

Varanelli v Varanelli

2007 NY Slip Op 31321(U)

April 19, 2007

Supreme Court, Suffolk County

Docket Number: 0022517/2005

Judge: Peter Fox Cohalan

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INDEX # 22517-05
RETURN DATE: 5-17-06
MOT. SEQ. # 001 & 002

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY**

PRESENT:
Hon. PETER FOX COHALAN

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JOHN C. VARANELLI and CORNERSTONE BUILDING
& RESTORATION, INC.,

CALENDAR DATE: December 13, 2006
MNEMONIC: MG; XMD

Plaintiffs,

PLTF'S/PET'S ATTORNEY:

-against-

FOSTER & VANDENBURGH
220 Roanoke Ave.
Riverhead, NY 11901

JOHN R. VARANELLI,

Defendant.

DEFT'S/RESP ATTORNEY:

RICHARD M. GORDON & ASSOCIATES
780 New York Ave.
Huntington, NY 11743

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Upon the following papers numbered 1 to 48 read on this motion to consolidate and for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-12; Notice of Cross-Motion and supporting papers 13-37; Answering Affidavits and supporting papers 38-43; Replying Affidavits and supporting papers 44-48; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the plaintiffs to consolidate a landlord-tenant action in Suffolk County Sixth District Court with the above captioned Supreme Court action for a constructive trust on property located at 150 Montauk Highway in East Moriches, Suffolk County on Long Island, New York is hereby granted in its entirety. The cross-motion by the defendant for summary judgment pursuant to CPLR §3212 is hereby denied as there are readily identifiable fact issues which preclude summary disposition as a matter of law.

The plaintiffs, John C. Varanelli and his company, Cornerstone Building & Restoration, Inc., instituted this action against the plaintiff's son, defendant John R. Varanelli, seeking the imposition of a constructive trust on property alleged to be nominally in the name of defendant but purchased by the plaintiff John C. Varanelli. The plaintiff previously resided at the marital residence at 44 Driftwood Lane in East Moriches with his now estranged wife, the mother of the defendant, but the plaintiff now resides at the residence at 150 Montauk Highway, East Moriches on which he claims a constructive trust with the defendant (who is the petitioner in the landlord-tenant action in the Suffolk County Sixth District Court). The plaintiffs allege that the residence at 150 Montauk Highway was purchased by the plaintiff with Cornerstone Building & Restoration, Inc. (hereinafter Cornerstone) funds and that the mortgage on the property is paid with Cornerstone funds but that the defendant's name was placed on the deed to provide the defendant with a tax abatement and also to build up his credit rating. The plaintiffs' construction of the residence, as attested to by the defendant in his cross-motion, was to provide additional storage for Cornerstone as well as additional parking and also to rent the upstairs to Linda DeWilde, the plaintiffs' employee. The defendant resides at 49 Driftwood Lane near his mother's home at 44 Driftwood Lane and the plaintiff alleges that his son has unnecessarily involved himself in the contested matrimonial action between his parents and in seeking to deprive him of assets.

The defendant denies the allegations and claims that the residence was given to him as a gift by his parents and that the property at 150 Montauk Highway was to be a rental property to generate income and not to provide a residence for his father and his alleged girlfriend, Linda DeWilde. The defendant thereafter instituted an action in Suffolk County Sixth District Court in eviction seeking to have his father removed from the residence at 150 Montauk Highway. The plaintiffs now seek to consolidate the landlord-tenant action with this action for a constructive trust and a stay of the eviction proceedings pending a resolution of the Supreme Court action for a constructive trust. The defendant opposes the requested relief and cross-moves for summary judgment pursuant to CPLR §3212 claiming that the documentary evidence supports his ownership of the house as a matter of law. The plaintiffs oppose the summary disposition cross-motion arguing there are numerous issues of fact which preclude judgment as a matter of law.

For the following reasons, the plaintiffs' motion for consolidation of the Suffolk County Sixth District Court landlord tenant proceeding under Index # L & T 2881-2005 is granted and the defendant's cross-motion for summary judgment and dismissal of the plaintiffs' complaint pursuant to CPLR §3212 is denied.

The power to order consolidation rests in the sound discretion of the Court and is appropriate where it involves common questions of law and fact. **Mideal Homes Corp. v. L & C Concrete Works, Inc.**, 90 AD2d 789, 455 NYS2d 394 (2nd Dept. 1982). The common bond in both fact and law between the instant Supreme Court case for constructive trust and the landlord-tenant proceeding in the lower court is the issue of the rightful owner of the property located at 150 Montauk Highway in East Moriches, New York. The issue presented is common to both actions, involves the same parties and requires this Court to determine the ownership of the residence at issue. Consolidation is not only preferred but mandated to avoid not only inconsistent findings but in the interest of judicial economy, the interest of justice and the ease of decision making where common issues prevail. **Amtorg Trading Corp. v. Broadway & 56th Street Assoc.**, 191 AD2d 212, 594 NYS2d 204 (1st Dept. 1993).

The plaintiffs' motion for an order consolidating the above Suffolk County District Court action under Index # L & T 2881-2005 with this Court's action under Index # 22517-05 pursuant to CPLR 602 is granted to the extent that the Court directs a joint trial of these actions.

The action will proceed under the joint caption of these actions as listed above. All matters of trial practice are reserved until the joint trial. The Court directs that separate notes of issue and certificates of readiness be filed and that separate fees be paid on each of the actions here consolidated. Each party shall be entitled to enter a separate bill of costs. Each plaintiff shall also file a Request for Judicial Intervention (RJI) and pay such fee as required, if an RJI on each action has not previously been purchased.

All parties shall exchange any matter previously received through pre-trial discovery with any party so demanding, if not previously provided, and the plaintiff is directed to

discovery with any party so demanding, if not previously provided, and the plaintiff is directed to serve a copy of this order on the Calendar Clerk of this Court. The plaintiff is also directed to serve a copy of this order on the Clerk of the Suffolk County Sixth District Court who is directed to forward the file of this matter under Index # L & T 2881-2005 to the Clerk of the Supreme Court of Suffolk County pursuant to CPLR §511 (d).

As to the defendant's cross-motion for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212, that motion is denied.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. *Elzer v. Nassau County*, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); *Steven v. Parker*, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); *Gaeta v. New York News, Inc.*, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in *Sillman v. Twentieth Century Fox*, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*DiMenna & Sons v. City of New York*, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is 'arguable' (*Barnett v. Jacobs*, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, *Thomas v. Drake*, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. *S.J. Capelin Assoc., v. Globe*, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar after looking at the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [*Robinson v. Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact as to the true ownership of the property in question especially in light of the monies clearly expended by the plaintiff corporation, Cornerstone, and the lack of a funding trail by the defendant in purchasing the residence other than to claim it was a gift from his parents. A constructive trust may be imposed upon the finding of four (4) elements (1) a confidential or fiduciary relationship, (2) a promise, express or

implied, (3) a transfer in reliance thereupon, and (4) unjust enrichment. *Sharp v. Kosmalski*, 40 NY2d 119, 386 NYS2d 721 (1976); *Scivoletti v. Marsala*, 97 AD2d 401, 467 NYS2d 268 (2nd Dept. 1983). As the Court recently stated in *Iwanow v. Iwanow*, AD3d , NYS2d (2nd Dept. 2007) WL1018219;

“The constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice (see *Simonds v. Simonds*, 45 N.Y.2d 233, 241; *Sharp v. Kosmalski*, *supra* at 123; *Natasi v. Natasi*, *supra* at 39). Performance of a wrongful act by the party unjustly enriched is not required. Rather, what is required, generally, is that a party ‘hold property under such circumstances that in equity and good conscience he [or she] ought not to retain it’ *Simonds v. Simonds*, *supra*.”

As noted in *Simonds*, *supra* at 251 citing to *Beatty v. Guggenheim Exploration Co.*, 225 NY 380, 386, 122 NE 378, 380 wherein the Court stated: “In the words of Judge Cardozo, (a) constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”

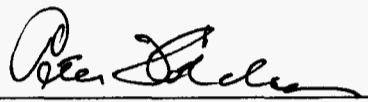
Here, the plaintiffs allege a confidential relationship between both the father as a plaintiff and his son, the defendant, and a “marital property” relationship with a promise to transfer the property to the son in name only for the defendant to establish credit and provide some favorable tax claims but definitely not to exercise ownership or control over the property. These facts along with the fact that the property was earmarked for the Cornerstone business to raise rental income, for storage and parking and not for defendant’s benefit lay the basis for a claim of unjust enrichment as to the defendant to the detriment of the plaintiffs. The plaintiffs point out the defendant was not involved in the planning, construction or financing of the property nor did he monitor the project or involve himself in Cornerstone’s planning with regard to the rental of the property, other than having his name put on the deed by his parents. In fact, the plaintiffs assert that they built this residence next to the Cornerstone business to provide additional storage, parking and a rental residence for the plaintiff’s employee, Linda DeWilde. The defendant concurs with this in the affidavit attached to defendant’s cross-motion for summary disposition. The defendant also admits that he did not have the financial resources to purchase the property, seemingly in an attempt to support his claim of a gift; but this lends credence to the plaintiffs’ claim that the defendant’s name was on the property in name only so as to establish credit but was always viewed and understood to be the father’s property and that of his corporation, Cornerstone. Anything otherwise, it is argued, would defeat the very purpose of the residence to be income-producing and to provide storage and additional parking for the plaintiffs’ business next door. According to the defendant’s claims, his authority to remove Cornerstone materials and prevent business parking would defeat the very purpose for the residence’s construction.

Clearly, there are numerous issues of fact as to the ownership of the property, *i.e.*, the manner in which it was acquired by the defendant, the fact of the monthly payments on the mortgage by the plaintiff through his company, Cornerstone, rather than by the defendant and the inescapable fact that a marital action between the plaintiff and the defendant's mother is pending wherein this property may be in issue. All these issues present questions of fact and issues of credibility involving the parties.

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. ***VanNoy v. Corinth Central School District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). Accordingly, the defendant's cross-motion for summary judgment and dismissal of the plaintiff's action for the imposition of a constructive trust pursuant to CPLR §3212 is hereby denied in its entirety.

The foregoing constitutes the decision of the Court.

Dated: April 19, 2007



J.S.C.