

**Panetta v Kelly**

2004 NY Slip Op 30044(U)

March 10, 2004

Supreme Court, New York County

Docket Number:

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 12

*Justice*

0103212/2002

103212

PANETTA, JOSEPH  
vs  
KELLY, SHARON

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

SEQ 3

SUMMARY JUDGMENT

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**  
MAR 15 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

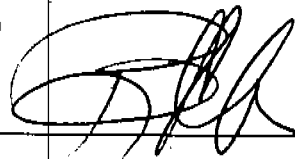
PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motions are decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/10/04

  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

**BARBARA R KAPNICK**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12

-----X  
JOSEPH PANETTA,

Plaintiff,

-against-

SHARON KELLY and JEANNE TINGO,

Defendants.  
-----X

BARBARA R. KAPNICK, J.:

**DECISION/ORDER**

Index No. 103212/02  
Motion Seq. No. 003

This action involves the ownership of a cooperative apartment located in the building known as Lincoln Towers at 205 West End Avenue, New York, New York.

Plaintiff Joseph Panetta claims that he and defendants "basically agreed" orally in April 1993 that he and defendant Sharon Kelly would **equally purchase** the shares of stock attributable to apartment 26F, and would place said shares in the name of defendant Jeanne Tingo "for convenience purposes only and as an accommodation to [him] and defendant Kelly" since the rules of the cooperative corporation's board required that the apartment be owner-occupied and Tingo was **already** a resident of Lincoln Towers.

Plaintiff further alleges that the parties orally agreed to equally share in the profits and losses, if any, from the sale of the apartment and to sell the apartment when one of the parties desired.

dispute that Tingo did not contribute to either the purchase price or to the vast majority of the maintenance payments,' but that she

This dispute arose when Tingo refused Kelly's request to transfer the apartment to her. Tingo claims that Kelly promised that the apartment would become her property upon Kelly's death. However, both Panetta and Kelly testified at their depositions that they never intended to give Tingo a gift or any other equity ownership in the unit.

Panetta's First Amended Verified Complaint seeks to recover damages for breach of contract based on defendants' refusal to sell the co-op unit (first cause of action); specific performance (second cause of action); to impose a constructive trust against defendant Tingo and the stock certificate currently in the name of

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<sup>1</sup> Tingo claims that she made some initial maintenance payments to the building management, but plaintiff and Kelly both claim that Tingo made the payments only so it would appear that they came from Tingo and that she was promptly reimbursed.

defendant Tingo (third cause of action); and to recover use and occupancy for the unit from the commencement of the action until the premises are sold and the proceeds split (fourth cause of action).

Kelly has asserted cross-claims against Tingo for common law and contractual indemnity and contribution, and specific performance and breach of contract.<sup>2</sup> Tingo has not asserted any cross-claims or counter-claims.

Plaintiff now moves for summary judgment on the grounds that: (i) the parties all testified that an agreement existed whereby plaintiff and defendant Kelly would equally purchase the apartment and equally pay the maintenance charges on the unit while placing the name of defendant Tingo on the stock certificate; (ii) plaintiff and defendant Kelly both testified that the apartment was never intended as a gift to Tingo; (iii) any promise by Kelly that the apartment would be inherited by Tingo is unenforceable absent a will and plaintiff's consent; and (iv) Tingo cannot make any showing that she detrimentally relied on any promise by Kelly.

Defendant Sharon Kelly cross-moves for an order granting her summary judgment and specific performance compelling Tingo to transfer the apartment.

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<sup>2</sup> Kelly has not asserted a cross-claim against Tingo to impose a constructive trust.

Defendant Tingo cross-moves for an order: (i) amending her answer to assert an affirmative defense of Statute of Frauds; (ii) dismissing plaintiff's contractual claims (first and second causes of action) as barred by the Statute of Frauds since there was no written contract for the conveyance of the subject real property; (iii) dismissing plaintiff's complaint in its entirety for failure to state a cause of action; (iv) denying summary judgment to plaintiff; (v) granting summary judgment dismissing plaintiff's complaint against her on the grounds that plaintiff's first and second cause of action are barred by the Statute of Frauds, and the third cause of action which seeks to impose a constructive trust must fail because Tingo had no confidential or fiduciary relationship (or any relationship and/or dealings) with plaintiff; (vi) dismissing Kelly's cross-claim against her for failure to state a cause of action; (vii) denying summary judgment to Kelly on her cross-claim; (viii) granting summary judgment dismissing defendant Kelly's cross-claim against her: **and** (ix) striking the Note of Issue or directing further disclosure by defendant **Kelly** regarding maintenance payments allegedly made by Tingo.

Pursuant to CPLR § 3025 (b), leave to amend pleadings is to "be freely given upon such terms as may be just". Defendant Tingo is, therefore, granted leave to amend her answer to assert a Statute of Frauds defense.

"Under the Statute of Frauds (General Obligations Law § 5-703), a contract for the sale of real property or a contract creating an interest in real property is void unless in writing, and the Statute is applicable to a contract purporting to create or convey an interest in a cooperative apartment (citations omitted)." Moloney v. Weingarten, 118 A.D.2d 836, 836-837 (2nd Dep't 1986), ly. to app. den. 69 N.Y.2d 608 (1987). See also, Chiana v. Chang, 137 A.D.2d 371 (1st Dep't 1988),

Thus, plaintiff's first and second causes of action which seek recovery for breach of the alleged oral agreement and specific performance of that agreement are barred by the Statute of Frauds and must be dismissed. Likewise, defendant Kelly's cross-claims against defendant Tingo which are based on said oral agreement must be dismissed.

and (4) unjust enrichment (citations omitted)." Crom Realty

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Here, however, plaintiff has not only failed to establish a confidential or fiduciary relationship with Tingo, but has failed to set forth any proof that he ever had any contact whatsoever with Tingo. Moloney v. Weingarten, supra 118 A.D.2d at 837. Moreover, based on the undisputed facts in this case, it does not appear that plaintiff could make out a case for unjust enrichment.

Plaintiff thus cannot demonstrate an entitlement to a constructive trust, The third cause of action and the fourth cause of action **for** use and occupancy must, therefore, be dismissed.

Accordingly, based on the papers submitted and the oral argument held on the record on March 19, 2003, plaintiff's motion for summary judgment and defendant Kelly's cross-motion for summary judgment are denied and defendant Tingo's cross-motion is granted to the extent of dismissing plaintiff's complaint and defendant Kelly's cross-claims.

The Clerk may enter judgment dismissing plaintiff's complaint in its entirety, as well as dismissing the cross-claims asserted by defendant Kelly against defendant Tingo, with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: March 10, 2004



BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C**

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