

**Diorio v Graziano**

2009 NY Slip Op 30689(U)

March 20, 2009

Supreme Court, Nassau County

Docket Number: 018680/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

\_\_\_\_\_  
JOHN DIORIO and THERESA FRANCES  
DIORIO,

Plaintiffs,

INDEX No. 018680/08

MOTION DATE: Jan. 5, 2009  
Motion Sequence # 001

-against-

MICHAEL GRAZIANO and THERESA  
GRAZIANO,

Defendants.  
\_\_\_\_\_

The following papers read on this motion:

- Notice of Motion..... X
- Affidavit in Opposition..... X
- Reply Affidavit.... X
- Memorandum of Law..... XX
- Memorandum of Law in Reply..... X

This motion, by defendant Michael Graziano, for an Order, pursuant to the CPLR 3211 (a) (1), (5), and (7), dismissing the Verified Complaint and vacating Notice of Pendency filed against the Premises on the grounds that:

- a. Defenses are founded upon documentary evidence.

- b. The Six Causes of Action in the Verified Complaint may not be maintained because they are barred by the Statute of Limitations or Statute of Frauds; and
- c. The pleading fails to state a cause of action upon which relief may be granted.

is determined as hereinafter set forth.

### FACTS

This action involves six claims by plaintiffs John Diorio (hereinafter "John") and Theresa Francis Diorio (hereinafter "TF") for the imposition of a constructive trust, specific performance of the alleged agreement, breach of contract, unjust enrichment, fraudulent inducement and misrepresentation.

Defendants Michael Graziano (hereinafter "Michael") and Theresa Graziano (hereinafter "Theresa") are married to each other and are currently involved in a matrimonial action; plaintiffs John and TF are also married to each other and are the parents of Theresa, and Michael is their son-in-law.

Michael and Theresa owned a single family residence home in or about 1994. John and TF owned a single family residence home in or about 1994, as well. Both families sold their houses, and a new home (hereinafter "premises"), at issue in this case, was acquired exclusively in the name of Michael and Theresa, on August 10, 1994. The new house was transformed into a multi level mother/daughter residence, occupied on the main level by John and TF, and on the upper level by Michael, Theresa and their children. It is undisputed that John and TF advanced fifteen thousand (\$15,000.00) dollars to renovate the kitchen and three thousand five hundred (\$3,500.00) dollars for landscaping; and that John and TF were giving Theresa and Michael initially the sum of one thousand dollars (\$1,000.00) per month, which was increased eventually to one thousand five hundred (\$1,500.00) dollars per month.

In 2007, Michael vacated the premises.

**PLAINTIFFS' CONTENTIONS**

Plaintiffs contend that they agreed with defendants to sell their individual homes and jointly acquire the new home. John and TF advanced the sum of ten thousand (\$10,000.00) dollars toward the purchase of the property, and the additional sum of approximately two hundred twenty thousand (\$220,000.00) dollars toward the necessary renovations in exchange for John and TF being permitted to utilize exclusively the main floor of the property and use of the common areas of the property. Plaintiffs further assert that they agreed with defendants that if for any reason John and TF no longer resided at the property, or upon the sale of the property, Michael and Theresa would repay them the sum of two hundred twenty thousand (\$220,000.00) dollars, so that John and TF could purchase an alternative residence in which to reside.

Since the commencement of the matrimonial action between Michael and Theresa, Theresa reconfirmed the alleged agreement; however, Michael has repudiated it.

The plaintiffs assert in their opposition to the motion that the Statute of Limitations and the Statute of Frauds are inapplicable because the plaintiffs properly alleged a constructive trust claim; and there are material triable issues of fact, therefore, Michael is not entitled to summary judgment.

**DEFENDANT'S CONTENTIONS**

Michael denies the existence of the agreement between the parties. He asserts that fifteen thousand (\$15,000.00) dollars for construction and three thousand five hundred (\$3,500.00) dollars for landscaping were the only contributions made by the plaintiffs toward the renovations, the monthly payments were a rent, and plaintiffs never asked for, nor demanded, a repayment of any of the funds, and that plaintiffs made the contributions as a gift to their children and grandchildren.

Michael contends that plaintiffs are trying to assist and aid Theresa in the matrimonial action by bringing this frivolous lawsuit, and that they failed to establish a prima facie case for a constructive trust, their claims are time barred and barred by the Statute of Frauds. Michael further asks the Court to invoke the husband-wife privilege, disregard Theresa's affidavit, bar her testimony or evidence during trial or hearing of this action; and to lift the Notice of Pendency. Finally, Michael argues that he is entitled to summary judgment because there are no issues of fact.

DECISION

“On a motion to dismiss pursuant to CPLR 3211 the court may grant dismissal when ‘documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.’” (Biel Sav. Bank v. Sommer, 8 N.Y.3d 318, 324, 2007) (citations omitted).

In considering a motion to dismiss a complaint for failure to state a cause of action (see, CPLR 3211 (a) (7)), the pleadings must be liberally construed (see CPLR 3026). (See, Sotomayor v. Kaufman, Malchman, Kirby & Squire, L.L.P., N.Y.S.2d 894; 252 A.D.2d 554, 1998). The sole criteria is whether “from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (Guggenheimer v. Ginsburg, 43 N.Y.2d 268, 275; see also, Bovino v. Village of Wappingers Falls, 215 A.D.2d 619). The facts pleaded are presumed to be true and are to be accorded every favorable inference, although bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to such consideration. (See Morone v. Morone, 50 N.Y.2d 481, and Gertler v. Goodgold, 107 A.D.2d 481, affd 66 N.Y.2d 946).

With respect to Michael’s argument that plaintiffs failed to establish a prima facie case for a constructive trust, “[g]enerally, before granting the equitable remedy of a constructive trust, four elements must be established: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment.” (Crown Realty Co. v. Crown Heights Jewish Community Council, 175 A.D.2d 151, 151, 572 N.Y.S.2d 38, 2<sup>nd</sup> Dept., 1991) (citations omitted).

Herein, Michael first argues that plaintiffs failed to establish the confidential or fiduciary relationship between the parties, and such is not recognized as regularly occurring between in-laws and their children’s spouses.

It is well established that family ties constitute a confidential relationship. (See Reiner v. Reiner, 100 A.D.2d 872, 1984). However, confidential or fiduciary relationship may arise where a bond of trust and confidence exists between the parties, and marital or other family relationship is not essential for the existence of a confidential relation. (See Sharp v. Kosmalski, 40 N.Y.2d 119, 1976; see also, Coco v. Coco, 107 A.D.2d 21, 2<sup>nd</sup> Dept., 1985) (fiduciary relationship was found between the plaintiff and the defendants where the plaintiff was the mother of one defendant and the mother-in-law

of the second defendant); Lester v. Zimmer, 147 A.D.2d 340, 542 N.Y.S.2d 855 (3<sup>rd</sup> Dept., 1989) (fiduciary relationship was found where the defendant was plaintiff's prospective mother-in-law).

Herein, plaintiffs clearly allege the existence of a confidential or fiduciary relationship in the Verified Complaint. Further, they support their allegation by their own affidavits, and the affidavit of Theresa, stating that there was trust between the parties. Moreover, Michael states in his motion that there was love and affection of the plaintiffs toward Theresa, and that both extended families gathered in the premises each holiday and on many weekends over the years, and accepted gifts from each other. Therefore, this is a question of credibility and an issue of fact whether there was a confidential or fiduciary relationship between the parties.

Michael further argues that there was no agreement or promise to give the plaintiffs any interest in the premises; and plaintiffs could not have made any transfer of real estate in reliance thereon. Similar to the issue of confidential or fiduciary relationship issue, plaintiffs properly allege in the Verified Complaint that there was an agreement between the parties, supported by the plaintiffs' and Theresa's affidavits; and, therefore, it is an issue of fact. Furthermore, "the transfer concept extends to instances...where funds, time and effort are contributed in reliance on a promise to share in the result." (Lester v Zimmer, supra at 342 (citations omitted)). Here, the plaintiffs contend that they expended money and effort toward purchasing and renovating the premises.

Thus, plaintiffs correctly allege in the Complaint all four elements of the constructive trust claim, and support it by their own affidavits and the affidavit of Theresa.

Additionally, "[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." (Simonds v. Simonds, 45 N.Y.2d 233, 241 (Ct. App. 1978) (citations omitted)). "Although the [four] factors are useful in many cases constructive trust doctrine is not rigidly limited. For a single example, one who wrongfully prevents a testator from executing a new will eliminating him as beneficiary will be held as a constructive trustee even in the absence of a confidential or fiduciary relation, a promise by the "trustee," and a transfer in reliance by the testator." Id. (citations omitted). "[A] constructive trust will be erected whenever necessary to satisfy

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the demands of justice... [I]ts applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them.” Id. (citations omitted).

Thus, the Court may impose the constructive trust even when the four elements of the doctrine are not established. At this time, the Court **denies** the defendant’s motion inasmuch as an issue exists as to whether the justice requires that the plaintiffs are granted interest in the premises by enforcing the alleged agreement.

Additionally, contrary to the defendant’s contentions, it is irrelevant whether the plaintiffs’ name is not on the deed, and that they had no expectation or promise that either of their names would be on the deed to the premises. (See Thaler v Adler, 372 B.R. 572 (Bankr. E.D.N.Y. 2007).

With respect to the applicability of Statute of Frauds in the instant case, “[t]he Statute of Frauds will ordinarily prevent enforcement of an oral agreement to convey an interest in land (General Obligations Law, § 5-703). A constructive trust will be impressed, however, when an unfulfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment.” (McGrath v. Hilding, 41 N.Y.2d 625, 628-29, 1977) (citations omitted)); and “the statute of frauds is not a defense to a properly pleaded cause of action to impose a constructive trust on real property.” (Ubriaco v. Martino, 36 A.D.3d 793, 794, 828 N.Y.S.2d 490, 2<sup>nd</sup> Dept., 2007) (citations omitted)).

Herein, since the Court finds that the plaintiffs properly pleaded a cause of action to impose a constructive trust, the Statute of Frauds is not applicable.

With respect to the applicability of the Statute of Limitations in the instant case, “[t]he equitable claim for the imposition of a constructive trust is governed by the six-year Statute of Limitations of CPLR 213 (1)...” (Maric Piping Inc. v. Rajco Maric, et al., 271 A.D.2d 507, 508, 705 N.Y.S.2d 684, 2<sup>nd</sup> Dept., 2000). “A cause of action to impose a constructive trust or equitable lien is subject to a six-year limitations period that ‘commences to run upon the occurrence of the wrongful act giving rise to a duty of restitution.’” (Morando v. Morando, 41 A.D.3d 559, 561, 840 N.Y.S.2d 593, 2<sup>nd</sup> Dept., 2007) (citations omitted). “A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held

adversely from the date of acquisition, or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property.” (Id. (citations omitted)).

Herein, plaintiffs assert that the Statute of Limitations began to run when Michael repudiated the existence of the agreement after the matrimonial action commenced. Therefore, the Statute of Limitations does not bar the plaintiffs from bringing the instant action.

Furthermore, “[a] cause of action based upon fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered, or with reasonable diligence, could have been discovered, whichever is longer.” (Oggioni v. Oggioni, 46 A.D.3d 646, 648, 848 N.Y.S.2d 245, 2<sup>nd</sup> Dept., 2007). “The two-year period begins to run when the circumstances reasonably would suggest to the plaintiff that he or she may have been defrauded, so as to trigger a duty to inquire on his or her part.” (Pericon v. Ruck, et al., 56 A.D.3d 635, 636, 868 N.Y.S.2d 118, 2<sup>nd</sup> Dept., 2008).

Herein, since the plaintiffs assert that they discovered the alleged fraud when Michael repudiated the alleged agreement, the cause of action for fraud is not time barred and is sustained.

The limitations period on claims for breach of contract and for a constructive trust based on a breach of fiduciary duty and unjust enrichment, both of which arise out of the defendant’s refusal to honor an alleged agreement, begins to run when one of the defendants disavows the agreement. (See Held v. Kaufman, 91 N.Y.2d 425, 1998). The statute of limitations on an unjust enrichment claim begins to run upon the occurrence of the wrongful act giving rise to the duty of restitution. (See Ingrami v. Rovner, 45 A.D.3d 806, 847 N.Y.S.2d 132, 2<sup>nd</sup> Dept., 2007). A defendant cannot raise a statute of limitations defense where the plaintiff was induced by the defendant's fraud or misrepresentations to refrain from filing a timely action. (See Robare v. Fortune Brands Inc., 39 A.D.3d 1045, 833 N.Y.S.2d 753, 3<sup>rd</sup> Dept., 2007).

Herein, the Statute of Limitations does not bar the plaintiffs from bringing the claims in the Verified Complaint.

With respect to the defendant's request to invoke the marital privilege, the privilege for confidential communications between spouses applies to (a) a communication (b) induced by the marital relationship (c) made in confidence (d) during the marriage, if it is (e) not waived and (f) not subject to an exception (see CPLR 4502(b)).

Confidentiality is a key element of the marital privilege. Thus, the privilege will not attach to communications made by the spouses in the known presence of outsiders. (See People v. Thomas, 288 A.D.2d 405, 733 N.Y.S.2d 231, 2<sup>nd</sup> Dept., 2001, appeal denied, 97 N.Y.2d 709, 2002).

Herein, defendant Michael Graziano is seeking to invoke the husband-wife privilege, requests that the Court disregard the affidavit submitted by his wife, the co-defendant in this action, Theresa, and bar her testimony or evidence at any hearing or trial. However, Michael has not shown that any fact in Theresa's affidavit was confidential. At issue in this case is the existence of an agreement between Michael and Theresa on one side, and Theresa's parents – on the other side. Theresa does not indicate any communication in her affidavit, which occurred between her and Michael in confidence. Her affidavit contains conversations and agreements reached between the parents, her and Michael. The presence of the parents destroyed the ability of Michael to claim marital privilege in this instance.

Additionally, whether a particular communication must be excluded from evidence involves a preliminary question of fact which must be made on an ad hoc basis. (See Matter of Vanderbilt, 57 N.Y.2d 66, 1982). Therefore, Michael's request to invoke marital privilege to disregard Theresa's affidavit is **denied**, and the Court will make a separate determination during the trial or a hearing regarding this issue.

With respect to the defendant's request to lift a notice of pendency, "[a] notice of pendency, commonly known as a "lis pendens," can be a potent shield to protect litigants claiming an interest in real property. The powerful impact that this device has on the alienability of property, when conjoined with the facility with which it may be obtained, calls for its narrow application to only those lawsuits directly affecting title to, or the possession, use or enjoyment of, real property." (5303 Realty Corp. v. O&Y Equity Corp., 64 N.Y.2d 313, 315-16, 1984).

In the instant case, it is true that plaintiffs are not asking for the property to be put

into their name, rather, they are asking for a portion of the funds from the sale of the premises to be held for them under a theory of constructive trust for their alleged investments in the property, or, alternatively, that the Court declare that John and TF have the right to remain and have exclusive use of the main floor of the premises and use of all common areas for the rest of each of their lives, and they are currently in occupancy of the premises. As such, they ask for the relief that places a restriction on the defendant's use, enjoyment or transfer of the premises, therefore a Notice of Pendency is not proper. (Compare to **Tiger Riverdale Inc. v. Tiger Riverdale Inc.**, 47 A.D.3d 441, 849 N.Y.S.2d 242, 1<sup>st</sup> Dept., 2008) (where the complaint for money damages did not refer to the subject property in connection with the relief sought, and thus failed to allege the direct relationship to real property required for a notice of pendency), **5303 Realty Corp. v. O&Y Equity Corp.**, 64 N.Y.2d 313 (1984) (where a suit to specifically perform a contract for the sale of stock representing a beneficial ownership of real estate did not support the filing of a notice of pendency), **Bd. of Mgrs. of Woodpoint Plaza Condominium v. Woodpoint Plaza LLC, et. al.**, 43 A.D.3d 971, 841 N.Y.S.2d 471 (2<sup>nd</sup> Dept., 2007) (where in an action for specific performance of warranty provisions of a condominium offering plan, the motion to cancel a notice of pendency was granted on Appeal).

Based upon the flexible approach to constructive trusts under New York law and the high standard for summary judgment, the Court finds that the plaintiffs have raised genuine issues of material fact as to whether, **inter alia**, there was an agreement between the parties which grants any interest in the premises to the plaintiffs, whether and when it was breached by Michael, amount of money contributed by the parents, and whether the contributions were an investment, a loan or a gift to the defendants. Contrary to Michael's contentions, John did not testify that he did not own any interest in the premises, that there was never any agreement, verbal or written, which grants him and his wife interest in the premises. There was no such question asked. Mr. Diorio was asked specific questions. He was never asked about the total amount of his and his wife's contributions to the premises (toward purchase of the residence and total cost of renovations). He merely acknowledged that his name was not on the Deed. Moreover, John was never asked and did not testify whether any sum of money was made as a gift or a loan. The Defendant made improper inferences from the deposition.

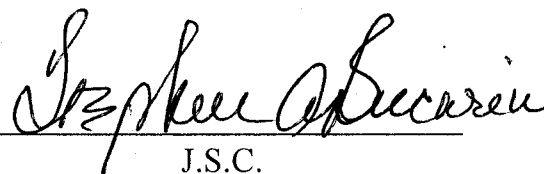
Accordingly, the defendant's motion is **denied**.

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A Preliminary Conference has been scheduled for May 5, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated MAR 20 2009

  
J.S.C.

**ENTERED**  
MAR 23 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE