

**Anthoine v Wolff**

2010 NY Slip Op 30419(U)

March 2, 2010

Supreme Court, New York County

Docket Number: 106020/03

Judge: Joan A. Madden

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

PRESENT: Hon. J. A. Mudd

PART 11

Index Number : 100711/2009

**ANTHOINE, EDITH**

VS.

**WOLFF, MICHAEL**

SEQUENCE NUMBER : 002

STRIKE ANSWER

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

is motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum Decision + Order.

**FILED**

MAR 04 2010

NEW YORK

COUNTY CLERK'S OFFICE

Dated: March 2, 2010

[Signature]

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: IAS PART 11

-----X  
EDITH ANTHOINE , Index No. 106020/03  
Plaintiff,

-against-

MICHAEL WOLFF and ALISON ANTHOINE,  
Defendants.

-----X  
MICHAEL WOLFF and ALISON ANTHOINE,  
Third-party Plaintiffs,

-against-

ROBERT ANTHOINE, NELSON ANTHOINE, NINA ANTHOINE, and WINDHAM RESOURCES, LLC,  
Third-party Defendants.

-----X  
Joan A. Madden, J:

Plaintiff Edith Anthoine ("Plaintiff") moves to strike the affirmative defenses of defendants Michael Wolff and Alison Anthoine's (collectively, "Defendants" or "Third-Party Plaintiffs") and to dismiss their counterclaim and third-party complaint. Defendants cross-move, pursuant to CPLR 3212(e), for partial summary judgment dismissing Plaintiff's claims for fraud, for the imposition of a constructive trust, and for unjust enrichment. (Motion Seq. No. 002). Third-party defendants Robert N. Anthoine, Nelson Anthoine, Nina Anthoine, and Windham Resources, LLC (collectively, "Third-Party Defendants") move to dismiss the third-party complaint and for sanctions against Defendants. Defendants oppose the motion and request sanctions against Third-Party Defendants. (Motion Seq. No. 003).<sup>1</sup>

**FILED**  
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NEW YORK  
COUNTY CLERK'S OFFICE

<sup>1</sup> Motion Seq. No. 002 and 003 are consolidated for disposition.

For the reasons set forth below, Plaintiff's motion is granted to the extent of dismissing the twelfth affirmative defense of unclean hands, Defendants' motion for partial summary judgment is granted only to the extent of dismissing the fraud cause of action, and the motion by Third-Party Defendants to dismiss the Third-Party Complaint is granted in its entirety. The requests for sanctions are denied.

### **BACKGROUND**

Unless otherwise noted, the following facts are based on the allegations of the complaint. Plaintiff is the 87 year-old mother of defendant/third-party plaintiff Alison Anthoine ("Alison") and of third-party defendants Robert N. Anthoine, Nelson Anthoine, and Nina Anthoine (collectively, the "Anthoine Children"). Defendant/Third-Party Plaintiff Michael Wolff ("Michael") is a journalist/author who is now legally separated from Alison.

On or about February 1, 1964, Plaintiff and her former husband Robert Anthoine ("Robert") moved into a rent-stabilized apartment known as #6A at 1065 Lexington Avenue, New York, New York (hereinafter "the Lexington Apartment"). The Lexington Apartment is a four-bedroom, three-bathroom apartment on the Upper East Side. On or about June 1, 1990, Plaintiff and Robert were divorced and Plaintiff continued to live as a rent-stabilized tenant in the Lexington Apartment.

On or about January 1, 1984, the New York State Attorney General ("Attorney General") approved the cooperative conversion plan (the "Offering Plan") that the owners of 1065 Lexington Avenue, New York, New York had proposed for the building. Under the Offering Plan, according to Plaintiff, long-term residents had the option of either purchasing

their apartments at a below market-rate "insider price" or could remain leasehold residents.<sup>2</sup>

According to the complaint, on or about March 1, 1994, Defendants made the following proposal--that Plaintiff would permit them to exercise her right to purchase the Lexington Apartment at the "insider price" while they would purchase a smaller apartment for her on the Upper East Side. Plaintiff would herself pay the maintenance and utility charges for the smaller apartment. Defendants, however, maintain by 1994 any right to an insider price on the Lexington Apartment had lapsed, and in support of this assertion submit the affidavit of Robert Liberman, the Sponsor's general partner, who states that by 1994, when Defendants purchased the Lexington Avenue Apartment, Plaintiff's right to purchase the Lexington Apartment at an "insider's price" had lapsed. However, in an email dated April 24, 2008, Alison appears to state that Defendants purchased the the Lexington Apartment at an insider price or at least obtain a below market rate price on the apartment. Alison's e-mail to Michael and the Anthoine Children states that "'Mom made it possible for us to buy her apartment for approximately \$200,000 under the market value of the apartment in 1995. So that's what she gave us." (emphasis added). Exhibit C to the Affidavit of Alison Anthoine.

On or about August 12, 1994, Defendants entered into a contract of sale ("Contract") for the Lexington Avenue Apartment with 1065 Lexington Avenue Associates, the sponsor ("Sponsor") of the Offering Plan, which provided, in relevant part, that:

The parties hereto acknowledge that the apartment is currently occupied by a relative of Alison Anthoine...In the event the current rent regulated tenant desires to stay in the Apartment pursuant to

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<sup>2</sup>Defendants deny these allegations and claim that the Offering Plan was accepted by the Attorney General in May 1990.

her rights under the lease and/or at law, Purchasers [Defendants] acknowledge that the current tenant may do so. Purchasers further acknowledge that it is their understanding that the current tenant intends to vacate the Apartment within a reasonable time prior to or after closing but that the failure of the tenant to so vacate the Apartment shall not give the Purchasers any right of rescission nor shall it constitute an event of default on the party of either party hereto.

(Section 40 of the Contract).

In September 1994, Defendants closed on the Lexington Apartment and Defendants purchased the cooperative corporate shares in connection with apartment #8F, 207 East 74th Street, New York, New York ("74th Street Apartment"). On or about April 1, 1995, Plaintiff moved from the four-bedroom Lexington Apartment to the one-bedroom 74th Street Apartment and since that time Defendants have resided at the Lexington Apartment. The complaint alleges that Plaintiff relied on the Defendants' representation that they bought the 74th Street Apartment for her to live out the rest of her life. In their answer, Defendants admit that they bought the 74th Street Apartment for Plaintiff but that "no lease terms were mentioned," that the agreement was not reduced to writing, and that there was no contingency planned for, such as the divorce between Alison and Michael, by the parties.

Plaintiff alleges that, during her tenancy at the 74th Street Apartment, she made regular annual gifts within the applicable federal exemption amounts to the Defendants or made tax-exempt gifts covering their children's tuition fees to various private schools to, inter alia, cover the maintenance fees for said apartment and that she paid the monthly maintenance fees and utilities for the 74th Street Apartment and paid for its annual insurance coverage. She alleges that her monetary gifts to Defendants "were understood" to cover the maintenance payments for the 74th Street Apartment while simultaneously allowing Defendants to enjoy tax deductions for

the property.

Defendants claim that, without any contribution from the Anthoine Children, from 1995 to until approximately March 2009, they met the financial obligations associated with the purchase of the Lexington Apartment and the 74th Street Apartment, along with the associated maintenance charges.

The complaint alleges that on or about May 18, 2005, Plaintiff divided her Fidelity Fund portfolio (the "Portfolio") into equal portions for each of her four children (Alison and the Anthoine Children) with the understanding that the funds were to be held for her benefit until her death. Upon Plaintiff's death, any remaining balance in these accounts would represent the inheritance that she was distributing to her children. Plaintiff contends that each of the four accounts held shares worth \$104,760.50 as of May 31, 2005.

It is further alleged that, since on or about September 1, 2008, Defendants have invaded that portion of the Portfolio held by Alison to fund their legal expenses in connection with their efforts to evict her from the 74th Street Apartment. It is also alleged that, on or about March 1, 2007, Defendants informed Plaintiff that they wanted her to vacate the 74th Street Apartment by October 1, 2008 so they could sell it. Plaintiff contends that, on or about July 1, 2008, she was contacted by her building's managing agent and told that two maintenance payments were in arrears for the 74th Street Apartment as of July 1, 2008. Plaintiff alleges that she subsequently paid these fees herself and that, when she confronted Defendants in July 2008 about the arrearage, they told her, among other things, that they had cash flow problems and had used her money to send one of her grandchildren to France for vacation. Plaintiff further contends that, on or about December 30, 2008, she was again informed that two months' maintenance was in arrears and that she again paid the arrearage herself.

Plaintiff argues that Defendants attempted to have her evicted from the 74th Street Apartment through a "forced sale" by repeatedly failing to pay the apartment's maintenance fees. Defendants contend that they made an attempt to find alternative living arrangements for Plaintiff and that the Anthoine Children refused to help them in this effort. See, e-mails annexed to the Alison Affidavit as Exhibits "A", "B", "C", "D" and "E".

On or about November 24, 2008, Defendants attempted to serve a 30-day termination notice ("Termination Notice") upon Plaintiff. (Answer, Par. 95). Defendant failed to vacate the 74th Street Apartment. Thus, on or about January 14, 2009, Defendants commenced a holdover proceeding in the Civil Court, New York County (Index #052379/2009) ("Holdover Proceeding"). In the Holdover Proceeding, Defendants sought a final judgment seeking, inter alia, awarding Defendants possession of the 74th Street Apartment along with an award of use and occupancy from January 1, 2009 to be determined by the Court.

On or about January 12, 2009, Plaintiff commenced this action containing claims for breach of the duty of good faith and fair dealing, breach of contract, breach of fiduciary duty, unjust enrichment, imposition of a constructive trust upon the 74th Street Apartment, fraud, conversion, replevin, and the intentional infliction of emotional distress. On February 23, 2009, Plaintiff moved, by order to show cause, to stay the Holdover Proceeding. After hearing argument, on March 11, 2009, this court stayed the Holdover Proceeding and ordered that Plaintiff was to pay use and occupancy in an amount equal to the monthly maintenance fee commencing on April 1, 2009.

On or about April 8, 2009, Defendants served a verified answer with affirmative defenses, one counterclaim, and a third-party complaint. In their counterclaim ("Counterclaim"), Defendants assert that Plaintiff was a month-to-month tenant in the 74th Street Apartment

commencing in April 1995, that she was duly served with the Termination Notice, and that she has continued to remain in the 74th Street Apartment. Defendants, as relief, seek a judgment of possession and a warrant of eviction for the 74th Street Apartment, along with a money damages award for use and occupancy from January 1, 2009.

### DISCUSSION

#### Plaintiff's Motion to Dismiss

Plaintiff moves to dismiss Defendants' thirteen affirmative defenses and counterclaim. As set forth below, with the exception of the thirteenth affirmative defense of unclean hands, which must be dismissed, the motion is otherwise denied.

"A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." CPLR 3211(b). A CPLR 3211 motion to dismiss "must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal citations quotation marks omitted]." Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 289 (1st Dept. 2003) *quoting* 511 W. 232nd Owners Corp. v. Jennifer Realty Corp., 98 N.Y.2d 144, 151-152 (2002). Pleadings are to be afforded a 'liberal construction". Leon v. Martinez, 84 N.Y.2d 83, 87 (1994).

Here, Plaintiff has moved to strike Defendants' first eleven affirmative defenses, all of which allege that Plaintiff has failed to state a cause of action. It is well-settled that the affirmative defense of failure to state a cause of action is merely "surplusage" and that a plaintiff may not make a motion under CPLR 3211(b) to strike that defense. Riland v. Frederick S. Todman & Co., 56 A.D.2d 350, 352-53 (1st Dept. 1977) ("The assertion of that defense in an answer should not be subject to a motion to strike or provide a basis to test the sufficiency of the

complaint"); Citi Management Group, Ltd v. Highbridge House Odgen, LLC, 45 A.D.3d 487 (1st Dept. 2007); Butler v. Catinella, 58 A.D.3d 145 (2nd Dept. 2008) (adopting the First and Third Departments rationale that plaintiff may not strike a failure to state a cause of action defense). Accordingly, the motion to strike the first eleven affirmative defenses is denied.

In regard to the twelfth affirmative defense of balance of equities, Plaintiff argues that the balance of equities lie in her favor. As it is premature at this juncture to make this determination, the motion to dismiss this affirmative defense is denied.

As for the the thirteen affirmative defense of unclean hands, contrary to Plaintiff's assertions, Defendants may raise this doctrine affirmatively. McGrath v. Hilding, 41 N.Y.2d 625, 394 N.Y.S.2d 603 (1977) (A promisee seeking to establish a constructive trust must show she is not guilty of an equivalent breach of the fidelity upon which the constructive trust is based). However, it is "never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then 'only when the conduct relied on is directly related to the subject matter of the litigation and the party seeking to invoke the doctrine was injured by such conduct.' "National Distillers & Chemical Corp. v. Seyopp Corp., 17 A.D.2d 12, 15-16 (1966) (internal citation omitted). In this matter, Defendants have pled this defense in a conclusory fashion without setting forth any allegations detailing Plaintiff's unconscionable conduct, how they were injured by such conduct, and how it relates to her request for the imposition of a constructive trust upon the 74th Street Apartment. Kronish Lieb Weiner & Hellman, LLP v. Tahari, LTD., 35 A.D.3d 317 (1st Dept. 2006) (Defendants' affirmative defense of unclean hands properly dismissed as conclusory). Accordingly, the defense of unclean heads should be dismissed.

Plaintiff also moves to dismiss the first counterclaim, which seeks judgment of possession and a warrant of eviction, on the basis that the court lacks subject matter jurisdiction.

The motion to dismiss the Counterclaim is denied as the court clearly has subject matter jurisdiction over a claim seeking judgment of possession and a warrant of eviction. Nestor v. McDowell, 81 N.Y.2d 410, 415 (1993) (Supreme Court jurisdiction "includes 'all cases of every description in law and equity, from the most important and complicated to the most simple and insignificant'")(internal citation omitted); Kagen v. Kagen, 21 N.Y.2d 532, 537 (1968) ("Supreme Court is a court of original, unlimited and unqualified jurisdiction").

Plaintiff has also moved to dismiss the Third-Party Complaint--which she labels a "Second Counterclaim." As none of the claims in the Third-Party Complaint are asserted against the Plaintiff, she may not seek such relief, including on the grounds that the court lacks personal jurisdiction over the Third-Party Defendants.

#### Defendants' Motion for Partial Summary Judgment

Defendants move for partial summary judgment, pursuant to CPLR 3212(e), dismissing the claims for fraud, unjust enrichment and for a constructive trust.

In her affidavit in support of Defendants' motion, Alison states that, in respect to the fraud claim, neither she nor Michael made any misrepresentation to Plaintiff concerning their intention to provide her with "comfortable housing at a subsidized rate." She states that the fact that they permitted plaintiff to reside in the 74th Street Apartment for more than 13 years is evidence that they did not make a misrepresentation and that only the unforeseen circumstance of her divorce triggered the need to sell the 74th Street Apartment and to relocate Plaintiff.

As for the constructive trust claim, Alison asserts that she has no confidential or fiduciary relationship with her estranged mother. In addition, Alison states that Defendants purchased the Lexington Apartment directly from the Sponsor and thus Plaintiff has not met the "transfer of property" requirement needed to impose a constructive trust. Alison also states that Defendants

have not been "unjustly enriched" since Plaintiff has ended up paying less "rent" for the 74th Street Apartment than the Lexington Apartment while Defendants have tied up their capital in the 74th Street Apartment. She also states that Plaintiff is the party (along with the Anthoine Children) that has been enriched by virtue of their agreement.

Defendants also rely on the statement by Robert Liberman, the Sponsor's general partner, that by 1994, when Defendants purchased the Lexington Avenue Apartment, Plaintiff's right to purchase the Lexington Apartment at an "insider's price" had lapsed.

#### Fraud Cause of Action

The fraud claim is based on allegations that at the time of the purchase of the 74<sup>th</sup> Street Apartment it was "understood by the parties" that Plaintiff was "the intended resident of the unit [74th Street Apartment] for as long as she required it" and that she "acted in reliance upon the representations of the [D]efendants that they would be purchasing [the 74th Street Apartment] for her to live out her life in." (Complaint, ¶'s 13, 16). It is further alleged that Plaintiff was "induced by to act to her detriment" based on the "promises and representations" by Defendants (Id., ¶ 45). In regard to the Portfolio, the complaint alleges that Plaintiff divided its funds with the "explicit understanding" that the funds were to be held by Alison and the Anthoine Children for her benefit until her death and that any remaining amounts upon her death would represent their inheritance. She alleges that, since September 2008, Defendants have threatened to and invaded plaintiff's own funds held by Alison in the Portfolio to fund their attempt to evict her from the 74th Street Apartment.

To state a cause of action for fraud, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance, and resulting injury. Waggoner v. Caruso, 68 A.D.3d 1 (1st Dept. 2009); Zanett Lombardier, Ltd. v.

Maslow, 29 A.D.3d 495 (1st Dept. 2006). It is well-established that a cause of action for fraud must be pled with specificity. CPLR 3016(b); J.A.O. Acquisition Corp. v. Stavitsky, 18 A.D.3d 389, 390 (1st Dept. 2005) (affidavit in support of fraud claim insufficient as it only contained vague assertions); Callas v. Eisenberg, 192 A.D.2d 349, 350 (1st Dept. 1993) (Partial summary judgment dismissing a fraud claim should have been granted because plaintiff's conclusory allegations did not satisfy the pleading requirement). CPLR 3016(b) requires that claims for fraud set forth "the circumstances constituting the wrong...in detail."

Thus, "[a]lthough there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege basic facts to establish the elements of the cause of action." Euryclej Partners, L.P. v. Seward & Kissel, L.P., 12 N.Y.3d 553, 559 (2009). Further, the First Department has held that "a cause of action for fraud and deceit cannot be maintained unless it alleges misrepresentation of a present or pre-existing fact known to be untrue by the party making it with the intent to deceive and for the purpose of inducing the other party to act upon it causing injury." Roney v. Janis, 77 A.D.2d 555, 556-557 (1st Dept. 1980), aff., 53 N.Y.2d 1025, (1981); Glatt v. Mariner Partners, Inc., 63 A.D.3d 428, 429 (1st Dept. 2009) (cause of action for fraudulent inducement properly dismissed as there was "no allegation of a knowing misrepresentation of a present material fact with intent to deceive"). Moreover, a claim "'based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement.'" Laura Corio, M.D., PLLC v. R. Lewin Interior Design, Inc., 49 A.D.3d 411, 412 (1st Dept. 2008) quoting Non-Linear Trading Co. v. Braddis Associates, Inc., 243 A.D.2d 107, 118 (1st Dept. 1998).

Here, Plaintiff has not adequately alleged any misrepresentation of a pre-existing fact but

instead merely alleges that "it was understood" that she would be permitted to reside in the 74<sup>th</sup> Street Apartment for as long as she required it and that Defendants did not intend to keep their promise to her in regard to the 74th Street Apartment. Plaintiff has failed to allege that the Defendants entered into the alleged deal with Plaintiff (wherein she would give up the Lexington Apartment in return for the right to live in the 74th Street Apartment) with intention that they would not honor this agreement. Plaintiff also fails to allege any facts from which it could be inferred that at the time that Defendants entered into the contract to purchase the Lexington Avenue Apartment, that they knew they were not going let Plaintiff live out the remainder of her life in the 74th Street Apartment.

Plaintiff's conclusory allegations, moreover, do not satisfy the requirement that fraud be pled with specificity. The complaint fails to contain any factual allegations asserting that Defendants made any fraudulent misrepresentations with the requisite scienter to Plaintiff either with respect to the 74th Street Apartment or to Alison's Portfolio share. In fact, the complaint lacks any allegation regarding any type of fraudulent misrepresentation in connection with Alison's share of the Portfolio. Accordingly, the fraud claim must be dismissed.

#### Constructive Trust

Plaintiff alleges that "based upon the history of transactions" between herself and the Defendants the requisite elements of a constructive trust have been met. She alleges that Defendants proposed to her that Plaintiff allow them to purchase the Lexington Apartment at an insider's price in exchange for the purchase of the 74th Street Apartment for which she would pay maintenance and utility charges. Plaintiff claims she agreed to this exchange and transfer of her rights to the Lexington Apartment as a means of extending a benefit and gift to Defendants and that she acted in reliance upon the Defendants' representation that she could live out the

remainder of her life in the 74th Street Apartment.

Defendants argue that Plaintiff has failed to meet three of the four requirements necessary for the imposition of a constructive trust. Defendants claim that, even though Alison and Plaintiff are mother and daughter, there is no confidential or fiduciary relationship between them. Second, Defendants contend that Plaintiffs have failed to show how Defendants were unjustly enriched at Plaintiff's expense. Defendants also argue that an essential element necessary to impose a constructive trust is the transfer of a property upon the reliance of a promise--an element which is absent in this case. Defendants argue that Plaintiff was only a tenant of the Lexington Apartment and thus did not and could not transfer "property" to them upon their promise that they would purchase the 74th Street Apartment for her to live out the remainder of her life.

Courts have held that the following four elements are relevant in determining whether a constructive trust should be imposed: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance upon the promise; and (4) unjust enrichment. Sharp v. Komalski, 40 N.Y. 2d 119, 121 (1976); Panetta v. Kelly, 17 A.D.3d 163 (1st Dept. 2005) , lv. to app. dis., 5 N.Y.3d 783 (2008). There is no "set formula", however, for determining whether such a trust should be imposed. Majer v. Schmidt, 169 A.D.2d 501, 502 (1st Dept. 1991); Hira v. Bajaj, 182 A.D.2d 435 (1st Dept. 1992). "A constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest," Sharper v. Harlem Teams for Self-Help, Inc., 257 A.D.2d 329, 332 (1st Dept. 1999) *quoting* Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378 (1919). Constructive trusts "are raised by equity for the purpose of working out right and justice." Id., 332-333 *quoting* Frier v. J.W. Sales Corp., 261 A. D. 388, 391 (1st Dept. 1941);

Simonds v. Simonds, 45 N.Y.S.2d 233, 241 (1978).

Here, the complaint contains sufficient allegations to state a claim for a constructive trust and the evidence submitted on the motion is not sufficient to warrant a contrary finding. Plaintiff alleges that she gave up the Lexington Apartment, a rent-stabilized apartment on Manhattan's Upper East Side, upon Defendants' promise that they would purchase the 74th Street Apartment for her to reside in. These allegations are adequate to show that plaintiff surrendered a valuable leasehold in reliance upon Defendants' agreement that they were going to provide her with a home for the remainder of her years in the 74th Street Apartment. Plaintiff further alleges she provided Defendants with money for the 74th Street Apartment's maintenance fees. Thus, while she may not have been the legal owner of the Lexington Apartment or the 74th Street Apartment, the complaint adequately alleges that she relinquished her interest in a rent regulated apartment based upon her daughter and son-in-law's promises that they would provide her with another apartment (the 74th Street Apartment) for life. See e.g., Size v. Size, 276 A.D.2d 329 (1st Dept. 2000), lv. to app. den., 96 N.Y.2d 712 (2001)(affirming trial court's decision that allegations by a formerly estranged son against his father were sufficient to state a claim for the imposition of a constructive trust, where the complaint alleged the father and son entered into an oral agreement whereby the father executed a mortgage and took legal title to a condominium apartment in exchange for the adult son providing the down payment and agreeing to make mortgage payments while he (the son) resided in the apartment).

Moreover, contrary to Defendants' argument, the statements in Alison's affidavit that she did not have a good relationship with her mother, do not provide a basis for finding that there was no confidential or fiduciary relationship between Plaintiff and Alison. The courts have found that even strained familial relationships give rise to fiduciary and/or confidential

relationship necessary to impose a constructive trust. See, e.g., Size v. Size, supra, (Father and son who, before getting back in touch, had no contact for more than 30 years found to have confidential relationship); Scull v. Scull, 94 A.D.2d 29, 34 (1st. Dept. 1983), aff., 67 N.Y.2d 926 (1986), rearg. den., 68 N.Y.2d 754 (1986) (First Department upheld trial court's determination that, in the context of a separated couple, "a confidential relationship existed cannot be disputed in light of a marriage that lasted for thirty years").

Next, Defendants' argument that there must be a transfer of an ownership interest in property in order to impose a constructive trust is without merit. See, Size, supra. See also, Braddock v. Braddock, 60 A.D.3d 84, 96, 871 N.Y.S.2d 68 (1st Dept. 2009) (dismissal of constructive trust based upon plaintiff's claim that he was entitled to shares and profits in a company was improper as "[plaintiff] alleged that he contributed a portion of his investment banking fees and contributed time and energy to the creation of the company in reliance on [defendant's] promise that he would received a specified ownership interest in it").

In addition, to satisfy the element of unjust enrichment for the purposes of a constructive trust there is no requirement that "the performance of any wrongful act by the one enriched...[i]nnocent parties may frequently be unjustly enriched. What is required...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 at 242 (citations omitted); Zuch v. Zuch, 117 A.D.2d 397 (1st Dept. 1986), app. den., 68 N.Y.2d 611 (1986) (Appellate Division found that trial court erred in failing to find that unjust enrichment existed and to thus impose a constructive trust on apartment shares).

Thus, based on the allegations in the complaint and the record before the court, Defendants' motion for summary judgment dismissing the claim for a constructive trust must be

denied.

#### Unjust Enrichment

A cause of action for unjust enrichment "requires the court to determine whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chipetine, 221 A.D.2d 284, 286 (1st Dept. 1995) *quoting* Paramount Film Distr. v. State of N.Y., 30 N.Y.2d 415, 421 (1972); Wiener v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept. 1998).

Here, Plaintiff's unjust enrichment claim is sufficient to state a claim based on allegations that she gave up her valuable rent-stabilized interest in the Lexington Apartment, allowed Defendants to purchase it at an insider's price, and made annual monetary gifts to Defendants (including paying tuition for Defendants' children at private schools) which, among other things, was to cover her maintenance fees for the 74th Street Apartment while allowing them to enjoy tax deductions for the apartment. She also alleges that she maintained the 74th Street Apartment and, by virtue of her efforts, it appreciated in value. Additionally, Plaintiff's allegations that Defendants were unjustly enriched when they invaded Alison's Portfolio share (which she was to hold for benefit of Plaintiff during her lifetime) for the purposes of funding the proceedings to eject her from the 74th Street Apartment, provides a basis for an unjust enrichment claim.<sup>3</sup>

Although Defendants assert that Plaintiff could not have afforded to remain in the

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<sup>3</sup>In fact, Alison, in a letter to the Court dated July 14, 2009, stated that "[b]ecause Edith [Plaintiff] never asked me to return the Fidelity Funds to her at any time prior to the commencement of this lawsuit, even though I had been telling her for months that I intended to use them to pay for the costs of any litigation between us, I viewed her silence as an implied consent. I have made no withdrawal since being served with the complaint..."

Lexington Apartment and deny that Plaintiff's monetary gifts were sufficient to cover maintenance charges in the 74<sup>th</sup> Street Apartment, these assertions are inadequate to resolve the factual disputes underlying the unjust enrichment claim in Defendants' favor.

Moreover, while Defendants contend, and submit evidence that, they did not purchase the Lexington Apartment at an insider's price, there is other evidence, including the email dated April 24, 2008 from Alison indicating that, at the very least, Defendants benefitted financially from Plaintiff's agreement to give up the Lexington Apartment

Accordingly, Defendants' motion for summary judgment dismissing the claim for a unjust enrichment must be denied.

#### Third-Party Defendants' Motion to Dismiss Third-Party Complaint

The Third-Party Complaint seeks contribution from the third-party defendants for payment of Plaintiff's relocation from the 74<sup>th</sup> Street Apartment and support based on allegations or a transfer of real property from Plaintiff to the Third-Party Defendants. Specifically, it is alleged that Plaintiff owned real property consisting of a house and land located on Fishers Island, New York ("Fishers Island Property") and that the Anthoine Children induced Plaintiff to transfer this property to third-party defendant Windham Resources, LLC ("Windham").

Defendants further contend that Plaintiff transferred her ownership of Windham to the Anthoine Children and that Windham sold the Fishers Island Property in or about 2006. In the Third-Party Complaint, Defendants allege that Windham was organized by the Anthoine Children solely to provide a vehicle for the transfer of ownership of the Fishers Island Property and as a means to distribute the proceeds of the sale of said property. Defendants, moreover, claim that only the Anthoine Children, having "induced" Plaintiff to transfer Fishers Island Property to them, received distributions from the sale.

Defendants further allege that the third-party defendants have failed to contribute to the expenses associated with Plaintiff's alleged tenancy in either the Lexington Apartment or the 74th Street Apartment and that they have "frustrated" Defendants' attempts to evict Plaintiff from the 74th Street Apartment or to resolve this matter. As relief, Defendants seek to have Third-Party Defendants contribute, in an amount to be determined by the Court, to the relocation of Plaintiff to an alternative premises.

Third-Party Defendants seek to dismiss the Third-Party Complaint, asserting that there is no basis for a contribution claim against them as they have not breached any duty owing to Plaintiff in connection with the her allegations arising out of the arrangements involving Lexington Apartment/74th Street Apartment arrangements, or the the stocks given by Plaintiff to Alison.

"While contribution is usually predicated on a breach of a duty to *plaintiff*...[the courts] have also recognized that contribution can be based on a duty to *defendant*." Sommer v. Federal Signal Corporation, 79 N.Y.2d 540, 559 (1992). At the same time, however, it must be shown that the breach by the third-party defendants "contributed to or aggravated plaintiff's alleged damages." Parker & Waichman v. Napoli, 51 A.D.3d 558 (1st Dept. 2008). What is critical to the validity of the claim is that "the breach of the duty by the contributing party had a part in causing or augmenting the injury for which contribution is sought." Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corporation, L.P., 71 N.Y.2d 599, 603 (1988); Sullivan v. F.C. Bruckner Associates, 62 A.D.3d 417 (1st Dept. 2009) (Concrete contractor entitled to dismissal of contribution claim on grounds that plaintiff's claim does not arise out of its performance nor out of any negligence on its part).

Here, Defendants seek to have Third-Party Defendants contribute to any relocation costs

necessary to move Plaintiff to "suitable alternative premises for the remainder of Plaintiff's life." See, Answer, Para.109. However, there are no allegations or evidence that the Third-Party Defendants (either Windham or the Anthoine Children) owed a duty to Defendants or to Plaintiff to pay for her to live in either the Lexington Apartment, the 74th Street Apartment or any other location, or that any financial benefit obtained through the sale of the Fishers Island Property was intended to be used to pay for Plaintiff's living arrangements. Nor are there any allegations from which it could be inferred that Third-Party Defendants contributed to any alleged injury with respect to Plaintiff's alleged right to occupy the 74th Street Apartment. Moreover, while the third-party complaint also seeks contribution for Plaintiff's support, as no claim for support is made in the underlying complaint (and the Third-party Defendants owe no duty to support Plaintiff), there is no valid claim for contribution on this basis. Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corporation, L.P., *supra*.

Thus, even affording the Third-Party Complaint the benefit of every favorable inference (Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Sheila C. v. Povich, 11 A.D.3d 120, 122 (1st Dept. 2004)), its allegations fail to provide a legal basis for a contribution claim. Accordingly, the Third-Party Defendants' motion to dismiss the Third-party Complaint is granted.

Finally, both Third-Party Defendants and Defendants have respectively requested the imposition of sanctions upon the other for frivolous conduct. 22 NYCRR 130.1-1 (c) defines conduct as frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument...(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." It is well-settled that conduct is not considered frivolous if "it does not manifest the extreme behavior that courts have traditionally found to merit such sanctions." Hunts Point

Terminal Produce Cooperative Associations, Inc. v. New York City Economic Development Corporation, 54 A.D.3d 296 (1st Dept. 2008). Here, neither Third-Party Defendants nor Defendants have demonstrated that type of conduct nor have their arguments been so completely without merit as to warrant the imposition of sanctions. The respective requests for the imposition of sanctions are accordingly denied.

**CONCLUSION**

In view of the above, it is

ORDERED that Plaintiff's motion to dismiss is granted to the extent of dismissing the twelfth affirmative defense for unclean hands and is otherwise denied; and it is further

ORDERED that Defendants' motion for partial summary judgment is granted to the extent of dismissing the fraud cause of action and is otherwise denied; and it is further

ORDERED that the Third-Party Defendants' motion to dismiss the Third-Party Complaint is granted in its entirety; and it is further

ORDERED that the Third-Party Defendants and Defendants' respective requests for the imposition of sanctions are denied; and it is further

ORDERED that the remaining parties shall appear on March 11, 2010 at 9:30 a.m. for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: March 2, 2010

  
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J.S.C.

**FILED**  
MAR 04 2010  
NEW YORK  
COUNTY CLERK'S OFFICE