

Smith v Reilly

2008 NY Slip Op 30263(U)

January 23, 2008

Supreme Court, Suffolk County

Docket Number: 0035725/2007

Judge: Martin J. Kerins

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claims that this was done to avoid being turned down for a mortgage as a result of their history of credit problems. She also claims that the Smiths were promised that they could remain in the premises for the remainder of their lives without having to pay rent. Plaintiff has attached a copy of both deeds to this motion. Apparently, James Hulme, Esq. represented both the Smiths and Reillys on this transfer of the property. The Smiths' daughter, Mari Joe Reilly, died on August 6, 2005. Plaintiff further avers that her husband, Joseph Smith has severe Alzheimer's disease and resides at the Riverhead Health Center.

Mrs. Smith maintains that the Reillys obtained a \$260,000.00 mortgage on the property, repaid the Smiths' mortgage of \$198,035.00 from those proceeds, and retained in excess of \$50,000.00.

In August 2004, apparently around the time of the transfer of title, the defendant Reilly, obtained a Power of Attorney over her income, as well as her husband's income. Her income includes her monthly Social Security benefit. Her husband's income amounts to a total income of approximately \$3700 a month, from a military pension, IRA, and Social Security retirement benefits. Plaintiff claims that these funds are used by defendant to pay the mortgage and taxes on the property.

In opposition, the defendant, Robert Reilly, notes the number of times Mr. and Mrs. Smith filed for bankruptcy in order to avoid foreclosure proceedings. He also contends that it was the Smiths' attorney who contacted the Reillys about buying the Smith's home in order to prevent it from being sold in foreclosure. The Reillys were concerned about purchasing the home and renting it to the Smiths in light of their poor credit history and their inability to maintain the premises. The Smiths kept a large number of animals in the house and did not clean their feces and urine. Mr. Reilly also lists the extensive repairs that he made to the home. These included among other things, a new roof, new cesspool, replaced windows and siding, new furnace and burner unit and removed and replaced the oil tank.

In any event, the Reillys agreed to purchase the home and allow the Smiths to reside there as tenants. However, he claims that such agreement was contingent upon the conditions that they maintain and clean the home and pay rent in the amount of the mortgage, etc. If they abided by those conditions, they would be able to reside there until a point in time that they were financially, physically, or mentally unable to maintain the home.

The defendant denies there was ever any agreement or consideration to give the Smiths a life estate. Moreover, soon after the closing the Smiths gave the Reillys a power of attorney over their finances. However, when Mr. Smith was moved to a nursing home this caused an additional expense. Further, Mrs. Smith neglected to take care of her pets. He notes that she is 82 years of age and the house consists of three bedrooms and two bathrooms. He argues that it is too large for her to afford and maintain.

When Mr. Reilly suggested that she move to a smaller home or apartment that would be better suited for her, she refused. At that point, the defendant began eviction proceedings in the Town

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Justice Court of Southampton Town. He planned on moving her to more suitable living accommodations.

The affidavit provided by James Hulme, Esq., states that he represented the Smiths and Reillys on the transfer of title to the property. He further notes that the purpose of the transfer of the property was to help the Smiths with their debts. He further claims that the defendants' intent was to aide the Smiths to reside there for the remainder of their lives. Mr. Hulme does not indicate whether there were any conditions attached to the agreement.

Plaintiff's complaint seeks a constructive trust granting her a life estate in the subject premises. By order to show cause she seeks a preliminary injunction preventing the defendant from taking action to remove her from the subject premises; from transferring, conveying, or encumbering the property; prohibiting the defendant from entering the residence without her consent; and removing the summary proceeding pending in the Southampton Town Justice Court to this Court.

A constructive trust is an equitable remedy that is invoked when property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest in the property (*Beatty v Guggenheim Exploration Co.*, 225 NY 380). The party seeking to impress a constructive trust on property has the burden of proving that such a trust is necessary to prevent unjust enrichment. Although a writing is not required in an action seeking to impress a constructive trust, (General Obligations Law §5-703[1]; *McGrath v Hilding*, 41 NY2d 625; *Vunasco v Angiolelli*, 97 AD2d 462), the following four requirements must be present: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment (*Sharp v Kosmaiski*, 40 NY2d 119). In ascertaining unjust enrichment, the conveyance should be interpreted, "not literally or irrespective of its setting, but sensibly and broadly with all its human implications" (*Sinclair v Purdy*, 235 NY 245, 254).

In order to impose a constructive trust "a plaintiff must plead and prove four essential elements: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) transfer in reliance thereon, and (4) unjust enrichment caused by the breach of the promise (*Valvo v Spitale*, 305 AD2d 668, citations omitted). The elements, however, are not rigid but are flexible considerations (see *Crown Realty Co. v Crown Heights Jewish Community Council*, 175 AD2d 151).

A constructive trust does not, by its very nature, require a writing (see *Vanasco v Angiolelli*, 97 AD 2d 462). The statute of frauds is not a defense to an action seeking the imposition of a constructive trust (see *Cilibrasi v Gagliardotto*, 297 AD2d 778; *Delango v Delango*, 203 AD2d 319; *Gottlieb v Gottlieb*, 166 AD2d 413. Moreover, there are triable issues of fact with respect to the plaintiffs' claim for the imposition of a constructive trust on the premises (see *Mollin v Lerner*, 258 AD2d 444; *Spirt v Spirt*, 209 AD2d 688).

Regarding the motion for a preliminary injunction, it is well settled that in order to obtain a preliminary injunction the movant must demonstrate a likelihood of ultimate success on the merits,

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irreparable harm unless the injunction is granted and that the equities are balanced in her favor (*see Aetna Ins. Co v Capasso*, 75 NY2d 860; *Grant Co v Srogi*, 52 NY2d 496). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that would render a judgment ineffectual (*see Moy v Umeki*, 10 AD3d 604). Here, the plaintiff's allegations are sufficient to support a cause of action for a constructive trust. Although the defendant sharply disputes the allegations, the presence of issues of fact does not require the denial of the motion (*see Moy v Umeki*, supra). Indeed, the denial of a motion for a preliminary injunction would be inconsistent with the purposes of the equitable doctrine of constructive trust, namely, to prevent a breach of trust and to restore to the plaintiff real property in which she alleges she has a life estate (*see Hightower v Reid*, 5 AD3d 440). Under these circumstances, the balancing of equities warrants the granting of the preliminary injunction to maintain the status quo (*see Moy v Umeki*, supra; *Hightower v Reid*, supra).

Accordingly, the motion for a preliminary injunction is granted to the extent that the defendant is restrained from selling, transferring or encumbering the property located at 45 Apaucuck Point Rd., Westhampton, NY. Further, the summary proceeding pending in the Southampton Town Justice Court, Docket No: 07081372 is stayed. However, the motion to consolidate that action with this action is denied. Plaintiff has presented no arguments in support of that request. In all other respects the motion for a preliminary injunction is denied. To the extent not continued by the preliminary injunction that has been granted, the temporary restraining order is vacated. Moreover, the plaintiff is required to post an undertaking (*see* CPLR 6312[b]; *Moy v Umeki*, supra; *Hightower v Reid*, supra). If the parties cannot stipulate to an appropriate amount, the parties shall submit papers to the Court regarding the amount of the undertaking no later than March 7, 2008.

As a final note, plaintiff's reply submitted in support of the motion is based solely on the affidavit of counsel. Except as to those matters alleged to be on her personal knowledge, the Court has not considered that affidavit.

Dated: January 23, 2008
RIVERHEAD, NY


Martin J. Kerins, J. S. C.

FINAL DISPOSITION _____

NON-FINAL DISPOSITION _____