

**Kuferman v Scott**

2004 NY Slip Op 30356(U)

June 25, 2004

Sup Ct, Suffolk County

Docket Number: 98-26387

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 12-2-03  
ADJ. DATE 3-25-04  
Mot. Seq. # 004 - MD  
# 005 - XMD  
# 006 - XMD

-----X		
JOEL R. KUPFERMAN,	:	ANNA STERN, ESQ.
	:	Attorney for the Plaintiff
Plaintiff,	:	351 Broadway, 4 <sup>th</sup> Floor
	:	New York, New York 10013
	:	
- against -	:	JOSEPH FARALDO, ESQ.
	:	Attorney for the Defendant
	:	125-10 Queens Blvd., Suite 12
MINDY SCOTT,	:	Kew Gardens, New York 11415
	:	
Defendant.	:	
-----X		

Upon the following papers numbered 1 to 19 read on this motion ~~to restore; cross motion to dismiss; and cross motion to amend complaint~~; Notice of Motion/ Order to Show Cause and supporting papers 1-6; Notice of Cross Motion and supporting papers 7-13; 14-17; Answering Affidavits and supporting papers 18-19; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the Calendar Clerk is directed to restore this action to the court's calendar; and it is further

**ORDERED** that this motion by plaintiff Joel R. Kupferman for an order restoring this action to the calendar, is denied as moot; and it is further

**ORDERED** that the cross motion by defendant Mindy Scott for an order dismissing the complaint pursuant to CPLR 3211, is denied; and it is further

**ORDERED** that the cross motion by plaintiff Joel R. Kupferman for an order granting him leave to amend his complaint, is denied.

The facts as set forth in a previous decision of this court dated November 1, 2001, are as follows. The plaintiff, Joel Kupferman, an attorney, purchased a single-family house at 73 West

Kupferman v Scott  
Index No. 98-26387  
Page No. 2

Shore Road, in Huntington, New York, on or about March 10, 1987. The purchase price was \$197,000.00, of which he paid \$40,000.00 at the closing, and the remainder of which he obtained a fifteen year mortgage. In September, 1996, the plaintiff met the defendant, Mindy Scott, a chiropractor who owned and managed the North Shore Pain Management Center. Within weeks of their first meeting, the two entered into "an exclusive romantic relationship." In January 1997, the plaintiff and defendant decided to live together, and the plaintiff moved into the defendant's home in Centerport, New York. On July 19, 1997, the plaintiff transferred title to his West Shore Road home to the defendant. Thereafter, on December 15, 1997, the defendant obtained a mortgage on the West Shore Road property in the amount of \$147,000.00, of which approximately, \$72,000.00, went to pay off the plaintiff's original mortgage. Somewhere during these events the parties' relationship began to deteriorate, and eventually the relationship came to an end.

The plaintiff commenced this action in 1998 against the defendant to impose a constructive trust on the West Shore Road property and to restrain the defendant from transferring, encumbering, or otherwise disposing of the property. The defendant served an answer on or about December 30, 1998. On March 17, 2000, the Hon. John J.J. Jones, Jr., granted the defendant's motion to cancel the notice of pendency filed by the plaintiff against the West Shore Road property. Thereafter, on November 1, 2001, this court denied the plaintiff's motion for summary judgment and for a preliminary injunction.

The plaintiff now moves for an order restoring this action to the calendar. The plaintiff alleges that unbeknownst to him, the clerk of the court marked this action off the calendar. He contends that he had no intention of abandoning the case. He claims that he was frustrated in his attempts to move the case forward by the defendant's attorney, who finally, after many delays, refused to comply with discovery on the grounds that the defendant could not be deposed and documents could not be produced because she was incarcerated in federal prison for mail fraud. In support of his motion, the plaintiff submits copies of discovery demands which were served on the defendant's attorney, as well as letters written to the defendant's attorney demanding that the defendant comply. The plaintiff also submits a letter dated April 2, 2002, written by the defendant's attorney, Joseph A. Faraldo, wherein Mr. Faraldo states, "The difficulty with the discovery demand is the fact that my client, your adversary, is still incarcerated, which makes it extremely difficult to provide the information you requested. I will endeavor to find out her release date so that this matter can proceed forward." The plaintiff alleges that on information and belief, the defendant has served her jail sentence. He asserts that when he attempted to request that the within action be scheduled for a preliminary conference in order to obtain a discovery order, he was told by the clerk's office that the matter had been marked off the court's calendar.

The plaintiff alleges that what is at issue here is the ownership of the home which he had purchased in 1987 with all of his life's savings. He claims that he transferred the property to the

Kupferman v Scott  
Index No. 98-26387  
Page No. 3

defendant in 1997 with the understanding that, because they were romantically involved and committed to each other, and because he was suffering from clinical depression at the time, he could trust her to help manage his finances and business dealings. He asserts that he and the defendant specifically agreed and it was expressly understood that he had nominal title to the property in constructive trust and that the defendant would convey her interest in the property to him upon his request. The plaintiff alleges that in less than a year it became clear that the defendant betrayed his trust. He alleges that when the defendant refused to transfer ownership of the property back to him and refused to turnover the rental income from the property, he commenced this action. He maintains that if this action is not restored to the court's calendar, the defendant will have successfully used her federal incarceration for the purpose of perpetrating another gross injustice, namely, the theft of his home.

The defendant opposes this motion and cross-moves for an order pursuant to CPLR 3211 dismissing the complaint. She alleges that upon information and belief, the within matter was marked off the calendar due to the plaintiffs failure to proceed with the litigation and his failure to make any appropriate motion practice. She contends that while the plaintiff complains about a failure to conduct discovery, motion practice was never initiated by the plaintiff to either cause the production of the defendant or to seek appropriate relief by way of an order of preclusion or to strike the defendant's answer. The defendant alleges that she was released from incarceration in March, 2003, and plaintiff made no inquiry to her attorney as to her status or whereabouts. The defendant also alleges that the property was sold to a good faith buyer on October 6, 2003. She contends that since she no longer has title to the West Shore Road property, and since this action seeks to impose a constructive trust on the property, under the circumstances that currently exist, this court would be without power to impose a constructive trust, and discovery would be moot. Thus, argues the defendant, the complaint should be dismissed.

The plaintiff opposes the defendant's cross motion and cross-moves for leave to amend his complaint to include a cause of action for fraud in the inducement and a cause of action for conversion. In opposition to the defendant's cross motion, he alleges that it is absurd for the defendant to argue that, even if she did steal the property from him, such theft is now moot since she has sold the property to a third party. He argues that the defendant has never produced any evidence to refute his constructive trust claim. As to his proposed amendments to the complaint, the plaintiff asserts that in defiance of her agreement to hold the property in constructive trust for him, the defendant clearly obtained the property by defrauding him and then converting it for her own use and enjoyment. The plaintiff maintains that in order to ensure that he is adequately compensated for the defendant's malfeasance, it is crucial that these two causes of action be added.

The defendant opposes the plaintiffs cross motion to amend his complaint. She alleges that a cause of action for fraud in the inducement based upon these facts is time-barred. She also contends that the plaintiff has failed to plead this cause of action with a degree of specificity as

Kupferman v Scott  
Index No. 98-26387  
Page No. 4

required by CPLR 3016(b). Additionally, the defendant argues that a cause of action for conversion does not lie herein because: plaintiff had no superior right to the property having conveyed it to the defendant; plaintiff is merely seeking damages for breach of contract; and real property cannot be converted.

The plaintiffs motion to restore this action to the calendar is denied as moot. After a careful examination of the court's computerized records, the court finds that due to a clerical error, this case was incorrectly marked "case disposed" on March 17, 2000. Since this case was never disposed and since the erroneous clerical entry was not due to any act or omission of the plaintiff, there is no need for the plaintiff to restore the action. In any event, even if the situation herein were viewed as a default by the plaintiff, he has met the requirements for a motion to restore (*see, Basetti v Nour*, 287 AD2d 126, 731 NYS2d 35 [2001]).

The defendant's cross motion to dismiss the case is also denied. The court finds no merit to defendant's argument that because she has sold the property, the court is without power to impose a constructive trust. It is well settled that a trust will follow property through all changes in its shape and form, so long as the property or its proceeds are capable of identification (*see, Rogers v Rogers*, 63 NY2d 582, 483 NYS2d 976 [1984]; *Simonds v Simonds*, 45 NY2d 233, 408 NYS2d 359 [1978]; 106 *NY Jur2d*, Trusts §222). Trust funds may be pursued wherever they are found until actual restitution or collection is effected (*see, Palmer v Elco Realty Co.*, 8 NYS2d 908 [19381]). "Where a trustee in breach of trust disposes of trust property and receives other property in exchange, the beneficiaries can charge him as constructive trustee of this property or at their option can enforce an equitable lien upon it to secure their claim against the trustee for damages for breach of trust. The same remedies are applicable wherever a conscious wrongdoer uses the property of another in acquiring other property; the person whose property is so used is entitled at his option either to enforce a constructive trust or to enforce an equitable lien upon the property so acquired" (*Frier v J. W. Sales Corporation*, 261 AD 388, 392; 25 NYS2d 576, 581 [1941]; quoting 5 *Scott on Trusts*, §508 at 555 [4\* ed]). Moreover, even where the specific proceeds cannot be traced, the court is not without remedy; it may enforce a personal judgment against the wrongdoer (*see, Fur & Wool Trading Co., Ltd. v George I. Fox, Inc.*, 245 *NY* 215 [19271]). Therefore, the plaintiffs right to resort to equity has not ended simply because the defendant has disposed of the West Shore Road property.

The plaintiff's cross motion to amend his complaint to include a second cause of action for fraud in the inducement is denied. It is undisputed that the transfer of the West Shore Road property occurred in July, 1997, and that in December, 1997, the defendant took out a mortgage on the property for \$147,000.00. The statute of limitations for fraud is six years from the date of commission of the act or two years from the date of discovery, whichever is longer (CPLR 213[8]; CPLR 203[g]; *see, Smith v Sarkisian*, 63 AD2d 780, 404 NYS2d 911 [1978]). Here, the fraud complained of took place in 1997, and it was discovered by the plaintiff in 1997 when the defendant allegedly gave the plaintiff only \$3,000.00 out of the mortgage proceeds. Thus, the

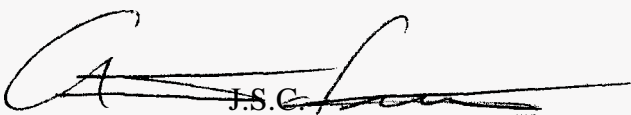
Kupferman v Scott  
 Index No. 98-26387  
 Page No. 5

plaintiffs cause of action for fraud is clearly time-barred. Nor does the proposed cause of action for fraud in the inducement relate back to the original complaint (*see*, CPLR 203[f]; *see also*, **Glatzer v Scappatura**, 116 AD2d 697, 498 NYS2d 15 [1986]). Therefore, the plaintiffs request for leave to amend his complaint to include a cause of action for fraud must be denied.

The plaintiffs request for leave to amend his complaint to add a cause of action for conversion, must also be denied. In this proposed cause of action, the plaintiff is alleging that the defendant wrongfully converted the proceeds of the 1997 mortgage, wrongfully converted the net income from the rental of the West Shore Road property from 1997 to 2003, and unlawfully sold the subject property to a good faith purchaser for value on October 6, 2003. With regard to the defendant's sale of the West Shore Road property, an action sounding in conversion does not lie where the property involved is real property (**Roemer and Featherstonhaugh, P.C. v Featherstonhaugh**, 267 AD2d 697, 699 NYS2d 603 [1999]; **Garellick v Carmel**, 141 AD2d 501, 529 NYS2d 126 [1988]; **Boll v Town of Kinderhook**, 99 AD2d 898, 472 NYS2d 496 [1984]). As to the mortgage proceeds and rental income, while money may be the subject of conversion, the same as any chattel, (**Melnick v Kukla**, 228 AD 321, 239 NYS 16 [1930]), to sustain such an action, a plaintiff must allege that he had ownership, possession or control of the money which is the subject of the action (**Fiorenti v Central Emergency Physicians, P.L.L.C.**, 187 Misc2d 805, 723 NYS2d 851 [2001]). Here, the plaintiff transferred title to the property to the defendant on July 19, 1997, prior to the defendant's alleged conversion of mortgage proceeds and rental income. Where a plaintiff relinquished his ownership rights to the money prior to the time of the alleged conversion, he cannot maintain a cause of action for conversion (*see*, **Di Siena v Di Siena**, 266 AD2d 673, 698 NYS2d 93 [1999]). Accordingly, the plaintiffs cross motion for leave to amend his complaint is denied.

The parties are directed to appear before this court on the 29th day of July, 2004, at 9:30am, in Courtroom 5, of the Arthur M. Cromarty Court Complex, 210 Center Drive, Riverhead, N.Y., for a conference. Movant shall serve a copy of this order upon the calendar clerk of the court.

Dated: June 25, 2004

  
 \_\_\_\_\_ J.S. Glatzer

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION