

Masta v Masta

2009 NY Slip Op 30249(U)

January 23, 2009

Supreme Court, Nassau County

Docket Number: 05293/07

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
NANCY MASTA and WILLIAM TAVARELLI,

TRIAL TERM PART: 47

Plaintiff,

-against-

INDEX NO.: 05293/07

MOTION DATE: 1-7-09

SUBMIT DATE: 1-21-09

SEQ. NUMBER - 002

PAT MASTA,

Defendant.

-----X

The following papers have been read on this motion:

- Notice of Motion, dated 12-8-08.....1**
- Affidavit in Opposition, dated 12-29-08.....2**
- Affirmation in Reply, dated 1-12-09.....3**

Defendant's motion for summary judgement pursuant to CPLR §3212 is granted as to the First Cause of Action and denied as to the Second Cause of Action.

Plaintiff Nancy Masta was married to and then divorced from defendant's son. As part of her divorce settlement she received approximately \$54,000.00 and primary custody of the couple's four children. She gave the cash received to defendant, her father-in-law (former husband's father) to be used to construct a dormer apartment in defendant's house where she, her children and co-plaintiff Tavarelli resided and paid a monthly rental. While

the apartment was being constructed, she and her children slept in the basement and shared other facilities in common with her in-laws. Co-plaintiff Tavarrelli alleges that he also contributed \$10,000.00 toward the improvements. Defendant terminated the tenancy and brought an eviction action in District Court which resulted in a stipulation of settlement that acknowledged and terminated the tenancy as of a specified date.

In this action which ensued shortly after plaintiffs vacated, the plaintiffs contend that they were wrongfully evicted (First Cause of Action) and that defendant was unjustly enriched by reason of his breach of a promise to allow plaintiffs to reside in the house. (Second Cause of Action).

As a remedy, plaintiffs seek to impose a constructive trust upon the money given to defendant and the amount, if any, by which the value of the premises was enhanced by reason of the alterations and improvements which plaintiffs claim they funded.

In this motion for summary judgment, defendant alleges that the stipulation in the District Court eviction proceeding necessitates dismissal of the First Cause of Action for wrongful eviction and that summary judgment should be granted on the Second Cause of Action because the elements for a constructive trust have not been established. *Sharp v. Kosmalski*, 40 NY2d 119, 121 (1976).

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82

AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co.*,

Inc., 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Ciccione v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

Summary judgment is granted with respect to the cause of action for wrongful eviction and that claim is dismissed. A claim of unlawful or wrongful eviction must be premised on facts which reflect physical expulsion, physical exclusion or constructive eviction, by wrongful conduct. *Humphrey v. Onondaga County Sheriff's Department*, 9 AD3d 898 (4th Dept. 2004); *see also North Main Street Bagel Corp., v. Duncan*, 6 AD3d 590 (2d Dept. 2004); *Appeal After Remand*, 37 AD3d 785 (2d Dept. 2007). When an eviction is found to have been lawful dismissal is proper on the grounds of *res judicata* and collateral estoppel. *Bell v. Alden Owners Inc.*, 299 AD2d 207 (1st Dept. 2002).

Where, as here, the parties enter into a stipulation settling a prior summary proceeding in which a tenant agrees to vacate the premises, no action will lie. *Steinman v. 319 West 48th Street Realty Corp.*, 276 AD2d 355 (1st Dept. 2000); *Witters v. Yatrakis*, 19 Misc. 3d 144A (Sup. Ct. App. Term 2d and 11th Jud. Dists. 2008).

In sum, the stipulation settling the possessory action is valid and binding on plaintiffs there is no reason to deny the effect of its terms, and it acts as a bar to the claims of plaintiffs that they were wrongfully evicted. *Varveris v. Fisher*, 229 AD2d 573 (2d Dept. 1996).

With respect to the Second Cause of Action, defendant has failed to make a *prima facie* showing of entitlement to relief, and in any event, plaintiffs have raised issues of fact which require denial of summary judgment.

“The elements of a constructive trust are a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment. As a constructive trust is an equitable remedy, courts do not rigidly apply the elements but use them as flexible guidelines.

In this flexible spirit, the promise need not be express, but may be implied based on the circumstances of the relationship and the nature of the transaction. Similarly, courts have extended the transfer element to include

instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer actually occurred.” *Moak v. Raynor*, 28 AD3d 900, 902 (3rd Dept. 2006) internal citations omitted.

The Second Department is in accord, and with respect to unjust enrichment, has held:

“Similarly, to prevail on a claim of unjust enrichment, “a party must show that (1) the other party was enriched, (2) at that party’s expense, and (3) that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’. “Unjust enrichment, however, does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched.” *Cruz v. McAneney*, 31 AD3d 54, 59 (2d Dept. 2006) internal citations omitted.

See also A.G. Homes, LLC v. Gerstein, 52 AD3d 546 (2d Dept. 2008); *Marini v. Lombardo*, 39 AD3d 824 (2d Dept. 2007).

A constructive trust is thus an equitable remedy for unjust enrichment, *ie* imposition of the remedy is intended and designed to prevent the unjust enrichment of the holder of the property. *Simonds v. Simonds*, 45 NY2d 233, 241 (2000); *Cinquemani v. Lazio*, 37 AD3d 882 (3rd Dept. 2007).

Whether or not a promise existed, a transfer took place or defendant was unjustly enriched are questions that should be decided by the trier of fact. *Moak v. Ranor*, *supra* at 902-903.

Finally, on these facts, the Court is not prepared to state that as a matter of law there was no confidential relationship between the parties. There are sufficient familial contacts and, as a to the children, blood relationships from which a trier of fact might also find a confidential relationship. *Almasy v. Ward*, 53 AD3d 946 (3rd Dept. 2008).

As can be gleaned from the foregoing, many factors should be considered in determining whether a person has been unjustly enriched and a constructive trust imposed as a remedy. Close family relationships and living arrangements require scrutiny, transfers of value, be they monies, work labor and services or tangible property, must be weighed against what or how persons in similar situations might normally be expected to conduct themselves and finally whether the recipient of the claimed largess benefitted in some measurable way. Here all of these elements are present and none can be determined without a weighing of the evidence.

Based on the foregoing, summary judgment is granted to the plaintiff on the First Cause of Action and denied as to the Second Cause of Action.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 23, 2009



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
JAN 27 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE