

Dinardo v Mitarotonda
2014 NY Slip Op 33781(U)
July 10, 2014
Supreme Court, Westchester County
Docket Number: 69894/2013
Judge: Francesca E. Connolly
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MICHAEL DINARDO and LUCY DINARDO,

Plaintiff,

-against-

FRANK C. MITAROTONDA, SR.,

Defendant.

-----X

CONNOLLY, J.

CORRECTED¹
DECISION and ORDER
Sequence No. 1
Index No. 69894/2013

The following papers were read in connection with the plaintiffs' motion:

Order to show cause, affidavit, exhibits	1-7
Affidavit in opposition, exhibits, memo of law	12-16
Reply affirmation, affidavit, exhibits	17-20

The plaintiffs Michael Dinardo and Lucy Dinardo commenced this action to impose a constructive trust on real property located at 174 Winfred Avenue, Yonkers, New York. The plaintiffs now move (1) for a preliminary injunction staying a landlord-tenant proceeding in Yonkers City Court, commenced by the defendant to evict them from the subject property, (2) to consolidate the landlord-tenant proceeding with this action pursuant to CPLR 602, and (3) restraining the defendant from selling, mortgaging or otherwise encumbering the premises during the pendency of this action.

In support of the motion, the plaintiff Lucy Dinardo submits an affidavit averring that the plaintiffs were the title owners of the subject property until July, 18 1995. The plaintiffs had experienced financial difficulties and the property was in foreclosure. According to Ms. Dinardo, the defendant, who at that time was engaged to the plaintiffs' daughter, in the spirit of wishing to help his future in-laws, "agreed to purchase the subject property at a foreclosure sale for [the plaintiffs]" (Lucy Dinardo Aff. ¶ 4). The plaintiffs submit a copy of a deed dated July 18, 1995 in which G.F. Mortgage Corporation transferred the subject property to the defendant (Plaintiff's Exhibit C).

¹ This order is issued, after obtaining consent from counsel for both parties, to correct the computation of carrying costs for the months of August 2013 to June 2014 from \$20,133 to \$24,607. The prior order dated July 3, 2014 is vacated.

Although no agreement was memorialized in writing, Ms. Dinardo avers that, as consideration for the purchase, the plaintiffs agreed to pay the mortgage, taxes, insurance, and pay for upkeep of the property after the transfer. The plaintiffs allegedly paid the defendant for these expenses in cash, and it was purportedly agreed that the defendant “would be repaid back said expenses when we decided to sell said real property” (Lucy Dinardo Aff. ¶ 5). In support of their claim to the existence of this agreement, the plaintiffs submit copies of the defendant’s tax returns, which indicate that the defendant did not declare the plaintiffs’ payments to him as rental income (Plaintiffs’ Exhibit D).

After the property was placed in the defendant’s name, the defendant and the plaintiffs’ daughter were married. The plaintiffs continued to live in the property and make payments to the defendant for 18 years, allegedly without incident. However, the defendant and the plaintiffs’ daughter were divorced on July 3, 2013. Within days of the divorce, the defendant served the plaintiffs with a 30-day notice to vacate the premises, and on or about September 3, 2013, the defendant commenced a proceeding to evict the plaintiffs in Yonkers City Court. According to the petition in that proceeding, which is verified by the defendant, the plaintiffs had agreed to pay the defendant rental and/or “use and occupancy” payments of \$2,237, and that no such payments had been made since August 1, 2013 (*see* Plaintiff’s Exhibit E).

In support of their motion, the plaintiffs contend that, since their sole defense to the landlord-tenant proceeding is their claim to a constructive trust, which they seek in the instant action, the matters should be consolidated and the landlord-tenant proceeding stayed. The plaintiffs contend that they have a strong case to impose a constructive trust and that their eviction would cause them irreparable harm. Accordingly, they seek a preliminary injunction staying their eviction pending resolution of this action.

In opposition, the defendant submits an attorney’s affirmation arguing that the instant motion is simply a delay tactic to avoid eviction. The defendant submits the deed and mortgage indicating that he is the sole owner and mortgagor of the property (*see* Defendant’s Exhibits A & B). In a memorandum of law, the defendant argues that the plaintiffs have not established the elements of a constructive trust and, therefore, a preliminary injunction should not be issued. The defendant concedes that the plaintiffs’ allegations facially establish the first two elements of a constructive trust, i.e., a fiduciary relationship and a promise, however, the defendant contends that the facts of this case contradict the plaintiffs’ claims.² The defendant argues that he was not a family member of the plaintiffs in July 1995, as he was not yet married to the plaintiffs’ daughter and, therefore, no confidential or fiduciary relationship was formed. Moreover, the defendant contends that the plaintiffs’ payments were simply rent. Further, the defendant contends that the third and fourth elements of a constructive trust, reliance and unjust enrichment, have not been established since the defendant is the sole owner of the property and he has not obtained anything of value that rightfully belongs to the plaintiffs.

² The defendant’s memorandum of law states: “[T]he first two elements needed to establish a constructive trust *have been met*. However, the evidence clearly disproves them” (Defendant’s Memo of Law at 3 [emphasis added]).

In reply, the plaintiffs argue that the defendant's submissions are defective in that the defendant has not submitted his own affidavit in opposition, but rather an attorney's affirmation which does not constitute admissible evidence. The plaintiffs additionally contend that the defendant has been unjustly enriched, as the plaintiffs have paid for all upkeep and improvements in the property until the time when the landlord-tenant proceedings were commenced. In a reply affidavit, Ms. Dinardo avers that, had the defendant not agreed to purchase the home for them, the plaintiffs would have pursued other options to avoid the foreclosure. Further, she avers that it was only because the defendant had purchased the property for them that the plaintiffs paid all of the expenses for the subject property.

DISCUSSION

As an initial matter, the plaintiffs correctly argue that the defendants' attorneys' affirmation does not constitute admissible evidence (*see European Granite & Marble Group, Inc. v McNaughton*, 102 AD3d 732, 733 [2d Dept 2013] [attorney's affirmation submitted in opposition to motion, "which was not based upon personal knowledge of the facts . . . was . . . of no evidentiary significance"]). Accordingly, the defendants' opposition papers may only be considered to the extent that they make legal argument in opposition to the motion. Nevertheless, the Court must still determine whether, on the basis of the plaintiffs' submissions, they have established their entitlement to a preliminary injunction (*see Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844 [2d Dep't 2009] [party seeking preliminary injunction bears the burden of establishing his or her entitlement thereto]; *see also Law Offs. of Neal D. Frishberg v Toman*, 105 AD3d 712 [2d Dept 2013] [failure to oppose motion with proof in admissible form does not warrant automatic granting of motion]).

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *see Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin, Co.*, 53 AD3d 612, 613 [2d Dept 2008]).

"The usual elements of a constructive trust are '(1) a confidential or fiduciary relation[ship], (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment'" (*Cruz v McAneney*, 31 AD3d 54, 59 [2d Dept 2006], quoting *Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

To the extent the defendant argues that no fiduciary relationship was created since he was not yet married to the plaintiffs' daughter in 1995, premarital transfers have been found to constitute the basis for confidential relationships (*see Lester v Zimmer*, 147 AD2d 340, 342 [3d Dept 1989] ["a premarital transfer of funds . . . can form a predicate for the imposition of a constructive trust"]; *see also Rowe v Kingston*, 94 AD3d 852, 853 [2d Dept 2012] ["As familial relatives, the parties shared a confidential relationship"]). The fact that the defendant and the plaintiffs' daughter did in fact marry after the alleged agreement was entered into only ratifies the existence of a confidential relationship between the plaintiffs and the defendant as their future son-in-law.

Moreover, with respect to the second element requiring a promise, the plaintiffs have set forth that the defendant promised to permit them to reside on the property until it was sold, at which point he would be repaid for his investment and the costs of the arrangement.

With respect to the third element, which requires a transfer, the Court notes that the plaintiffs did not personally transfer the property to the defendant—the deed indicates that the property was transferred to the defendant from the bank. Although, under these facts, the transfer of the property was not directly from the plaintiffs to the defendant, the rules governing constructive trusts are not to be rigidly applied (*see Byrd v Brown*, 208 AD2d 582, 583 [2d Dept 1994] [“the four factors [for a constructive trust] are not an unyielding formula which limits a court’s freedom to fashion this equitable remedy and the requirements are not to be rigidly applied” (internal quotation marks omitted)]. In any event, “[t]he law of constructive trusts . . . is not confined to reconveyance situations” (*see Lester v Zimmer*, 147 AD2d 340, 342 [3d Dept 1989]). Rather, “an equitable interest” in property may develop “through the expenditure of money, labor, and time in the property” (*Marini v Lombardo*, 79 AD3d 932, 934 [2d Dept 2010]; *see Lester v Zimmer*, 147 AD2d at 342] [“the transfer concept extends to instances . . . where funds, time and effort are contributed in reliance on a promise to share in the result”]). Here, the plaintiffs have set forth uncontradicted proof that they have expended time, money, and effort in maintaining the property in the 18 years since the alleged agreement was reached. While the Court is doubtful that the plaintiffs’ efforts and expenditures in this regard will, if they are successful in this action, entitle them to 100% ownership in the subject premises, the plaintiffs have set forth proof that a legally cognizable transfer was made.

Finally, while mere appreciation in real property may not, alone, establish unjust enrichment, the foregoing expenditures constitute evidence of unjust enrichment to the defendant as the title owner of the property. The Court of Appeals has stated that unjust enrichment is not to be determined in isolation, but such determination “must be a realistic determination based on a broad view of the human setting involved” (*McGrath v Hilding*, 41 NY2d 625, 629 [1977]). Moreover, although the defendant has claimed—not through admissible evidence but through his attorney—that the plaintiffs’ payments to him were simply rent and that he has not been enriched thereby, the plaintiffs have offered proof that the defendant did not claim the payments as rent on his tax return, and it is well-established that “[a] party to litigation may not take a position contrary to a position taken in an income tax return” (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]).

In addition to the plaintiff’s likelihood of success, the Court also gives great weight under the circumstances of this case to the potential for irreparable harm to the plaintiffs if the injunction is not granted. “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (*County of Suffolk v Givens*, 106 AD3d 943, 944 [2d Dept 2013]). The plaintiffs, who are elderly, have resided in the subject property under the arrangement with the defendant for over 18 years, and had resided there prior to that date as well. The human toll associated with evicting such long-time residents presents the danger of severe and irreversible harm. Indeed, in balancing the equities, where the danger for irreparable harm is extraordinary, a preliminary injunction may be granted even where the probability of success is low (*see Mohammed v Reno*, 309 F3d 95, 101-102 [2d Cir 2002]).

Accordingly, having considered the relevant factors, the Court finds that the plaintiffs are entitled to a preliminary injunction staying the landlord-tenant proceeding. Further, to preserve the status quo, the defendant shall be enjoined from selling, mortgaging or otherwise encumbering the premises during the pendency of this action.

However, the branch of the motion which is for consolidation is denied. Upon resolution of the issues in the action at bar, if necessary, this Court can lift the stay and the proceedings in Yonkers City Court may, at that time, go forward (*see All 4 Sports & Fitness, Inc. v Hamilton, Kane, Martin Enterprises, Inc.*, 22 AD3d 512 [2d Dept 2005] [the local court “is the preferred forum for the resolution of landlord-tenant disputes”]).

Terms of the injunction

In order to maintain the injunction, the Court will require the plaintiffs to pay the carrying costs of the property, which, under the alleged terms of the constructive trust, they were required to pay. The only evidence in the record as to the carrying costs of the property is the sum of \$2,237 per month, which is the uncontradicted amount that the plaintiffs had agreed to pay to the defendant before the dispute at bar arose (*see* Plaintiffs’ Exhibit E [affidavit of Frank C. Mitarotonda, Sr. in support of holdover petition ¶ 11]). Even if the Court were to accept the plaintiffs’ allegations as completely true, their arrangement with the defendant made them responsible for the costs and expenses of the property—it would be unfair to permit the plaintiffs to remain in the house at the defendant’s expense when their own alleged agreement required them to pay these costs. Under the circumstances, the Court will require the plaintiffs to pay the defendant the sum of \$2,237 per month to maintain the preliminary injunction.

Further, as the record indicates that the plaintiffs have not made any payments to the defendant since August 2013, the Court will require the plaintiffs the defendant the sum of \$24,607, representing eleven months of carrying costs for the months from August 2013 to June 2014.

All sums paid by the plaintiffs to the defendant pursuant to this order are without prejudice to an award of restitution or damages, upon a proper showing of entitlement thereto, after a final determination of the parties’ interests in the subject property (*see Dzubey v Teachers’ College*, 87 AD2d 783, 784 [1st Dept 1982] [“when rights and duties have been re-established after litigation, a party is entitled to seek restitution for any wrongful deprivation”]).

Further, the Court is required to condition the granting of the preliminary injunction upon the plaintiffs’ posting of an undertaking (*see* CPLR 6312 [b]). The party opposing the preliminary injunction bears the burden to establish the damages he or she will sustain by virtue of the preliminary injunction in order for the Court to set the amount of the undertaking (*see e.g. Parolisi v Slavin*, 98 AD3d 488, 490 [2d Dept 2012] [“amount was rationally related to the amount of potential damages which the defendant established that she might sustain by virtue of the preliminary injunction if it were later determined that the plaintiff was not entitled to the preliminary injunction” (emphasis added)]). Here, the defendant has offered no evidence of potential damages he might

sustain by reason of the injunction. However, inasmuch as the preliminary injunction prevents the defendant from, for example, renting the property out at a higher rate, the defendant faces potential lost rents and profits from the property (his damages in this case would consist of the difference between the carrying costs—which he will be receiving pursuant to this order—and the rate at which he could rent the property on the open market) (*see e.g. Lelekakis v Kamamis*, 103 AD3d 693, 697 [2d Dept 2013] [“the Supreme Court properly concluded that the defendants sustained damages by reason of the preliminary injunction in the form of lost rent and profits for the entire period during which the preliminary injunction was in effect”]). Given that the property is a single family home, the Court will require the plaintiffs to post an undertaking in the form of a bond in the amount of \$25,000.

Accordingly, it is hereby,

ORDERED that the branches of the motion which are for a preliminary injunction staying a proceeding in Yonkers City Court entitled *Matter of Mitarotonda v Dinardo* (LT4918-13), and enjoining the defendant from selling, mortgaging or otherwise encumbering the premises during the pendency of this action are granted, conditioned upon:

1. the plaintiffs paying the defendant the carrying costs on the property in the amount of \$2,237 during the pendency of this action, beginning with the first payment due within 10 days of the date of this order, and each additional payment due on the first day of the month (or on the first business day if the first is a Sunday or holiday);
2. the plaintiffs paying the sum of \$24,607 to the defendants within 30 days of the date of this order, representing eleven months of carrying costs for the months from August 2013 to June 2014; and
3. the plaintiffs posting an undertaking in the form of a bond in the amount of \$25,000 within 30 days of the date of this order; and it is further

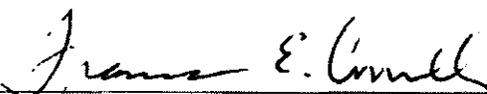
ORDERED that if the plaintiffs violate the terms of this order, the defendant may move to lift the injunction by order to show cause on notice to the plaintiffs; and it is further

ORDERED that the parties are directed to appear in the Preliminary Conference Part on August 11, 2014, at 9:30 a.m., in Room 811 of the Westchester County Courthouse at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York 10601; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
July 10, 2014


HON. FRANCESCA E. CONNOLLY, J.S.C.