2013 WL 7929992 (Conn.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Connecticut.
Hartford County

Elaine Erwin MATULIS,

v.

Robert McCABE, Executor.

No. HHBCV095011302.
September 16, 2013.

**Plaintiff's Reply Brief**

Plaintiff: Elaine Erwin Matulis, Martin McQuillan, Esq., Januszewski, McQuillan & DeNigris, P.O. Box 150, New Britain, CT 06050, 860-225-7667, Juris No. 2942.

In his post trial brief, the Defendant has thirty-two pages and two hundred and twenty-eight separate numbered proposed Findings of Fact. Responding individually to each and every one of these proposed Findings of Fact would only add to the burden of the Court in having to wade through the already overly voluminous record. Further, the Defendant does not even cite to the proposed Findings of Fact to support his legal arguments.

The Plaintiff will point to specific significant and relevant differences in her version of the facts which differ from those of the Defendant, with the knowledge that it is the Court's own recollection of the evidence which will prevail over anything either of the parties claim.

Plaintiff does not under any circumstances concede the accuracy or validity of the Defendant's numerous proposed findings of fact. Plaintiff asserts that many of them are taken completely out of context, are not sufficiently supported by the record, and/or ignore in wholesale fashion substantial and weightier countervailing evidence.

Plaintiff will devote the thrust of her reply brief to a recital of the appropriate law and facts - not to a point by point repudiation of Defendant's voluminous proposed findings of fact.

***Plaintiff's Response to Defendant's Claim for Admission of Evidence:***

The Plaintiff objects to the admissibility of exhibits TT-VV and UU, which are appraisals of the subject property at various times. The Defendant claims they are relevant and material for the following reasons:

1. They support Defendant's refusal of Plaintiff's many offers to buy on the grounds that the offers were below market value and;

2. They support Defendant's damage claim of a difference between the fair market value of the property and the partition sale price. (Defendant's brief p. 32).

With regard to reason one, there is no claim related to the Defendants refusing to sell the property to the Plaintiff. The fact is that the Plaintiff did offer to purchase the property at various times but, as was the Defendant's right, they declined to sell it. Therefore, on this basis, the proposed exhibits are irrelevant.

With regard to reason two, the Defendant is attempting to use these exhibits as a way to cobble together an argument that he was damaged because the property was sold at a partition auction, instead of by sale through a real estate agent.

This argument must fail for the following reasons:

1. Real Estate appraisals do not constitute evidence of what the fair market value of a property is. What constitutes fair market value is what a willing and ready buyer is prepared to pay for the property. This was established at the auction when John McCabe was the successful bidder for the property at $190,000.00. Ironically, that is the same amount the Plaintiff offered to pay for the property in December 2008. (Exhibit V: letter from Attorney McQuillan to Attorney Kosinski dated December 9, 2008).

2. There is no expert testimony as to the fair market value of the property. The Defendant is just making a blanket statement that when a property is sold at auction the amount realized is less than what would be realized at sale by broker, with no supporting evidence or testimony.

3. There is no set time frame as to when this alleged market value was to be determined. As the real estate market has shown, when a property is sold has a significant impact on the price.

4. As Judge Shortall's order granting the Plaintiff's Motion For Summary Judgment on count one of the Plaintiff's Complaint (Partition Action) states, "...plaintiff has an absolute right to partition." (docket entry# 134.04) citing *Scalafini vs. Dweck, 85 Conn. App. 151,156-57(2004)*.

The Plaintiff also objects to the admissibility of Exhibit C, the assessor's field card of the subject property for the same reasons as those set forth for the appraisals, Exhibits TT-VV and UU.

If the Court should find the Exhibit has some helpful information about property and house dimensions, as the Defendant argues, the Court should ignore any assessed values indicated on the Exhibit as irrelevant to any matters properly at issue in this case.

***Plaintiff's response to Defendant's Section B. Circumstantial Evidence:***

The Plaintiff is confident the Court is well aware of the law as it applies to circumstantial evidence and that the Court will evaluate all relevant evidence and testimony in rendering its decision. The Plaintiff is also confident that the Court will reject those claims and theories being advanced by the Defendant which have no basis in fact, real or circumstantial, but are based on pure speculation.

Examples of which are:

- Many or all of the expenditures made to repair or improve the house's condition were lost because the subsequent partition sale led to a price that was lower than the market value of the house (Defendant's Brief p. 46).

- Plaintiff's real goal was from the beginning was to seek partition if Defendant did not agree to sell to her at a below market price (Defendant's Brief p. 46). - Plaintiff expended monies from the common fund for improvements in amounts greater than any resulting increase in the value of the property (Defendant's Brief p. 47).

The Defendant has produced no evidence to support these claims/theories.

***Defendant's Exhibit EEEE-Claimed Joint Account Between Valerie McCabe and Jessie Erwin:***

The Defendant alleges that the Plaintiff received a checkbook from Robert McCabe sometime in 1998 which he claims was a joint checking account between his mother, Valerie McCabe, and the Plaintiff's mother, Jessie Erwin. It supposedly contained funds from the rental of the subject property. The only evidence of said account is a copy of a bank statement dated 04/29/1998 (Defendant's Exhibit EEEE). Nothing in this Exhibit identifies it as being for funds related to the subject property. The only evidence that the account is joint is a handwritten notation: JT./w Jessie Erwin. Nowhere on the exhibit does it state what bank it is from. Jessie Erwin passed away on October 11, 2009, five and a half months after this bank statement is dated.

Robert McCabe admits that when he claims to have given the checkbook to the Defendant he did not know how much was in the account.(Tr. 4-16 p. 101, lines 6-8). Robert McCabe admits that the only other bank statement he has (which was not produced by the Defendant) was a bank statement from in and around 2000 and the number for the account in Exhibit EEEE is missing (*Id.* p. 100, lines 22-27).

The Defendant would like the Court to believe that the Plaintiff took this money. (Defendant's Brief p. 53). In addition to the lack of evidence related to this account, is the fact the Defendant fails to show how the Plaintiff would have had the legal authority to access an account in Valerie McCabe's name.

The Plaintiff denies having received a bank account in which Valerie McCabe had an interest (Tr. 4-9 p. 65 and Tr. 4-10 p. 46-47). The Court should find the Defendant has failed to prove the Plaintiff ever had possession of said account or any funds from the account.

***Plaintiff is entitled to a Declaratory Judgment:***

In his post-trial Brief, Defendant alleges for the first time ever that the Plaintiff's request for a Declaratory Judgment is procedurally defective. (See Defendant's Brief, pp. 34-35).

He quotes the very last portion of § 17-55 of the Practice Book which provides that:

> "... (3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the Court is of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure."

Defendant then claims that Plaintiff has neither pled, nor proved the requirements set forth therein and that she should be denied her declaratory judgment as a result.

The argument is frivolous.

First, subsection (3) only applies *in the event* there is another form of proceeding that can provide the Plaintiff *immediate redress.* Despite the Defendant's self-serving claim to the contrary, there is no other form of proceeding that could have provided the Plaintiff the *immediate redress* specified in subsection 3.

The need for the Declaratory Judgment sought in Plaintiff's Second Count is found in the peculiar nature of the factual circumstances set forth therein. They do not lend themselves to claims sounding in any of the alternative theories casually mentioned by the Defendant in his brief.

Specifically, as the Court understands, Plaintiff managed real property which she jointly owned with the Defendant's decedent. At one time, Plaintiff compensated herself for her managerial services without complaint by the Defendant's decedent or by Defendant, as was stipulated to by the parties. (Joint Exhibit 1 #3). Thereafter, Plaintiff and the Defendant could not agree

upon her compensation, nor upon "the reimbursement of fees and costs incurred since commencing said services." See Second Revised Complaint, docket entry *#114.50*, page 3, paragraphs 8-9.

The Third Count, which Defendant claims is "another form of proceeding," asserts a totally different theory, based upon arguably different facts. It certainly would not provide the "immediate redress" required by subsection 3 - nor would the other theories mentioned in passing by the Defendant.

Second, the actual basis for a declaratory judgment like the one sought by Plaintiff is found in §52-29 of the General Statutes. The statute has been on the books for well over 50 years. §(a) of that statute provides in pertinent part as follows:
"The Superior Court *in any action or proceeding* may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment." (Emphasis added).

The remainder of §52-29 authorizes the judges of the Superior Court to make orders or rules necessary or advisable to carry into effect the provisions of this section. Clearly, the statutory section quoted evinces a legislative intent that declaratory judgments be available in circumstances like this, subject to such rules as the judges promulgate--like §17-55 of the Practice Book.

Third, the availability of "another form of proceeding" has not kept courts from entering declaratory judgments--even in cases where it appears that it should have refrained from doing so. In *Coscina v. Coscina*, 24 Conn. App. 190 (1991) Plaintiff called upon the Court to issue a declaratory judgment interpreting a paragraph in a marital distribution agreement. The Trial Court did so, despite the clear availability of an alternative form of proceeding.

In approving this procedure, the Appellate Court stated:
"The trial court here accepted the plaintiff's complaint for a declaratory judgment coupled with a request for monetary damages. Although an alternative form of action was available, namely the motion for clarification of judgment, we do not disapprove of the trial court's proceeding as it did.

The trial court correctly determined that the paragraph in dispute was ambiguous and in need of determination in order to settle the legal obligations between the plaintiff and the defendant... [A] plaintiff may request other relief, in this case monetary damages, in conjunction with an action for declaratory judgment... although a motion for clarification of judgment was an option, it would not have been speedy and convenient for the trial court to request a change of the pleadings. The plaintiff's request for a declaratory judgment clearly afforded her an appropriate and complete remedy."

It is difficult to imagine circumstances where the existence of "another form of proceeding" is more available to the party seeking the declaratory judgment than in *Coscina.* Yet, the *Coscina* court fully approved the trial court's decision to proceed with a declaratory judgment action.

Finally, it would be reasonable to assume that, if the Defendant claimed that the Plaintiff's pleadings were not sufficient to state a cause of action for the relief she was seeking, that he would have raised the issue with a Motion to Strike. Instead, despite having displayed an avid interest in extensive pleadings in other parts of this matter, Defendant chose not to raise this issue for the first time until his post-trial Brief. The Plaintiff's action seeking a declaratory judgment should go forward and Defendant has given this Court no plausible reason why it should not.

***Plaintiff's Response to Defendant's Section D. Tortious Interference:***

The Plaintiff agrees with the Defendant that it is the Plaintiff's position that the Defendant's refusal to agree to the rental of the premises was the "proximate cause" of the Plaintiff's inability to rent the property. Prior to Defendant's counsel telling the

Plaintiff not to rent the property (Plaintiff's testimony Tr. 4-10 p. 22), the property had been consistently rented from August 15, 1999 through August 15, 2008 (Plaintiff's testimony Tr. 4-9 p. 43 and Exhibits 4 and 5 - Leases).

The Defendant claims that despite its alleged refusal to allow the Plaintiff to rent the property, that the Plaintiff still had the legal right to do so. The Defendant then goes through a tortured analysis of Connecticut General Statute § 47a-1 definitions to support this position. This particular argument goes against the Defendant's argument/theme throughout this case, that being that the Plaintiff acted without consent of the Defendant. In this matter the Defendant is arguing that the Plaintiff should have ignored Defendant's counsel's direct order not to rent the property. The Defendant would thus place the Plaintiff in the position of damned if she did/damned if she didn't.

The Defendant argues that the Plaintiff's real reason for not renting the property was that the Probate Court had not granted her Motion requesting that the Probate Court order the estate to allow her to rent the property (Exhibits 33 and EE). This argument fails in that the Plaintiff's complaint in this case contained Count Three, alleging Defendant's refusal to permit re-renting and the Probate Court issued a decree dated January 27, 2009, stating that the jurisdiction of this matter is now with the Superior Court and it is in the best interest of all parties that the matter be heard in one forum (Exhibit Y). The Plaintiff also refers the Court to her original brief pages 8-10 for analysis of the loss of rental income claim.

The Defendant's final defense to this count is that there was “proper justification” for the Defendant to order the Plaintiff not to rent the property because of the Plaintiff's many bad practices (Defendant's brief at 38). The Defendant goes on to list what it claims were the Plaintiff's bad practices.

The Plaintiff denies each of these alleged bad practices and relies on the testimony and evidence elicited at trial to support her claim that she has acted appropriately in her management of the subject property and common fund.

***Plaintiff's Response to Defendant's Section E. Partnership, Good Faith and Fair Dealing, Duty of Care; F. Conversion and G. Trust:***

The Plaintiff has stipulated to the fact that by agreement with the Defendant's Decedent and the Defendant's estate she managed the subject property from October 1998 until at least sometime in 2008 (Joint Exhibit I, #2).

The Plaintiff denies that she “wasted monies of the common fund”. The evidence shows that the Plaintiff was acting in the best interest of both parties as evidenced by the funds being held by the Court. The evidence also shows that Robert McCabe, in both his capacity as Attorney-In-Fact for Valerie McCabe and as fiduciary of her estate, did absolutely nothing to advance the interest of the “partnership”.

Ultimately it appears that the Defendant's arguments come down to the following:

1. Plaintiff paid her attorneys out of common funds.

Plaintiff's response:

The Plaintiff respectfully refers the Court to her original brief pages 12-13 for analysis of this issue.

2. Plaintiff paid for installation of rugs and/or floors of the second floor of the subject property.

Plaintiff's response:

Plaintiff respectfully refers the Court to her original brief pages 13-14 for analysis of this issue.

3. Plaintiff failed to reimburse the common fund for overdraft fees.

Plaintiff's response:

Plaintiff denies having failed to reimburse the common fund for overdraft fees. In fact, as set forth in her original brief, Page 8, Section 3, Claim For Plaintiff Over-Reimbursing Common Fund From Personal Account, the Plaintiff has actually over-reimbursed the common fund account and is seeking compensation from the common fund for these over-payments.

4. Plaintiff failed to disclose common fund accounts that were opened in her name alone.

Plaintiff's response:

Plaintiff respectfully refers the Court to her original brief pages 16-19 for analysis of this issue.

5. Plaintiff did not disburse one-half of the common fund when Defendant's counsel “demanded” she do so.

Plaintiff's response:

Plaintiff respectfully refers the Court to her original brief pages 19-20 for analysis of this issue.

***Plaintiff's Response to Defendant's Section H. Detrimental Reliance:***

Plaintiff respectfully refers the Court to her original brief, response to Defendant's Seventh Count paragraph 3d-3f pages 23-25 and response to Defendant's Twelfth Count pages 27-28 for the analysis of this issue.

***Plaintiff's Response to Defendant's Section I. Accounting:***

The Plaintiff has acted in good faith in supplying the Defendant with all pertinent documents to support her doings relative to her management of the subject property and common fund (Plaintiff's testimony Tr. 4-16 p. 148-149). The Defendant is critical of the Plaintiff for not being able to produce certain documents, some going back over ten years from when they were requested of the Plaintiff.

The Plaintiff has produced schedule E's from 2001-2011 (Exhibit 10) and testified they were sent to Robert McCabe every year (Tr. 4-10 p. 54) and yet the Defendant is critical that the Plaintiff could not produce schedule E's for 1998-2000. It is the Plaintiff's position that had Robert McCabe requested these documents in a timely manner, before the passage of ten years, then the Plaintiff would have had them in her possession and would have provided them to him.

The Plaintiff denies that she failed to account for all the money she received in 1998-14

2000. The Plaintiff has acted in good faith in providing the Defendant with all the documentation in her possession. Again, the passage of time before requests for this information is Robert McCabe's fault.

The Plaintiff denies she disobeyed a specific Court Order to provide certain tax information. To the best knowledge of the Plaintiff she did produce the tax information ordered by the Court and is unaware of the Defendant claiming that the documents were not produced. This issue was never addressed during the trial.

The issue of missing discovery was one of the first issues addressed by the Court at the commencement of this trial (Tr. 4-9 p. 9-19). At that time Attorney Kosinski identified three items which he was still seeking: 1. Missing page from January 23rd '09

CL&P bill; 2. Fidelity registers prior to November 30th of '99 and after December 6th of '01; and 3. checking account, 3090, statements from September 1st of '05 through December 25th of '07.

During the course of the trial the Plaintiff obtained and produced the CL&P bill and checking account 3090 for the requested period (Tr. 4-10 p. 3). With regard to the Fidelity check registers, the Plaintiff testified that she did not recall there being check registers prior to 11-30-99 (Tr. 4-9 p. 16) and that she did not use check registers. She relied on the bank records (Tr. 4-11 p. 8-10).

The issue of production was also one of the last things discussed at the trial (Tr. 4-16 p. 151-153). Based on what was requested by Attorney Kosinski at the commencement of the trial and subsequently produced by the Plaintiff, the Plaintiff believes she has fully complied.

Given that Attorney Kosinski has all of the documentation he requested, it is unnecessary and unreasonable to now order the Plaintiff to provide an accounting from 1998-2011.

In addition, the Plaintiff respectfully refers the Court to her original brief, response to Defendant's Seventh Count, pages 22-23 and response to Defendant's Thirteenth Count pages 28-29 for analysis of this issue.

***Plaintiff's Response to Defendant's Claim J. Jurisdiction:***

It is the Plaintiff's claim that the Probate Court had jurisdiction over the Estate of Valerie McCabe and the Administrator of her estate, Robert McCabe. It is the Plaintiff's position that the Probate Court did not have jurisdiction over her.

The motions filed by the Plaintiff were done with the express purpose of having the Probate Court order Robert McCabe as Administrator, to do the things requested. It is the Plaintiff's position the Probate Court had no jurisdiction to order her to do or not do anything (Plaintiff's testimony Tr. 4-10 p. 129-130). This position is clearly set forth in Exhibit HHHH which the Court read into the record (Tr. 4-16 p. 141).

***Plaintiff's Response to Defendant's Claim K. Set-Off:***

Despite not having made a claim for payment for work performed on the property, on the last day of the trial Robert McCabe testified to certain work he performed at the property and was seeking a set-off (Tr. 4-16 p. 129-130). Mr. McCabe testified he removed a pine tree which work, he estimated, had a value of $1,000.00. He also winterized the property for which he thinks he paid two plumbers $200.00 each and probably bought $50.00 worth of Ecosafe Glycocoll (*Id.* p. 129). He also claims to have removed"... two, or three, or four bags of asbestos coating..." (Id). Total set-off $1,500.00.

The Plaintiff objects to the awarding of this set-off because she was not properly apprised of the claim and the amount requested is based on Mr. McCabe's off the cuff belief as to the value of his services and the amount paid to the plumbers. With regard to the asbestos and tree removal, Mr. McCabe could not even testify as to the year these were done. (*Id.* p. 136).

***Plaintiff's Response to Defendant's L. Punitive Damages:***

The Defendant has presented no evidence that the Plaintiff intentionally or willfully tortiously inferred with the Defendant's financial expectancy or converted to her own use the sums managed by her.

***Plaintiff's Response to Defendant's Conclusion:***

The Defendant's claim that the Plaintiff's actions constitute **elder abuse** is offensive and totally contradicted by the evidence. First of all, at all time relevant to this action the deceased Valerie McCabe's interests were being handled by her Attorey-In-Fact/Administrator, Robert McCabe. The Plaintiff communicated with Mr. McCabe throughout the period of time she managed the property.

Second, there is $214,964.12 currently held by the Court waiting to be distributed to the Plaintiff and the Defendant's Estate, in large part due to the Plaintiff's management of the property. That portion which goes to the Defendant's Estate will ultimately be divided by Robert and John McCabe. In other words, Robert and John McCabe will inherit tens of thousands of dollars from the subject property and common fund without having done anything. The Plaintiff fails to see how this constitutes "**abuse**".

With regard to the second part of the Defendant's conclusion in which he rails on "...the elites in this country...", the plaintiff can only say that it is reflective of a bizarre, misplaced paranoia.

During the time the Plaintiff was managing the subject property and common fund, she was raising a family of four children, working full time and managing other properties she had acquired. Any financial success the Plaintiff and her husband have attained was through hard work and sacrifice.

***Conclusion:***

The Plaintiff respectfully requests the Court rule in her favor on Counts Two and Three of her Second Revised Complaint and award her damages of $145,781.07, as set forth on pages 10 and 11 of this Brief, plus statutory interest and costs.

Further, the plaintiff respectfully requests that the Court find that the Defendant has failed to meet his burden of proof as to each of his remaining Counterclaims and Special Defenses and enter Judgment in her favor accordingly.

PLAINTIFF: ELAINE ERWIN MATULIS

By: _____

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