

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

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MARIA MOUNDRAKIS,
Plaintiffs,

Index No.:8008/08
Motion Date: 7/8/09
Motion Cal. No.: 49

-against-

JOHN DELLIS and YITHEO LLC.,
Defendants.

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The following papers numbered 1 to 13 read on this motion by defendant John Dellis for an order pursuant to CPLR 3212 granting summary judgment in favor of John Dellis, cancelling the Notice of Pendency, and for an order pursuant to CPLR 6514 (c) setting this matter down for a hearing on costs and expenses due to the cancellation of the Notice of Pendency; and cross-motion by plaintiff for an order pursuant to CPLR 3126 striking defendant John Dellis’ Answer for failure to comply with this Court’s Discovery Order.

PAPERS
NUMBERED

Notice of Motion-Affidavit-Exhibits.....	1-4
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Reply and Affirmation in Opposition-Exhibits.....	9-11
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Upon the foregoing papers it is ordered that the motion by defendant John Dellis for an order pursuant to CPLR 3212 granting summary judgment in favor of John Dellis, cancelling the Notice of Pendency, and for an order pursuant to CPLR 6514 (c) setting this matter down for a hearing on costs and expenses due to the cancellation of the Notice of Pendency is denied, and the cross-motion by plaintiff for an order pursuant to CPLR 3126 striking defendant John Dellis’ Answer for failure to comply with this Court’s Discovery Order is denied, for the following reasons:

According to the complaint, plaintiff and defendant John Dellis, purchased together the following premises (hereinafter, “premises”) 214 N. Crescent Street, Massapequa, New York, 21-15 29th Street, Astoria, New York; 43-07 Ditmars Boulevard, Astoria; New York, 30-15 30th Avenue, Astoria, New York; 21-75 Steinway Street, Astoria, New York; 21-42 33rd Street, Astoria, New York; 21-67 32nd Street, Astoria, New York; 21-72 33rd Street, Astoria, New York; 18-10 Astoria Boulevard, Astoria, New York; 20-33 47th Street, Astoria, New York; 35-52 32nd Street, Astoria, New York; 50-47 42nd Street, Astoria, New York; 83

N. Walnut Street, Massapequa, New York; 20-23 46th Street, Astoria, New York; 22-05 77th Street, Apt. 1C, Astoria, New York; Plaintiff alleges that she paid all or a portion of the money necessary to purchase the premises and since the purchase, plaintiff has paid all or a portion of the money necessary to keep the mortgage, taxes and insurance current and to upkeep and improve the premises. In an order dated November 3, 2008, this Court allowed plaintiff to amend the summons and complaint by adding Yitheo LLC since it is the “title” owner of the premises located at 21-72 33rd Street. As such, plaintiff claims she is the beneficial owner of all or a portion of the entire premises.

Plaintiff alleges that defendant, John Dellis, was listed on the deed to all of the premises at the time of the purchases except for premises known as 21-72 33rd Street, Astoria, New York which was listed under the defendant, Yitheo LLC. This was done in reliance upon the defendant’s express promise that defendant, John Dellis, would hold title to the premises in trust for the plaintiff and that defendants would, at any time, convey all or a portion of the premises to plaintiff upon plaintiff’s request. Plaintiff alleges that this arrangement was based upon plaintiff and defendant, John Dellis, living together and being involved in a romantic relationship at the time of the purchases of the premises. Since then, plaintiff has demanded that defendant convey all or a portion of the premises to plaintiff and defendants have refused to convey all or a portion of the premises to plaintiff. Based on these allegations, plaintiff’s first cause of action claims she is seized in fee as the owner of all or a portion of the premises and the defendants have refused to recognize plaintiff’s rights in the premises and she has no adequate remedy at law.

Plaintiff’s second cause of action claims that at all times hereinafter mentioned, defendants owned the premises and plaintiff and defendant, John Dellis, made and entered into an agreement by which he agreed to transfer sixty percent of the premises to the plaintiff. Plaintiff has performed all conditions set forth in the agreement and is not in default of same. Plaintiff claims to have been at all times ready, willing and able to accept the deeds from defendants, but defendant, John Dellis, notified plaintiff that he would not deliver the deeds and would not proceed to close title.

Plaintiff’s third cause of action claims that by refusing to convey the premises to plaintiff, defendants have converted plaintiff’s equity. Plaintiff’s fourth cause of action claims that defendant, John Dellis, formed defendant Yitheo LLC (“Yitheo”) for his personal business and benefit and at all times relevant to this action, defendant, John Dellis, was a member and/or manager of Yitheo owning at least 98% of Yitheo and controlled Yitheo without observing corporate formalities with respect to corporate or contractual obligations, co-mingling said entity with his personal funds and so dominated defendant Yitheo, that it had no separate mind, will or existence separate and apart from John Dellis. Moreover, defendant Yitheo and defendant John Dellis were fundamentally indistinguishable and John

Dellis used his dominance and control to commit and accomplish the acts that injured plaintiff herein and these actions were deliberately designed and intended to defraud plaintiff utilizing the corporate entity, Yitheo. Plaintiff claims that, as a result of the foregoing, defendant, Yitheo, is liable to plaintiff for all of the obligations of defendant, John Dellis, with respect to the premises known as 21-72 33rd Street, Astoria, New York.

Based on the above claims plaintiff seeks judgment against the defendants for; a trust to be impressed upon the premises and that deeds be executed by the defendant conveying to the plaintiff all or a portion of legal title to the premises; that the defendant, John Dellis, be adjudged specifically to perform the agreement to convey all or a portion of the premises to plaintiff; that the defendants be directed to deliver the deeds to all or a portion of the premises to plaintiff; and that the defendants be restrained by order and injunction from selling, mortgaging or otherwise encumbering or disposing of said premises; and for money damages.

Defendant John Dellis has now moved for summary judgment claiming that plaintiff cannot show an agreement or contract between her and John Dellis regarding the subject properties that does not violate the Statute of Frauds and due to plaintiff's "unclean hands" equity is not available to her. Defendants has also moved for an order cancelling the notice of pendency on these properties based on the evidence submitted in support of the summary judgment motion. Plaintiff opposes this motion.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, [Barr v. County of Albany, 50 NY2d 247 \(1980\)](#); [Miceli v. Purex, 84 AD2d 562 \(2d Dept. 1981\)](#); [Bronson v. March, 127 AD2d 810 \(2d Dept. 1987\)](#). Finally, as stated by the court in [Daliendo v. Johnson, 147 AD2d 312,317 \(2d Dept. 1989\)](#), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied.*

Defendant has submitted an agreement executed to plaintiff that specifically states John Dellis agreed to convey sixty percent of his interest in the listed properties to plaintiff. Defendant has also submitted checks made payable to various entities and individuals, including John Dellis that purport to relate to the purchase of the subject properties. The law is settled that an agreement or any contract for the sale of an interest in real property, such as the purported agreement at issue, may satisfy the Statute of Frauds and thus be subject to specific performance where it identifies the parties, describes the subject property, recites all essential terms of a complete agreement, and is signed by the party to be charged. General Obligations Law § 5-703(2). Moreover, the essential terms which must be set forth for the

memorandum to be enforceable include those terms customarily encountered in transactions of this nature. [O'Brien v West, 199 AD2d 369 \(2d Dept. 1993.\)](#) A meeting of the minds can be found only where a memorandum constitutes a complete agreement reciting all essential terms and satisfying the above-mentioned conditions (*see*, [La Barca v Altenkirch, 193 A.D.2d 586 \(2d Dept.1993.\)](#)) Furthermore, to satisfy the Statute of Frauds, the purported agreement must contain the entire contract with reasonable certainty so that the substance thereof appears from the writing alone. Parol evidence may not be utilized to provide the necessary terms so as to bring the memorandum into compliance with the requirements of the Statute of Frauds. [O'Brien v West, 199 AD2d 369 \(2d Dept. 1993.\)](#)

The application of the above principles to the facts of the instant case shows that the purported agreement satisfies the Statute of Frauds. First, the purported agreement was signed by John Dellis and there is evidence that he was authorized to convey his interest in the properties. *See generally*, General Obligations Law § 5-703; [Chan v Bay Ridge Park Hill Realty Company, 213 AD2d 467 \(2d Dept. 1994.\)](#) Moreover, the purported agreement shows that there was a meeting of the minds with respect to the alleged conveyance of the properties to plaintiff. "The meeting of the minds of parties to a real estate contract must relate to all essentials customarily encountered in such a transaction. . . mere agreement as to price is insufficient." [Lubeck Realty v Flintkote Co., 70 AD2d 800, 803 \(3rd Dept. 1991.\)](#) Here, there is evidence that suggests the parties had agreed on a price for the property and plaintiff made the required payments and John Dellis was performing his obligation by conveying the property. Furthermore, the description of the properties was sufficient to readily identify them. *See*, [Tetz v Dexter, 133 AD2d 79 \(2d Dept. 1987.\)](#) Finally, the purported agreement mentions the quality of title to be conveyed shall be a percentage of John Dellis' ownership interest. Accordingly, the court finds that there are issues of fact that the agreement was intended to be a complete contract containing all essential terms for the conveyance of the subject properties. *See*, [O'Brien v West, 199 AD2d 369 \(2d Dept. 1993\)](#), and the branch of the motion seeking summary judgment on the basis of Statute of Frauds is denied.

The branch of the motion seeking summary judgment on the grounds that equity is not available to plaintiff is denied. Defendant supports this claim with speculative assertions that plaintiff is a "gold digger" and various other derogatory attributes stemming from his interpretation of plaintiff's discovery and interrogatories. As such, there is insufficient basis to deny plaintiff her right to equitable relief in this action.

The Court notes that defendant John Dellis raises in his Reply papers issues concerning the plaintiff not making out the elements for a constructive trust and, as such, the cause of action for a constructive trust should be dismissed. This Court cannot grant relief upon a ground not raised in the original motion. [Rubens v Rodney Fund, 23 AD3d 636 \(2d Dept 2005.\)](#) In any event, if this Court were to consider this requested relief, it would be

denied. A constructive trust is only imposed upon a finding of "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" [Consumers Union of U.S., Inc. v State, 5 NY3d 327 \(2005\)](#) *citing* [Bankers Security Life Ins. Soc. v Shakerdge, 49 NY2d 939, 940 \(1980\)](#). The conflicting affidavits and documents presented, raise issues of fact as to whether a constructive trust is warranted under the circumstances. *See, Danza v Danza, 222 AD2d 481 (2d Dept 1995.)* Consequently, summary judgment on this ground would be denied.

Regarding the branch of the motion to vacate the Notice of Pendency on the subject properties, defendant relies upon the evidence submitted for the summary judgment motion and plaintiff points out that this Court, in an order dated November 3, 2008 has already rejected defendants' application to vacate the Notice of Pendency.

CPLR 6501 permits a party to effectively retard the alienability of real property without any prior judicial review. CPLR 6514 provides for the limited circumstances where cancellation of a notice of pendency is available. Under (a), the court must cancel a notice of pendency, "if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated." Under (b), the court may cancel a notice of pendency, "if the plaintiff has not commenced or prosecuted the action in good faith." Under either section, the court's scope of review is circumscribed. [5303 Realty Corp. v. O & Y Equity, 64 N.Y.2d 313 \(1984.\)](#) "One of the important factors in this regard is that the likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency." *Id.* at 320. There is little a court may do to provide relief to the property owner if the procedures prescribed in article 65 have been followed or if the action has been commenced or prosecuted in good faith.

In the instant matter, defendants have not alleged facts that suggest either mandatory or discretionary cancellation is required. They do not claim that the notice of pendency has been filed in violation of any procedural rules. Consequently, their claims are, in essence, that plaintiffs' action is without merit, which is not a basis to cancel the notice of pendency. [5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313 \(1984.\)](#) Accordingly, the motion by defendants for an order cancelling the Lis Pendens filed by plaintiff is denied. To the extent that they claim financial hardship due to the Lis Pendens, this is not a sufficient ground to cancel the Lis Pendens. [5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313 \(1984.\)](#) Based on this finding, the branch of the motion pursuant to CPLR 6514 (c) is denied.

The cross-motion by plaintiff for an order pursuant to CPLR 3126 striking defendant John Dellis' Answer for failure to comply with this Court's Discovery Order is denied. Although defendant has failed to adhere to the Compliance Conference Order, dated October 22, 2008, he has demonstrated such was not wilful and contumacious. Accordingly, the motion is denied. However, defendants must adhere to the Compliance Conference order and

Plaintiff's Discovery Demands and provide all required discovery on or before September 25, 2009. The failure to adhere to this Order shall indicate that such is wilful and contumacious and subject defendants to dismissal of their Answer.

A copy of this Order is being sent to the parties by means of facsimile transmission on July 13, 2009.

Dated: July 13, 2009

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ORIN R. KITZES, J.S.C.