

**Ewart v Ewart**

2010 NY Slip Op 31591(U)

June 7, 2010

Supreme Court, Suffolk County

Docket Number: 37692/2007

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

**PRESENT:**

HON. JOSEPH FARNETI  
 Acting Justice Supreme Court

\_\_\_\_\_  
 JAMES L. EWART, JR., MARGARET  
 LAMOUREE and PATRICIA A. EWART,

Plaintiffs,

-against-

JAMES L. EWART, III and DIANE TIMM,

Defendants.

ORIG. RETURN DATE: JANUARY 14, 2010  
 FINAL SUBMISSION DATE: JANUARY 14, 2010  
 MTN. SEQ. #: 003  
 MOTION: MD

**PLTF'S/PET'S ATTORNEY:**

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Upon the following papers numbered 1 to 5 read on this motion \_\_\_\_\_  
TO VACATE PRIOR ORDER

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; it is,

**ORDERED** that this motion by plaintiffs for an Order, pursuant to CPLR 5015 and the Court's inherent power of review of its own Order, relieving plaintiffs from this Court's Order dated June 30, 2009 that cancelled the notice of pendency against the real property commonly known as 65 Stony Hill Path, Smithtown, New York, by vacating such Order and directing the Suffolk County Clerk to vacate the cancellation of such notice of pendency, or otherwise reinstating the notice of pendency, or alternatively, or in addition, granting plaintiff JAMES L. EWART, JR. ("plaintiff" or "father") a money judgment in the sum of \$35,000 against defendant JAMES L. EWART, III ("defendant" or "son"), as of July 25, 2005, is hereby **DENIED** for the reasons set forth hereinafter.

By Order dated December 10, 2009, this Court granted the following temporary relief, pending the determination of the instant motion:

[A]ll parties, their agents and assigns are hereby enjoined and restrained from alienating, transferring or otherwise disposing or encumbering the 65 Stony Hill Path, Smithtown, New York property . . . as well as the property commonly known as 9 Branch Drive, Smithtown, New York.

Plaintiffs commenced the instant action on February 20, 2008, asserting various claims against defendants sounding in fraud, conversion, and the imposition of constructive trusts on two parcels of real property, to wit: 9 Branch Drive, Smithtown, New York, and 65 Stony Hill Path, Smithtown, New York. The plaintiffs herein are the father and sisters of defendant.

Defendants had filed a prior motion to vacate the notice of pendency as to the Stony Hill Path property only ("Stony Hill property"), arguing that plaintiffs in actuality seek money damages against defendants on the claims relative to the Stony Hill property, and therefore a judgment in the instant action would not affect the title to or the possession, use or enjoyment of, the Stony Hill property (see CPLR 6501). The underlying complaint alleges, among other things, that defendant wrongfully converted funds from a bank account held jointly by father and son, in the amount of \$35,000, and utilized said funds towards the purchase of the Stony Hill property. Defendants had argued that plaintiffs merely seek a money judgment against defendants for that amount, and therefore the notice of pendency should be cancelled as to the Stony Hill property.

By Order dated June 30, 2009, this Court granted defendants' application and vacated the notice of pendency as to the Stony Hill property. The Court found that the elements of a constructive trust were lacking. The Court held that plaintiffs allege that defendant converted plaintiff's funds to purchase the Stony Hill property, which is distinguishable from the situation wherein a plaintiff knowingly invests funds in a property in reliance on a defendant's promise to share in some interest in the property. Therefore, the Court found that a judgment would not affect the title to or the possession, use or enjoyment of, the Stony Hill property.

Plaintiffs have now filed the instant application, pursuant to CPLR 5015, for an Order vacating the Order of June 30, 2009 and directing the Suffolk County Clerk to vacate the cancellation of the notice of pendency, or otherwise to reinstate such notice of pendency. Plaintiffs initially argue that defendants'

motion was required to be brought on by order to show cause, not by notice of motion, but concede that they did not object on this procedural ground in their original opposition papers. Next, plaintiffs argue that they pled in the alternative in the complaint that the \$35,000 was a loan from father to son to purchase the Stony Hill property, and therefore the Court should “reconsider the merits of the constructive trust cause of action based upon an implied promise inherent in the transaction at issue,” to wit: a promise to repay the loan. In support thereof, plaintiffs rely on *Watson v Pascal*, 65 AD3d 1333 (2009), a Second Department decision rendered after this Court’s Order of June 30, 2009, which held that “[t]he remedy is flexible and a constructive trust may be imposed even without an express promise where, given reliance upon the confidential relationship of the parties, ‘a promise may be implied or inferred from the very transaction itself’ ” (*Watson v Pascal*, 65 AD3d 1333, 1334, citing *Sharp v Kosmalski*, 40 NY2d 119 [1976]).

In opposition, defendants allege that although couched as a motion to vacate pursuant to CPLR 5015, the substance of plaintiffs’ motion is to reargue and/or renew defendants’ prior motion pursuant to CPLR 2221. Defendants inform the Court that the Order of June 30, 2009 was entered on August 12, 2009, and served with notice of entry on August 26, 2009. As such, defendants contend that plaintiffs’ instant motion to reargue is untimely, having been filed more than thirty (30) days after service of the Order with notice of entry (see CPLR 2221 [d] [3]). Further, defendants argue that the case law cited by plaintiffs predate the motion to vacate the notice of pendency, thus making plaintiffs’ motion to renew baseless. Moreover, defendants allege that the five grounds for relief pursuant to CPLR 5015 are all inapplicable herein.

Initially, the Court agrees with defendants that none of the grounds under CPLR 5015 for relief from the Order of June 30, 2009 are applicable herein. The Court finds that plaintiffs’ instant motion is more analogous to a motion to reargue defendants’ prior motion to vacate the notice of pendency, which, as argued by defendants, would make the instant motion untimely. Notwithstanding the foregoing, for the following reasons the Court finds no basis to depart from its earlier determination.

As discussed, plaintiffs now rely on the allegations in their complaint (at paragraphs 70 and 73) that the \$35,000 was a loan from father to son to purchase the Stony Hill property. However, paragraph 70 alleges that the \$35,000 was taken “without the Father’s prior consent” for the purchase of the

Stony Hill property. Therefore, although characterized as an “unpaid loan” in the complaint, the factual allegations do not support such an assertion.

As recited in the Order of June 30, 2009, imposition of a constructive trust requires proof of four elements, namely, a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise, and unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119, *supra*). While the Court acknowledges that the case law cited holds that the remedy of a constructive trust is flexible and may be imposed even without an express promise where, given reliance upon the confidential relationship of the parties, a promise may be implied or inferred from the very transaction itself, the Court finds that these cases are distinguishable from the instant matter. In both *Watson v Pascal*, 65 AD3d 1333, and *Sharp v Kosmalski*, 40 NY2d 119, there was a transfer of real property without an express promise, and, based upon the facts and circumstances therein, a promise to reconvey the property was implied or inferred. For example, in *Watson*, the plaintiff and defendant were in a long-term relationship and the plaintiff, at defendant’s request, transferred title to property co-owned by the parties to defendant alone. Plaintiff then paid for the remodeling of the property and paid the mortgage for the next seven years. After defendant started paying the mortgage, he locked the plaintiff out of the premises. Under those facts, the Court found that the imposition of a constructive trust was appropriate even in the absence of an express promise to reconvey the property.

Here, the Court finds that the Stony Hill property was not transferred to defendant in reliance on an express promise made by him to plaintiff, and these facts are distinguishable from the cases cited above where a promise to reconvey was implied. In any event, plaintiffs urge the Court to imply a promise to “repay the loan,” not to reconvey the Stony Hill property to plaintiff or to share in some interest in the Stony Hill property. As such, the Court finds that two of the four elements for the imposition of a constructive trust are lacking.

Finally, plaintiffs argue that they are entitled to a notice of pendency with respect to the relief sought of an “equitable lien” on the Stony Hill property. New York law allows the imposition of an equitable lien if there is an express or implied agreement “that there shall be a lien on specific property” (*Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996] [internal quotation marks and citation omitted]; see *M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 NY3d 798 [2009]). Such an agreement must evince a sufficiently clear intent that the property is to be “held, given or transferred as security for the

obligation" (*Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, *supra*). A party's "mere expectation, however sincere, is insufficient to establish an equitable lien" (*Scivoletti v Marsala*, 61 NY2d 806, 809 [1984]).

In the instant matter, there was, of course, no express agreement that there be a lien on the Stony Hill property in favor of plaintiff, and on this record it cannot be said that it was the parties' clear intent that the Stony Hill property would be held as security for the alleged loan, or that an interest in the property would be conveyed to plaintiff. The subjective expectations of plaintiff, however sincere, are insufficient to establish an equitable lien (*Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, *supra*; *Farr v Covert*, 34 AD3d 1204 [2006]).

Accordingly, for the foregoing reasons, plaintiffs' motion is **DENIED** in its entirety. The temporary restraining order heretofore granted on December 10, 2009, shall be of no further force and effect.

The foregoing constitutes the decision and Order of the Court.

Dated: June 7, 2010

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court