

**Malul v Azulay**

2011 NY Slip Op 31565(U)

May 26, 2011

Sup Ct, Queens County

Docket Number: 9844/10

Judge: Orin R. Kitzes

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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. ORIN R. KITZES**  
**Justice**

**PART 17**

-----X  
**SHALOM MALUL,**

**Plaintiff,**

**-against-**

**Index No.: 9844/10**

**MAIMON ZIV AZULAY, YIZHAQ IVGI and**  
**PLEASANT PLACE, LLC,**

**Defendants.**

-----X  
The following papers numbered 1 to 8 read on this motion by defendants **YIZHAQ IVGI** (“Ivgi”) and **PLEASANT PLACE, LLC** (“Pleasant”) for an order pursuant to CPLR 3211(a) and 6501, dismissing the plaintiff’s complaint and vacating and cancelling the Notice of Pendency. This motion was fully submitted in Justice Hart’s Part 18 on March 16, 2011. In a Short Form Order, dated April 19, 2011, Justice Hart referred this matter to Part 17. The papers were returned on April 20, 2011 since the matter was not reassigned to Part 17 pursuant to a directive of the Administrative Judge of the Supreme Court, Queens County. On May 10, 2011, Justice Hart sent an official Request for Reassignment of the instant matter to Part 17 to the Administrative Judge. The case was officially re-assigned to Part 17 on May 17, 2011 and this was effectuated by the Motion Support Office on May 18, 2011, when the instant motion was delivered to Part 17.

	<b>PAPERS</b>
	<b><u>NUMBERED</u></b>
Notice of Motion-Affirmation-Exhibits.....	1- 4
Affirmation In Opposition.....	5- 6
Reply Affirmation in Further Support of Motion To Dismiss and to Vacate Notice of Pendency.....	7-8

Upon the foregoing papers it is ordered that this motion by defendants Ivgi and Pleasant for an order pursuant to CPLR 3211(a) and 6501, dismissing the plaintiff’s complaint and vacating and cancelling the Notice of Pendency of this action, filed by the plaintiff on April 19, 2010, against Block 13351, Lots 100 and 102, the property owned by defendant Pleasant Place LLC is decided as follows:

The plaintiff’s allegations, which must be accepted as true for the purpose of this CPLR 3211(a)(7) motion (see, 1455 Washington Ave. Assocs. v Rose & Kiernan, 260 AD2d 770), are as follows: Under the first cause of action, which is for a declaratory judgment and permanent injunction, plaintiff claims that, in or about the July 2005, defendant Azulay approached plaintiff with an opportunity to develop a vacant parcel located in Laurelton, New York and described as Section 56, Block 13351, Lots 100 and 102 (the “Property”). Thereafter, in August 2005, plaintiff and Azulay agreed to partner together on the project and to share equally any profits or losses of the venture. At the time, the Property was owned by Pleasant and Azulay was its sole member.

Consistent with their partnership agreement, however, Azulay granted plaintiff a one-half interest in Pleasant and plaintiff was made a managing member of that entity. Thereafter, and pursuant to and in reliance upon this agreement, plaintiff made substantial investments of money and time towards the development of the Property and also lent his credit for the subject project, as well as other partnership ventures and projects.

Despite plaintiff's managing member status and ownership interest in Pleasant, Ivgi has been representing he is the sole owner and managing member of Pleasant and has been attempting to convey Pleasant's sole asset, the Property. Consequently, plaintiff claims he is entitled to judgment declaring that he is the managing member and co-owner of Pleasant and to a permanent injunction enjoining Ivgi, Azulay, and/or Pleasant from conveying, transferring or encumbering the Property, without plaintiff's written assent.

Under the second cause of action, which seeks the imposition of a Constructive Trust, plaintiff claims that a fiduciary relationship exists and existed at all relevant times between Azulay and plaintiff respecting the Property based upon Azulay and Pleasant's promise to hold plaintiff's one-half interest in the Property for plaintiff's benefit. Plaintiff claims to have made financial and other contributions in connection with the Property, all in material reliance upon Azulay's (and thereby Pleasant's) promises that the Property would be held for plaintiff and Azulay as co-owners. Plaintiff claims, on information and belief, Ivgi has been asserting his false claims of ownership of the Property at Azulay's behest and instigation and Azulay is otherwise conspiring with Ivgi to cause a transfer of the Property to a third party with the purpose of divesting plaintiff of his interest in the Property. This conduct is in breach of the promises to plaintiff and it would be against equity and good conscience and defendants would be unjustly enriched were any of them permitted to retain the Property or the profits derived therefrom. Accordingly, plaintiff seeks a judgment declaring that he is a co-owner of the Property and impressing a constructive trust on said Property as well as upon any proceeds derived therefrom. Under the third cause of action, which is for a breach of fiduciary duty, plaintiff claims that Azulay's and Pleasant's actions in furtherance of their intent to sell the Property for Azulay's exclusive profit are all in violation of Azulay's and PPL's fiduciary duties owed plaintiff. On or about April 19, 2010, plaintiff filed a Notice of Pendency on the subject property.

Defendants Ivgi and Pleasant now move to dismiss the complaint pursuant to CPLR 3211 (a) based on plaintiff's failure to have adequately pleaded a constructive trust cause of action and the existence of pending, prior causes of action with substantially similar issues and facts. Defendants also seek an Order vacating and cancelling the Notice of Pendency filed on the property based upon plaintiff's interests in the property stem from a membership in a New York limited liability company, (i.e. Pleasant). Plaintiff opposes this motion.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not

examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, *supra*, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

The branch of defendants motion to dismiss the complaint pursuant to CPLR 3211 (a) (4) is denied. Under this section, an action may be dismissed if there is another action pending between the same parties for the same cause of action in a court of any state or the United States. The actions under Index Number 5280/2010 and 32952/09 do not involve the same parties as the instant action. This is the only ground raised by defendants to dismiss the first and third causes of action.

Regarding the second cause of action, defendants claim that plaintiff has not alleged a specific promise or agreement regarding the holding of the property in trust for the benefit of plaintiff. To state a cause of action to impose a constructive trust, a plaintiff must allege "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment", Sharp v Kosmalski, 40 N.Y.2d 119 (1976.) See, Nastasi v Nastasi, 26 AD3d 32 (2005.) 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. Although there is no unyielding formula that limits a court's freedom to fashion this equitable remedy, absent circumstances that otherwise call for equitable relief, the above are essential elements that must be shown to establish a constructive trust. Bontecou v. Goldman, 103 A.D.2d 732 (2d Dept 1984.) Here, the plaintiff has stated a cause of action to impress a constructive trust since there are allegations in the complaint that he gave money to a member of Pleasant for an interest in Pleasant and he has not been given that interest. Consequently, the equitable remedy of a constructive trust is available inasmuch as there is an allegation that there has been a transfer of property to defendants Ivgi and Pleasant in reliance upon a fiduciary relationship. Lipton v Lipton, 5 AD3d 356 (2d Dept 2004.) Accordingly, the branch of the motion seeking dismissal of the second cause of action is denied. Based on the above, the branch of the motion pursuant to CPLR 3211 is denied in its entirety.

The branch of the motion seeking to vacate and cancel the Notice of Pendency is granted. Pursuant to CPLR 6501, a notice of pendency may be filed in any action in which the judgment would affect the title, possession, use or enjoyment of real property. (See, 5303 Realty Corp. v O&Y Equity Corp., 64 NY2d 313.) An action seeking to impose a constructive trust over real property qualifies as one in which the filing of a notice of pendency is allowed. See, Nastasi v. Nastasi, 26 A.D.3d 32 ( 2d Dep't 2005.) Cancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where its filing fails to comply with CPLR 6501. *Id.* In

addition, the statutory grounds of mandatory and discretionary cancellation are available to a party aggrieved by the filing of a notice of pendency. *See* CPLR 6514 [a] [b]). When the court entertains a motion to cancel a notice of pendency in its inherent power to analyze whether the pleading complies with CPLR 6501, it neither assesses the likelihood of success on the merits nor considers material beyond the pleading itself; "the court's analysis is to be limited to the pleading's face" *Id.* (Citations omitted.)

Defendants claim that the Notice of Pendency must be vacated and cancelled because this action involves plaintiff's alleged interest in Pleasant, a Limited Liability Company, not in the actual real property, and this action was commenced in bad faith. First, as indicated above, the Court finds that plaintiff has alleged viable causes of action and as such, this action was not commenced in bad faith. Moreover, pursuant to the New York State Limited Liability Company Law, § 601. Nature of membership interest, "A membership interest in the limited liability company is personal property. A member has no interest in specific property of the limited liability company." As such, claims involving membership interest of a limited liability company would not support a notice of pendency. *Yonaty v. Glauber*, 40 A.D.3d 1193 (3d Dep't 2007) *Sealy v Clifton, LLC*, 68 A.D.3d 846 (2d Dep't 2009.)

To further support his Notice of Pendency, the plaintiff claims that his request to impose a constructive trust on the property, establishes a basis for the proper filing of the Notice. It is true that certain actions seeking to impose a constructive trust on real property have been deemed to affect title to real property. As such, this Court must determine whether the essence of the Plaintiff's cause of action entails such direct claim on the Premises. Here, there is no written contract between the plaintiff and the defendants for the purchase of the real property in their names jointly and title to the property is in the name of Pleasant and there is no mention of the Plaintiff's name in the deed. Moreover, there are no allegations that there has been a fraudulent transfer of the subject property to a third party. *See, Klein v. Gutman* 12 AD3d 348 (2d Dep't 2004). Plaintiff merely alleges the possibility of such transfer.

Similarly, in *Nastasi*, supra, the cause of action involved plaintiff's alleged transfer of real property to the defendant in reliance on an agreement to pay the plaintiff an annuity. The *Nastasi* court held that such action was sufficient to impose a constructive trust on the real property at issue. (*Id.*). Clearly, *Nastasi* involved plaintiff's direct ownership of the subject real property (and a written agreement conveying such property to the plaintiff), where, upon the plaintiff's purported "exchange" of the real property for the annuity, no annuity payments were made to the plaintiff by the defendants. (*See id.*). To reiterate, such a transfer of real property, which would justify the notice of pendency filed in connection with the underlying real property, is not present here.

Other New York cases support the rule that a cause of action to impose a constructive trust on real property will not alone permit the filing of a notice of pendency if the alleged claim does not have a direct relationship to the subject. For example, in *Yonaty*, supra., the court denied a notice of pendency motion because it found that the true action behind the plaintiff's request to impose a constructive trust on certain real property was "to enforce defendants' promise to give the plaintiff a 20% interest in the LLC which acquired the property, not an ownership interest in the real property itself." (*Id.* at 1194) There, the plaintiff asserted that the defendants breached various oral contracts

involving plaintiff's assistance in acquiring development rights to the real property in return for a 20% interest in the LLC that would take title to the property and a construction management fee. (Id. at 1194.) The plaintiff sought, *inter alia* declaratory relief, an accounting, and imposition of a constructive trust on the subject property. (*Id.*) The Yonaty court held that, "while the plaintiff seeks imposition of a constructive trust on real property," the plaintiff never claimed to have an interest in the real property itself and asserted only an interest in the LLC which acquired the subject real estate. (Id. at 1195. at 1195). Such claim implicated a membership interest in the LLC, which is personal property, "and an LLC member has no interest in specific property of the LLC." (Id. [quoting Limited Liability Company Law § 601]). Thus, in Yonaty, the court looked past the labels assigned to the plaintiff's causes of action and the relief sought, and ascertained that the pleadings did not support the notices of pendency. (Yonaty, 40 AD3d at 1195). *See also*, Sealy v Clifton, LLC, *supra*. (Citing Yonaty.)

In the instant case, like in Yonaty, the true action behind the plaintiff's request to impose a constructive trust on the Premises was to enforce an oral promise to share with the Plaintiff all income and profits generated by Pleasant, and entity in which plaintiff allegedly had invested. Any allegations concerning the property to be purchased being kept in some type of trust for plaintiff are not by itself enough to convert plaintiff's claim into one which complies with the necessary requirements of CPLR § 6501. While the Plaintiff claims that he is entitled to his percent interest in the property, the true nature of the action is reflected in the property being purchased by and for the benefit of Pleasant. Consequently, plaintiff did not invest in the property itself, but instead allegedly invested in a Limited Liability Company dealing in realty, which purchased the property. As such, his action for the imposition of a constructive trust involves Pleasant, not the property.

Based on the above, this Court finds that this action does not directly affect title to or the possession, use or enjoyment of real property, and the filing of a notice of pendency was not proper. (CPLR 6501; Yonaty, supra. Accordingly, the branch of the motion seeking to vacate and cancel the notice of pendency is granted and the notice of pendency on the property located in Laurelton, New York and described as Section 56, Block 13351, Lots 100 and 102 is vacated and cancelled. Consequently, It is **ORDERED**, that the County Clerk of Queens is directed, upon payment of the proper fees, if any, to cancel and discharge a certain Notice of Pendency filed on this action on or about April 19, 2010, against real property known as Section 56, Block 13351, Lots 100 and 102 and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this Order.

**Dated: May 26, 2011**

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**ORIN R. KITZES, J.S.C.**