

Lomaglio v Colasuonno
2011 NY Slip Op 32412(U)
August 8, 2011
Supreme Court, Suffolk County
Docket Number: 09-46786
Judge: Joseph C. Pastoressa
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 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 03-09-11
ADJ. DATE 03-30-11
Mot. Seq. # 001 - MD

-----X	:		:	
FRANCINE LOMAGLIO,	:		:	JAKUBOWSKI, ROBERTSON, MAFFEI,
	:		:	GOLDSMITH & TARTAGLIA, LLP
	:	Plaintiff,	:	Attorney for Plaintiff
	:		:	969 Jericho Turnpike
	:	- against -	:	Saint James, New York 11780
	:		:	
CHRISTOPHER COLASUONNO and DIANA	:		:	THOMAS WEISS, P.C.
PARISI f/k/a DIANA COLASUONNO,	:		:	Attorney for Defendants
	:		:	41 Hilton Avenue
	:	Defendants.	:	Hempstead, New York 11550
-----X	:		:	

Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17-20; Replying Affidavits and supporting papers 21-25; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendant Christopher Colasuonno for summary judgment dismissing plaintiff's complaint and granting judgment in his favor on his counterclaims is denied.

Plaintiff Francine Lomaglio commenced this action pursuant to Real Property Law Article 15 seeking a determination of a claim to real property known as 58 Lama Drive, Shirley, New York. The subject premises was purchased in 1974 by plaintiff and Dennis Colasuonno, the father of her two children, defendants Christopher Colasuonno and Diana Parisi, a/k/a Diana Colasuonno. Plaintiff lived with Mr. Colasuonno and her children at the premises until October of 1981, when Mr. Colasuonno separated from plaintiff and moved to Nevada. In February 1984, plaintiff married Anthony Lomaglio and continued to reside in the premises with her children. Approximately two years later, Mr. Colasuonno entered an agreement with plaintiff concerning the premises wherein he acknowledged, among other things, the transfer of "his one-half interest as a tenant by the entirety . . . to Francine Lomaglio as trustee for Christopher Colasuonno and Diana Colasuonno." The deed memorializing said transfer lists both defendants as joint tenants with the right of survivorship in the premises. Following the execution of the deed and agreement, defendants continued to live in the premises with plaintiff until they moved out in 1994 and 2002 respectively.

[Handwritten mark]

Lomaglio v Colasuonno
Index No. 09-46786
Page No. 2

In 2007, plaintiff contacted defendant Christopher Colasuonno (“hereinafter Christopher”) with regard to outstanding tax arrears and a lien filed against the property. Shortly thereafter, Christopher paid off the tax arrears, constructed an addition to the property, and moved into the premises with his family. However, in or about June of 2009, plaintiff commenced an eviction proceeding against Christopher and his family. Plaintiff also was granted an order of protection against Christopher which resulted in his removal from the premises. Thereafter, plaintiff commenced the instant action. The complaint seeks a judgment declaring plaintiff the sole owner of the subject premises and directing defendants to execute a quit claim deed disclaiming their purported interest in the property. It further alleges no trust was created in favor of defendants at the time of the transfer, and that the recognition of any such trust would unjustly enrich defendants as they paid no consideration for the transfer. Christopher joined issue by filing an answer with counterclaims on December 29, 2009. He subsequently served an amended answer with counterclaims on July 15, 2010. Christopher’s counterclaims allege, inter alia, causes of action for a partition, an accounting, breach of fiduciary duty, constructive trust and unjust enrichment. Defendant Diana Parisi did not serve an answer or otherwise appear in this action.

Christopher now moves for an order dismissing plaintiff’s complaint and granting judgment in his favor on his counterclaims. In support of the motion Christopher submits, inter alia, a copy of the pleadings, copies of the deed and the agreements purportedly creating the trust, an affidavit of Dennis Colasuonno, as well as furniture and tax payment receipts for funds he expended in connection with the subject premises. Plaintiff opposes the motion, arguing triable issues exist as to whether the purported deed transferring the property from Dennis Colasuonno as trustee failed to create a trust in favor of defendants, and whether Christopher voluntarily undertook the responsibility of paying the taxes and carrying charges on the premises or did so in lieu of rent.

The agreement entered by plaintiff and Dennis Colasuonno, dated April 15, 1986, identifies plaintiff as the “party of the first part” and Dennis Colasuonno as the “party of the second part,” and acknowledges that Dennis Colasuonno is defendants’ natural father. The agreement further provides, in pertinent part, as follows:

The party of the first part agrees that he will provide medical insurance coverage for the aforementioned infants available through his employment until such time as the children shall attain the age of twenty-one (21) years, or the coverage is allowable for them pursuant to the company or carrier terms. (3) The party of the first further agrees that he will provide all school clothing for the two infant children, and will contribute an amount of TWENTY & 00/100 (\$20.00) DOLLARS per week as and for support for the children, which amount will be forwarded to the party of the second part on Friday of each week. (4) The party of the first part acknowledges that he is executing this agreement in consideration of his having transferred his one-half interest as tenant by the entirety to premises known as 58 Lama Drive, Shirley, New York, to FRANCINE LOMAGLIO, as Trustee for CHRISTOPHER COLASUONNO and DIANA COLASUONNO, simultaneously with the execution hereof.

Also submitted in support of the motion is a copy of the April 1986 agreement between plaintiff and

Lomaglio v Colasuonno
Index No. 09-46786
Page No. 3

Dennis Colasuonno which purportedly contains a handwritten statement by plaintiff. The handwritten statement, which is located after the signatures of the parties, states:

This [agreement] was done so [Dennis Colasuonno] wouldn't have to pay 5 years of back child support, which is also the reason for the lien on my home. And it's all on record and verifiable! It was never anything I did. I had to force your father to sign his name over to you. It had nothing to do with him being generous or responsible! The other lien is for updating the house. . . [l]ike a home improvement loan, but with no interest . . . My home will be paid up, free and clear, and if I want to I can pay on those liens. But no one has to unless [they're] stupid enough to want to sell this house. There's no other reason to do that but greed.

In his affidavit, Dennis Colasuonno states he entered an agreement with plaintiff on April 15, 1986, whereby he conveyed his one-half interest in the subject premises to his children. Mr. Colasuonno states that at the time of the agreement he and plaintiff shared an understanding that plaintiff was being appointed as trustee on behalf of their minor children until they reached the age of majority and would become partial owners of the subject premises. Mr. Colasuonno indicates that the creation of the trust was memorialized in the agreement and deed transferring the premises, and that both documents were prepared by an attorney retained by plaintiff. He further asserts that at no time prior to entering the agreement did he indicate to plaintiff that he was transferring all of his interest to her in consideration for unpaid child support payments. Mr. Colasuonno states plaintiff never commenced any child support proceeding against him and that it was his intention, upon separating from plaintiff, that his interest in the property be given to his children.

In his affidavit submitted in support of the motion, Christopher states, among other things, that he took it upon himself to bring the tax arrears on the premises current to avoid a lien on the subject premises. Christopher's affidavit also states that he constructed the addition on the property because he realized it would be too small to comfortably accommodate both his family and his mother's family.

In her affidavit in opposition to the motion, plaintiff states that Dennis Colasuonno "transferred his interest in the house in exchange for back child support I felt he owed." Plaintiff's affidavit further states that "[t]he agreement and deed we executed was an effort to provide Dennis assurance that if and when I died while owning the house, it would pass to the children . . . no trust agreement was ever executed in connection to the premises."

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist, not to resolve issues of fact or determine matters of credibility (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 665 NYS2d 25 [1997]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Uni. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316

[1985]).

The factors essential to the creation of an express trust are a designated beneficiary and trustee, a fund or other property sufficiently designated or identified to enable title of the property to pass to the trustee, and the actual delivery of title of the property with the intention of vesting legal title in the trustee (*see Matter of Doman*, 68 AD3d 862, 890 NYS2d 632 [2d Dept 2009]). “A trust must be manifested and proved by writing and the nature of the trust, and the terms and conditions of it, must sufficiently appear, so that the court may not be called upon to execute the trust in a manner different from that intended” (*Dillaye v Greenough*, 45 NY 438, 445, 4 NYS 438 [1871]; *see Fagan v McDonnell*, 115 AD89, 100 NYS 641 [2d Dept 1906]). Whenever the writing establishing the trust is produced, “it must be interpreted, like all other contracts and written instruments, according to the intentions of the parties ascertained from the language used and all surrounding circumstances” (*Hutchins v Van Vechten*, 140 NY 115, 121, 35 N.E. 446 [1893]). The determination of the intent of the parties to a contract can only be made as a matter of law where their intent is discernable within the four corners of an unambiguously worded agreement (*see Nappy v Nappy*, 40 AD3d 825, 836 NYS2d 256 [2d Dept 2007]; *Geothermal Energy Corp. v Caithness Corp.*, 34 AD3d 420, 825 NYS2d 485 [2d Dept 2006]; *Siegel v Golub*, 286 AD2d 489, 729 NYS2d 755 [2d Dept 2001]). When a contract term or clause is ambiguous, and the determination of the parties’ intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; *Brook Shopping Ctr.s v Allied Stores Gen. Real Estate Co.*, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

Here, Christopher failed to establish his prima facie entitlement to summary judgment by eliminating significant triable issues of fact from the case (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). Specifically, copies of the agreement, the deed instrument and the affidavits submitted in support of the motion demonstrate the existence of triable issues as to whether it was the intent of plaintiff and Dennis Colasuonno that all of his interest in the premises be transferred to plaintiff in satisfaction of alleged unpaid child support payments, or whether plaintiff and Mr. Colasuonno intended to create an inter vivos trust on behalf of the minor defendants. Triable issues are also raised as to whether the alleged trust provided defendants with a mere right of survivorship or a vested interest in the subject premises upon reaching the age of majority. Accordingly, the branch of the motion seeking dismissal of the complaint is denied.

With regard to the branch of the motion seeking summary judgment on Christopher’s counterclaims for unjust enrichment and the imposition of a constructive trust, 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 (*see Sharp v Kosmalski*, 40 NY2d 119, 386 NYS2d 72 [1976]). 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 (*see Depena v Schocker*, 83 AD3d 885, 922 NYS2d 119 [2d Dept 2011]; *Berger v Berger*, 81 AD3d 765, 916 NYS2d 626 [2d Dept 2011]). However, these elements are simply guidelines and are not to be applied rigidly in pursuing the goal of preventing unjust enrichment (*see Matter of Wiczorek*, 186 AD2d 204, 587 NYS2d 755 [2d Dept

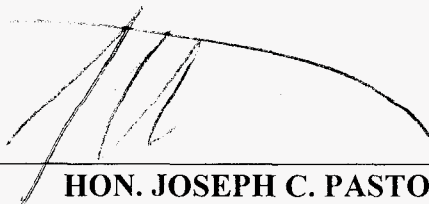
Lomaglio v Colasuonno
 Index No. 09-46786
 Page No. 5

1992]). Indeed, the third element may be satisfied where the party seeking to impose the trust has no prior interest in the property but does contribute funds, time or effort to the property in reliance on a promise of an interest therein (*see Moak v Raynor*, 28 AD3d 900, 814 NYS2d 289 [3d Dept 2006]; *Heness v Hunt*, 272 AD2d 756, 708 NYS2d 180 [3d Dept 2000]; *Lester v Zimmer*, 147 AD2d 340, 542 NYS2d 855 [3d Dept 1989]).

Although Christopher submitted an affidavit stating he expended time, funds and effort to construct an addition on the premises and to bring the tax arrears current, he failed to eliminate significant triable issues from the case, namely whether he relied on his mother's representation that he had or would gain an interest in the property when he undertook those actions, or whether his conduct was voluntary and motivated by his love, care and affection for her (*see Sharp v Kosmalski*, 40 NY2d 119, 386 NYS2d 72 [1972]; *Moak v Raynor*, *supra*; *Booth v Booth*, 178 AD2d 712, 576 NYS2d 686 [3d Dept 1991]; *Lester v Zimmer*, *supra*).

As for Christopher's application for summary judgment in his favor on his counterclaims for partition and an accounting, an action for partition cannot be maintained by a party who does not hold a recognized interest in the subject premises (*see RPAPL 901; Bender v Paulus*, 197 NY 369, 90 NE 994[1910]; *Watson v Pascal*, 27 AD3d 459, 811 NYS2d 422 [2d Dept 2006]; *O'Connor v O'Connor*, 249 AD 515, 293 NYS 64 [2d Dept 1937]). Moreover, it is well settled that "the right to an accounting rests on the existence of a fiduciary relationship regarding the subject matter of the controversy at issue" (*Town of Windsor v New Windsor Volunteer Ambulance Corps.*, 16 AD3d 403, 404, 791 NYS2d 159 [2d Dept 2005]; *see Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616, 845 NYS2d 827 [2d Dept 2007]). Thus, where, as in this case, a determination as to the claimant's interest in the subject property and whether he shared a fiduciary or a mere landlord and tenant relationship with plaintiff has not been made, summary judgment on claims for partition and an accounting must be denied, as premature.

Dated: August 8, 2011



HON. JOSEPH C. PASTORESSA

___ FINAL DISPOSITION X NON-FINAL DISPOSITION