

DePaolis v Cau

2009 NY Slip Op 31716(U)

July 24, 2009

Supreme Court, New York County

Docket Number: 103987/09

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

JOAN DePAOLIS,
Plaintiff,

Index No.: 103987/09

- v -

Motion Date: 04/21/09

GEORGE CAU,
Defendant.

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this show cause order for a preliminary injunction

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers,

In this action seeking the imposition of a constructive trust and damages for unjust enrichment in connection with a three bedroom condominium apartment ("the apartment"), plaintiff moves for a preliminary injunction enjoining defendant from taking any action to terminate plaintiff's possession, use and occupancy of that apartment. For the reasons that follow, the court shall deny plaintiff's motion for provisional relief.

This dispute arises out of s paramour relationship between the parties over the past two dozen years. Each were married to other people during much of that time, with defendant's marriage

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

ending in 1995 when his wife died, and plaintiff's ending in divorce from her husband in 2000. Until March 2005, plaintiff and defendant lived together in a house located in Westchester County, which defendant purchased as an investment thirty years before. Thereafter, plaintiff and defendant shared the apartment, which was purchased with the proceeds of the sale of the Westchester County House. It is undisputed that defendant has legal title to the apartment. Plaintiff used her interest in the proceeds of her marital home to purchase a studio apartment in the same building as the apartment.

Plaintiff commenced this action to impose a constructive trust on the apartment on the basis that (1) defendant promised to always take care of her and to provide her with a 50% interest in the Westchester house; (2) relying on defendant's promises, she gave up her full time career to move into the Westchester house and nurse defendant back to health when he fractured his back after falling from a tree; (3) she actively participated in the selection and purchase of the apartment; 4) she "undertook extensive major renovations" of the Westchester house, including the development and maintenance of a garden, as well as the apartment; and (5) she rented her studio apartment to someone else.

As the Court of Appeals has stated

Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder

of the legal title may not in good conscience retain the beneficial interest therein. In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment. Most frequently, it is the existence of a confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust."

Sharp v Kosmalski, 40 NY2d 119, 121 (1976).

Plaintiff has established a likelihood of success on the merits as to the first element of her claim. As stated in Sharp, no marital or other family relationship is necessary for the existence of a confidential relationship. The parties' contentions are on all fours with the facts of Sharp so "the defendant must be charged with an obligation not to abuse the trust and confidence placed in [him] by the plaintiff." The parties' disagreement about the duration and continuousness of their co-habitation is of no moment to this question.

However, the record is bereft of any evidence that plaintiff made a transfer in reliance on such confidential relationship. Plaintiff's contentions are distinguishable from the facts in McGrath v Hilding, 41 NY2d 625 (1977), since she admits that the proceeds of the sale of her own marital home were used to purchase an apartment in her own name. Although "[t]he transfer concept extends to instances where funds, time and effort were contributed in reliance on a promise to share in the result" (Sylvester v Sparra, 268 AD2d 424 [2d Dept 2000]), there is no

case that holds that affection, care and provision of domestic services alone suffice. There is no evidence in the record nor does plaintiff even contend that she paid any of the expenses incidental to the ownership of either the Westchester property or the apartment. Nor does she contest defendant's statement that she contributed none of the funds held by the parties in their joint account. Finally, even assuming plaintiff gave up her career as a registered nurse, such decision does not constitute a transfer. By analogy, if the parties were married, her employment status would support a claim for equitable distribution, but would not form the basis for the imposition of a trust. Terrielle v Terrielle, 171 AD2d 906 (2d Dept 1991).

The equities do not weigh in plaintiff's failure either. She does not contest that the lease on her own apartment ended in May 2009. Nor does she deny that defendant first asked her to move in 2007, a request that he renewed in September 2008 so that she would make plans to relocate to her studio apartment. Plaintiff waited six months after the latter date to commence this action, which was filed four months after defendant filed his original hold-over summary proceeding. The equities tilt in favor of defendant, who should not be forced to continue co-habiting with plaintiff at his total expense. Since defendant paid for the apartment with the proceeds from the sale of the Westchester County house, which was purchased solely with his own

funds and since he never received a penny from plaintiff toward the recurring expenses of either property, it is plaintiff who is being unjustly enriched.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction staying defendant from taking any action to terminate plaintiff's possession, use and occupancy of the apartment is DENIED, and it is further

ORDERED that the parties are hereby directed to attend a preliminary conference on September 1, 2009 at 9:00 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York 10013.

This is the decision and order of the court.

Dated: July 24, 2009

ENTER:

~~John A. James~~
HON. DEBRA A. JAMESs.c.

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NEW YORK