

White v Cavaricci

2008 NY Slip Op 31965(U)

July 8, 2008

Supreme Court, New York County

Docket Number: 0116601/2007

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH

Justice

PART 6154

H. Steven White

INDEX NO. _____

MOTION DATE

11/6/09
3/13/08

Frances R. Casarici

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

1/2

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
JUL 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____

7/8/08

HON. SHIRLEY WERNER KORNREICH

[Signature]
J/S.c

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
H. STEVEN WHITE,

Plaintiff,

Index No.:116601/2007

-against-

FRANCES R. CAVARICCI,

Defendant.

FILED
DECISION and
ORDER

JUL 14 2008

COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This is an action by plaintiff H. Steven White for declaratory relief, a constructive trust and injunctive relief. Plaintiff, by order to show cause, seeks to enjoin defendant from encumbering, conveying or otherwise disposing of two residential properties and one commercial property in Italy; and (2) the stock, inventory and assets of a business owned by defendant. Plaintiff also seeks the same substantive relief as pled in his complaint. On December 20, 2007, the court (Acosta, J.) granted plaintiff a temporary restraining order pending the hearing on his order to show cause. In response defendant submitted a motion to dismiss this action on the ground of *forum non conveniens* pursuant to CPLR 327. Defendant also submitted opposition to the order to show cause and an Answer and Counterclaims. The motions are consolidated herein for disposition.

I. Statement of Facts

The parties have each filed an affidavit in support of their respective motions, along with attorneys' affirmations and exhibits. The following material facts are not in dispute. Although they never married, the parties were involved in a close personal relationship for twenty-four years. They lived together, purchased and sold a condominium in New York together, ran an accounting firm together and maintained a joint bank account. They each deposited income and salary into the joint

bank account, and they continue to have equal ownership of the accounting firm Cavaricci & White, Ltd. They have two children (now 24 and 20). The parties agree that during the period covered by the complaint they maintained a confidential relationship. Defendant owns an antique business named Franca's Collection, Inc. ("Franca"). The parties' accounting firm provides accounting and tax services for Franca, with no compensation. Plaintiff also alleges that defendant used their joint monies to start Franca, that he has provided free photographic services to Franca, that he has paid defendant's credit card charges incurred to purchase merchandise for Franca and that he and defendant jointly loaned Franca \$105,000, which Franca has not repaid.

Defendant has dual American and Italian citizenship. She has lived and worked in New York for many years. She is named as a tenant (along with plaintiff) on a lease for an apartment on 68th Street in Manhattan. She has a social security number and a New York driver's license, is registered to vote in New York and files income taxes in New York. She also runs her business Franca in New York, where it is incorporated. Defendant has spent a considerable amount of time in Italy, where she is the titled owner of three properties, two residential and one commercial. Although the parties dispute amounts, they do not dispute that the funds used for the purchase of these properties came from their joint bank account, from Franca and from family loans.

Defendant denies that she promised to share title for Franca or the Italian properties with plaintiff. She insists that she used her own money and money from Franca to purchase the Italian properties, denying that plaintiff's contribution was significant. Defendant also claims she now lives in Italy. Plaintiff disputes defendant's characterization of the circumstances. He claims that defendant promised and that he always expected to be given title to Franca and the Italian properties. He also insists that his salary provided the lion's share of the couple's income, that they

shared whatever net profit Franca provided and that he has (until recently) paid the expenses for their apartment in New York.

II. Discussion and Rulings

A. Forum Non Conveniens

Defendant seeks dismissal of the action under the common-law doctrine of *forum non conveniens* [CPLR 327(a)], which permits dismissal of actions that would be better adjudicated in another forum. Relevant factors in the determination of a motion to dismiss on the ground of *forum non conveniens* include the unavailability of an alternative forum, the burden that will be imposed on the New York courts, the potential hardship to defendants and whether the underlying transaction occurred primarily in a foreign jurisdiction. *Islamic Republic v Pahlavi*, 62 N.Y.2d 474, 479, *cert. denied* 469 U.S. 1108 (1985); *Martin-Trigona v. Waaler & Evans*, 148 A.D.2d 361 (1st Dept. 1989). Defendant has a “heavy burden in attempting to establish that New York is an inappropriate forum.” *Highgate Pictures, Inc. v. De Paul*, 153 A.D.2d 126, 129 (1st Dept. 1990) (trial court abused discretion in granting motion to dismiss on *forum non conveniens* grounds).

Similar to the circumstances in *Highgate*, both parties are American citizens and New York residents and defendant has failed to establish that the foreign jurisdiction (Italy) would be either an available alternative forum or more convenient than New York. *Highgate*, 153 A.D.2d at 129-130. Defendant does not address whether plaintiff’s claims would be cognizable or could be adjudicated in an Italian court.

Defendant’s failure to establish an available alternative forum for the litigation is not dispositive, but it is compelling in light of the convenience of litigating this action in New York, the residence of both parties. Defendant’s business Franca, which she claims funded her purchase of the

Italian realty, is located and incorporated in New York. Plaintiff's equitable claims of an enforceable interest in the realty and the business also derive from his long-term intimate relationship with defendant and her alleged statements and promises made to him in New York, and will be based in part on in-kind transactions and defendant's use of commingled funds in New York. The financial records relating to the parties' joint account, the joint accounting business, Franca and the parties' personal finances are located in New York.

Although New York cannot impose a constructive trust on realty in Italy [*cf. Azarian v. Ettinger*, 87 A.D.2d 980 (4th Dept. 1982) (finding Massachusetts could not enforce constructive trust on New York realty)], plaintiff is not required to bring his equitable claim in an Italian court. Under the principle of "comity," a New York judgment for constructive trust and declaratory relief could arguably be given effect by an Italian court. The general international rule of comity, as recognized by the United States, is that "comity may be extended to a foreign court upon a showing that "the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated".' *Hunter Douglas N.V. v. Wotan Maquinas Ltda*, 5 Misc.3d 1031A (Sup. Ct., N.Y. Cty, 2004), quoting *Cunard Co. S.S. Ltd. v. Salen Reefer Services AB*, 777 F.2d 452, 457 (2d Cir. 1985). With this principle in mind, the court would then consider the "laws and policy" of Italy, which would be considered the "forum state." Since defendant has not cited to any, she has not sustained her burden to show that adjudication of the action in New York would be improper. In any event, the court's brief foray into foreign law has uncovered an Opinion of Mr. Advocate General Darmon on a Reference by the Court of Appeals in England to the European Court of Justice for a Preliminary Ruling. *Webb v. Webb*, 1994 ECJ CELEX LEXIS 58. The *Webb* case concerned a set of circumstances analogous to those here. In

Webb a father in England gave his son money to purchase property in France. The son purchased the property, but put it in his own name. The father sought a ruling from an English court that the son held the property in trust for his father. The Advocate General concluded that the English court had jurisdiction to adjudicate the action because it concerned the parties' relationship and not just the property in France, explaining that,

...an action brought by a person against another person for a declaration that the latter holds immovable property as trustee and for an order requiring the latter to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action in rem...

This suggests a view by the European Union, of which Italy is a member, that actions like plaintiff's are not considered *in rem* and therefore may be adjudicated outside of the country where the property is located. Moreover, plaintiff's claims are not limited to the Italian properties, but also concern Franca, which is located in New York. For these reasons, defendant's motion to dismiss is denied.

B. Order to Show Cause

(1) Preliminary Injunction Standard

To the extent that Plaintiff's motion attempts to obtain all substantive relief claimed in his Complaint, it is denied on its face. The court will, however, address whether plaintiff is entitled to a preliminary injunction pursuant to the applicable grounds set forth in CPLR 6301:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

A preliminary injunction may be granted under this section only when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). The movant must demonstrate "a clear right to that relief under the law and the undisputed facts upon the moving papers." *Gagnon Bus. Co. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004) The court (Acosta, J.), in granting plaintiff a temporary restraining order, determined from plaintiff's papers that, "immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing [on a preliminary injunction] can be had." CPLR 6301. The court must now determine whether defendant's papers compel a different conclusion. The court will focus on the claim for constructive trust as the declaratory relief claim seeks a declaration of the same rights plaintiff asserts in his constructive trust and injunctive relief causes of action.

(2) *Constructive Trust*

A constructive trust is an equitable remedy. As Judge Cardozo explained, "[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." *Beatty v. Guggenheim Exploration Co.*, 225 NY 380, 386. Generally, courts employ a four-factor test to determine whether a constructive trust should be impressed on certain property. *Sharp v Kosmalski* (40 NY2d 119, 121). These factors are whether there exists: a promise, a transfer in reliance on the promise, a fiduciary or confidential relationship between the parties, and the "unjust enrichment" of the defendant. *Id.*

Defendant does not dispute the existence of a long-term confidential relationship with

plaintiff. The undisputed evidence clearly sustains this conclusion. Although plaintiff and defendant were not formally husband and wife, they maintained a twenty-four year intimate relationship during which they lived and worked together, raised their two children, shared income and expenses and maintained a joint bank account.

The court must next determine whether there is a likelihood of success on the merits or whether undisputed facts establish plaintiff's claim that he made a transfer to defendant in reliance on a promise that resulted in her unjust enrichment. There is no dispute that plaintiff knew defendant was using joint monies to purchase the Italian properties. In essence, this was a "transfer" in that plaintiff continued to fund the account with his money knowing that it would be used to purchase the properties. Although defendant disputes promising to share title to the properties with plaintiff in the future, there is no allegation that plaintiff simply turned a blind eye toward defendant's use of substantial sums from their joint account. Defendant baldly asserts that the properties are hers. An assertion which does not refute plaintiff's claimed understanding that these would be investment properties, as well as his alleged expectation to share title to the purchased properties. As Justice Cardozo stated in *Sinclair v. Purdy*, 235 N.Y. 245, 254 (1923), on reversing the trial court's judgment dismissing an equitable counterclaim seeking a trust in real property,

Though a promise in words was lacking, the whole transaction, it might be found, was "instinct with an obligation" imperfectly expressed (*Wood v. Duff-Gordon*, 222 N. Y. 88, 91). It was to be interpreted, not literally or irrespective of its setting, but sensibly and broadly with all its human implications. Even the denial of an express promise might not unfairly be discredited.

Id.

Here, the parties' lengthy relationship, the intermingling of their finances, the use of funds from their joint account to purchase and maintain the properties, the fact that the funds' primary

sources were plaintiff's income and the refinance of the parties' jointly titled New York condominium, and the continued availability and use of funds from the parties' joint account, undisputably establish that plaintiff had an expectation of an interest of some kind in the Italian properties. Indeed, defendant admits that she used funds from the joint account and borrowed money from plaintiff's family to purchase the properties, but she claims it was always her intention to keep the properties and that plaintiff "never had any entitlement to them." *See Lester v. Zimmer*, 147 A.D.2d 340, 342 (3d Dept. 1989) (nature of unmarried couple's relationship supported constructive trust for expenditure of funds or efforts in reliance on promise to share in result); *cf. Tomaino v. Tomaino*, 68 A.D.2d 267, 268-269 (4th Dept. 1979) (in divorce action lower court properly imposed constructive trust on home in husband's name where wife contributed money for improvements relying on oral promise it would be to her benefit). Under these circumstances defendant would be unjustly enriched if allowed to reap the entire benefit of the Italian properties.

As for the New York business Franca, defendant is on even more tenuous ground. She does not dispute that plaintiff paid her credit card bills for merchandise to sell through Franca, that he provided accounting and photographic services to the business free of charge, that he maintains all the business records, that he and defendant jointly loaned Franca \$105,000 that is yet to be repaid, and that he shares in the small income the business generates. Yet defendant takes the position that because she was the sole shareholder, plaintiff has no interest in the business. There is simply no evidence that plaintiff intended to provide money and services for this business *gratis*.

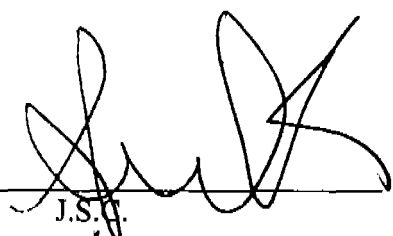
There is sufficient undisputed evidence to support the conclusion that plaintiff would be entitled to a constructive trust in both the Italian properties and the business Franca. There is also sufficient evidence that plaintiff will suffer irreparable injury if a preliminary injunction as to the

Italian properties is not granted. Defendant admits that she intends to give their daughter Sidney one of the properties. She does not dispute plaintiff's assertion that these properties would be used for investment purposes and that to date none has been rented, that she is now experiencing financial difficulties and that she has threatened to dispose of the properties. Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is granted and that, until further order of the court, defendant and anyone acting on her behalf, including but not limited to her agents, employees, attorneys and representatives, are enjoined and restrained from selling, conveying, transferring, mortgaging, leasing, renting, concealing, removing, dissipating, or in any other way disposing of and/or conveying or encumbering the following: 1) the condominium unit located at Via di Monserrato No. 7, Rome, Italy; the condominium unit located at Piazza Cancelli No. 5, Terracina, Italy; and the commercial unit located at Piazza Cancelli No. 3, Terracina, Italy; 2) the stock, inventory and assets, wherever located, of Franca's Collection Ltd. or any other business interests, ventures, investments or incomes affiliated with Franca's Collection Ltd., except in the ordinary course of business; and it is further

ORDERED that defendant's motion to dismiss is denied.

ENTER:


J.S.T.

Dated: July 8, 2008

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JUL 14 2008
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