

Gamman v Silverman
2008 NY Slip Op 30576(U)
February 22, 2008
Supreme Court, Nassau County
Docket Number: 5850-06/
Judge: Kenneth A. Davis
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SCAP

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

JOAN D. GAMMAN,

Plaintiff,

SUBMISSION DATE: 1/22/08
INDEX No.: 5850/06

-against-

JILL H. SILVERMAN,

MOTION SEQUENCE # 5,6

Defendants.

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... XX
- Answering Papers..... X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

INTRODUCTION

This is a motion by the Defendant for summary judgment pursuant to Civil Practice Law and Rules § 3212 dismissing the complaint. The Plaintiff cross-moves for an Order denying the motion in all respects and granting the cross-motion in all respects. The cross-motion does not request specific relief, and will be treated as opposition to the underlying motion by the Defendant.

BACKGROUND

The parties commenced an intimate relationship in 1991. They

soon resided with one another at 5 Hanover Street, Floral Park, New York, a home owned by the Plaintiff and her brother. Because of unpleasantness among the parties, the Plaintiff's brother and his girlfriend, the parties vacated 5 Hanover Street, and leased a home at 106 Central Avenue, New Hyde Park, New York. After some two years, discussions arose with respect to the purchase of a home.

In 1994 there was a purchase of 344 Clive Avenue, Oceanside, New York. The Plaintiff's position is that the home was purchased for \$179,000, to which she made an initial contribution of \$25,000, and the Defendant \$35,000, \$10,000 of which came from the Defendant's mother. ¹

The Plaintiff further claims that because of a foreclosure of the house which she owned with her brother, and her status as a mortgagor on that loan, her credit rating was adversely affected. Consequently, she and the Defendant agreed that because of the adverse impact on her ability to obtain a mortgage, the deed and mortgage were to be in the name of the Defendant alone. During the first year after the May 2, 1994 acquisition, the Plaintiff claims to have paid to the Defendant 50% of the financing and utility costs. The agreement was soon changed to provide that the Plaintiff would pay all of the household expenses, and the Defendant would pay the mortgage. ² She claims to have made

¹ Affidavit of Joan D. Gammon, attached to cross-motion at ¶ 7.

² *Id.* at ¶¶ 10, 11.

payments in the range of \$50,000 to acquire and renovate the home.

3

The Defendant, on the other hand, takes the position that she acquired title to the premises individually on May 2, 1994, and that she has contributed in excess of \$299,398 for mortgage, tax and insurance payments, and \$88,566 toward maintenance and improvement costs. The Plaintiff is alleged to have contributed not more than \$12,924 for living at the premises over a ten-year period. ⁴

The Complaint alleges five causes of action seeking the following relief:

1. Constructive trust on the subject premises;
2. Determination of unjust enrichment;
3. Award of $\frac{1}{2}$ interest in the subject premises;
4. Damages in the amount of \$250,000 for injuries sustained by an assault on the Plaintiff by the Defendant;
5. Return of a Golden Retriever to the Plaintiff by the Defendant.

As a result of an action to recover possession of real property in District Court, the Defendant is in sole possession of the subject premises.

³ *Id.* at ¶ 13.

⁴ Affidavit of Jill H. Silverman attached to moving papers at ¶¶ 5, 13 — 15.

APPLICABLE LEGAL PRINCIPLES

Summary Judgment

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *Quinn v. Krumland*, 179 A.D.2d 448, 449 - 450, 577 N.Y.S.2d 868, (1st Dept. 1992); See also, *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 343, 357 N.Y.S.2d 478, 480, 313 N.E.2d 776, 777 (1974).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 505, 144 N.E.2d 387, 392 (1957). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *Moskowitz v. Garlock*, 23 A.D.2d 943, 259 N.Y.S.2d 1003 (3d Dept. 1965); *Crowley's Milk Co. v. Klein*, 24 A.D.2d 920, 264 N.Y.S.2d 680 (3d Dept. 1965).

The evidence will be considered in a light most favorable to the opposing party. *Weill v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *Tortorello v. Carlin*, 260 A.D.2d 201, 206, 688

N.Y.S.2d 64, 68 (1st Dept. 2003). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597, 404 N.E.2d 718, 720 (1980).

The failure of the opposing party to respond to a motion for summary judgment does not mandate a grant of the motion. The movant is still required to make the necessary showing that there is no issue of fact and that the movant is entitled fo judgment as a matter of law. *Liberty Taxi Mgt., Inc. V. Gincherman*, 32 A.D.3d 276, 820 N.Y.S.2d 49 (1st Dept. 2006).

Constructive Trust

A constructive trust may be imposed "(w)hen property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest." *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 (1919). It is an equitable remedy, necessarily flexible so as to accomplish its purpose. *Counihan v. Allstate Insurance Co.*, 194 F3d 357, 361 (2d Cir. 1999)., citing *Simonds v. Simonds*, 45 N.Y.2d 233, 241 (1978).

In *Sharp v. Komalski*, 40 N.Y.2d 119, 123 (1976), the Court of Appeals set forth four elements to establish a constructive trust: "(1) a confidential or fiduciary relation, (2), a promise, (3) a transfer in reliance thereon and(4) unjust enrichment." There are no rigid requirements for the establishment of a constructive trust, and these are more aptly considered as guidelines. Because the fundamental purpose is to prevent unjust enrichment, a constructive trust is appropriate whenever necessary to satisfy the demands of justice. *Matter of Estate of Knappen*, 237 A.D.2d 677, 655 N.Y.S.2d 110 (3d Dept 1997).

DISCUSSION

The Defendant seeks summary judgment dismissing the complaint on the grounds that there was no evidence of a promise by the Defendant to the Plaintiff to the effect that she was holding title to the premises for their mutual benefit, that the Plaintiff did not contribute equally to the payment of the mortgage, taxes, insurance and maintenance of the property, that the relief sought by the Plaintiff would violate the Statute of Frauds. The Defendant also seeks dismissal of the claim for personal injuries because the Defendant never intended to make contact with the Plaintiff and believes she never did. She further claims that the Defendant did not in fact sustain personal injuries in the encounter.

With respect to the return of the dog, the Defendant claims

that the warrant of eviction issued to Joan D. Gamman included all of her personal property. Apparently, the claim is that if she did not remove the dog at that time, it is because it was not her personal property.

The law in New York has been long-settled that "the statute of frauds will not obstruct the recognition of a constructive trust affecting an interest in land where a confidential relation would be abused if there were repudiation, without redress of a trust orally declared." *Foreman v. Foreman*, 251 N.Y. 237, 240, 167 N.E. 428, 429 (1929).

The papers submitted in support of the Defendant's motion for summary include an attorney's affirmation, memorandum of law, affidavit of the Defendant Jill Silverman, and attached Exhibits "A" - "J". The following do not appear to be the subject of dispute:

1. The action was commenced by the service of a summons and verified complaint;
2. One of the causes of action was to impress a constructive trust upon certain real property;
3. The parties were in a non-marital committed relationship which commenced in or about June 1991, and ended in 2005;
4. The parties lived together from the commencement of the relationship until its termination;
5. The Defendant acquired title to 344 Clive Avenue,

Oceanside, New York by deed dated May 2, 2004;

6. The purchase price of the home was \$179,000, toward which the Plaintiff contributed \$25,000, the Defendant \$25,000, and the Defendant's mother \$10,000.

7. At the conclusion of the relationship, the Defendant obtained a warrant of eviction for the removal of the Plaintiff from the premises.⁵

The issues presented are whether there was a confidential or fiduciary relationship between the parties, an agreement whereby the premises were to be taken in the name of the Defendant alone, but which was to be held in part for the benefit of the Plaintiff, whether the Plaintiff, in reliance of this promise, made an initial transfer of \$25,000 and additional sums thereafter, and whether the Defendant has been unjustly enriched.

There is little doubt but that the parties were in a confidential or fiduciary relationship. Both sides agree that they lived as domestic partners for fourteen years, and counsel for the Plaintiff alleges that they had a commitment ceremony, and registered as such under the Domestic Partners Law of the City of New York.⁶

The payment of \$25,000 toward a \$179,000 purchase price is subject to interpretation, a question of fact for a jury. While

⁵ Exh. "B" to moving papers.

⁶ Affirmation in Opposition to Motion and Support of Cross-Motion at ¶ 10.

the Plaintiff's position is that the payment was in furtherance of an oral agreement, the Defendant disputes the existence of any such agreement, and regards the payment as a proffer of evidence of financial ability to pay a share of expenses attendant to living in a single family residence.

A jury could well find that if the Defendant were permitted to sell the home for its current fair market value, without any consideration of the \$25,000 initial payment by the Plaintiff, and subsequent contributions, if any, made by her toward the maintenance and upkeep of the home, this would constitute unjust enrichment.

The issues surrounding the intention of the parties at the time of the purchase, the existence of a mutual agreement toward the payment of the mortgage, taxes, repairs and maintenance, either directly, or in kind, and the existence of unjust enrichment are legitimate questions of fact which preclude the grant of summary judgment.

Among the arguments of the Defendant in support of the motion for summary judgment is that the Statute of Frauds precludes the Court from finding that the Plaintiff has an interest in the real property. As far back as 1929, the Statute of Frauds as a bar to the imposition of a constructive trust was laid to rest. In *Foreman v. Foreman*, 251 N.Y. 237, 240, 167 N.E. 428, 429 (1929) Ch. J. Cardozo writing for the Court stated as follows: (t)he rule is

now settled by repeated judgments of this court that the statute does not obstruct the recognition of a constructive trust affecting an interest in land where a confidential relation would be abused if there were repudiation, without redress, of a trust orally declared."

Defendant's further contentions that the action for malicious assault and return of a pet dog should be dismissed are without merit. The gist of the Defendant's position with respect to the allegation of malicious assault is that she never intended to drive a vehicle over the Plaintiff's foot, never did, and the Plaintiff was not injured. As respects the dog, the Defendant appears to be saying that if the Plaintiff did not remove the dog after service of the Warrant of Eviction, it was because the dog was not hers in the first place. Either the Defendant intended to drive over the foot of the Plaintiff or she did not; the Plaintiff sustained injuries, or she did not; and the pet either belongs to the Plaintiff, or it does not. These are clear questions of fact which cannot be decided on the submitted documents, and therefore preclude the grant of summary judgment to the Defendant movant.

The Plaintiff has cross-moved, ostensibly for summary judgment. The underlying motion was apparently mailed to the Plaintiff's counsel on November 13, 2007, and was returnable on January 7, 2008. The Notice of Motion called for answering papers to be served not less than seven (7) days prior to the return or


adjourned date of the motion. The cross-motion is dated December 26, 2007 and was apparently mailed to counsel for the Defendant the same date. This would appear to be timely, in that it provided seven (7) days as demanded, with three (3) days for mailing.

But whether or not it was timely is not particularly relevant. The Notice of Cross-Motion asks for an Order "A. Denying the Defendant's main Motion in all respects; B. Granting the Plaintiff's Cross Motion [sic.] in all respects; and C. Granting such other and further relief as to this Court may seem just and proper, and equitable." But it does not request any specific relief other than a denial of the motion. The Court treats these as opposition papers.

Significantly, nothing in the opposition papers mandates the denial of the underlying motion. The motion is denied because it fails to establish a prima facie showing of entitlement to the relief requested. In particular, there remain unanswered questions of fact with respect to the existence and import of the alleged oral agreement, the conditions under which the Plaintiff contributed \$25,000 to the down payment for the home, the amount of and conditions under which the Plaintiff made additional payments toward, or in lieu of, mortgage and taxes, and contributions toward home improvements, and the amount, if any, by which the Defendant has been unjustly enriched by any such contributions by the Plaintiff.

The motion by the Defendant for summary judgment is denied. The cross-motion is treated as opposition to the motion; but to the extent that it may be considered a cross-motion, it is also denied because of the same outstanding questions of fact which preclude the grant of summary judgment to the Defendant.

Dated: FEB 22 2008



Hon. Kenneth A. Davis, J.S.C.

ENTERED
FEB 26 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE