

Mele v Okubo

2010 NY Slip Op 31571(U)

June 14, 2010

Supreme Court, Suffolk County

Docket Number: 04-29107

Judge: Ralph F. Costello

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

0009

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 1-26-10 (#008)
MOTION DATE 5-4-10 (#009)
ADJ. DATE 5-18-10
Mot. Seq. # 008 - MotD
009 - XMD

-----X
LORETTA MELE, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 SCOTT OKUBO, :
 :
 :
 Defendant. :
-----X

NOVICK & ASSOCIATES, P.C.
Attorneys for Plaintiff
202 East Main Street, Suite 208
Huntington, New York 11743

MICHAEL A. LEBIT, P.C.
Attorneys for Defendant
191 Terry Road
Smithtown, New York 11787

Upon the following papers numbered 1 to 26 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (008) 1 - 14; Notice of Cross Motion and supporting papers (009) 15-21; Answering Affidavits and supporting papers 22-26; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (008) by the plaintiff, Loretta Mele, pursuant to CPLR 3212 for summary judgment imposing a constructive trust upon real property located at 15 Georgia Street, East Northport, New York is denied; and further order dismissing the four counterclaims asserted by the defendant, Scott Okubo, is granted only to the extent that the demand for punitive damages in the fourth counterclaim is dismissed and the remainder of the application is denied; and it is further

ORDERED that this motion (009) by the defendant, Scott Okubo, pursuant to CPLR 3212 for summary judgment dismissing the complaint of this action is denied.

This an action was commenced on December 15, 2004 upon the filing of the summons and complaint wherein the plaintiff, Loretta Mele, has asserted a first cause of action for breach of agreement wherein the plaintiff and the defendant, Scott Okubo, allegedly agreed that they owned equally the property located at 15 Georgia Street, East Northport, New York; and a second cause of action wherein the plaintiff seeks a constructive trust on the premises.

In his verified answer, the defendant Scott Okubo has asserted counterclaims wherein he seeks sole custody of John-Paul Okubo; child support from the plaintiff; and a third counterclaim in which it appears that the defendant seeks exclusive use and occupancy of the premises located at 15 Georgia Street, East Northport, New York; and a fourth counterclaim for attorney's fees and punitive damages.

In motion (008), the plaintiff claims entitlement to an order granting summary judgment and the imposition of a constructive trust on certain real property located at 15 Georgia Street, East Northport and the dismissal of the defendant's counterclaims.

In motion (009), the defendant seeks summary judgment dismissing the complaint. It is noted that this cross-motion (009), was served on April 7, 2010. The Note of Issue and Certificate of Readiness were filed with this court on August 21, 2009. CPLR 3212(a) provides in pertinent part that a motion for summary judgment shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown. The Court of Appeals has addressed this very issue in Brill v City of New York, 2 NY3d 648 [2004], wherein it held, "Good cause in N.Y. C.P.L.R. 3212(a) requires a showing of good cause for the delay in making a motion for summary judgment--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, non-prejudicial filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" Here, the plaintiff has failed to offer any excuse for the delay in serving the within cross-motion (009) within 120 days of the filing of the Note of Issue and Certificate of Readiness, and is deemed untimely. Additionally, the defendant has not supported cross-motion (009) with copies of the pleadings as required by CPLR 3212 and is deemed insufficient as a matter of law.

Accordingly, motion (009) is denied.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers, Winegrad v N.Y.U. Medical Center, supra. Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact," CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2nd Dept 1989], and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]. Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979].

In support of motion (008), the plaintiff has submitted, inter alia, an attorney's affirmation; the plaintiff's affidavit dated December 9, 2009; a copy of the summons and complaint, defendant's verified answer with counterclaims, and plaintiff's verified reply to the counterclaims; copies of the transcripts of the examinations before trial of Scott Okubo and Loretta Mele both dated January 21, 2008; a copy of the Executor's Deed for the subject premises; a copy of an affidavit by Scott Okubo dated February 17, 2005; and a copy of a Family Court petition brought by Jean-Paul Okubo and filed on February 4, 2005, with a copy of an Order (Simeone, J.) vacating the Order of Protection and indicating the petition of February 4, 2005 was withdrawn.

Scott Okubo testified to the effect that he has completed some high school and is self-employed in his own business known as Custom Woodworking which he started in about 2004-2005. He never had a period of time where he could not find work or did not have work from 1989 to 2004. He has never been married. He

stated his address for the eight years prior to his examination before trial was 15 Georgia Street, East Northport, New York, and he moved into his home about July 2000. Loretta Mele and his son, John Paul Okubo, also lived with him at that address. He never had a paternity test done to determine if he was the father of John Paul Okubo and he believed Loretta when she said he was the child's father. His name is not listed on the birth certificate, but his son has been living with him for 19 years. Prior to moving into the 15 Georgia Street address, he lived at 24 Juanita Avenue in 1996 with Loretta Mele and his son. He stated the 24 Juanita Avenue premises are owned by Loretta Mele and her two sisters, one brother and one half-brother, and that he paid a reduced rent of \$600 a month rent when they lived there until 2004 in exchange for building an apartment in the upstairs of the Juanita Avenue premises which he built after they moved in and completed it in 1998. The apartment was thereafter rented out by the owners. He gave Loretta money to put into her account at Roslyn Savings Bank to pay the rent and the bills at Juanita Street. They did not split the rent and he paid the majority of all the rent and the utilities. She provided some of the furnishings and a washer and dryer which they took to the Georgia Street premises. He and Loretta Mele began a romantic and intimate relationship in about 1988. The romantic relationship ended in about 1998 and the intimate relationship ended in 2002. He did not have a credit card in his name which the plaintiff was authorized to use. He might have referred to Loretta Mele as his wife on occasion while they were residing together, but he could not remember a particular occasion. He never proposed marriage to her. She probably referred to him as her husband. He purchased the 15 Georgia Street premises for \$185,000, with a five percent down payment of \$9,250 which he saved, and obtained a mortgage in his name. However, there was a matter with Loretta's credit which had to be resolved before the mortgage was issued. While he was saving for the house, he still paid family expenses while living at the 24 Juanita premises. He testified that Loretta Mele was happy about his referring to it as "our house" until she saw it and then complained that it was too small and was not good enough. Her name was not placed on the deed. He was aware that Loretta had a lot of credit card debt when he met her and stated she "spends money like crazy." When they moved into the house he did not ask her to pay rent. She brought food into the house and contributed to the clothing for their son. She also brought living room furniture, a wall unit, and did the majority of laundry. He refinanced the house in 2001 and took out \$12,000 which he used to put \$8,500 down on a 2001 Hyundai for Ms. Mele and put some money into the house and cleared up credit card debt. He then paid half her car payments. He also testified that his son missed a lot of school during the 2004/2005 school year as Ms. Mele was harassing their son by calling the police on him over Post-It Notes. He stated Ms. Mele would take their son out to spend time with him, then leave him. His son would then have to call him to pick him up. This occurred prior to her leaving the Georgia Street premises. He stated he asked her to leave in November 2003 or 2004. He offered her \$15,000, and then a little more as she refused. In 2004 he was having a slow time at work for a couple of months and applied for an equity loan of \$20,000 which he used for attorney's fees and for carrying him over.

Loretta Mele testified to the extent that she rents an apartment, pays \$600 a month rent including gas and utilities, and has worked at a CVS pharmacy full time since 2002. She has also been working for JC Penny part-time. Prior to 2002 she worked as a hair dresser's assistant when her son went to school full-time. Her son is John Paul and he was born December 21, 1988. She was living at 24 Juanita Avenue, a rental, with Scott Okubo when the child was born, but they never married. She had lived at that address until 1989 and then moved out and moved back in with Scott Okubo from 1994 to 2000 at the same address. They both paid the rent as her mother owned the house the first time they lived there. Thereafter, her mother transferred ownership of the house to her children, including her. When she and Mr. Okubo moved back into the house, the plaintiff then owned the house with her siblings. She and the defendant then paid \$600 a month rent which she paid in cash deposited into her sister's account which was used for paying taxes on the Juanita Street house. Some of the money went to her mother to provide an income for her mother. She later testified that the rent money was being deposited into an account she had with her sister in both their names. While they lived at the Juanita

Street residence, Scott Okubo put in a bathroom and an upstairs kitchen. She did not know how much money Mr. Okubo was contributing towards the rent before 2000. She paid for the electric bill of about \$100 a month, oil on a budget, and phone for \$50 a month. She sold her interest in the Juanita Street house in 2007. In 2000, she and Scott Okubo and their son moved into the 15 Georgia Street house. Mr. Okubo's name is on the deed. She did not attend the closing. She had a bank account with North Fork, and in 2000 changed her account to Roslyn Savings Bank. She also has a checking, savings and CD's with Washington Mutual and Apple. She has \$38,000 in her checking account and a CD in the amount of \$9,000 at Washington Mutual. She has a CD with Apple in the amount of \$9,000. She has about \$200 in the Roslyn Checking account. She has a 2006 Hyundai Elantra which she purchased for \$15,000 and pays \$189 a month. She did not know how much money was in her savings account. She stated she has an interest in the 15 Georgia Street premises as she remembers giving Mr. Okubo \$1,000's cash in 1999 towards the down payment. She did not receive a receipt or document reflecting she gave him this money. She states she saved the money at home from tips from her job and did not put the money in a bank and did not claim the tips on her income tax returns. She also testified that she filed a bankruptcy petition, but did not set forth the date of filing. She knew of no other money that she gave Mr. Okubo towards the purchase of the 15 Georgia Street residence. She had no documentation of a promise that she would have an equal ownership in the Georgia Street residence. During the time she and Mr. Okubo lived in the Georgia Street residence, Mr. Okubo paid the mortgage, utility bills, maintenance, and repairs. She testified that she paid for food, clothing, her son's medical through Child Health Plus in the amount of \$9 a month and then \$15 a month, furnishings in the nature of a wall unit, living room set, curtains and a bed, kitchen things, and toiletries. She also testified that Mr. Okubo paid for some of their son's clothing. However, she stated she had no documentation to support that she paid those items. When she moved out, she authorized a friend to come in to take the living room set. She stated Mr. Okubo broke the wall unit. A washer and dryer were purchased while they were living at Jaunita Street. A refrigerator was purchased in 1998 for Juanita Street. The air conditioner was purchased for Juanita Street. She further testified that when they were living at Juanita Street that they paid a reduced rent because her siblings knew she and Scott were saving for a home. She further stated that there was never a discussion that the house at Georgia Street would belong solely to Mr. Okubo. In December 2003 they had a discussion about selling the house and splitting the proceeds.

Based upon the foregoing testimonies, unsupported by any admissible evidence, it is determined that the plaintiff has not demonstrate prima facie entitlement to summary judgment on that part of the application to impose a constructive trust on the property located at 15 Georgia Street, East Northport, New York, as there are factual issues raised in the moving papers which preclude granting summary judgment to the plaintiff on that issue. The plaintiff's contentions concerning what she paid for and how much she paid and contributed towards the 15 Georgia Street premises are unsupported. No actual agreement, express or implied, has been demonstrated to support her claim that she was to be an owner of the Georgia Street premises. It is further determined that the plaintiff has not demonstrated prima facie entitlement to summary judgment dismissing the first, second and third counterclaims due to factual issues. However, that part of the fourth counterclaim premised upon a claim for punitive damages is dismissed as a matter of law.

The state of New York does not recognize the right to receive compensation based on an implied agreement to live together outside of a lawful marriage, Artache v Goldin, 133 AD2d 596 [2nd Dept 1987]). "While cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law," Marone v Marone, 50 NY2d 481 [1980]). New York Courts have refused to imply an agreement based on non-marital relationships where no express agreement exists, Cannisi v Walsh et al., 2006 NY Slip Op 52075U, 13 Misc. 3d 1231A [Kings County 2006], *citing* Morone v Morone, 50 NY2d 481 [1980]). While New York courts will not imply an agreement between unmarried domestic partners based on

the nature of their relations, they have imposed constructive trusts on assets of a relationship of unmarried partners in certain situations, Cannisi v Walsh et al, supra).

“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. Thus, a constructive trust is an equitable remedy. It is perhaps more different from an express trust than it is similar. The constructive trustee is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee. A constructive trust will be erected whenever necessary to satisfy the demands of justice. Its 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. Unjust enrichment does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched. 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. A bona fide purchaser of property upon which a constructive trust would otherwise be imposed takes free of the constructive trust, but a gratuitous donee, however, does not,” Simonds v Simonds, 45 NY2d 233 [1978]).

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 AD2d 329 [1999]). In determining whether the imposition of a constructive trust is warranted to prevent an unjust enrichment, a court looks to four factors: the existence of a fiduciary or confidential relationship, a promise, a transfer in reliance thereon, and an unjust enrichment, Artache v Goldin, supra; Cannisi v Walsh et al, supra). The required promise may be inferred where the totality of the transactions and the relations of the parties would render an express promise superfluous. Unjust enrichment is the heart of the constructive trust doctrine, see, Bolla v Bolla, 10 Misc3d 906 [Surrogate’s Court of New York, Bronx County 2005]).

It was further set forth in Cannisi v Walsh et al, supra, that “[t]he Appellate Division Second Department, has held that an unmarried domestic partner may assert a cause of action for a constructive trust over property acquired during the relationship, to prevent unjust enrichment. Artache v Goldin, 133 AD2d 596 (2nd Dept 1987). That case involved a plaintiff who had cohabited with the defendant for 14 years and with whom she had four children, and who claimed a right to share of defendant’s property based on an agreement during the relationship. The court held that plaintiff had the burden of proving that the claimed agreement was an express agreement, citing Morone v Morone, supra. However, the court upheld a separate cause of action in which plaintiff asserted a constructive trust over certain of defendant’s assets, including the family residence.” The Court continued, “In Lester v Zimmer, 147 AD2d 340, 542 NYS2d 855 (3rd Dept 1989), the Third Department held that third element of a constructive trust, a transfer in reliance of a promise, can be shown by contributions of funds, time, and effort, by a domestic partner in reliance on a promise to share the results of their joint efforts.” The Court then set forth that “[h]ere, defendant has asserted that she made contributions of time and effort on behalf of the family unit in reliance on plaintiff’s promise to contribute to the support of the family unit. She also asserts that the plaintiff would be unjustly enriched if those contributions are ignored and the proceeds of the partition are divided based on the financial contributions made toward the subject property. Assuming defendant’s allegations to be true, she has articulated a colorable claim for a constructive trust on the proceeds of the sale of the subject property. The contributions of the parties to the relationship, both financial and otherwise, including plaintiff’s retirement funds are relevant to defendant’s claim.” In Lester v Zimmer, supra, the girlfriend met her burden of demonstrating prima facie basis for imposition of a constructive trust by her supporting affidavits that indicated that she provided financial support to her former boyfriend during the construction of their home, contributed for the cost of material, and actually participated in building the house

on the boyfriend's mother's land. The plaintiff, who was seeking a one half interest in the property, contended that the mother promised to give title to the house to them.

“A person may be deemed to be unjustly enriched if he (or she) has received a benefit, the retention of which would be unjust (Restatement, Restitution, §1, Comment a). 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. It is a conclusion reached through the application of principles of equity,” Sharp v Kosmalski, 40 NY2d 119 [1976]).

It is undisputed that a confidential relationship existed between the parties in the instant action. A confidential relationship has been described as a “relation arising out of a close and intimate association which creates and inspires trust and confidence between the parties so associated,” Schwartz et al v Houss, 2005 NY Slip Op 50308U, 6 Misc3d 1035A [Supreme Court of New York Kings County 2005]). It has not been demonstrated, however, that there was a promise, express or implied, to convey the real property at issue in part to Ms. Mele. Nor has it been demonstrated that the defendant was unjustly enriched.

Even though the parties lived together for many years, the plaintiff has not demonstrated anything more than an implied agreement to share expenses and living arrangements. There has been no or evidence in support of any claim by the plaintiff that she ever had, or was ever promised, a legal interest in the defendant's realty. The parties never entered into a common law marriage in another state. They did not hold a joint bank account. The defendant applied for, obtained and paid the mortgage on the house. It is not claimed they filed joint income tax returns. Here, the plaintiff only contributed some of her income into their living arrangements and retained the remainder for herself. The plaintiff was compensated from her employment as was the defendant in his woodworking business. The plaintiff claims she paid the costs of utilities. The defendant claims he paid the mortgage and utilities and performed the maintenance and repair of the house. The parties did not execute any agreement specifying any changes that would occur in their respective rights should they go their separate ways. There was at no time during the relationship that a transfer of title to the real property was effectuated wherein the plaintiff's name was placed on the deed.

As set forth in Tomkins v Jackson, 2008 NY Slip Op 51285U, 20 Misc3d 1108A [Supreme Court New York County 2008]), “It may be argued that the plaintiff never owned or had a propriety interest in the property, thus failing to meet the predicate for the imposition of a constructive trust, In re Zelnick, 273 AD2d 18 [4th Dept 1971] citing In re Wells' Will, 36 AD 2d 471...[failure to establish grounds for imposition of a constructive trust where there was no evidence that claimant had an interest in the property at the time it was transferred]). Courts have held that a party may not impress a constructive trust on real property absent the relinquishment of some interest in the parcel in reliance on a promise to convey, and that this interest was parted with in reliance on the promise]; *see also, Miller v Merrell, 53 NY2d 881 [1981]* [defendant can be held a constructive trustee only if the law imposed upon him the obligation, regardless of intent, of acting in relation to the subject property for plaintiffs as well as himself, or in preference to himself]; Levy v Brush, 45 NY 589 [1871] [an oral agreement where one party agrees to purchase land, and pay from his own funds the necessary amount for that purpose for the joint benefit of both, the other to reimburse one half of the money so paid, cannot be enforced in equity; the oral agreement is not a partnership between the parties, and the party refusing to perform does not commit a fraud, as the contract is void, and there has been no part performance or parting with valuable consideration by the other]; Scivoletti v Marsala, 97 AD2d 201] [a constructive trust will be imposed where property is parted with on faith of an oral or implied promise to reconvey, “but none may be imposed by one who has no interest in the property prior to obtaining a promise that such interest will be given to him” error in imposing a constructive trust where there is no indication that the plaintiff ever had an prior interest in the house] *affd.* 61 NY2d 806 [Supreme Court Oneida County 1954.]”

Accordingly, that part of the plaintiff's application for summary judgment imposing a constructive trust on the premises located at 15 Georgia Street, East Northport, is denied.

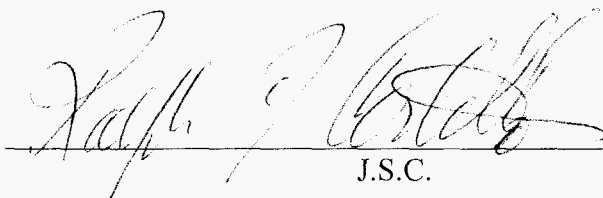
Turning to the counterclaims asserted by the defendant in his answer, no copy of a birth certificate has been provided to this court to establish the age of John Paul Okubo relative to the counterclaim concerning custody of the child. The plaintiff has not established prima facie entitlement to summary judgment dismissing the counterclaim for custody of the child and that part of the plaintiff's application is denied.

It has not been established where the child is living and the age of the child to make a determination as to dismissal of the counterclaim for child support. Further, it has not been demonstrated that as of the date the counterclaim was interposed that the plaintiff was supporting the child and it has not been established that there was a legal obligation to provide child support based upon the age and circumstances of the child. No order of filiation has been produced and the defendant is not listed on the birth certificate as the father of the child. The foregoing factual issues preclude summary judgment. Accordingly, that part of the application for dismissal of the counterclaim premised upon child support is denied.

There are factual issues which preclude dismissal of the third counterclaim in which the defendant seeks exclusive use and occupancy of the premises located at 15 Georgia Street, East Northport, New York, as set forth above as it cannot be determined from the moving papers whether or not there was an agreement between the parties that the plaintiff would own the premises, or have an interest therein with the defendant. Accordingly, that part of the plaintiff's motion for dismissal of the third counterclaim is denied.

There has been no determination on the merits upon which to base dismissal of the fourth counterclaim for counsel fees and therefore, that part of the plaintiff's application for dismissal of the counterclaim wherein the defendant seeks attorney's fees is denied. Relative to that part of the counterclaim which seeks punitive damages, it is determined that New York does not recognize an independent cause of action for punitive damages. A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action, Randi A.J. v Long Island Surgi-Center, 46 AD3d 74 [2nd Dept 2007]). Here, the defendant has not attached the demand for punitive damages to a substantive cause of action. Accordingly, that part of the plaintiff's application for dismissal of the fourth counterclaim set forth in defendant's answer wherein the defendant seeks punitive damages is granted and that part of the fourth counterclaim for punitive damages is dismissed.

Dated: June 14, 2010


 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION