed or not, and any real property not specifically devised, and with the joinder of the specific devisee real property specifically devised.
> 20 Pa.C.S. §3351

Section 3351 would thus give Benjamin Nedwood, as administrator of his wife's estate, legal authority to sell the 907 N. 5th Street property. Since there was no will in this case and the property at issue was not specifically devised, under section 3351 the administrator of the estate had authority to sell it. While section 3311 provides that a "personal representative shall have the right to and shall take possession of, maintain and

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[17] Count I- Lack of Capacity was DISMISSED
Count II – Undue Influence REMAINED as to Defendants Tom Cohen and CPH Properties;
Count III - Fraud and Conspiracy DISMISSED as to defendant First Partners Abstract Company but REMAINS as to all other defendants;
Count IV – Negligence as to First Partners Abstract Company was DISMISSED;
Count V – as to Benjamin Nedwood REMAINS, due, in part , to his failure to respond to the Complaint, and he is ordered to file an account within 30 days;
Count VI – Breach of Covenant of Good Faith and Fair Dealing was DISMISSED as to all defendants.

administer all the real and personal estate of the decedent, except real estate occupied at the time of death by an heir or devisee with the consent of the decedent," this would create no impediment to the sale of the property by Benjamin Nedwood because he resides at the premises at issue.[18] See 20 Pa.C.S. §3311. Nedman's authority to sell 907 North 5th Street as both administrator and resident heir to his wife's property is thus clear.

No effort was made to remove Benjamin Nedwood as Administrator of the Estate of Mary Nedwood until nearly two months after the property was sold. Not until October 25, 2005 was a petition filed with the Register of the Wills to remove Nedwood as administrator.[19] Moreover, the mere removal of Benjamin Nedwood would not "impeach" his sale of property to CPH Properties so long as that transaction occurred in "good faith" under the PEF code:

> No act of administration performed by a personal representative in good faith shall be impeached by the subsequent revocation of his letters….
> 20 Pa.C.S. §3329.

In addition, the sale of the property cannot be revoked merely because of the inadequacy of the price absent fraud:

> INADEQUACY OF CONSIDERATION OR BETTER OFFER
> When a personal representative shall make a contract not requiring approval of court….neither inadequacy of consideration, nor the receipt of an offer to deal on other terms shall, except as otherwise agreed by the parties, relieve the personal representative of the obligation to perform his contract or shall constitute ground for any court to set aside the contract, or to refuse to enforce it by specific performance or otherwise: Provided, That this subsection shall not affect or change the inherent right of the court to set aside a contract for fraud, accident or mistake. Nothing in this subsection shall affect the liability of a personal representative for surcharge on the ground of negligence or bad faith in making a contract.
> 20 Pa.C.S. §3360

[18] 6/19/2007 N.T. at 4 (Nedwood); Second Amended Complaint, ¶ 13.
[19] Second Amended Complaint, ¶ 42.

The plaintiffs argue, however, that they presented clear and convincing evidence that Tom Cohen, as agent for CPH Properties, exerted undue influence over Benjamin Nedwood and that defendants Cohen, Perlman and Nedwood conspired to commit a fraud in acquiring the property now known as 908 St. John Neumann Place.[20] The relationship between Cohen and Nedwood is therefore a critical threshold issue that must be analyzed in terms of both the record and relevant principle.

2. Plaintiffs Have Failed to Establish the Existence of a Confidential Relationship Between Cohen and Nedwood

Mere inadequacy of price is not a sufficient basis for rescinding an agreement to sell real estate. Not only does section 3360 of the PEF code state that a contract may not be set aside due to inadequacy of price alone, but Pennsylvania case law embraces the same principle. See, e.g. Frey's Estate, 223 Pa. 61, 65, 72 A. 317, 318 (1909)(a contract may not be rescinded merely because of inadequacy of price). Instead, for rescission "something more is demanded—such as fraud, mistake or illegality." Frey's Estate, 223 Pa. at 65, 72 A. at 318. More recently, the Pennsylvania Superior court observed that a conveyance of real property by deed is presumptively valid and cannot be rescinded without "clear and convincing evidence" that the transfer was induced by fraud or was the result of "a lack of mental capacity, undue influence, fraud or a confidential relation." Walsh v. Bucalo, 423 Pa. Super. 25, 27-28, 620 A.2d 21, 22-23 (1993).

As a general principle, contracts between parties who are in a confidential relationship are accorded special scrutiny because a contract may be set aside if it can be shown that the parties did not bargain at arm's length or were in a confidential relationship. Biddle v. Johnsonbaugh, 444 Pa. Super. 450, 455, 664 A.2d 159 (1995).

[20] See generally Plaintiffs' 11/13/ 2007 Memorandum at 1-2.

The existence of a confidential relationship, alone, is not a sufficient basis for rescinding a contract but merely indicates that the agreement is voidable. Rebidas v. Mirasko, 450 Pa. Super. 546, 553, 677 A.2d 331, 335 (1996). Consequently, once the existence of a confidential relationship has been established, "the party seeking to benefit from such a transaction has the burden of proving that the transfer was indeed 'fair, conscientious and beyond the reach of suspicion.'" Estate of Mihm, 345 Pa. Super. 1, 8, 497 A.2d 612, 615-16 (1985); see also Rebidas, 450 Pa. Super. at 553-54, 677 A.2d at 335.

An action to rescind a contract differs from a will contest although the issue of a confidential relationship permeates both. While courts analyzing whether a contract should be rescinded focus initially on whether the parties bargained at arm's length or had a confidential relationship,[21] in will contests the focus is on whether undue influence was exerted on a testator, and in resolving that question, the existence of confidential relationship is one of three factors to be analyzed.[22] In the instant case, the plaintiffs invoke the three pronged test for the presumption of undue influence more typical of a will contest[23] and concede that they have the burden of establishing a prima facie case of

[21] See, e.g., Ruggieri v. West Forum Corp., 444 Pa. 175, 180, 282 A.2d 304, 307 (1971)(in action involving the sale of a restaurant and liquor license between parents and their son, "once a fiduciary or confidential relationship is shown to exist, the burden is shifted to the person who is in such relationship, here Valentino, to prove absence of fraud, and that the transaction was fair and equitable").

[22] See generally Biddle v. Johnsonbaugh, 444 Pa. Super. at 456 n. 1 ("Confidential relationship, as used throughout this opinion, is distinguishable from undue influence. While the two terms are sometimes used interchangeably, the latter is used mostly in will contests, and the former is employed most often in contract disputes)." For a discussion of the 3 pronged test to establish undue influence, which incorporates the existence of a confidential relationship, see Estate of Fritts, 906 A.2d 601, 606-09(2006).

[23] Plaintiffs' 11/13/2007 Memorandum at 8 (citing In re Estate of Fritts, 906 A.2d 601, 606-07 (2006)(a person challenging a will based on undue influence has the burden of establishing a prima facie case by establishing that "(1) there was a confidential relationship between the proponent and the testator; (2) the proponent receives a substantial benefit under the will; (3) the testator had a weakened intellect"). The plaintiffs suggest that "[a]lthough these cases arise in the context of a will contest, the same principles apply in this action to set aside the conveyance of the decedent's property by a personal representative." Id. at 9, n.1.

undue influence by clear and convincing evidence.[24] In an abundance of caution, the elements of this test will also be analyzed not just because the plaintiffs invoke them, but also because the case law on the rescission of contracts is not always clear that proof of a confidential relationship alone suffices to shift the burden to the party seeking to enforce the contract.[25]

A confidential relationship can exist as a matter of law or of fact. As a matter of law, for instance, there is a confidential relationship between an attorney and client, a guardian and a ward, a trustee and the cestui que trust where "one of the parties is bound to act with the utmost good faith for the benefit of the other party and can take no advantage to himself from his acts relating to the interest of the other party." In other instances—such as the present case--- a confidential relationship is a question of fact to be determined by evidence. Biddle v. Johnsonbaugh, 444 Pa. Super. at 455, 664 A.2d at 161-62. A general test for a confidential relationship "is whether it is clear that the parties did not deal on equal terms." Frowen v. Blank, 493 Pa. at 145, 425 A.2d at 416. In a confidential relationship, on "one side of a transaction there is an overpowering influence and, on the other, a weakness, dependence or trust." Biddle v. Johnsonbaugh, 444 Pa. Super. at 456, 664 A.2d 162. To establish a confidential relationship "it is necessary to show that as a result of a relationship between two parties, one depended upon the other, who was able to exercise an overmastering influence over the other." Walsh v. Bucalo, 423 Pa. Super. 25, 29, 620 A.2d 21, 23-24 (1993).

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[24] Plaintiffs' 11/13/2007 Memorandum at 8 & 10.

[25] In Maus v. Long, 24 Fid. Rep. 2d 281 (Cambria Cty. O.C. 2002), the court concluded that the transfer of 156 acres of land from an elderly uncle to his nephew should not be rescinded after considering first, whether a confidential relationship existed, next whether the uncle had mental capacity to intend this transfer and finally whether there was an element of fraud in the transaction. In Maus, the court concluded that a confidential relationship had not been established. It is thus not clear whether the court would have gone on to consider mental capacity and fraud if a confidential relationship had been established.

In the instant case, the plaintiffs' claims of undue influence, fraud and conspiracy against David Perlman, CPH Properties, and especially Tom Cohen, are rooted in an alleged breach of a confidential relationship. Plaintiffs maintain that because of Cohen's pressure and overmastering influence, Nedwood was duped into selling the 907 North 5th Street property for a grossly inadequate price while not acknowledging the existence of the other heirs to Mary Nedwood's estate.[26]

The testimony of Benjamin Nedwood, however, belies these claims that he was overmastered by the influence of Tom Cohen in the negotiations for the sale of 907 N. 5th Street.[27] From the inception of their relationship, Nedwood was aware that Tom Cohen "came through the neighborhood" and "was scouting to buy houses and all."[28] Cohen took a particular interest in the property located at 907 North 5th Street which was a garage behind Nedwood's home. After several visits to the property, Cohen approached Nedwood who responded:

> Well, I asked him—I says, "What do you have in mind, you know, about money-wise?[29]

Cohen gave an initial offer of $20,000, and in response, Nedwood "told him no. I said I can't begin to do no business like that."[30] Nedwood responded with a counter-offer: "So,

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[26] In Count II of their Second Amended Complaint asserting undue influence, for instance, the plaintiffs assert that Tom Cohen "by his persistence and pressure and by gaining Benjamin Nedwood's trust and confidence exerted undue influence over him by telling him not to acknowledge the other heirs, and by causing him to execute an Agreement of Sale for a grossly inadequate consideration and then re-executing the Agreement of Sale for even less consideration. Second Amended Complaint, ¶ 52. Similarly, in Count III asserting "Conspiracy/Fraud," plaintiffs assert that "[b]y means of unfair persuasion, undue influence and taking advantage of trust that Tom Cohen had established with defendant Benjamin Nedwood, defendants CPH Properties, L.P., David Perlman and Tom Cohen conspired to defraud the heirs of Mary Nedwood by purchasing the property at a price well below its market value." Second Amended Complaint, ¶ 55. See also Plaintiffs' 11/13/2007 Memorandum at 1-2 & 28.

[27] Plaintiffs unconvincingly emphasize the conclusory testimony of Joyce Davis that Nedwood had a confidential relationship with Cohen whom he viewed as an "advisor." See, e.g. Plaintifffs' 11/13/2007 Memorandum at 16. Nedwood's testimony, in contrast, presents his more jaundiced, pragmatic view of his give and take with Cohen in negotiating the sale that is more credible.

[28] 6/19/2007 N.T. at 7 (Nedwood).

[29] 6/19/2007 N.T at 11-12 (Nedwood).

price-wise and all I told him, I says, 'How about $75,000?'" In response, Nedwood recalled Cohen as replying: "I can't….You just won't get $75,000, not for that property."[31]

This recalled exchange reflects a vigorous business negotiation and not a confidential relationship. Moreover, Nedwood expressed a common sense skepticism about Cohen's efforts to persuade him to sell because it would make him rich:

> Nedwood: And he made a –he mentioned that—he says Benjamin, he says, "You going to be rich."
> Q: He told you that?
> A: Yeah, he told me that. He says, 'You're going to be rich.' I says, "Tom, why do you say that.' I says, 'You know, I have grandchildren and all. They got to get a part of it, you know." So when he said that—if he would have said like a million dollars or something like that, I would have been rich. $75,000, that's, you know, not rich.[32]

Rather than yield to Cohen's sales pitch, Nedwood was forthrightly skeptical. Nedwood recalled going to and fro "about half a dozen" times with offers and counteroffers from the time he first met Cohen until the agreement of sale was signed on September 2, 2004.[33] The meetings took place at Nedwood's home where typically Cohen and Nedwood were not alone. Someone else was usually present, either Joyce Davis, who characterized herself as Nedwood's common law spouse of fourteen years,[34] or her twenty-five year old son.[35] Moreover, when the agreement of sale was finally

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30 6/19/2007 N.T. at 13 (Nedwood).
31 6/19/2007 N.T. at 13 (Nedwood).
32 6/19/2007 N.T. at 14-15 (Nedwood).
33 6/19/2007 N.T. at 17 & 20 (Nedwood). Joyce Evans testified to an even longer period of negotiation when she stated that Nedwood came to the house about 20 times before the contract was signed. 7/30/2007 N.T. at 59 (Evans).
34 7/30/2007 N.T. at 48 (Evans);6/19/2007 N.T. at 64 (Nedwood).
35 6/19/2007 N.T. at 25 & 64-65 (Nedwood).

signed by Nedwood on September 2, 2004, it was in Nedwood's home and in the presence of Joyce Davis.[36] In fact, Joyce Davis signed the agreement as a witness.[37]

Nedwood's testimony concerning his relationship with Cohen undermines the plaintiffs' assertion that Nedwood was subjected to undue influence by Cohen. Undue influence, a fluid and inchoate concept, "is defined as conduct including 'imprisonment of the body or mind, fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery or physical or moral coercion [manifested in] such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a present restraint upon him in making a will." Kern v. Kern, 2005 Pa. Super. 422, 892 A.2d 1, 8, app.denied, 588 Pa. 765, 903 A.2d 1234 (2006)(citations omitted). The plaintiffs failed to present any evidence of this kind of overmastering relationship between Tom Cohen and Benjamin Nedwood. Instead, based on the record, they had a business relationship based on negotiations over the sale of the property.

Another factor that undermines plaintiffs' claim that the sale of 907 North 5th Street was the result of undue influence is that Nedwood had practical reasons for selling the property. According to plaintiff Ikishia Purnell, Nedwood stated that he sold the property to get money to fix up his home and pay back taxes.[38]

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[36] 6/19/2007 N.T. 21 (Nedwood)

[37] See Ex. B.

[38] 6/19/2007 N.T. at 85 (Ikishia Purnell). Ikishia was named administrator of Mary Nedwood's estate after the removal of Benjamin Nedwood. She conceded, however, that she had not filed any tax returns or inventory and had done nothing more to administer the estate. She was unaware that $20,000 from the sale of the property had been placed in escrow to pay taxes. 6/19/2007 N.T. at 100-02 (Ikishia Purnell). According to Susan Marcus, who conducted the settlement, $20,000 in sales proceeds is being held in escrow for payment of inheritance taxes. 7/31/2007 N.T. at 111-12 (Marcus).

Finally, the parties stipulate that Nedwood did seek out legal advice prior to the settlement by consulting with Community Legal Services.[39] Benjamin Nedwood met with an attorney, Meyer Rose, in early March 2005 to discuss his discontent with the agreement of sale, but he then resigned the agreement on March 19, 2005 that was then notarized.[40] Finally, he went to the Northern Liberties Association and was referred to various sources of legal counsel, including Legal Services, Darlene Threatt, Esquire, and Joyce Ullman, Esquire.[41] These contacts with outside legal counsel were yet additional evidence that Nedwood was not under the sway or undue influence of the defendants.

B. Plaintiffs Failed to Meet Their Burden of Proof that the Agreement of Sale Should Be Rescinded Because Benjamin Nedwood Suffered From a Weakened Intellect Due to His History of Intoxication and Alleged Intoxication on September 2, 2004

As part of their effort to show that Cohen exerted undue influence over Nedwood, the plaintiffs emphasize Nedwood's history of drinking as evidence of a weakened intellect. In so doing, the plaintiffs invoke precedent more relevant to will contests.[42] Due to the difficulty in establishing undue influence, Pennsylvania courts have recognized a presumption of undue influence based on evidence that "(1) there was a confidential relationship between the proponent and testator (2)the proponent received a substantial benefit under the will, and (3) the testator had a weakened intellect." Estate of Fritts, 906 A.2d 601, 606-07 (Pa. Super. 2006). Just as the record presented did not establish the requisite confidential relationship between Cohen and Nedwood, it does not

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[39] 7/30/2007 N.T. at 156. See also Ex. Q (documenting visit on May 5, 2005).
[40] 7/30/2007 N.T. at 76 (Davis). Ex. H (March 3, 2005 letter from attorney Meyer Rose to CPH Properties re the agreement of sale).
[41] 7/30/2007 N.T. at 42 (Adams).
[42] Plaintiffs' 11/13/2007 Memorandum at 8-10, 14, 16.

support rescission of the Agreement of Sale based on Nedwood's purported weakened intellect.

Nedwood testified that when he signed the September 2, 2004 sales agreement he was "under the influence of a little booze."[43] Joyce Evans, who witnessed the agreement, likewise testified that at that time Nedwood was "really intoxicated" but she reached this conclusion not because Nedwood was incapacitated but because Cohen and Nedwood kept going back and forth about the price.[44]

As a practical matter, the issue of Nedwood's alleged intoxication when he signed the agreement of sale on September 2, 2004 is moot in light of the entire record and, in particular, the "re-signing" of that agreement of sale before a notary six months later. On March 19, 2005, another agreement of sale for the 907 North 5th Street property was signed. See Ex. C. Nedwood recalled that Cohen told him that the agreement had to be re-signed before a notary. Once again, Nedwood bargained with Cohen over this request rather than simply acquiesce. In return, Nedwood recalled that "[t]his time I told him—I says, look, if I'm going to do this here and all, I says you're going to have to, you know—yeah, he gave me a hundred bucks."[45] Nedwood noticed that the sales price for the property had been decreased to $63,000 but he nonetheless signed it. He explicitly testified that he was sober at that time.[46]

Finally, settlement on the sale was held nearly 6 months later on September 1, 2005. On that day, Nedwood stated that he was sober.[47] Joyce Evans likewise testified

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[43] 6/19/2007 N.T. at 32 (Nedwood).
[44] 7/30/2007 N. T. at 67-68 (Davis).
[45] 6/19/2007 N.T. at 35, 34 (Nedwood).
[46] 6/19/2007 N.T. at 36-37 (Nedwood)("I was sober that day). See Ex. C (March 19, 2005 Agreement).
[47] 6/19/2007 N.T. at 57 (Nedwood).

that Nedwood did not take a drink before the settlement.[48] Susan Marcus, the settlement clerk, testified that she had no recollection that Nedwood was intoxicated at the settlement.[49]

This testimony was contradicted by plaintiff Ikishia Purnell, who stated that she had confronted Nedwood and Cohen after the settlement, and accused Cohen of taking Nedwood to the settlement while Nedwood was drunk. When Cohen responded that "He's not drunk. There's nothing wrong with him," Ikishia insisted "it was clear my grandfather was highly intoxicated."[50]

Ikishia's testimony is not credible on this issue. Ikishia admitted that she was not present at the settlement nor had she witnessed any other meetings between Cohen and Nedwood so that she could not testify as to any pressure Cohen may have exerted over her grandfather.[51] The record reveals that she was a highly interested party prone to violent relations with her grandfather. Nedwood testified, for instance, that after Ikishia learned of the sale she flew into a rage and threw a vacuum cleaner.[52] Ikishia did not deny that she threw the vacuum cleaner.[53] Nedwood also testified that Ikishia and her boyfriend had jumped on him and kicked him in the ribs.[54] Ironically, to the extent the record reveals any attempt to unduly influence Benjamin Nedwood, it is by plaintiff Ikishia Purnell.

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48 7/30/2007 N.T. at 93-94 & 107 (Evans).
49 7/31/2007 N.T. at 110 (Marcus).
50 6/19/2007 N.T. at 92 (Ikishia Purnell).
51 6/19/2007 N.T. at 99 (Ikishia Purnell).
52 6/19/2007 N.T. at 43 (Nedwood). Nedwood testified that when Ikishia found out about his intent to sell the property "Well, at that time she was in a rage. She came in the house like a granddaughter that I never knew. She came in there and I have a vacuum cleaner and she was highly upset. She took the vacuum cleaner and threw it and busted the vacuum cleaner. She was just like—she was in a rage."
53 6/19/2007 N.T. at 91-92 (Ikishia Purnell)("Yes, I threw the vacuum cleaner. We were inside the house and I threw the vacuum cleaner).
54 6/19/2007 N.T. at 69 (Nedwood).

No medical testimony was presented that Benjamin Nedwood suffered a weakened intellect due to his drinking. While "weakened intellect" is a somewhat vague condition, case law establishes that "it is typically accompanied by persistent confusion, forgetfulness and disorientation." Estate of Fritts, 2006 Pa. Super. 220, 906 A.2d 601, 607 (2006). The testimony by Nedwood and Joyce Evans that he was "high" or intoxicated when he signed the September 2, 2004 agreement fell short of stating that Nedwood suffered from the persistent confusion or disorientation typical of weakened intellect at that time. In any event, Nedwood testified that when he "re-signed" the agreement on March 19, 2005, he was sober. [55] No contrary evidence was presented. By re-signing the agreement to sell the 907 North 5th Street property, Nedwood ratified it. As the Pennsylvania Supreme Court concluded; "A drunkard when in a complete state of intoxication so as not to know what he is doing, has no capacity to contract in general; but his contract is voidable only and not valid, and may therefore be ratified by him when he becomes sober." Thorne's Estate, 344 Pa. 503, 514-15, 25 A.2d 811, 817 (1942)(emphasis added). By signing the agreement on March 19, 2005 and then attending the settlement on September 1, 2005 while sober, Nedwood entered into a binding agreement for the sale of 907 North 5th street.

C. The Plaintiffs Failed to Meet Their Burden of Proof That the Agreement to Sell 907 North 5th Street Should be Set Aside Because Cohen and Nedwood Conspired to Commit a Fraud on the Register of Wills When Nedwood Listed Himself as "Sole Heir" But Nedwood Can Be Subject to a Surcharge

The plaintiffs argue that the Agreement of Sale should be rescinded because Tom Cohen, individually and as agent for CPH Properties, David Perlman, individually and as agent of CPH Properties and Benjamin Nedwood, as former administrator of the Estate of

[55] 6/19/2007 N.T. at 36-37 (Nedwood).

Mary Nedwood, "conspired to commit a fraud, and did commit a fraud, on the Register of Wills and on them as intestate heirs of Mary Nedwood."[56] To establish a civil conspiracy, it is necessary to establish that "two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." Reading Radio, Inc. v. Fink, 2003 Pa. Super. 353, 833 A.2d 199, 212 (2003), app.denied, 577 Pa. 723, 847 A.2d 1287 (2004). An essential element of this cause of action is "proof of malice, i.e. an intent to injure." Id.

Plaintiffs claim that Tom Cohen conspired with Nedwood to misrepresent to the Register of Wills that he was the only heir of Mary Nedwood and he sought to deceive Nedwood into believing that he was "entitled to all of the proceeds from the sale of the property as the only heir."[57] As previously discussed, however, Nedwood consistently testified that he was aware that any proceeds from the sale of the property would have to be shared with his grandchildren. Moreover, he scoffed at any notion that the sale would make him rich man.[58]

The record as to how Nedwood came to identify himself as the "only heir" on the certification of notice under Pennsylvania Orphans' Court Rule 5.6(a) filed with the Register of Wills on September 8, 2004 is less clear. Nedwood testified, for instance, that prior to signing the agreement, Cohen had advised him to obtain letters of administration for his wife's estate from the Register of Wills. As part as that process, Nedwood filled in a certification of notice form under rule 5.6(a). His testimony on how he obtained, completed and filed this certification was unclear. On direct examination, Nedwood presented conflicting testimony as to whether Cohen brought these forms to

[56] Plaintiffs' 11/13/2007 Memorandum at 1.
[57] Plaintiffs' 11/13/2007 Memorandum at 17.
[58] See, e.g., 6/19/2007 N.T. at 14-15 (Nedwood).

him and then brought them back to the Register of Wills; on cross examination, Nedwood stated that he went to the Register of Wills by himself to obtain the letters of administration and to file an inventory listing the value of the property as $49,500.[59] Nedwood unequivocally stated that he personally wrote the words "Benjamin Nedwood, only heir" on the form. He admitted that he knew this was wrong.[60]

Nedwood's testimony as to Cohen's role in this particular notation was conflicting and unclear. While Nedwood hesitatingly suggested that he did this at Cohen's direction, on cross examination he acknowledged that in a prior deposition he stated he "could not be sure" that Cohen had told him specifically to write "only heir"[61] This issue was further muddied by testimony by one of plaintiffs' own witnesses Roseann Stagno Adams,[62] who was employed by the Northern Liberties Neighbors Association. She testified that Nedwood had told her that he had identified himself as the "only heir" on the certification of notice form so that he could "get a reduction on his gas or something—some senior citizen reduction, and that he didn't think it had nothing to do with –with anything else."[63] This record, therefore, is inconclusive and does not constitute clear and convincing evidence that Cohen influenced or conspired with Nedwood to represent Nedwood as the only heir to his wife's estate.

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[59] *Compare* 6/19/2007 N.T. at 26-27, 28-29, 31(direct examination) *with* 6/19/2007 N.T. at 65-66(cross examination). See Ex. E (inventory filed September 8, 2004).

[60] 6/19/2007 N.T. at 29-30 (Nedwood).

[61] *Compare* 6/19/2007 N.T. at 29-30 *with* 6/19/2007 N.T. at 66-68 (Nedwood). When originally asked whether Cohen directed that he fill in "only heir," Nedwood's response was evasive: "Well, he was, you know, he was—after he said what he said and all and this was going on at this here time that he was saying that I was going to be so rich, so he says go ahead and fill in the heirs and all, you know." 6/19/2007 N.T. at 29-30 (Nedwood)(emphasis added). This response suggests merely that Cohen told him to fill in the form, and not "only heirs."

[62] 7/30/2007 N.T. at 8.

[63] 7/30/2007 N.T. at 18-19(Adams).

Moreover, as the defendants argue, the whole issue of Nedwood's representation of himself as "only heir" is a red herring or nonissue for several reasons. To void a contract for fraud, a party must prove by clear and convincing evidence "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether or not it was true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance. All of these elements must be present to warrant the extreme sanction of voiding the contract." Porreco v. Porreco, 571 Pa. 61, 69, 811 A.2d 566, 570 (2002)(emphasis added). The "fraud" the plaintiffs emphasize is Benjamin Nedwood's characterization that he was the only heir to his wife's estate.[64] That fraud would be "material" to any claim that the assets of the estate were not properly distributed. It is not material to the agreement of sale negotiated between Cohen and Nedwood since, as previously discussed, Nedwood was the legally appointed administrator of his wife's estate with authority to sell the property.

In their memorandum, the plaintiffs also invoke Levy's Estate, 326 Pa. 310, 192 A.102 (1937) to argue that the sale should be set aside because the buyer was not an innocent purchaser, the sale was tainted with fraud, there was no necessity to sell and there was gross inadequacy of price.[65] Plaintiffs have not established that there was no necessity to sell since, as previously discussed, plaintiff Ikishia Purnell herself testified

[64] See, e.g., Plaintiffs' 11/13/2007 Memorandum at 17 (asserting that "Tom Cohen conspired with and influenced Benjamin Nedwood to misrepresent the fact that he was not the only heir of Mary Nedwood in documents filed with the Register of Will; that Tom Cohen acted recklessly if not intentionally to deceive Benjamin Nedwood and to lead him to believe that he would be entitled to all of the proceeds from the sale of the property as the sole only heir").
[65] Plaintiffs' 11/13/2007 Memorandum at 25.

that Nedwood had told her he sold the property to pay for repairs and taxes.[66] Moreover, in the instant case, plaintiffs failed to establish that Cohen and CPH properties were not innocent buyers. Under 20 Pa.C.S. § 3357(a), a personal representative has the authority to convey full title of a decedent's property to a buyer. Moreover, "persons dealing with the personal representative shall have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the estate." 20 Pa.C.S. § 3357(b). It is indisputable that Nedwood, as the surviving spouse of Mary Nedwood, was qualified to obtain letters of administration for his wife's estate. See 20 Pa.C.S. § 3155(b)(2). It is equally undisputable that Nedwood, as administrator, was required to provide notice to all intestate heirs under Pa. O.C. Rule 5.6. See Hydock Estate, 26 Fid. Rep. 2d 209, 214-15 (Phila. O.C. 2006). Consequently, it is Nedwood—and not the other defendants—who is responsible for assuring the proper notice and distribution to beneficiaries of any assets from the sale of 907 North 5th Street.

The plaintiffs' reliance on the Levy's Estate is misplaced for other reasons. In that case, the Pennsylvania Supreme court refused to rescind the agreement of sale where the "nearest"the plaintiff came to showing fraud was an alleged inadequacy of price. The court emphasized, in contrast, that mere inadequacy of price would not establish fraud and even a gross inadequacy of price creates only an inference of fraud. Id., 326 Pa. at 315, 192 A. at 104. Moreover, it distinguished between agreements to sell and *consummated* agreements of sale:

> This sale was consummated. In cases of this type a distinction must be drawn between agreements to sell and consummated sales. In the former, as in Crawford's Estate, 321 Pa. 121, where the price is inadequate, the performance of the contract will be restrained. But where the sale was consummated, as it is here, an entirely different result is necessarily reached. An honest purchaser is entitled

[66] 6/19/2007 N.T. at 85 (Ikishia Purnell).

> to retain the benefits of his bargain. If an executor or trustee is recreant or exercises grossly bad judgment, the estate is protected by surcharging him on the audit of his account.
> Id., 326 Pa. at 315-16, 192 A. at 104-05.

The sole remedy available to the plaintiffs regarding this sale of real property consummated by agreement and settlement, therefore, would be a surcharge against their grandfather, Benjamin Nedwood.

D. The Present Record Provides an Inadequate Basis for Assessing a Surcharge Against Benjamin Nedwood as the former Administrator of His Wife's Estate

The plaintiffs seek a surcharge against Benjamin Nedwood as former administer of his wife's estate. A surcharge "is the penalty imposed for failure of a trustee [or fiduciary] to exercise common prudence, skill and caution in the performance of its fiduciary duty, resulting in a want of due care." Dentler Family Trust, 2005 Pa. Super. 146, 873 A.2d 738, 745 (2005), app. denied, 587 Pa. 707, 897 A.2d 1184 (2006)(citations omitted). The party seeking a surcharge has the burden of proving that the fiduciary breached a duty and that a related loss occurred. The burden of persuasion would then shift to the fiduciary to establish that the loss would have occurred even without the breach of duty. Estate of Stetson, 463 Pa. 64, 84, 345 A.2d 679, 690 (1975).

The plaintiffs seek a surcharge against Benjamin Nedwood "equal to the amount of his intestate share of the Estate."[67] As the surviving spouse, Nedwood would be entitled to the first $30,000 plus one-half of the balance of the intestate estate. 20 Pa.C.S. § 2102(3). There are, however, several problems with plaintiffs' request that the surcharge against Nedwood be calculated as his intestate share of his wife's estate. First, it is not clear how this surcharge relates to the actual loss, if any, suffered by the plaintiffs as beneficiaries of the Mary Nedwood estate due to the sale of the 907 N. 5th Street

[67] 11/13/2007 Memorandum at 30.

property.[68] Second, on the present record it is not possible to calculate the respective intestate shares because Nedwood failed to file an account of his administration of the estate that would have provided a record for that calculation. Third, it is not possible to determine whether Nedwood breached his duty in selling the property for $63,000 until an account is filed that documents the practical, economic factors that may have necessitated this sale. At the hearing, for instance, Ikeishia testified that Nedwood had justified the sale to pay taxes and make repairs on his residence.

Since the plaintiffs' primary objection to Nedwood's administration of the estate is that he sold the 907 North 5th Street property for a grossly inadequate price, a surcharge based on that particular amount would be more appropriate. At the hearing, plaintiffs presented testimony by Philip Fortuna, a real estate appraiser, as to the market value of 907 North 5th street, aka 908 St. John Newman Place as of September 2005. Fortuna observed that the subject property was located in the Northern Liberties area which was "hot" and agreed that property values ranged from $45,000 to $740,000.[69] Based on his analysis of three "comparable" properties, Fortuna concluded that 908 St. John Neumann Way had a value of $115,000 in September 2005.[70] He also prepared an expert report that the highest use of the property would be as a single family residence, which would require a variance. He noted that a two-story masonry structure occupied "most of the

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[68] A surcharge should bear a relationship to the loss suffered by the beneficiaries as evidenced in Estate of McCrea, 475 Pa. 383, 380 A.2d 773 (1977), where the Pennsylvania Supreme Court affirmed the imposition of a surcharge on executors who utilized the real property of the decedent for their business or residence. The surcharge imposed was calculated in terms of the rent for the premises as 3.5% interest per year on the value of the property held by the executors. See also Trust of Munro, 373 Pa. Super. 448, 541 A.2d 756 (1988), app. denied, 520 Pa. 607, 553 A.2d 969 (1988)(A surcharge "is imposed to compensate beneficiaries for the loss caused by the fiduciary's want of due care"). See also Estate of Stetson, 463 Pa at 84, 345 A.2d at 690 ("It is generally the rule that a trustee who breaches a fiduciary duty will not be surcharged for a loss sustained by the trust if there is no causal connection between the breach of duty and the loss").

[69] 7/31/2007 N.T. at 18-19 (Fortuna).

[70] 7/31/2007 N.T. at 31 (Fortuna).

site and is beyond rehabilitation."[71] According to his report, the lot was next to a surface parking lot that services a warehouse; there were no other homes on the block. Instead, the street was lined with "1 story garages, warehouse type buildings and the rear of houses on the adjacent streets."[72]

For various reasons, the valuation provided by Fortuna was not conclusive. First, the three other properties that Fortuna used for comparables (902 N. New Market Street, 945 N. New Market Street and 987 N. 6th Street) were at least .47 miles from the subject property.[73] He initially tended to confuse the valuation by citing sells of developed properties as opposed to undeveloped lots.[74] Although he concluded that the existing structure on the property did not enhance its value, he did not include a cost for demolition until he was pressed to do so and then hypothesized at $10,000 to $15,000 cost.[75] Finally, in cross examination he conceded that in contrast to the St. John Neumann Way property, the comparable properties were located on streets with residences and not just the backs of homes or garages.[76]

Defendants Perlman, Cohen and CPH properties also presented expert testimony by a real estate appraiser, Henry Hoffman, who concluded that the St. John Neumann Way property had a value as of September 2005 of $40,000 based on analysis of three comparables: 217 West Girard, 163 West Girard and 1035 Mount Vernon Street.[77] This analysis was severely flawed and lacks credibility, however, because Hoffman admitted in cross examination that none of the three comparables were located in the Northern

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[71] Ex. S.
[72] Ex. S.
[73] Ex. S & 7/31/2007 N.T. at 21-28 (Fortuna).
[74] See, e.g. 7/31/2007 N.T. at 19-21 (Fortuna)
[75] 7/31/2007 N.T. at 34-36 (Fortuna).
[76] 7/31/2007 N.T. at 35-38 (Fortuna).
[77] 7/31/2007 N.T. at 55-57 (Hoffman).

Liberties area but at best were on the borderline;[78] one was located in a "rebounding" area while another was in a commercial strip;[79] he concluded that the highest use for the St. John Neumann property would be as a garage and not for residential development even though that had been the plan of the defendants;[80] he admitted that measurements for the garage on 163 West Girard Avenue had been incorrect.[81]

Benjamin Nedwood, who was unrepresented by counsel, presented no evidence as to the value of 907 North 5th Street in September 2005.

The record therefore does not establish a viable fair market value for the subject property as of September 2005. It should be noted that plaintiffs' valuation of $115,000 for the 907 North 5th Street Property is considerably less than the alleged value for that property in plaintiffs' Second Complaint where they claimed it had a fair market value of "at least $150,000."[82]

It has been suggested that the "basic duty of the executor was to get the best price" and to do so he must "expend every reasonable effort." Bailey Estate, 36 Pa. D. & C. 2d 413, 416 (1965). In the instant case, the best approach to determining whether Benjamin Nedwood should be surcharged for his actions relating to the sale of 907 North 5th Street property was suggested by the Pennsylvania Supreme Court in Levy's Estate:

> If an executor or trustee is recreant or exercises grossly bad judgment, the estate is protected by surcharging him on the audit of his account. The only forum for determination of the question of mere inadequacy of price, in cases of consummated sales, is the Orphans' Court, at the audit of the trustee's account, and the proper procedure the making of a demand for surcharge.
> Levy's Estate,326 Pa. at 316, 192 A. at 105.

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78 7/31/2007 N.T. at 64-74 (Hoffman).
79 7/31/2007 N.T. at 61-65 (Hoffman)
80 7/31/2007 N.T. at 65-66(Hoffman). See Ex. P (development projection).
81 7/31/2007 at 72-74 (Hoffman).
82 Second Amended Complaint, ¶ 75.

Consequently, Benjamin Nedwood by a contemporaneously issued decree shall be required to file an account of his administration of the Estate of Mary Nedwood unless all interested parties agree that on the present record such an accounting is no longer necessary. Otherwise, the interested parties may pursue a request for a surcharge—if any-- in the form of an objection to the account.

Date: _____ BY THE COURT:

_____
John W. Herron, J.