

**Moundrakis v Dellis**

2008 NY Slip Op 33106(U)

November 3, 2008

Supreme Court, Queens County

Docket Number: 8008/08

Judge: Orin R. Kitzes

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**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**

**PART 17**

**Justice**

-----X

**MARIA MOUNDRAKIS,**

**Plaintiffs,**

**Index No.:8008/08**

**Motion Date: 10/1/08**

**-against-**

**Motion Cal. No.: 16 & 17**

**JOHN DELLIS,**

**Defendants.**

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The following papers numbered 1 to 16 read on this application by defendant John Dellis and proposed intervenors Lillian Dellis and Yitheo, LLC, for an order, *inter alia*, cancelling the Lis Pendens filed by plaintiff; and cross-motion by plaintiff for an order pursuant to CPLR 3025 granting plaintiff leave to supplement the summons and complaint. These applications and cross-motion were reassigned to Part 17, pursuant to an Administrative Order dated October 23, 2008. The applications under calendar numbers 16 and 17 are consolidated for purposes of disposition.

**PAPERS  
NUMBERED**

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Upon the foregoing papers it is ordered that the application by defendant John Dellis and proposed intervenors Lillian Dellis and Yitheo, LLC, for an order, *inter alia*, cancelling the Lis Pendens filed by plaintiff; and cross-motion by plaintiff for an order pursuant to CPLR 3025 granting plaintiff leave to supplement the summons and complaint are decided as follows:

According to the complaint, plaintiff and defendant John Dellis, purchased together the following premises (hereinafter, "premises") 214 N. Crescent Street, Massapequa, New York, 21-15 29th Street, Astoria, New York; 43-07 Ditmars Boulevard, Astoria; New York, 30-15 30th Avenue, Astoria, New York; 21-75 Steinway Street, Astoria, New York; 21-42 33rd Street, Astoria, New York; 21-67 32nd Street, Astoria, New York; 21-72 33rd Street, Astoria, New York; 18-10 Astoria Boulevard, Astoria, New York; 20-33 47th Street, Astoria, New York; 35-52 32nd Street, Astoria, New York; 50-47 42nd Street, Astoria, New York; 83 N. Walnut Street, Massapequa, New York; 20-23 46th Street, Astoria, New York; 22-05 77th Street, Apt. 1C, Astoria, New York; Plaintiff alleges that she paid all or a portion of the money

necessary to purchase the premises and since the purchase, plaintiff has paid all or a portion of the money necessary to keep the mortgage, taxes and insurance current and to upkeep and improve the premises. As such, plaintiff claims she is the beneficial owner of all or a portion of the entire premises.

Plaintiff alleges that defendant, John Dellis, was listed on the deed to all of the premises at the time of the purchases except for premises known as 21-72 33rd Street, Astoria, New York which was listed under the defendant, Yitheo LLC. This was done in reliance upon the defendant's express promise that defendant, John Dellis, would hold title to the premises in trust for the plaintiff and that defendants would, at any time, convey all or a portion of the premises to plaintiff upon plaintiff's request. Plaintiff alleges that this arrangement was based upon plaintiff and defendant, John Dellis, living together and being involved in a romantic relationship at a the time of the purchases of the premises. Since then, plaintiff has demanded that defendant convey all or a portion of the premises to plaintiff and defendants have refused to convey all or a portion of the premises to plaintiff. Based on these allegations, plaintiff's first cause of action claims she is seized in fee as the owner of all or a portion of the premises and the defendants have refused to recognize plaintiff's rights in the premises and she has no adequate remedy at law.

Plaintiff's second cause of action claims that at all times hereinafter mentioned, defendants owned the premises and plaintiff and defendant, John Dellis, made and entered into an agreement by which he agreed to transfer sixty percent of the premises to the plaintiff. Plaintiff has performed all conditions set forth in the agreement and is not in default of same. Plaintiff claims to have been at all times ready, willing and able to accept the deeds from defendants, but defendant, John Dellis, notified plaintiff that he would not deliver the deeds and would not proceed to close title.

Plaintiff's third cause of action claims that by refusing to convey the premises to plaintiff, defendants have converted plaintiff's equity. Plaintiff's fourth cause of action claims that defendant, John Dellis, formed defendant Yitheo LLC ("Yitheo") for his personal business and benefit and at all times relevant to this action, defendant, John Dellis, was a member and/or manager of Yitheo owning at least 98% of Yitheo and controlled Yitheo without observing corporate formalities with respect to corporate or contractual obligations, co-mingling said entity with his personal funds and so dominated defendant Yitheo, that it had no separate mind, will or existence separate and apart from John Dellis. Moreover, defendant Yitheo and defendant John Dellis were fundamentally indistinguishable and John Dellis used his dominance and control to commit and accomplish the acts that injured plaintiff herein and these actions were deliberately designed and intended to defraud plaintiff utilizing the corporate entity, Yitheo. Plaintiff claims that, as a result of the foregoing, defendant, Yitheo, is liable to plaintiff for all of the obligations of defendant, John Dellis, with respect to the premises known

as 21-72 33rd Street, Astoria, New York.

Based on the above claims plaintiff seeks judgment against the defendant for; a trust to be impressed upon the premises and that deeds be executed by the defendant conveying to the plaintiff all or a portion of legal title to the premises; that the defendant, John Dellis, be adjudged specifically to perform the agreement to convey all or a portion of the premises to plaintiff; that the defendants be directed to deliver the deeds to all or a portion of the premises to plaintiff; and that the defendants be restrained by order and injunction from selling, mortgaging or otherwise encumbering or disposing of said premises; and for money damages.

Defendant John Dellis has now applied for an order to lift all Lis Pendens attached to the premises. He claims that “these properties are my livelihood because I do business and make my living by selling refinancing and trading my properties. For more than four months I have been estopped by the plaintiff from using y properties to make income. Plaintiff case is nothing other than malicious prosecution and frivolous at best.” Defendant John Dellis also claims that he is “losing important refinance commitments from banks in order to improve and repair and food money my real estate properties. I have lost the lock-in interest rate and shall lose my commitments if I do not close right away. Furthermore, I will lose my earnest money deposit on the mortgage commitments.”

CPLR 6501 permits a party to effectively retard the alienability of real property without any prior judicial review. CPLR 6514 provides for the limited circumstances where cancellation of a notice of pendency is available. Under (a), the court must cancel a notice of pendency, “if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated.” Under (b), the court may cancel a notice of pendency, “if the plaintiff has not commenced or prosecuted the action in good faith.” Under either section, the court's scope of review is circumscribed. 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313 (1984.) “One of the important factors in this regard is that the likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency.” *Id.* at 320. There is little a court may do to provide relief to the property owner if the procedures prescribed in article 65 have been followed or if the action has been commenced or prosecuted in good faith.

In the instant matter, defendant John Dellis has not alleged facts that suggest either mandatory or discretionary cancellation is required. He does not claim that the notice of pendency has been filed in violation of any procedural rules. His claim that the action was filed without good faith is not supported by any basis or evidence. Consequently, his claims are, in essence, simply that plaintiffs’ action is without merit, which is not a basis to cancel the notice of pendency. Accordingly, the application by defendant John Dellis for an order cancelling the Lis Pendens filed by plaintiff is denied.

The branch of the application by Lillian Dellis, defendant John Dellis’ mother seeking

to intervene in this action in her individual capacity and as the managing member of Yitheo, LLC, pursuant to CPLR 1012 is denied. Lillian Dellis claim that she lives at 21-15 29<sup>th</sup> Street Astoria, New York, one of the subject premises contested in this action. According to her, she purchased these premises on January 15, 1998, and placed the premises in the name of her son, John Dellis, for inheritance and other purposes. Since then she has paid for all utilities used and repairs at the premises. At some point she applied for a mortgage on the premises and defendant John Dellis has agreed to execute a deed transferring the premises to her. However, due to the Lis Pendens filed by plaintiff on this property, she cannot refinance the property. She claims that her beneficial interest precedes plaintiff's interest in the property since such precedes any interest she had in defendant John Dellis. This interest is her basis for intervening in the action.

Regarding intervention by Yitheo, LLC, she claims that she is the managing member of Yitheo, LLC and her son John Dellis is the only other member. The property located at 21-72 33<sup>rd</sup> Street, Astoria New York is owned by Yitheo, LLC and plaintiff has no interest in the property. Plaintiff opposes the application for intervention, submitting copies of the Deed to the properties.

Initially, the court notes that the proposed intervenors have failed to indicate which section of the CPLR they are seeking the instant relief. However, based upon a review of the papers it seems they are moving pursuant to CPLR 1003. This section states that:

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

Generally, intervention should be permitted where the proposed intervenor has a real and substantial interest in the outcome of the proceeding. Plantech Housing v Conlan, 74 AD2d 920 (2d Dept 1980.) "However, it should be restricted where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute." Osman v. Sternberg, 168 A.D.2d 490 (2d Dept 1990.)

The proposed intervenors claim a right to intervene based upon their interest in the property. Regarding Lillian Dellis' intervention in this action as it concerns the property at 21-15 29<sup>th</sup> Street Astoria, New York, in her individual capacity, she has not submitted any evidence to support her claims that she has contributed financial resources to the premises. The Deed to the property shows John Dellis as the owner and this has been the case since January

1998. Additionally, in her proposed Answer, she has not sought the right to the imposition of a constructive trust on the premises. Even if she were to claim such, it would fail since the property has been owned by John Dellis for more than ten years since the imposition of any alleged constructive trust.

In any event, to state a cause of action to impose a constructive trust, plaintiff must allege "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment", Sharp v Kosmalski, 40 N.Y.2d 119 (1976.) See, Nastasi v Nastasi, 26 AD3d 32 (2005.) Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein. Although there is no unyielding formula that limits a court's freedom to fashion this equitable remedy, absent circumstances that otherwise call for equitable relief, the above are essential elements that must be shown to establish a constructive trust. Bontecou v. Goldman, 103 A.D.2d 732 (2d Dept 1984.)

Here, Lillian Dellis has failed to state a cause of action to impress a constructive trust since she claims that the property was given to John Dellis for, in essence, Estate tax matters. As such, there was no promise for John Dellis to hold the property in trust for his mother; rather, it was a pre-death gift of the property. Such cannot be the basis for the imposition of a constructive trust.

Based on the above, there has been no showing that the proposed intervenor Lillian Dellis has standing to intervene in this action and to allow her to intervene would confuse the issues and would not result in benefit to the parties already in the litigation. It is clear that the inclusion of her in this action would contribute nothing to the resolution of this controversy and would only serve to delay the outcome of the matter. Accordingly, the application by Lillian Dellis seeking permission to intervene in this action is denied. Consequently, the Court will not address the other branches of her application as they relate to her in an individual capacity.

Regarding the branches of the application seeking intervention by Yitheo, LLC, the Court notes that Yitheo, LLC is the owner of the premises located at 21-72 33<sup>rd</sup>. However, there is insufficient proof that Lillian Dellis has the capacity to bring an action on Yitheo LLC's behalf. Any evidence submitted in her reply papers have not been considered by this Court since it is not in response to plaintiff's opposition and it is accompanied by an unsworn attorney's affirmation. Rubens v Rodney Fund, 23 AD3d 636 (2d Dept 2005.) *Compare*, Conter, v Frelen Associates, LLC, 2008 NY Slip Op 4308, 2008 NY App Div Lexis 4057 (2d Dept 2008.) Accordingly, the branches of the application relating to Yitheo, LLC are denied, with permission to renew by a suitable party.

In any event, the Court notes that were it to consider the branches of the application by Lillian Dellis and Yitheo, LLC seeking an order cancelling the Lis Pendens, these branches would be denied. Their applications are premised upon claims of financial hardship due to the

Lis Pendens and to the merits of the action by plaintiff. As set forth above, these are not sufficient grounds to cancel the Lis Pendens. 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313 (1984.)

Plaintiff has moved by cross-motion for an order permitting plaintiff to amend the summons and complaint by adding an additional defendant, Yitheo LLC since it is the "title" owner of the premises located at 21-72 33<sup>rd</sup>. It is well-settled that leave to amend pleadings is freely given "absent prejudice" or surprise resulting directly from the delay." McCaskey Davies & Associates Inc. v New York City Health and Hospitals Corp., 59 N.Y.2d 755 (1983.) In the instant case, plaintiff's claims involve this property and by necessity require the titled owner to be a party. There is no opposition to this cross-motion. Accordingly, the cross-motion is granted.

Plaintiff shall serve and file with the court, the amended complaint and supplemental summons, with an amended caption in the form proposed in the moving papers within thirty days of the entry of this order. Service upon defendants shall be pursuant to Article 3 of the CPLR.

In sum the applications by John Dellis and proposed intervenors Lillian Dellis and Yitheo, LLC, for an order, *inter alia*, cancelling the Lis Pendens filed by plaintiff are denied and the cross-motion by plaintiff for an order pursuant to CPLR 3025 granting plaintiff leave to supplement the summons and complaint is granted.

**Dated: November 3, 2008**

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**ORIN R. KITZES, J.S.C.**