

<b>Soffer Sachs v Soffer</b>
2009 NY Slip Op 31503(U)
June 23, 2009
Supreme Court, New York County
Docket Number: 114699/08
Judge: Martin J. Schulman
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: SHULMAN  
Justice

PART 1

SACHS, LINDA SOFFER

INDEX NO. 114699/08

BARBARA K. SOFFER,  
ETAL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

~~Notice of Motion~~/ Order to Show Cause - Affidavits - Exhibits A-K  
Answering Affidavits ~~- Exhibits~~  
Replying Affidavits - Exhibits A-B

PAPERS NUMBERED	
<u>1, 2, 3</u>	
<u>4, 5</u>	
<u>6, 7, 8, 9</u>	

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in  
accordance with the attached decision and  
order.

**FILED**

JUN 26 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: June 23, 2009

  
**MARTIN SHULMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
LINDA SOFFER SACHS,

Plaintiff,

Index No: 114699/08

-against-

Decision and Order

BARBARA K. SOFFER, individually and as Trustee  
of the JOSEPH SOFFER 2001 REVOCABLE FAMILY  
TRUST, and STUART M. SOFFER, individually and as  
Trustee of the JOSEPH SOFFER 2001 REVOCABLE  
FAMILY TRUST, and the JOSEPH SOFFER 2001  
REVOCABLE FAMILY TRUST,

Defendants.

**FILED**  
JUN 26 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**Hon. Martin Shulman, J.S.C.:**

By order to show cause ("OSC"), co-defendants, Barbara K. Soffer, individually and as Trustee of the Joseph Soffer 2001 Revocable Family Trust ("B. Soffer"), Stuart M. Soffer, individually and as Trustee of the Joseph Soffer 2001 Revocable Family Trust ("S. Soffer") and the Joseph Soffer 2001 Revocable Family Trust (the "Trust") (collectively, "Defendants") have moved pursuant to CPLR §6514(b) to cancel the notice of pendency (Exhibit F to OSC) plaintiff, Linda Soffer Sachs ("Soffer-Sachs" or "Plaintiff") filed against a condominium unit known as Unit 16F located at 155 East 38<sup>th</sup> Street, New York, New York 10016 (the "Condo Apt.") and other related relief.

**Complaint**

In the underlying complaint (Exhibit E to OSC), Plaintiff *inter alia* seeks to impose a constructive trust and declare herself the owner of the Condo Apt. A summary of the pleaded factual allegations gives Plaintiff's claim some context. B. Soffer is Plaintiff's mother and S. Soffer is her brother. They are also co-trustees of the Trust (Exhibit B to

OSC) of decedent Joseph Soffer, Plaintiff's father ("J. Soffer" or "Father"), set up to "hold his assets for his benefit during his lifetime, and for the benefit of his wife and children upon his death." (Complaint at ¶ 4). In 1982, Plaintiff moved into the Condo Apt. as a tenant and in 1987, the building in which the Condo Apt. is located converted to condominium ownership (Complaint at ¶¶ 5-6). Plaintiff then financed the purchase of the Condo Apt. and continued to pay the monthly mortgage fees and common charges for the next two years (*Id.* at ¶ 6). In 1989, Soffer-Sachs moved to Connecticut and secured a sub-tenant for the Condo Apt. who resided there from 1989 to 2008 and paid her rent directly to Plaintiff. During this entire period, Plaintiff used these rental proceeds to make her monthly mortgage and common charges payments (Complaint at ¶ 7).

Prior to Plaintiff's marriage in 1989, Soffer-Sachs had discussions with her Father about whether to share ownership of the Condo Apt. with her soon-to-be husband. This discussion apparently resulted in an arrangement whereby Plaintiff transferred her ownership to the Condo Apt. to her Father that year without receiving any consideration (Complaint at ¶¶ 8-9; Recorded Deed as Exhibit A to OSC). In 2001, J. Soffer created the Trust to hold his assets during his lifetime and for the benefit of his wife and children upon his death (Complaint at ¶ 10). In September 2004, Plaintiff's Father transferred the Condo Apt. to the Trust (Exhibit C to OSC) for estate planning purposes, but with an understanding that the Trust was constructively holding the Condo Apt. for Plaintiff's ultimate benefit (Complaint at ¶ 13). J. Soffer passed away on January 6, 2005 (Complaint at ¶ 12). Notwithstanding certain assurances from B. Soffer and S. Soffer that the Condo Apt. belonged to Plaintiff, Plaintiff learned that the

former were planning to sell the Condo Apt. "without Plaintiff's consent and without reimbursing Plaintiff the cost of the [Condo Apt.]" (Complaint ¶ 14). Ignoring Plaintiff's claimed rights to the Condo Apt., B. Soffer and S. Soffer, as co-trustees, moved ahead to arrange the sale of the Condo Apt. However, they did afford Plaintiff the option of repurchasing the Condo Apt. and imposed a deadline for a \$50,000.00 down payment, otherwise the now vacant Condo Apt. would be sold to an adjoining neighbor (Complaint at ¶ 18). Soffer-Sachs then filed the notice of pendency and this action ensued.

### **Defendants' OSC**

Annexed to their OSC to vacate the notice of pendency is Defendants' Verified Answer and Counterclaims and supporting affidavits, wherein Plaintiff's mother and brother jointly deny many of the complaint's allegations as well as the existence of any oral side agreement between Plaintiff and her Father regarding the posthumous disposition of the Condo Apt. (Exhibit G to OSC). For example, Defendants contend that: Plaintiff's Father never informed Plaintiff that the Trust would be holding the Condo Apt. for Plaintiff's ultimate benefit after he transferred title of the Condo Apt. to the Trust (Verified Answer at ¶ 11); J. Soffer gave \$12,000.00 to Soffer-Sachs towards her initial purchase of the Condo Apt. in 1987 (B. Soffer Aff. in Support of OSC at ¶ 3); Plaintiff's Father signed Plaintiff's Note and Mortgage as a guarantor and contractually assumed the responsibility to pay the mortgage held by Emigrant Bank at the time title to the Condo Apt. was transferred to Plaintiff's Father in 1989 (Exhibit H to OSC); since May 3, 1989, Plaintiff has not paid any Condo Apt. common charges, mortgage payments and taxes and abandoned all her rights, title and interest in the Condo Apt. (B. Soffer

Aff. in Support of OSC at ¶¶ 14-17); from 1989, to date, Plaintiff's Father and then B. Soffer and S. Soffer have been paying all the Condo Apt. expenses (see Exhibits I and J to OSC); pursuant to the Trust, B. Soffer and S. Soffer, as co-trustees, have powers and authority to sell the Condo Apt. for good consideration; and the Plaintiff's impermissible actions have caused Defendants a potential loss of \$560,000.00, the purchase price the adjoining neighbor agreed to pay for the Condo Apt. (Exhibit D to OSC).

The OSC's central premise, Defendants argue, is that Plaintiff is legally incapable of proving her Father's purported oral promise to hold the Condo Apt. in trust for her, especially when weighed against the legal transfer of the Condo Apt. from Plaintiff to her Father in 1989 and J. Soffer's subsequent, "expressly written wishes . . ." set forth in the Trust and in the 2004 deed transferring his title to this property to the Trust (Exhibit C to OSC). And without a shred of documentation or other competent proof to support what Defendants characterize as a "bad faith" action and "spite" suit, Defendants seek an order cancelling the notice of pendency pursuant to CPLR §6514(b) or, alternatively, cancelling same upon the posting of a sufficient undertaking (CPLR §6515).

### **Plaintiff's Opposition**

In her affidavit in opposition to the OSC, Plaintiff reiterates her complaint allegations and emphasizes that she owns a remainder interest in the Condo Apt. because of a promise her Father made to her, especially when he agreed to hold same in trust for the latter. Plaintiff, through her counsel, also reveals her suspicions about

her Father's sudden decision to transfer his title to the Condo Apt. to the Trust a mere four months prior to his death from pancreatic cancer (Miltenberg Opp. Aff. at ¶¶ 5-6). Soffer-Sachs then informs that S. Soffer had a similar arrangement in 1985 when he transferred title to his Connecticut house located at 33 Howard Avenue, Branford Connecticut (the "CT. Home") to their Father (who originally purchased this property) without any consideration and the latter then deposited same as principal to the Trust. Plaintiff emphatically accuses B. Soffer and S. Soffer, co-trustees under the Trust, of uneven handedly transferring title to the CT. Home to her brother 2½ years after her Father's death, while now wrongfully trying to sell what is rightfully hers. Finally, Soffer-Sachs characterizes the Condo Apt. as being unique and attests to her emotional attachment to this property and the injustice of Defendants thwarting her long-held desire to have her children reside there while attending college in New York City.

Parenthetically, during one of the status conferences the parties attended, Plaintiff's counsel requested the court to take judicial notice that Plaintiff has filed a petition in a Court of Probate, District of Branford, State of Connecticut, seeking to remove B. Soffer and S. Soffer as co-trustees of the Trust and a related Superior Court action to nullify the transfer of title to the CT. Home to S. Soffer and re-convey that asset back to the Trust.

### **Defendants' Reply**

In reply, B. Soffer counters what she believes to be Plaintiff's revisionist version of the parties' shared history regarding her children's connection to their respective property interests (i.e., the Condo Apt. and CT. Home), and the facts and

circumstances regarding the subtenant's long term occupancy of the Condo Apt., etc. Plaintiff's mother clearly highlights her "broad power over assets included in the Trust . . . [with authority] to act without restriction in all matters concerning any business or property included in the Trust . . ." (bracketed matter added)(B. Soffer Reply Aff. at ¶ 10). Plaintiff's brother also denied Soffer-Sach's charge of self-dealing or that he made any promises to hold the Condo Apt. in trust for Plaintiff. He informs that what he did agree to do was exercise sound business judgment if and when he and B. Soffer, as co-trustees, made the decision to sell the Condo Apt. and that Plaintiff would be given a right of first refusal "to purchase the . . . [Condo Apt.] before it was sold to a third party. . . [and] in fact . . . [Plaintiff was given] an opportunity to purchase the . . . [Condo Apt.] at a discounted price of \$495,000.00 before . . . [Defendants] entered into a contract of sale in October 2008. . ." (bracketed matter added)(S. Soffer Reply Aff. at ¶¶ 7-8 and Exhibit A attached thereto). S. Soffer also stated that notwithstanding his transfer of the CT. Home to his Father in 1985, and unlike Plaintiff's conduct after transferring title to the Condo Apt. to her Father, he has always "occupied . . . the [CT. Home] and paid all expenses related to the property from 1985 through the present . . ." (S. Soffer Reply Aff. at ¶ 14).

As an added bonus, Stephen L. Saltzman, Esq., an attorney licensed to practice in Connecticut with a specialty in estate planning and administration, weighed in with a reply affidavit, wherein he attests to his long-standing relationship with J. Soffer as his attorney in estate planning matters (Saltzman Reply Aff. at ¶ 4). Mr. Saltzman principally informs that the purpose of the Trust *inter alia* was to ensure that a "large portion of . . . [J. Soffer's] assets be available for the benefit of Barbara Soffer without

being includible [sic] in her estate for tax purposes on her death. . . ." (bracketed matter added) (*Id.* at ¶ 10), and explains why the Condo Apt. was transferred to the Trust shortly before J. Soffer's death ("to help avoid ancillary administration in New York State on Joseph Soffer's death." [*Id.* at ¶ 12]).

### **Discussion**

CPLR §6514(b) states, in relevant part, that a "court, upon a motion of any person aggrieved . . . may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith." In *551 West Chelsea Partners LLC v. 556 Holding LLC*, 40 AD3d 546, 548, 838 NYS2d 24 (1<sup>st</sup> Dept. 2007), the Appellate Division, First Department, discusses the high burden Defendants would have to meet to successfully cancel the notice of pendency under this statute. First, Defendants would have to show that Plaintiff's action does not fall within the scope of CPLR §6501 ("A notice of pendency may be filed in an action . . . in which the judgment demanded would affect title to, or the possession, use and enjoyment of, real property. . ."). Here, Plaintiff's complaint *inter alia* pleads a claim to impose a constructive trust to protect her alleged title to real property, i.e., the Condo Apt.,<sup>1</sup> as well as related declaratory relief. Since Plaintiff's action is within the purview of CPLR §6501, it was commenced in good faith. The *Chelsea* court, *supra*, citing to *Williams v. Harrington*, 216 AD2d 761, 765, 628 NYS2d 842, 845 (3<sup>rd</sup> Dept. 1995), noted that a failure to prosecute an action in good faith requires a showing that Plaintiff engaged in

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<sup>1</sup> Plaintiff has pleaded the four requisite factors to impose a constructive trust, i.e.: (1) a confidential relationship with J. Soffer; (2) an implied or express promise; (3) her transfer of the Condo Apt. to her Father without any consideration in reliance on a promise; and (4) unjust enrichment (*see Byrd v. Brown*, 208 AD2d 582, 583, 617 N.Y.S.2d 192, 193 [2<sup>nd</sup> Dept. 1994]).

dilatory conduct. In Defendants' OSC, no such conduct is alleged. While Defendants made it clear that Plaintiff's likelihood of success in this action is doubtful, the *Chelsea* court, *supra*, found this to be an irrelevant factor for the court to consider in determining whether or not to cancel the notice of pendency under this statute. Based on the foregoing, Defendants failed to meet their required burden for CPLR §6514(b) relief and therefore this court denies the branch of their OSC seeking to cancel the notice of pendency pursuant to this CPLR provision.

CPLR §6515 states, in relevant part:

[T]he court, upon motion of any person aggrieved . . . may direct any county clerk to cancel a notice of pendency, upon such terms as are just, . . . if the moving party shall give an undertaking in an amount to be fixed by the court, and if:

1. The court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or
2. In such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for damages that may incur if the notice is not cancelled.

The gravamen of Plaintiff's claim is that notwithstanding a paper trail facially evidencing J. Soffer's ownership of the Condo Apt. as of 1989 and this property's subsequent transfer to the Trust in 2004, Plaintiff relies on her Father's longstanding promise to her that the Condo Apt. would be held in trust for her and never be sold or transferred. Admittedly, at this litigation's nascent stage, discovery has not yet taken place as to the search for admissible proof to support Plaintiff's action to impose a constructive trust on the Condo Apt. Still, Soffer-Sachs inescapably must realize that any potential testimony to confirm this promise via her personal communications with

her Father will probably be barred by CPLR §4519, *viz.*, the Dead Man's Statute. This "[s]tatute bars testimony from a person interested in the event, or a person from, through or under whom such person derives his or her interest or title with regard to any personal transaction or communication with the decedent (*see* CPLR §4519; *Matter of Johnson*, 7 AD3d 959, 961, 777 NYS2d 212 [3d Dept. 2004] . . .)." *Durazinski v. Chandler*, 41 AD3d 918, 920, 837 NYS2d 775, 776 (3<sup>rd</sup> Dept. 2007).

Surprisingly, Defendants have not relied on the strength of the 1989 and 2004 deeds and the Trust itself, but rather felt compelled to attest to certain claimed conversations J. Soffer presumably had with: (1) Plaintiff's mother and an estate planning attorney concerning the respective circumstances underlying Plaintiff's initial transfer of the Condo Apt. to her Father and the latter's unconditional ownership interest in this property (B. Soffer Reply Aff. at ¶ 6; Saltzman Reply Aff. at ¶ 13); (2) Plaintiff's brother about his Father's historic desire to sell the Condo Apt. because of its negative cash flow prior to transferring this property to the Trust in 2004 (S. Soffer Reply Aff. at ¶ 3); (3) the co-trustees to ultimately carry out J. Soffer's wishes to sell the Condo Apt. (*Id.* at ¶ 11); and (4) Plaintiff's brother to carry out his Father's wishes to posthumously transfer the CT. Home from the Trust to S. Soffer in 2006 without any consideration (*Id.* at ¶ 14).

By introducing the foregoing in this family feud ostensibly to defend against Plaintiff's claimed entitlement to the Condo Apt. based on J. Soffer's oft-repeated oral promises he allegedly made to Plaintiff, Defendants may have waived the protection of CPLR §4519. In other words, Defendants may have "opened the door" as to the

admissibility of J. Soffer's varied conversations with his loved ones raising material questions as to what should be the ultimate disposition of the Condo Apt. See *In re Estate of Wood*, 52 NY2d 139, 144, 436 N.Y.S.2d 850, 852 (1981).

Against a backdrop of a fluctuating real estate market, buyers ready, willing and able to purchase the Condo Apt., the parties' mutual credibility issues<sup>2</sup> and Plaintiff's demand for a judgment declaring Soffer-Sachs the owner of this real property, this court seeks to utilize CPLR § 6515[2] "by cancelling the notice of pendency upon an undertaking by the [D]efendant[s] . . . unless [P]laintiff . . . posts an undertaking which will indemnify [D]efendant[s] (see *Ansonia Realty Co. v. Ansonia Assocs.*, 117 AD2d 527, 498 NYS2d 141 [1<sup>st</sup> Dept 1986]). . ."; *Matter of Tschernia*, 18 Misc3d 1129(A), 856 NYS2d 503 [\*5-6] [Surr. Ct., Nassau Co. 2008]). And on the record thus far, "[t]his 'double bonding' choice is preferable even when [P]laintiff's likelihood of success is doubtful . . ." *Andesco, Inc. v. Page*, 137 AD2d 349, 357, 530 NYS2d 111, 115 (1<sup>st</sup> Dept. 1988).

Accordingly, this court exercises its discretion to grant Defendants' OSC cancelling the notice of pendency filed against the Condo Apt. on the condition that Defendants hold the net proceeds of the sale of this property in an interest-bearing escrow account within 45 days of the date of issuance of this Decision and Order,

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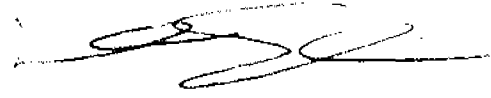
<sup>2</sup> Interestingly on this record, siblings Soffer-Sachs and S. Soffer share a common failing to credibly corroborate certain sworn statements with documentary proof. For example, Plaintiff claims to have paid the monthly mortgage and common charges from the rental proceeds of the Condo Apt. from 1989 to 2008, yet offers no proof of same. S. Soffer similarly claims he always paid the expenses of the CT. Home since 1985, but has not proffered even a single paid utility bill.

unless Plaintiff posts an undertaking of \$560,000.00<sup>3</sup> within this same period, which will continue the notice of pendency pending the ultimate disposition of this action.

Counsel for the parties are directed to appear for a status conference on July 28, 2009 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York  
June 23, 2009



Hon. Martin Shulman, J.S.C.

**FILED**  
JUN 26 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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<sup>3</sup> Defendants have additionally sought an undertaking for the accrued monthly costs of the Condo Apt. (e.g., common charges, mortgage, taxes, etc.), but have not specified precisely what the current costs are. Thus, this court declines to speculate as to the amount of any additional undertaking other than the \$560,000.00 purchase price offered for this property.