

**Covino v Survilla**

2009 NY Slip Op 30156(U)

January 7, 2009

Supreme Court, Nassau County

Docket Number: 08-12263

Judge: Joseph P. Spinola

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**  
SUPREME COURT, STATE OF NEW YORK  
COUNTY OF NASSAU

-----  
**ANTHONY COVINO,**  
Plaintiff

**Trial/IAS Part 17**  
**Index No. 08-12263**  
**Sequence No. 03, 04, 05, 06**  
**Submit Date 10/14/08**

*against*

**LaRUE SURVILLA and RICHARD COVINO,**  
Defendants  
-----

**The following papers read on this motion:**

- Notice of Motion/Order to Show Cause..... X**
- Cross-Motions..... X**
- Answering Affidavits..... X**
- Replying Affidavits..... X**

**PRESENT: HON. JOSEPH P. SPINOLA**

Plaintiff, Anthony Covino’s application [Sequence 003], pursuant to CPLR 6301, for an Order: (1) directing that, pending the hearing and determination of this action, plaintiff be granted exclusive possession and control of certain real property known as 30 Wolfle Street, Glen Cove, New York 11542 (the "Subject Property"); (2) prohibiting the defendants, LaRue Survilla and Richard Covino, from encumbering or transferring the Subject Property; and (3) directing that defendant LaRue Survilla return to the plaintiff certain personal property improperly taken from the Subject Property, is granted.

Motion [Sequence 004], by defendant LaRue Covino s/h/a LaRue Survilla ("LaRue"), for an Order, *inter alia*, pursuant to CPLR 3211, dismissing the amended complaint of the plaintiff, Anthony Covino, is denied.

Motion [Sequence 005] by defendant LaRue Covino, for an Order, *inter alia*, pursuant to CPLR 3211(a)(4), dismissing the amended cross claims of the co-defendant, Richard Covino, is also denied.

Cross-motion [Sequence 006] by defendant Richard Covino, for an Order,

pursuant to CPLR 3212, granting him summary judgment on his first cross claim imposing a constructive trust in his and plaintiff's favor on the subject premises is denied.

This is an action to impose a constructive trust upon real property. Specifically, this action concerns the disputed ownership of the Subject Property which plaintiff, Anthony Covino, and the defendant, Richard Covino, maintain is owned by them equally by way of constructive trust.

Prior to February 11, 1995, the Subject Property was owned by Joseph J. Covino and Antoinette Covino. Joseph and Antoinette were the parents of Anthony and Richard Covino. Richard Covino and LaRue Survilla are husband and wife. On February 11, 1995, Joseph and Antoinette Covino, as owners of the premises at 30 Wolfle Street, Glen Cove, New York 11542 ("the subject premises") executed a deed transferring title to the subject premises to their son, Richard, while reserving a life estate for themselves. According to the terms of the agreement, Richard in turn promised his parents that upon their demise, he would transfer fifty (50%) percent of the Subject Premises to his brother the plaintiff herein (*Complaint*, ¶9; *Richard Covino Answer*, ¶1).

On December 13, 1996, Richard Covino, without the consent, authorization or knowledge of the plaintiff, transferred nominal title to the Subject Premises to his wife, LaRue Survilla (*Richard Covino Answer*, ¶1). It is undisputed that the reason for this transfer was to avoid the claims of any potential future creditors (*Richard Covino Answer*, ¶4). The December 13, 1996 deed was executed without consideration and reserved a life estate for Richard's parents, Joseph and Antoinette (*Id*).

Richard alleges that as part of the December 13, 1996 transfer, he, together with his parents and wife, agreed that said transfer was made to LaRue in name only with no true beneficial transfer of ownership. He alleges that it was intended by all parties that the Subject Premises would be transferred back by LaRue to Richard (and to the plaintiff) upon Richard's request upon the death of his parents (*Richard Covino Answer*, ¶1). LaRue denies that she ever promised plaintiff's parents that she would sign a deed transferring the property back to Richard and/or Anthony.

Joseph Covino died on September 5, 2003. Thereafter, on July 25, 2007, LaRue commenced a divorce action against Richard in this Court under Index Number 202138-2007.

Subsequently, in August 2007, Richard requested that LaRue transfer the subject premises back to him LaRue refused. Additionally, in August 2007, Anthony and Richard Covino's mother, Antoinette Covino died. Plaintiff Anthony Covino became the Executor of her Estate; he received Letters Testamentary to act as the Executor on May 5, 2008.

Plaintiff, Anthony Covino, commenced this action to impose a constructive trust on the Subject Premises. Upon the instant motion, he seeks a preliminary injunction directing that, pending the hearing and determination of this action, he be granted exclusive possession and control of the Subject Premises; that defendants be prohibited from encumbering or transferring the Subject Property; and directing that LaRue return certain personal property to him that she took from the subject premises. Defendant LaRue seeks, *inter alia*, to dismiss plaintiff's complaint in its entirety.

The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits; (2) the party seeking the preliminary injunction will suffer irreparable harm in the absence of an injunction; and (3) a balancing of the equities favors the granting of an injunction (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; *Doe v. Axelrod*, 73 NY2d 748 [1988]; *Olabi v. Mayfield*, 8 AD3d 459 [2<sup>nd</sup> Dept. 2004]). The movant has the burden of establishing a prima facie entitlement to such relief (*Gagnon Bus Co., Inc. v. Vallo Transportation, Ltd.*, 13 AD3d 334 [2<sup>nd</sup> Dept. 2004]; *William M. Blake Agency, Inc. v. Leon*, 283 AD2d 423 [2<sup>nd</sup> Dept. 2001]). In this case, the plaintiff has demonstrated a probability of success on his cause of action to impose a constructive trust upon the Subject Premises.

The usual elements required for the imposition of a constructive trust are: (1) a confidential or fiduciary relation; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment (*Sharp v. Kosmalski*, 40 NY2d 119, 121 [1976]). The doctrine is not limited by rigid definition, and its very purposes requires flexibility in its application (*Beatty v. Guggenheim Exploration Co.*, 225 NY 380, 386 [1919]).

In the instant matter, there is no doubt that plaintiff had a relationship of trust and confidence with the defendant, Richard Covino, who is his brother; as well as a relationship of trust and confidence with Joseph and Antoinette Covino, his parents and the owners of the Subject Premises prior to the February 11, 1995 deed transfer. Additionally, plaintiff has sufficiently plead that as part of the 1995 deed transfer and agreement, his brother Richard, in accepting the deed transferring title in the subject premises to him, in turn promised his parents that he would transfer 50% of the Subject Premises to Anthony upon their demise and reserve 50% of the Subject Premises for himself. Further, plaintiff alleges (and Richard admits) that there was also an explicit promise by LaRue that she would transfer the title to the Subject Property to Richard and the Plaintiff at their request and upon the deaths of Joseph and Antoinette. While LaRue denies the existence of such a promise, she admits and explicitly states that the reason for Richard's transfer of the subject property was to protect him from future creditors. Moreover, for the purposes of these motions, plaintiff's allegations in his amended complaint must be accepted as true. The Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as

alleged fit within any cognizable legal theory" (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). In that regard, plaintiff has also satisfied the second element of a constructive trust claim.

Plaintiff has also plead sufficient facts to state that in reliance on the aforementioned promises, not only did Joseph and Antoinette Covino transfer the subject premises to Richard, but Richard in turn also transferred the subject premises to LaRue. Finally, plaintiff has established that absent a constructive trust recognizing plaintiff's 50% interest in the subject premises, the defendant La Rue Survilla would be unjustly enriched in asserting ownership in the subject premises (*Sharp v. Kosmalski*, supra at 121; *Ruiz v. Meloney*, 26 AD3d 485, 486 [2<sup>nd</sup> Dept. 2006]). Two transfers took place in this action, both of which were done in reliance on a promise made by someone who was in a confidential relationship with the transferor. Thus, plaintiff has established the four elements necessary for the imposition for a constructive trust on the subject property.

In addition to demonstrating a likelihood of success on the merits, plaintiff has also established irreparable harm in the absence of an injunction and a balancing of equities in favor of the injunction. Since February 11, 1995, plaintiff's beneficial interest in the subject property has been limited to 50% of the subject premises. However, as the Executor of the Estate of Antoinette Covino, he also has a fiduciary duty to the Estate to marshal the assets, pay administration expenses and make distribution (NY Surr. Ct. Proc. Act §103[21]). The undisputed facts herein also confirm that defendant LaRue Survilla has previously removed personal property belonging to the Estate of Antoinette Covino. As the Executor of the Estate of Antoinette Covino, this Court is convinced that in the absence of an injunction the defendant, LaRue Survilla, who has received, by virtue of the 1996 deed, legal title in the subject property may continue to remove personal property belonging to the Estate of Antoinette Covino and further, as the Executor of the Estate, the balancing of the equities tips in the favor of the plaintiff, such that pending the determination of this action, he shall be granted exclusive possession and control of the subject property.

For these reasons, plaintiff's application for preliminary injunctive relief enjoining and prohibiting the defendants, LaRue Survilla and Richard Covino, from encumbering or transferring the Subject property is granted. Plaintiff's application for exclusive possession and control of the subject premises pending the determination of this action is also granted.

Plaintiff's motion for Order directing that the defendant LaRue Survilla return certain personal property improperly taken from the subject property to the plaintiff including: (i) framed U.S. Navy picture of plaintiff's father's platoon at the training base, which had been on the basement wall; (ii) framed U.S. Navy picture of the U.S.S. New Mexico battleship, also taken from the basement wall; (iii) two sets of U.S. Navy uniform

bars of rank from plaintiff's father; (iv) U.S. Navy personal paperwork taken from plaintiff's father's desk, notes and pictures; (v) antique sailboat replica given by friends to plaintiff's father, roughly two feet long; (vi) foreign money (Japan or Philippines) taken from plaintiff's father's desk; and (vii) crucifix taken from basement desk area; is also granted. It is undisputed that on or about July 28, 2008, the defendant, LaRue and her son were found leaving the subject property having removed certain personal property therein that belongs to the Estate. Under these circumstances, defendant, LaRue is directed to *forthwith* return any personal property improperly taken from the subject premises to the plaintiff so that he may properly discharge his fiduciary duties as the Executor of the Estate.

Defendant LaRue's separate motions, pursuant to CPLR 3211, to dismiss plaintiff's amended complaint is herewith denied. As stated above, the complaint, if it is afforded the liberal construction to which it is entitled in a motion to dismiss, clearly states a cause of action to impose a constructive trust. Consequently, defendant LaRue's branch of the motion seeking to dismiss the complaint for failure to state a cause of action is denied.

Further, plaintiff's claim is not barred by the doctrine of "unclean hands." Defendant, LaRue Survilla, submits that title in the subject property cannot be transferred back to the plaintiff and Richard Covino because Richard Covino has come to Court with "unclean hands." The clean hands doctrine is applicable when the defendant shows that the plaintiff was guilty of immoral or unconscionable conduct when the agreement was made (*390 West End Associates v. Baron*, 274 AD2d 330 [1<sup>st</sup> Dept. 2000]), the conduct complained of is directly related to the subject matter in litigation (*Mehlman v. Avrech*, 146 AD2d 753 [2<sup>nd</sup> Dept. 1989]), and the party invoking the doctrine was injured by such conduct (*Black v. National Organization of New Apostolic Church of North America*, 104 AD2d 1016 [2<sup>nd</sup> Dept. 1984]).

First, it must be noted that the persons who made the transfer that is the subject of this constructive trust action were the parents - Joseph and Antoinette Covino. Thus, even if Richard came to this court with "unclean hands" LaRue would be precluded from using the doctrine as a bar to recovery.

Second, in this case, Richard Covino did not transfer title to the subject property to LaRue in order to avoid or defraud current or actual creditors. Richard Covino has stated that he transferred title in order to protect the subject property from any "potential" creditors that may appear in the future (*Richard Covino Answer*, ¶4). When a husband transfers title to property to his wife solely to protect it from potential claims that may arise from creditors in the future, the doctrine of "unclean hands" does not bar an action seeking reconveyance of title to the property from the wife (*Fishman v. Fishman*, 57 AD2d 606 [2<sup>nd</sup> Dept. 1977]; *Stoner v. Stoner*, 19 Misc.2d 761 [Sup. Ct. Nassau 1959]).

Moreover, a party that is aware that a transfer is being done to defraud creditors may not avail herself to the defense of "unclean hands" because she was an active part in the fraudulent transaction. Further, the unclean hands doctrine only benefits a party if they suffered injury by the person against whom the doctrine is invoked (*Bernstein v. Bernstein*, 2003 WL 1793069 [Sup. Ct. Nassau 2003]). LaRue has not been injured by the transfer to her from Richard. In fact, she has only benefitted from it. For these reasons, defendant LaRue's motion to dismiss plaintiff's action on the grounds that Richard Covino has "unclean hands" is denied.

Defendant's motion to dismiss plaintiff's complaint on the grounds that there is another action pending in the Court is also denied. Defendant LaRue claims that this action should be dismissed because there is already a divorce proceeding pending before Judge Robert A. Ross in this Court. CPLR 3211(a)(4) provides grounds for dismissal where there is another action pending between the same parties regarding the same claim. Here, the plaintiff is not a party to the divorce proceeding already pending (*Glatzer v. Scappatura*, 99 AD2d 505 [2<sup>nd</sup> Dept. 1984]). Ownership of the subject property is presumably just one of many issues that are being litigated in that action. Defendant's motion to dismiss plaintiff's complaint, pursuant to CPLR 3211(a)(4), is denied.

Similarly, plaintiff's claims are not barred by the statute of limitations. The statute of limitations concerning an action for the imposition of a constructive trust is six years (CPLR 213). The statute of limitations begins to run upon the occurrence of the wrongful act giving rise to the need for the constructive trust (*Mattera v. Mattera*, 125 AD2d 555 [2<sup>nd</sup> Dept. 1986]). In this action, the wrongful act as against LaRue Survilla, did not occur until defendant LaRue refused to transfer title in the subject property back to Richard Covino and plaintiff after Antoinette Covino died in August 2007. Contrary to LaRue's contentions, no wrongful conduct took place when Richard Covino transferred title in the subject property to LaRue in 1996. Said transfer was completed pursuant to a valid agreement. The only wrongful act occurred when LaRue breached this agreement on or about August 13, 2007 by refusing to transfer title despite demands by Richard Covino to do so. This wrongful act that triggered the running of the statute of limitations occurred a little more than a year ago. As such, plaintiff's claims are not barred by the statute of limitations. Defendant's motion to dismiss on this grounds is denied in its entirety.

Richard Covino's cross motion for summary judgment on his first cross-claim for the imposition of a constructive trust and his second cross claim for punitive damages is denied. The burden on a motion for summary judgment is different from the burden on an application for a preliminary injunction or a motion to dismiss, pursuant to CPLR 3211.

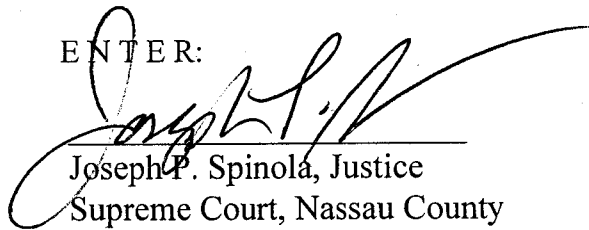
The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062

[1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id.*).

As there remain issues of fact, including whether LaRue Covino's alleged promise to reconvey the premises to the co-defendant and/or the plaintiff precludes the imposition of a constructive trust by Richard, defendant, Richard Covino's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

ENTER:



Joseph P. Spinola, Justice  
Supreme Court, Nassau County

Dated: January 7, 2009

**ENTERED**

JAN 22 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE