

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-760

AYESHA ALEKSOV

vs.

KRIS ALEKSOV & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Plaintiff Ayesha Aleksov (Ayesha) is the daughter and sole heir of Ronald Khan (Ronald), who died on May 3, 2019. This is a dispute between Ayesha and her son, defendant Kris Aleksov (Kris), a licensed attorney, regarding two allegedly fraudulent quitclaim deeds purporting to convey Ronald's real property to Kris and 28 Bradford Street LLC (LLC), an entity wholly controlled and operated by Kris,² shortly before Ronald's death. In September 2019, Ayesha filed a verified complaint in Superior Court against Kris and the LLC (collectively, defendants) claiming that Ronald's signatures on the deeds were procured by fraud and requesting, among other things, a declaratory judgment

¹ 28 Bradford Street LLC.

² The LLC was allegedly owned by both Kris (having a fifty-one percent interest) and Ronald (having a forty-nine percent interest). It is unclear, however, what became of Ronald's interest in the LLC on his death.

(count V) that the real property, and the rental income derived therefrom, belonged to Ayesha. Ayesha also filed an ex parte motion for lis pendens, which motion was allowed after hearing. The defendants filed a special motion to dismiss count V and to remove the lis pendens. After hearing, a judge of the Superior Court denied the special motion to dismiss in a February 6, 2020 order. The defendants appeal from that order.³ We affirm.

Background. We summarize the pertinent facts as alleged in the verified complaint and as set forth in other relevant documents in the record, noting undisputed facts where applicable. See Sudbury v. Massachusetts Bay Transp. Auth., 485 Mass. 774, 778 (2020). Ronald owned two multiunit apartment buildings in Wayland: 224 West Plain Street and 28-30 Bradford Street (properties). As of December 2016, Ronald and Ayesha occupied the two apartments at 224 West Plain Street, and Kris occupied one of the five apartments at 28-30 Bradford Street. The other apartments produced rental income from tenants. Although Ronald "explicitly told" Ayesha that she would inherit the properties after his death, Kris "ha[d] been planning and scheming since 2011 to disinherit [Ayesha,] . . . as evidenced by a fraudulent will prepared by [Kris]" that was purportedly signed by Ronald in 2011, but not witnessed until 2014. In

³ This is a permissible interlocutory appeal from an order denying a special motion to dismiss filed pursuant to G. L. c. 184, § 15 (c). See G. L. c. 184, § 15 (d).

furtherance of his scheme to disinherit Ayesha, Kris "tricked [Ronald] into signing two quitclaim deeds in February 2019 by stating to [Ronald] that the paper work he was signing was for MassHealth."⁴ The first deed, which purported to convey 28-30 Bradford Street to the LLC, was executed on February 4, 2019, and recorded on March 1, 2019. The second deed, which purported to convey 224 West Plain Street to Kris and Ronald as joint tenants with rights of survivorship, was executed on February 26, 2019, and recorded on May 6, 2019 (three days after Ronald died). It is undisputed that the notary public whose acknowledgement appeared on the deeds did not actually witness the signing of the deeds.

In April 2019, Ayesha took Ronald to meet with an estate planning attorney. The attorney thereafter informed Ronald of the deed conveying 28-30 Bradford Street to the LLC (the deed for 224 West Plain Street had not yet been recorded). Ronald and Ayesha then "confronted [Kris] about the fraudulently executed 28-30 Bradford Street Deed," at which time Ronald expressed his objection, stating that he had no memory of signing any deed in February 2019, that he had no knowledge of the LLC, and that "he wanted [Ayesha] to inherit his real estate

⁴ By 2018, Ronald's health had "seriously decline[d]" and the parties discussed obtaining MassHealth insurance for him. At the time the deeds were executed in February 2019, Ronald was receiving dialysis for kidney failure, and was being "heavily medicated by his doctors" while also "heavily drinking alcohol."

so that she could have a place to live and income." Kris refused to return the property to Ronald, and "began collecting rent from the tenants for his own personal use" in May 2019. On May 10, 2019, one week after Ronald died, Kris issued a no trespass notice to Ayesha for both properties. Approximately one month later, Kris served Ayesha with a ninety-day notice to quit 224 West Plain Street.

On September 17, 2019, Ayesha filed the verified complaint in Superior Court asserting claims for conversion (count I), fraud (count II), undue influence (count III), accounting (count IV), declaratory judgment (count V), and tortious interference with an expected inheritance (count VI). In the accompanying ex parte motion for lis pendens, Ayesha asserted that "[t]he subject matter of the present action constitutes a claim of right to title of real property or the use and occupation thereof of the buildings thereon," and "[a]s a result of the Defendants' fraudulent behavior in coercing [Ronald] to execute the quitclaim deeds, . . . [Kris] wrongfully di[vest]ed [Ayesha] from inheriting [Ronald's] estate, which but for the deeds would have included these parcels of real property." The motion for lis pendens was allowed after hearing on September 27, 2019.

In their special motion to dismiss count V and to remove the lis pendens, the defendants argued that Ayesha lacked standing to seek a declaratory judgment because (1) she had not

been appointed personal representative of Ronald's estate and was therefore not authorized to bring a claim on its behalf, see G. L. c. 230, § 1 ("An action which would have survived if commenced by or against the original party in his lifetime may be commenced and prosecuted by . . . his executor or administrator"); and (2) she failed to allege "any direct harm or injury" to herself resulting from the defendants' actions. The judge, however, disagreed, denying the special motion to dismiss and concluding that "[t]he complaint sufficiently alleges coercion, fraud or undue influence by Kris Aleksov on February 26, 2019, as well as [Ronald's] 'protest' on April 1, 2019 and the unexplained delay in recording the relevant, allegedly fraudulent deed until after [Ronald's] death, when nothing could be done short of this lawsuit." The judge further determined that, "[a]s an alleged heir of Ronald Khan, [Ayesha] has standing to sue [the defendants] under G. L. c. 230, § 5," which statute permits an heir or legatee to bring a claim on behalf of the estate when the personal representative⁵ "refuses . . . or is unable to do so by reason of his interest or

⁵ The term "'personal representative' . . . includes executor, administrator, successor personal representative, special administrator, special personal representative, and persons who perform substantially the same function under the law governing their status." G. L. c. 190B, § 1-201 (37).

otherwise." G. L. c. 230, § 5.⁶ The present appeal by the defendants followed.

Discussion. "A lis pendens is a written notice that alerts prospective buyers of property to pending lawsuits that claim an interest in that property." Ferguson v. Maxim, 96 Mass. App. Ct. 385, 388 (2019). "Presented with a statutorily compliant verified complaint in which the 'subject matter of the action constitutes a claim of a right to title to real property or the use and occupation thereof,' the judge 'shall' make a finding to that effect and endorse the lis pendens." Id., quoting G. L. c. 184, § 15 (b). "The judge's discretion in this regard is limited: 'once the judge determines that the subject matter of the action concerns an interest in real estate[,] . . . the allowance or denial of a memorandum of lis pendens hinges on the nature of the claim, not the merits thereof.'" Ferguson, supra

⁶ G. L. c. 230, § 5 provides that:

"It shall be unnecessary to remove an executor or administrator in order that an action to enforce a claim in favor of the estate may be brought by an administrator to be appointed in his place, when he refuses to bring such action at the request of an heir, legatee or creditor, or is unable to do so by reason of his interest or otherwise, but an heir, legatee or creditor having an interest in the enforcement of any such claim may bring a civil action to enforce it for the benefit of the estate in like circumstances and in like manner as a person beneficially interested in a trust fund may bring an action to enforce a claim in favor of such fund, and in case of such action in respect to real estate, it shall not be an obstacle to the action that a license to sell it has not been obtained by the executor or administrator."

at 388-389, quoting DeCroteau v. DeCroteau, 90 Mass. App. Ct. 903, 905 (2016). A defendant seeking to remove a lis pendens may file "a 'special motion to dismiss' any 'frivolous' action or claim on which [the] lis pendens is based." Ferguson, supra at 389, quoting G. L. c. 184, § 15 (c).⁷ "The question to be determined by a judge in deciding a special motion to dismiss [under § 15 (c)] is not which of the parties' pleadings and affidavits are entitled to be credited or accorded greater weight,' but whether the party with the burden of proof (here, the defendants) has shown that the claim made by the [plaintiff] was devoid of any reasonable factual support or arguable basis in law." Ferguson, supra at 390, quoting Benoit v. Frederickson, 454 Mass. 148, 154 n.7 (2009).⁸ "We review a judge's decision allowing a memorandum of lis pendens and denying a special motion to dismiss to determine whether the judge committed an error of law or abused his discretion." Citadel Realty, LLC v. Endeavor Capital N., LLC, 93 Mass. App.

⁷ "[A] claim is 'frivolous' if '(1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds.'" Ferguson, 96 Mass. App. Ct. at 389, quoting G. L. c. 184, § 15 (c).

⁸ "[U]nlike a motion pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), a special motion to dismiss under § 15 (c) requires the motion judge to consider alleged facts beyond the plaintiff's initial pleading and, based on those allegations, to determine whether the plaintiff's claims are devoid of a factual or legal basis." Ferguson, 96 Mass. App. Ct. at 390.

Ct. 39, 44 (2018). "Our review . . . involves an 'analysis [that] calls for an examination of the same factors properly considered by the judge in the trial court in the first instance" and "an order predicated solely on documentary evidence permits the appellate court to draw its own conclusions from the record." Id. at 44-45, quoting Galipault v. Wash Rock Invs., LLC, 65 Mass. App. Ct. 73, 82 (2005).

Here, because the defendants' special motion to dismiss requested dismissal of count V only, our review is confined to that count. See Citadel Realty, LLC, 93 Mass. App. Ct. at 44. Count V seeks a declaration that the properties, and the rental income collected by the defendants, belong to Ayesha. "In order for a court to entertain a petition for declaratory relief," the plaintiff must meet two requirements: the plaintiff must demonstrate (1) the existence of "an 'actual controversy'"; and (2) "the requisite legal standing to secure its resolution." Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 292 (1977), quoting G. L. c 231A, § 1. See G. L. c. 231A, § 9 (chapter 231A "is to be liberally construed and administered"). The defendants contend that Ayesha failed to satisfy the second requirement, arguing that she lacked standing to bring a claim on behalf of Ronald's estate pursuant to G. L. c. 230, § 5, because no personal representative had been appointed to administer the estate.

Relying on Heavey v. Maloof, 453 Mass. 259, 264 (2009), the defendants contend that an heir's right to bring suit under § 5 does not accrue until a personal representative has been appointed by a judge. See Heavey, supra (heir's authority to sue under § 5 not triggered when executor named in will refused to bring suit, because § 5 pertains to court-appointed personal representative).⁹ Heavey, however, is distinguishable from the present case, as the claim in Heavey involved personalty, title to which vests in the personal representative on the decedent's death. See id.

Here, in contrast, the claim involves real property, title to which "passes to heirs at law on death of an owner." Heavey, 453 Mass. at 265 n.7. See Russo v. Inzirillo, 360 Mass. 862, 862 (1971) ("title to realty of a deceased intestate vests immediately in the heirs and no distribution is required It does not pass to the administrator who is without power to convey real estate except by special authorization and license of the Probate Court"). It is undisputed that Ayesha is Ronald's "only surviving heir."¹⁰ Ayesha alleged in the verified

⁹ In Heavey, 453 Mass. at 264, the Supreme Judicial Court (SJC) held that the statute of limitations to bring a claim to recover the decedent's misappropriated funds began to run when the court-appointed estate administrator, rather than the decedent's heir, learned of the misappropriation.

¹⁰ An "heir" is defined as a "person" who is "entitled under the statutes of intestate succession to the property of a decedent." G. L. c. 190B, § 1-201 (21).

complaint that the 2011 will was "fraudulent,"¹¹ and that Ronald's signatures on the February 2019 deeds were procured by fraud in the factum as he was "tricked" into believing he was signing MassHealth forms. The judge determined that Ayesha alleged sufficient facts in her verified complaint to support her claims of fraud. Accordingly, drawing all reasonable inferences in Ayesha's favor, see Sudbury, 485 Mass. at 778, she has alleged facts plausibly suggesting that (1) Ronald died intestate;¹² (2) the February 2019 deeds were void ab initio and ineffective to convey title, see Strother v. Shain, 322 Mass. 435, 437 (1948); and (3) Ronald remained the owner of the properties until his death, at which time title immediately passed to his sole heir, Ayesha. See Russo, 360 Mass. at 862; Shrewsbury v. Murphy, 333 Mass. 290, 292 (1955); McCarthy v. Landry, 42 Mass. App. Ct. 488, 490-491 (1997).

¹¹ Ayesha also alleged facts suggesting that the 2011 will may not have been properly witnessed. See Day Trust Co. v. Malden Sav. Bank, 328 Mass. 576, 579 (1952) (writing signed by decedent that was not properly witnessed is "void as a testamentary instrument"). See also G. L. c. 190B, § 2-502 (a) (3).

¹² It appears that Ronald may have executed a will in 2019, naming Ayesha as his sole devisee. The 2011 and 2019 wills are the subject of a will contest in the Probate and Family Court. If Ayesha is successful in either invalidating the 2011 will or in proving the validity of the 2019 will, title to the properties owned by Ronald will have passed directly to her on Ronald's death. See Russo, 360 Mass. at 862; Daley v. Daley, 300 Mass. 17, 21 (1938) ("Title to real estate devised by will passes directly, on probate of the will, to the devisee and relates back to the instant of the death of the testator"). See also G. L. c. 190B, § 3-101.

Although the judge concluded that Ayesha had standing under G. L. c. 230, § 5, count V does not involve a claim brought on behalf of Ronald's estate. Rather, count V seeks a declaration that Ayesha is the present owner of the properties.¹³ Ayesha's standing to bring count V is not derived from § 5; it is derived from her status as an alleged heir in whom title to the properties has already vested. See Howe v. Johnston, 39 Mass. App. Ct. 651, 653 (1996), quoting Roper v. Murphy, 317 Mass. 176, 178 (1944) (because title of record passes to heirs on decedent's death, heirs are necessary parties to action adjudicating "[a]ny rights that the statutory heirs of the intestate or those claiming under him might have in the real estate").¹⁴ Ayesha has thus demonstrated "a cognizable legal interest . . . enough to confer standing" for purposes of G. L.

¹³ Insofar as count V also seeks a declaration that the rental income collected by the defendants belongs to Ayesha, her claim of entitlement to that rental income is incidental to her asserted ownership of the properties. See Medlinsky v. Premium Cut Beef Co., 320 Mass. 22, 25 (1946) (heir's entitlement to rent or occupancy value begins on date of decedent's death); Beardsley v. Hall, 291 Mass. 411, 414 (1935) ("An executor ordinarily has no right to rents of real estate which accrue after the testator's death. Such rents belong to the heirs or devisees of the real estate as an incident of the reversion").

¹⁴ Cf. Nunes v. Rogers, 307 Mass. 438, 443 (1940) (neither administrator nor executor, in absence of license to sell, has standing "to bring an action to recover the land . . . or to maintain a bill in equity to set aside an alleged fraudulent transfer by the decedent"); Hooker v. Porter, 271 Mass. 441, 445-446 (1930) (administrator lacks standing to bring suit to remove cloud on title to real property that passed to heirs on decedent's death).

c. 231A. Bortolotti v. Hayden, 449 Mass. 193, 198 (2007). As count V plainly involves "a claim of a right to title to real property," the judge properly allowed the motion for lis pendens. Ferguson, 96 Mass. App. Ct. at 388, quoting G. L. c. 184, § 15 (b). In light of the foregoing, the judge did not err in denying the defendants' special motion to dismiss.¹⁵ See Citadel Realty, LLC, 93 Mass. App. Ct. at 44. See also Clair v. Clair, 464 Mass. 205, 214 (2013) ("An appellate court may affirm a correct result based on reasons that are different from those articulated by the judge below"); DeCroteau, 90 Mass. App. Ct. at 906 (affirming judge's order on motion for lis pendens "on a separate and independent basis" than ground relied on by judge).

Order dated February 6, 2020,
denying special motion to
dismiss, affirmed.

By the Court (Milkey, Lemire
& Singh, JJ.¹⁶),



Clerk

Entered: September 8, 2021.

¹⁵ The defendants' request for attorney's fees and costs is denied.

¹⁶ The panelists are listed in order of seniority.