| **Dickson v Dickson** |
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| 2007 NY Slip Op 33958(U) |
| December 10, 2007 |
| Supreme Court, Rensselaer County |
| Docket Number: 0219228/2007 |
| Judge: George B. Ceresia |
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[* 1 ]

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

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JOSEPH DICKSON,

Plaintiff,

-against-

PHYLLIS DICKSON,

Defendant.

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All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0712-06 Index No. 219228

Appearances: Nestler & Gibson, Attorneys At Law
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**DECISION/ORDER**

George B. Ceresia, Jr., Justice

The above-captioned action arises out of the purchase of a parcel of real property located at 197 9th Street, Troy, New York by the defendant on March 10, 2000. Plaintiff alleges that he contributed funds towards the purchase of the house, as well as advancing cash to the defendant for payments on the mortgage, taxes and maintenance. He maintains that he personally rehabilitated and remodeled the house He alleges that since January 2006

the defendant has excluded him from the residence. He commenced the action to, inter alia, impose a constructive trust upon the real property, for return of his personal property and for unjust enrichment. Defendant indicates that although the parties lived together, the plaintiff did not contribute money in any meaningful way. She alleges that plaintiff was removed from the premises by Rensselaer County Family Court after he assaulted his daughter. Defendant's answer contains counterclaims for conversion of personal property, trespass and unjust enrichment.

The defendant has made a motion for summary judgment to dismiss the complaint. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, supra; Alvarez v. Prospect Hosp., supra; see also Wahila v. Kerr 204 AD2d 935, 936-937 [3rd Dept., 1994]). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [3rd Dept., 1995];

Boyce v Vazquez, 249 AD2d 724, 726 [3rd Dept., 1998]).

In addition, a party's burden on a motion for summary judgement is not satisfied by merely pointing to gaps in its adversary's proof. To succeed, there must be affirmative evidentiary proof demonstrating the movant's right to judgment as a matter of law. Until that condition is met, the strength of the opponent's proof is immaterial (see Antonucci v Emeco Industries, Inc., 223 AD2d 913, 914 [3rd Dept., 1996]; Rothbard v Colgate University, 235 AD2d 675, 678 [3rd Dept., 1997]; Clark v Globe Business Furniture Inc., 237 AD2d 846, 847 [3rd Dept., March 20, 1997]; Moffett v Harrison and Burrowes Bridge Contractors Inc., 266 AD2d 652, 654 [3rd Dept., 1999]). "'[A] movant's failure to satisfy his or her burden on a summary judgment motion requires denial of the motion, regardless of the sufficiency of the opposing papers'" (Ames v Paquin, 40 AD3d 1379 [3rd Dept., 2007], quoting Serrano v Canton, 299 AD2d 703, 705 [2002]).

Defendant maintains that the statute of frauds is a complete bar to plaintiff's first cause of action. It is well settled, however, that, "the statute of frauds is not a defense to an action seeking the imposition of a constructive trust" (Maynor v Pellegrino, 226 AD2d 883, supra, citing Delango v Delango, 203 AD2d 319 [2nd Dept., 1994][1]). The Court accordingly finds that defendant's argument has no merit.

Defendant next argues that she is entitled to summary judgment on plaintiff's first

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[1]The Court has reviewed the case of Bontecou v Goldman (103 AD2d 732 [2nd Dept., 1984]) cited by the defendant. In Bontecou the Court found that the facts set forth in plaintiffs' complaint were insufficient to establish a cause of action for imposition of a constructive trust, and that therefore the parties' alleged oral agreement was barred by the statute of frauds.

cause of action by reason that plaintiff never owned the subject real property, and therefore he never transferred the property to her. As stated in Cinquemani v Lazio (37 AD3d 882 [3rd Dept., 2007]) "[t]he elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon and unjust enrichment" (id., at p. 882 [citations omitted]; see also Peebles v Peebles, 40 AD3d 1388, 1390 [3rd Dept., 2007]; Moak v Raynor, 28 AD3d 900, 902 [3rd Dept., 2006]; Leire v Anderson-Leire, 22 AD3d 944, 945-946 [3rd Dept., 2005]). Notably, plaintiff's claim is not that he transferred real property to the defendant. He acknowledges he was never a title owner. Rather plaintiff's claim is that in exchange for defendant's promise that she would hold the real property for the benefit of both parties, he advanced a portion of the purchase price, and (since March 2000) money for mortgage payments and taxes; and that he maintained and improved the property at his own expense through his personal effort. This, in the Court's view is sufficient to state a cause of action to impose a constructive trust (see e.g., Williams v Lynch, 245 AD2d 715 [3rd Dept., 1997])

Turning to plaintiff's second cause of action, which seeks recovery of items of personal property, defendant argues that (1) the cause of action lacks merit by reason that defendant will not be able to prove what items of personal property he owned, and (2) that the cause of action is more appropriately brought in small claims court. As noted above, a moving party does not satisfy his or her burden of proof by arguing that the nonmoving party is unable to prove his or her case. It is up to the moving party to affirmatively

demonstrate entitlement to summary judgment. The Court finds that defendant failed to meet her burden on the issue. With respect to defendant's second argument, the Court finds that it does not serve as a ground to grant summary judgment to the defendant. Moreover, Supreme Court, as a court of general jurisdiction, has full authority to adjudicate the claim. In addition, and apart from all of the foregoing, defendant has failed to demonstrate that judicial economy would be furthered by a severance and transfer of the cause of action to a lower court.

Defendant's next argument is that plaintiff's third cause of action, sounding in unjust enrichment, is duplicative of his first cause of action. It is well settled that a cause of action for unjust enrichment requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff (see Baron v Pfizer, Inc., 42 AD3d 627, 629-630 [3rd Dept., 2007]; Clifford R. Gray, Inc. v Le Chase Construction Services, LLC, 31 AD3d 983, 987-988 [3rd Dept., 2006]; Clark v Daby, 300 AD2d 732, 732-733 [3rd Dept., 2002]). Significantly, "[a] constructive trust is an equitable remedy available when the holder of the legal title may not in good conscience retain a beneficial interest" (Wilcox v Wilcox, 233 AD2d 565, 566 [3rd Dept., 1996] citing Terrille v Terrille, 171 AD2d 906, 907). "Stated differently, the constructive trust doctrine is a fraud-rectifying rather than an intent-enforcing remedy" (id., quotations and citations omitted). As noted in Matter of Witbeck v La Fay (245 AD2d 848 [3rd Dept., 1997]) "'[t]he term "unjust enrichment" does

not signify a single well-defined cause of action'" (id., at 850, quoting 22A NY Jur 2d, Contracts, § 512, at 226). "Rather, such an action is for restitution or based upon quasi-contract (id.). By reason of the foregoing it is clear that the two causes of action, imposition of a constructive trust and unjust enrichment, are separate and distinct, both as to their elements, and with regard to their origin and purpose. The Court finds that the third cause of action is not duplicative of the first.

With regard to the defendant's remaining arguments, that plaintiff was not unjustly enriched and that plaintiff has unclean hands, defendant marshals a number of arguments having varying degrees of relevancy to the instant matter: that plaintiff has twenty children with seven different women; that plaintiff never paid rent to the defendant the entire time he resided at the subject premises; that plaintiff collected $500.00 rent from his son while his son resided at the subject premises; that he was ordered out of the house by Rensselaer County Family Court after having "smacked" his daughter in the face; and that he has attacked other women with whom he had a personal relationship. The Court observes that defendant failed to submit her own affidavit on the instant motion to affirmatively support any of these claims with factual averments. It is well settled that an attorney's affidavit, not based upon personal knowledge, is without value (see, Hasbrouck v. City of Gloversville, 102 AD2d 905; Romel V. Reale, 155 AD2d 747 [3rd Dept., 1989]; Bronson v Algonquin Lodge Association, Inc., 295 AD2d 681 [3rd Dept., 2002]; Bova v Vinciguerra, 139 AD2d 797, 798 [3rd Dept. 1988]). The Court finds that defendant failed to carry her burden of

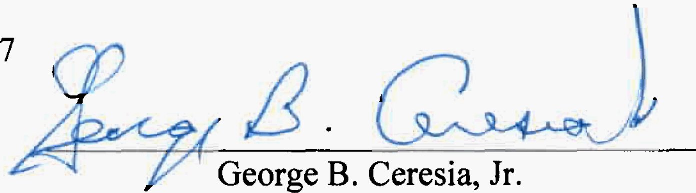
proof on the motion.

Accordingly, it is

**ORDERED**, that defendant's motion for summary judgment is denied.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the plaintiff, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: December 10, 2007
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated October 15, 2007, Supporting Papers and Exhibits
2. Reply Affidavit in Opposition To Defendant's Motion For Summary Judgment of Joseph Dickson, sworn to October 26, 2007, Supporting Papers and Exhibits