

**Kunkel v Kunkel**

2009 NY Slip Op 30772(U)

March 30, 2009

Supreme Court, Nassau County

Docket Number: 19166/08

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA  
Justice

MICHAEL KUNKEL and SUSAN KUNKEL,

Plaintiffs,

-against-

ANDREW KUNKEL,

Defendant.

Motion Sequence #1, #2  
Submitted January 16, 2009

INDEX NO: 19166/08

The following papers were read on these motions:

Notice of Motion/Order to Show Cause.....1  
 Notice of Cross-Motion.....2  
 Memorandum of Law in Opposition to Motion in Chief  
 and in Support Of Cross-Motion.....3  
 Affidavit in Support of Motion in Chief and in Opposition to  
 Cross-Motion.....4  
 Reply Affirmation.....5

Plaintiffs, MICHAEL KUNKEL and SUSAN KUNKEL, move, by order to show cause, for an order staying the action pending in First District Court, Landlord Tenant Part, entitled *Andrew Kunkel v. Michael Kunkel, Susan Kunkel, et al*, under Index No. SP4988/2008, and for an order removing and consolidating said action with the instant action . The Court granted plaintiffs an interim order in the initiating order to show cause, dated October 23, 2008, enjoining defendant, ANDREW KUNKEL, and his agents, from taking any action in

furtherance of the District Court action pending determination of the instant motion. Defendant ANDREW KUNKEL, opposes the motion and cross-moves for an order, pursuant to CPLR § 3211(a)(7), for an order dismissing the complaint for failure to state a cause of action. The motion and cross-motion are determined as follows:

This action is for breach of an oral contract, imposition of a constructive trust, fraud, conversion and partition. Defendant ANDREW KUNKEL, age 83, is the father of plaintiff, MICHAEL KUNKEL, who is 53. MICHAEL and his wife, SUSAN, live in an apartment in the two (2) family house owned by MICHAEL's father and located at 49 Roosevelt Court, Westbury, New York ("the Premises"). MICHAEL, who has lived in the house for his entire life, claims that he married in 1986, and that his father promised to transfer the entire house to him if he remained in the upstairs apartment. The transfer was not to take place before December 31, 1999. MICHAEL states that, in reliance upon his father's promise, he remained at home and began to make payments to his father of \$800.00 to \$1,000.00 per month to build equity. He claims to have made "substantial improvements" to the premises and to have paid for all maintenance. He claims that, in July 2008, "without prior notice", his father "suddenly and unilaterally demanded that plaintiffs vacate the Premises" and thereafter refused to recognize his interest in the Premises.

Defendant, ANDREW KUNKEL, denies all of his son's allegations regarding any promise to transfer his real estate. He submits an affidavit asserting that he purchased the subject premises in 1961, with his first wife Jeanne Kunkel. In 1985, he and his wife converted the second floor to a separate unit so that it could be classified as a legal two (2) family home. He asserts, and submits evidence to show, that ever since he has owned

the house he has paid for all costs of the improvements, as well as all maintenance. The evidence includes, *inter-alia*, tax, insurance and renovation invoices. Defendant also submits a Nassau County Tax Assessment showing a current value of approximately \$600,000.00 for the Premises.

In opposition to the motion to dismiss, MICHAEL submits an affidavit alleging that others have witnessed his father's promises regarding the premises and submits the affidavits of several non-party witnesses. He contends that the evidence submitted by his father is limited to real estate taxes and construction of the second floor apartment. He states that his father has been enriched by his payments totaling over \$300,000.00 and that he has been personally responsible for all maintenance on the upstairs unit and has paid for substantially all repairs thereon. He contends that he would not have made payments for twenty-three (23) years if there had not been a promise of ownership, as he desired to own his home and would never have paid rent for such an extended number of years. He asserts that there is no landlord tenant relation as there is no lease and his father never reported rental income. MICHAEL also claims that he made improvements to the Premises. Specifically he alleges that he paid to have the front door to the entire house replaced at a cost of \$3,000.00, and personally settled a landscaper's suit against his father for work done to the premises. MICHAEL asserts that his payments and actions are inconsistent with a landlord/tenant relationship, as are those of his father.

The first cause of action sets forth a claim for a constructive trust. A constructive trust is "the formula through which the conscience of equity finds expression" when the holder of the legal title may not "in good conscience retain the beneficial interest . . . ." (*Goodman v Goodman*, 84 AD2d 344, 446 NYS2d 270 [1st Dept 1982]). A trust is

recognized “to prevent the abuse of a confidential relationship” (*Williams v Williams*, 4 AD2d 793, 165 NYS2d 620 [2d Dept 1957], *affd* 5 NY2d 895 [C.A. 1959]), and four (4) required elements that have developed over time. The elements of a constructive trust are “a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment” (*Williams v Eason*, 49 AD3d 866, 854 NYS2d 471 [2d Dept 2008]). Defendant claims that plaintiffs cannot show unjust enrichment and that the apartment was worth the rent paid and thus his enrichment, if any, was not unjust.

A conclusion that one has been unjustly enriched “is essentially a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties” (*In re First Central Financial Corp.*, 377 F.3d 209, [2nd Cir. 2004], quoting *Brand v Brand*, 811 F.2d 74, [2d Cir. 1987]). There is no “unyielding formula” regarding a constructive trust, and with regard to the four factors “[a]lthough [they] are useful in many cases constructive trust doctrine is not rigidly limited” (*Simonds v Simonds*, 45 NY2d 233, 408 NYS2d 359, 380 NE2d 189 [C.A. 1978]). The “basic equitable principles long established in Anglo-American law and in this State” are “especially relevant when family transactions are involved” (*Simonds v Simonds, supra*). The Court of Appeals has stated, “[a] court of equity in decreeing a constructive trust is not bound by any unyielding formula. The equity of the transaction must shape the measure of relief” (*Simonds v Simonds, supra*, quoting *Beatty v Guggenheim Exploration Co.*, 225 NY 380, 122 NE 378 [C.A. 1919] [Cardozo, J.]). Thus, even with regard to enrichment, the equity of the transaction would be the measure to determine whether plaintiffs state a cause of action. What is required, generally, is that “a party hold property ‘under such circumstances that in equity and good

conscience he ought not to retain it” (*Simonds v Simonds, supra*). .

Here the complaint and supporting affidavit allege that a son paid over \$300,000 over a twenty-three (23) year period to a now eighty-three (83) year old father, and made improvements based upon the father’s promise to transfer the premises to him, a promise which he apparently abandoned based upon the influence of his new and younger wife. Plaintiffs allege that this was not something they would have done without the promise of ownership. They contend that they are now left with the prospect of reaching retirement age without owning their own home and burdened by the necessity of paying a mortgage long into their retirement. The equity of the circumstances alleged are sufficient to avoid dismissal and to engage the Court’s equity jurisdiction. The affidavits are considered not as evidence to support plaintiffs’ claim, but only to remedy any pleading defects (see, *Nonnon v City of New York*, 9 NY3d 825, 842 NYS2d 756, 874 NE2d 720 [C.A. 2007]).

Those claims that allege a breach of contract cause of action are dismissed based upon the Statute of Frauds. It is well settled that General Obligations Law §5-703(2) requires that agreements to sell real property must be in writing. With respect to the cause of action for specific performance, the part performance exception will not assist here based upon the possibility that a landlord/tenant relation existed. The doctrine of part performance, which “only applies to overcome the defense of the [s]tatute of [f]rauds in an action for specific performance of a contract” (*Stainless Broadcasting Co. v Clear Channel Broadcasting Licenses, L.P.*, 58 AD3d 996, 871 NYS2d 461 [3d Dept 2009]), “may be invoked only if plaintiff’s actions can be characterized as ‘unequivocally referable’ to the agreement alleged” (*Anostario v Vicinanza*, 59 NY2d 662, 463 NYS2d 409. 450 NE2d 215

[C.A. 1983]). MICHAEL's alleged improvements to the premises such as painting his own apartment and purchasing a new door, when taken in context with the parent/child relation, renders MICHAEL's payments ambiguous and not "unequivocally referable" to an alleged agreement to transfer title (*Anostario v Vicinanza, supra*).

The cause of action for fraud is also dismissed. There are no wrongful acts or scienter alleged, only a failure to transfer the premises in accordance with the alleged contract. "[A] cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim \* \* \* Further, mere conclusory language, without specific and detailed allegations establishing material misrepresentations of fact, is insufficient to state a cause of action to recover damages for fraud" (*Heffez v L & G General Const.*, 56 AD3d 526, 867 NYS2d 198 [2d Dept 2008]).

The conversion cause of action is dismissed upon the same grounds. "[A]n action for conversion cannot be validly maintained where damages are merely being sought for breach of contract" (see, *Peter, Griffin, Woodward, Inc. v WCSC, Inc.*, 88AD2d 883, 452 NYS2d 599 [1<sup>st</sup> Dept 1982]).

The cause of action for partition is also dismissed, as plaintiffs do not hold title to the premises. "Partition is 'the act or proceeding by which co-owners of property cause it to be divided into as many shares as there are owners, according to their interests therein, or if that cannot be equitably done, to be sold for the best obtainable price and the proceeds distributed according to the respective interests'" (*Chiang v Chang*, 137 AD2d 371, 529 NYS2d 294 [1<sup>st</sup> Dept 1988]). The alleged equitable interest is insufficient to sustain a cause of action for partition (RPAPL § 901).

With regard to removal of the landlord tenant proceeding to this Court for consolidation, the two (2) pending suits involve “common question[s] of law or fact” (CPLR 602[a]) “so that the removal of the summary proceeding to the Supreme Court, and its consolidation with the pending action . . . is appropriate in light of the absence of any claim of prejudice” (*McDermott v Florio*, 155 AD2d 417, 547 NYS2d 561 [2d Dept 1989]). However, because the parties would be both plaintiffs and defendants if a true consolidation were ordered which would result in jury confusion, a joint trial is ordered and the two (2) actions shall proceed with separate index numbers and result in separate judgments (*Padilla v Greyhound Lines*, 29 AD2d 495, 288 NYS2d 641 [1<sup>st</sup> Dept 1968]). Based on the foregoing, it is hereby

**ORDERED**, that plaintiffs’ motion for an order removing and consolidating the District Court action, pending in District Court, Nassau County, First District Landlord & Tenant Part, under Index No. SP 4988/2008 entitled *Andrew Kunkel v Michael Kunkel and Susan Kunkel* is granted to the extent that the action is removed to this Court for a joint trial; and it is further

**ORDERED**, that the Clerk of the District Court is directed to transfer the file in the above named District Court action to the Clerk of the Supreme Court; and it is further

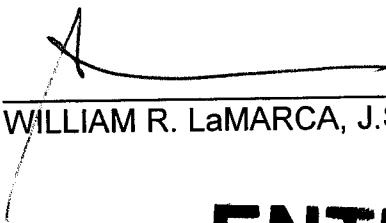
**ORDERED**, that defendant’s motion to dismiss the verified complaint is granted to the extent that the causes of action for breach of contract, fraud, conversion and for partition are granted, but is denied with respect to the cause of action for a constructive trust; and it is further

**ORDERED**, that the parties shall appear for a Preliminary Conference on May 19, 2009, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 30, 2009

  
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WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**

APR 02 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**