

**Graen-Lutz v Lutz**

2007 NY Slip Op 30392(U)

March 26, 2007

Supreme Court, Suffolk County

Docket Number: 0011902

Judge: Emily Pines

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**Supreme Court - State of New York**  
**J.A.S. Term, Part 23, Suffolk County**

*Present:*

**Hon. Emily Pines**  
Justice Supreme Court

\_\_\_\_\_X  
MARY GRAEN-LUTZ,

Plaintiff,

-against-

NANCY M. LUTZ,  
  
Defendant.  
\_\_\_\_\_X

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**DECISION AFTER TRIAL**

In this action between mother and daughter, to impose a constructive trust, with regard to shares of a co-operative corporation and proprietary lease, Plaintiff, mother, alleges that she agreed to place her daughter's name, NANCY LUTZ, on the lease and stock certificate, as a joint tenant of the apartment she was purchasing, not as a gift, but in return for her daughter's promise to aid her in the care of her ailing husband, the Defendant's father. In view of her daughter's breach of their "agreement", Plaintiff seeks to have title transferred solely to the

Plaintiff's name. The Defendant opposes Plaintiff's claim, denying the existence of any such agreement, and alleging that the placement of her name on the shares and proprietary lease, as a joint tenant, with rights of survivorship, was both a gift and a fair part of her parents' estate plan, involving their three children. As such, Defendant argues that there exists no basis for imposition of the equitable doctrine, when now that Plaintiff has decided that she disapproves of Defendant's living partner, Plaintiff attempts to take back what has been given without condition. Plaintiff sues, in the alternative, seeking a Partition of the subject cooperative, altering ownership of the shares from a joint tenancy to a tenancy in common without rights of survivorship, based on the falling out of the joint owners. Defendant opposes this request for relief on the grounds that to do so would alter the Plaintiff's gift and would violate the parties' proprietary lease by not having received the imprimatur of the Lessor. Finally, the Complaint seeks a share of the rental value of the apartment from the date of the Defendant's breach of the agreement to the present.

During the brief trial of this action, both the Plaintiff and her oldest daughter, Carol, testified on Plaintiff's behalf. Plaintiff stated on her direct examination that she moved from Florida to Hauppauge with her ailing husband, because she needed her family's help with his care. Shortly after coming here in 1997, she purchased a cooperative apartment for herself and her husband. She testified that her older daughter came to her home everyday and helped with the care of her husband, who had trouble walking and was essentially bedridden. In return for that daughter's aid, she purchased a cooperative apartment next door to her own, naming herself and her

daughter, Carol, as joint tenants. Carol stated that it was understood that she did this, in part, because the Plaintiff needed the help and that Carol fulfilled her part of the bargain, until her father's death in 2005. However, the Plaintiff testified that she never had such a conversation with her eldest daughter because Carol always was present and helpful and that no such condition was necessary.

Plaintiff stated that in 1997 or 1998, the Defendant began having marital problems, moved into her older sister's apartment, and began looking for a place of her own. Plaintiff testified that she offered to purchase a cooperative apartment across the street from her own, for Defendant and her children, with the understanding that the Defendant would also aid in the care of the ailing husband. She states that the Defendant fulfilled her part of the bargain for several years and later got into a fight with her over the Defendant's boyfriend, pushed her, and never came back. This occurred, according to Plaintiff sometime in 2002. The Plaintiff's testimony was essentially supported by the testimony of her oldest daughter Carol, although Carol was not present when the parties had their argument and only heard of it from each party. Carol also stated that everyone "understood" that the Defendant would aid in the care of her father and that was part of the deal.

On her cross examination, the Plaintiff, who is eighty-six years old, essentially forgot why she was in Court, could not remember that she had ever sued her daughter and only spoke about her disapproval of the Defendant's living mate. However, during her deposition testimony, Plaintiff did state that she had received estate planning advice that suggested she give one cooperative apartment to each of her

three children. Following a brief recess, the attorneys for both parties chose to continue the trial.

Defendant testified that her mother approached her when she was living with her sister and going through her divorce. According to Defendant, the Plaintiff offered to purchase a cooperative apartment across the street from her own, and to allow the Defendant to own the apartment in the same manner as her older sister, as a joint tenant with a right of survivorship, as a means of estate planning. She states that the Plaintiff also told her that the third child, a brother, would inherit the parents' cooperative apartment. According to the Defendant, the apartment was purchased as a gift, the only understanding being that it was a part of her parents' estate plan and that the plan sought to divide the parents' assets in a fair and even manner with each child getting one cooperative apartment in the same complex and of the same approximate size and value. According to Defendant that was the only reason ever given to her by Plaintiff for Plaintiff's purchase of the cooperative apartment.

The Defendant stated further that several years after the purchase, in or about September 2002, her mother kicked her out of the mother and father's apartment, after telling her that she did not approve of the Defendant's boyfriend, who had been spending significant amounts of time at both Defendant's and Plaintiff's residences. She stated that her mother told her to leave and not to return. Until that point, according to Defendant both she and her boyfriend had been coming on a regular basis to help care for her father.

Both parties testified that at this time, the Plaintiff's granddaughter and great grandson are residing

at the cooperative apartment in question and that the granddaughter suffers from a disability, is blind in one eye and is receiving SSD. When asked if she wished for the granddaughter to leave or be removed from the apartment, the Plaintiff stated no and also stated that she has a relationship with the granddaughter, despite having never reconciled with her daughter, Nancy. Defendant testified that all maintenance has and continues to be paid by Defendant and her daughter.

### CONSTRUCTIVE TRUST

Four requirements are often required to be met in whole or in part before a Court will impose a constructive trust on real or personal property. These include the following: 1) a confidential or fiduciary relation; 2) a promise; 3) a transfer in reliance on the promise, and 4) unjust enrichment. **Doxey v Glen Cove Community Development Agency**, 28 A.D. 3d 511, 813 N.Y.S. 2d 743 (2d Dep't 2006). Thus, a constructive trust may be imposed when legal title to property has been acquired under such circumstances that the holder of legal title may not, in good conscience, retain such beneficial interest. **Sharp v Kosmalski**, 40 NY 2d 119, 386 N.Y.S. 2d 72 (1976).

A Partition is an action or proceeding by which co-owners of property cause it to be divided into as many shares as there are owners, or, if not possible, to be sold and the proceeds distributed accordingly. **see**, 24 N.Y. Jur. 2d, **Cotenancy & Partition**, § 33, § 116, 3A. The Partition can be effectuated by mutual consent of the parties or, by judicial order on application of one of the parties. **see, Chang v Chang**, 137 A.D. 2d 371, 529 N.Y.S. 2d 294 (1<sup>st</sup> Dep't 1988). Like the action for

imposition of a constructive trust, a partition action is founded in equity upon the notion that the facts presented demonstrate a sufficient showing for equitable interference. **see, Loker v Edmans**, 204 A.D. 223, 197 N.Y.S. 2d 857 ( 1923).

Applying principles of equity to the case at Bar, the Court finds that the Plaintiff has failed to prove her case. While the rules concerning constructive trusts are not subject to rigid application, the Plaintiff has never stated that there was an express agreement between herself and the Defendant and she contradicted herself concerning whether there was ever even an understanding between her and the Defendant. Although the older daughter stated that she was told that she received her apartment in return for aiding in the care of her father, the Plaintiff contradicted that assertion in her direct testimony and stated that such words were never said nor implied. On the other hand, the Defendant's testimony that the purchase of the co-operative apartment was part of her parents' overall estate plan and that she would be getting a share equal to that of her brother and sister, was, indeed, credible. Accordingly, the Court finds the Defendant's statement that the purchase of the cooperative apartment for Defendant was a gift to be what in fact occurred, as it did with the purchase of the apartment for her older sister. This is also consistent with the Plaintiff's deposition testimony . Based on this finding, the Court finds that although the parties had a confidential relationship and the Plaintiff did purchase the shares of the cooperative, there was never a promise by the Defendant nor any evidence of unjust enrichment. Indeed, the contrary is true, since three essentially identical cooperatives within the same complex appear to be divided among three children.

For the same reasons, there does not appear to be any


equitable reason to grant a partition of the cooperative shares. To do so would effectively effectuate a return of what this Court has found to have been granted to the Defendant, by her credible testimony, as a gift.

With regard to the Complaint's request for rent, no testimony was provided to the Court concerning the rental value of the subject cooperative. In addition, the Plaintiff herself testified that she had no desire to dispossess her disabled granddaughter, the current resident, who is participating, with the Defendant, in paying maintenance. Under the circumstances, the Court is not in a position to award the Plaintiff rental payments.

For all of the above reasons, the Court finds that Plaintiff has failed to sustain her burden of proving equitable entitlement to either a constrictive trust or to partition, and the Complaint is dismissed.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 26, 2007  
Riverhead, New York

  
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Emily Pines  
J. S. C.