

Joseph v Marshall

2011 NY Slip Op 30957(U)

April 4, 2011

Supreme Court, Nassau County

Docket Number: 025098/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

_____ X

LORETTA L. JOSEPH,

Plaintiff,

Index No. 025098/09

Motion Sequence...01

-against-

Motion Date...03/30/11

XXX

DIANNE L. MARSHALL,

Defendants.

_____ X

Papers Submitted:

Amended Notice of Motion.....X

Affidavit in Opposition.....X

Reply Affidavit.....X

Upon the foregoing papers, the Plaintiff's motion seeking an order pursuant to CPLR § 3212, granting summary judgment imposing a constructive trust with respect to the property located at 39 Bernhard Street, Hempstead, New York [hereinafter the subject premises]; an order requiring the Defendant to convey title of the premises to the Plaintiff, or in the alternative, ordering the Clerk to issue a deed back to the Plaintiff; a money judgment in favor of the Plaintiff in the amount of \$40,000, is determined as hereinafter provided.

The Plaintiff, Loretta L. Joseph, is the mother of the Defendant, Dianne L.

Marshall (*see* Joseph Affidavit in Support at ¶ 6). In or around 1967, the Plaintiff and her deceased husband, Edward E. Joseph, purchased the subject premises (*see* Joseph Affidavit in Support at ¶ 7). The Plaintiff resided at the subject premises until 2001, when she separated from Edward Joseph. When Mr. Joseph died in 2006, the Plaintiff moved back into the subject premises (*see* Joseph Affidavit in Support at ¶ 8). At that time, the Defendant moved into the subject premises (*see* Joseph Affidavit in Support at ¶ 9) due to severe financial difficulties. The Plaintiff alleges that in April, 2007, the Defendant convinced her to take out a \$250,000 Home Equity Line of Credit and lend her \$40,000 (*see* Joseph Affidavit in Support at ¶ 11).

The Plaintiff alleges that she conveyed her interest in the subject premises to the Defendant due to her mistaken belief that she would derive some tax benefits by doing so. She maintains that she always intended the house to be left to all her children upon her death and did not understand that by conveying title to the Defendant, her intent as expressed in her will, could not be effectuated. As such, the Plaintiff contends that she requested that the Defendant reconvey title to the subject premises back to her. The Plaintiff contends that the Defendant agreed to reconvey the subject premises back to her, but later refused to do so.

The Plaintiff alleges that the Defendant has failed to repay the \$40,000 loan made to her and requests a money judgment for said amount. In response to the Defendant's claim that she made monthly payments to repay the Home Equity Line of Credit, the Plaintiff indicates in her Reply Affidavit that the Defendant is entitled to a credit in the amount of

\$12,445 and that the Plaintiff is entitled to a money judgment for the difference, in the amount of \$27,555.

As noted above, the moving Plaintiff seeks various forms of relief. This Court will initially address that branch of the application which seeks summary judgment imposing a constructive trust with respect to the subject premises. In support thereof, counsel for the Plaintiff posits that inasmuch as the Plaintiff and Defendant were mother and daughter, a confidential relationship between them existed to sustain the imposition of a constructive trust (*see* Plaintiff's counsel's Affirmation in Support).

Counsel further argues that the purported promise that the Defendant would reconvey the subject premises back to the Plaintiff is sufficient to satisfy the promise element for the imposition of a constructive trust. Furthermore, counsel for the Plaintiff argues that due to the nature of the confidential relationship between the parties, a promise to convey the subject premises back to the Plaintiff can be inferred.

Counsel additionally argues that the Defendant's own deposition testimony demonstrates that she promised to reconvey the title to the subject premises back to the Plaintiff.

In opposing the Plaintiff's application, the Defendant, pro se, contends, *inter alia*, that she has not committed any fraud nor did she ever induce the Plaintiff to transfer title to the subject premises.

In order to successfully state a cause of action to impose a constructive trust,

the plaintiff must allege the following: [1] a confidential or fiduciary relationship; [2] a promise; [3] a transfer in reliance on the promise, and; [4] unjust enrichment (*Sharp v. Kosmalski*, 40 N.Y.2d 119 [1976]; *Simonds v. Simonds*, 45 N.Y.2d 233 [1978]; *Nastasi v. Nastasi*, 26 A.D.3d 32 [2d Dept. 2005]). “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 N.Y.2d 119 [1976], *supra* at 121).

Having carefully reviewed the submissions of the respective parties, the Court finds that the Plaintiff has demonstrated her entitlement to summary judgment, in opposition to which the Defendant has failed to demonstrate the existence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Initially, the Court finds that the nature of the relationship which existed between the Plaintiff and the Defendant is the kind upon which to predicate the imposition of a constructive trust (*Almasy v. Ward*, 53 A.D.3d 946 [3d Dept. 2008]; *Sharp v. Kosmalski*, 40 N.Y.2d 119 [1976], *supra* at 121). Here, as can clearly be discerned from the deposition transcript of the Defendant, the Plaintiff made an error by transferring title to her home to the Defendant and retaining a Life Estate and asked the Defendant to reconvey title back to her. The Defendant admits this and also admits that she agreed to do so but later changed her mind. The Court has carefully reviewed the Defendant’s affidavit offered in opposition as well as the Defendant’s deposition transcript. Upon said review, other than stating “I have not commit any fraud, I never induced Loretta Joseph who I believe she is of

free will and sound mind”, the Defendant has failed to expound upon how her relationship with the Plaintiff was not one which reflected confidence and trust. Moreover, even assuming this Court had found there not to have been the existence of a promise to reconvey title to the subject premises back to the Plaintiff, the nature of the confidential relationship between the Plaintiff and the Defendant herein demonstrates that the promise can be inferred to impose a constructive trust.

Based upon the foregoing, that branch of the Plaintiff’s application, which seeks an order granting summary judgment is hereby **GRANTED**.

The Court now addresses those branches of the Plaintiff’s application which seek an order requiring the Defendant to convey title of the premises to the Plaintiff, or in the alternative, ordering the Clerk to issue a deed back to the Plaintiff and a money judgment in favor of the Plaintiff in the amount of \$40,000.

Inasmuch as the Court has granted the Plaintiff’s motion for summary judgment and imposed a constructive trust upon the subject premises, should the Defendant fail to sign a deed transferring title to the Plaintiff within 30 days from the date a copy of this order with notice of entry is served upon her, the Nassau County Clerk is hereby authorized and ordered to execute a deed on the Defendant’s behalf consistent with this Order.

The Plaintiff has failed to establish that the Defendant has defaulted on the repayment of the loan. So long as the Defendant continues to repay the \$40,000 loan to the bank as detailed in the “promissory note” attached to the Plaintiff’s motion as Exhibit H, the

Plaintiff cannot seek a money judgment.

Based upon the foregoing, the branch of the Plaintiff's application which seeks a money judgment is **DENIED**.

In accordance with the foregoing, it is,

ORDERED, that the branch of the Plaintiff's application, which seeks an order granting summary judgment imposing a constructive trust is hereby **GRANTED**; and it is further

ORDERED, that those branches of the Plaintiff's application, which seeks an order requiring the Defendant to convey title of the premises to the Plaintiff, or in the alternative, ordering the Nassau County Clerk to issue a deed back to the Plaintiff is hereby **GRANTED**; and it is further

ORDERED, that the branch of the Plaintiff's application which seeks a money judgment in favor of the Plaintiff in the amount of \$40,000 is hereby **DENIED**; and it is further

ORDERED, that the Plaintiff's counsel shall serve a copy of this Order upon the Defendant, by certified mail, return receipt requested and by regular mail within twenty (20) days of the date of entry of this Order and shall file proof of such service with the Nassau County Clerk; and it is further

ORDERED, that the Defendant shall execute a deed transferring title to the subject premises back to the Plaintiff within 30 days of the date a copy of this Order with

notice of entry is served upon the Defendant; and it is further

ORDERED, that should the Defendant fail to execute a deed as required in this Order, upon the presentment of an Affirmation of non-compliance by the Plaintiff's counsel to the Nassau County Clerk, the Clerk shall execute the deed on behalf of the Defendant.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

DATED: Mineola, New York
April 4, 2011



Hon. Randy Sue Marber, J.S.C.
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ENTERED
APR 06 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE