

**Rovner v Stewart**

2011 NY Slip Op 32893(U)

October 27, 2011

Sup Ct, Nassau County

Docket Number: 006597/11

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**  
*Justice.*

TRIAL/IAS PART 2  
NASSAU COUNTY

\_\_\_\_\_  
RACHEL ROVNER,

Plaintiff,

ORIGINAL RETURN DATE: 08/23/11  
SUBMISSION DATE: 08/23/11  
Index No. 006597/11

-against-

MATTHEW STEWART, ANDREA STEWART,  
and JOEL STEWART,

MOTION SEQUENCE ## 1, 2

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

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This application by plaintiff for an order staying any and all actions, excluding the instant action, and including summary proceedings, initiated by defendants or their agents in any court as related to the premises known as 563 Hewlett Street, Franklin Square, New York (the "Premises") is denied. Defendants' pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (7) is also denied.

Plaintiff's amended complaint seeks, among other things, the imposition of a constructive trust upon the Premises and damages based upon conversion and detrimental reliance. It is alleged in the complaint that plaintiff and defendant Matthew Stewart ("Matthew") became engaged in March 2010. Plaintiff claims that she contributed 50% towards the purchase price of the Premises and that defendants Joel Stewart and Andrea Stewart (collectively "Joel and Andrea") took title to the Premises in name only in order that the parties could obtain financing. It is plaintiff's contention that Joel and Andrea have not contributed any monies towards

the Premises. Plaintiff alleges that she has continued to pay half of the mortgage payments until the commencement of this action even though she is not on the mortgage or deed.

In support of her application for a stay, plaintiff submits her affidavit wherein she avers that she currently resides at the Premises and that a holdover summary proceeding has been commenced against her in the District Court of Nassau County. Plaintiff contends that the eviction proceeding is retribution for her obtaining an Order of Protection against defendant Matthew.

The issue before the court is whether plaintiff has met her burden of proof for a preliminary injunction. "To obtain a preliminary injunction, a movant must demonstrate a likelihood of success on the merits, danger of irreparable harm unless the injunction is granted, and a balance of the equities in [her] favor [citations omitted]" (*Dana Distributors, Inc. v. Crown Imports, Inc.*, 48 A.D.3d 613 [2d Dept.]).

Although plaintiff believes she has demonstrated a likelihood of success on the merits, irreparable damage, no adequate remedy at law and the balance of equities in her favor, the court disagrees. Plaintiff has an adequate remedy in the District Court. She may assert an affirmative defense in the District Court of the constructive trust she is seeking in this court (*see, Suissa v. Baron*, 24 Misc.3d 1236(A) [Dist. Ct., Suffolk Co., 2009]).

Defendants did not oppose plaintiff's motion but instead sought dismissal of the action. Defendant Matthew submits his affidavit setting forth his version of the facts: The premises were initially owned by Matthew and his then wife, Andrea Yenco ("Andrea"). Matthew and Andrea were divorced on September 15, 2008. Thereafter plaintiff and Matthew began dating and ultimately discussed the possibility of marriage. When Matthew and Andrea were presented with an offer for the purchase of the Premises, Matthew decided that he wanted to purchase the Premises with a view that it one day would become his marital residence with plaintiff.

Matthew avers that he and plaintiff decided against purchasing the Premises together and that plaintiff would receive an interest in the Premises contingent upon their marriage, at which time Matthew would convey an interest in the Premises to

plaintiff. In anticipation of their engagement, plaintiff gave Matthew a gift of \$7,500.00 by check payable to Andrea, which was used to buyout Andrea's interest in the Premises. It was agreed that so long as plaintiff was residing in the Premises she would pay 50% of the carrying charges, inclusive of the mortgage.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory [citation omitted]” (*Quesada v. Global Land, Inc.*, 35 AD3d 575 [2d Dept.2006]).

“[D]ismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law’ [citation omitted]” (*Chaudhry v. Vital Holding Co. of NY, Inc.*, 51 AD3d 844, 845 [2d Dept. 2008]).

Defendants contend that the documentary evidence submitted establishes that plaintiff's first cause of action for the imposition of a constructive trust must fail. The documentary evidence submitted is a copy of the deed from Matthew J. Stewart and Andrea M. Yenco, as grantors, to Matthew J. Stewart (50%), Andrea Stewart (15%) and Joel Stewart (25%), as grantees, (Ex. E) and an Agreement to Refinance Real Property between Matthew and Andrea (the “Agreement”) (Ex. D). According to the Agreement Matthew agreed to pay Andrea \$15,000 for her share of the marital home.

Defendants argue that plaintiff's interest in the Premises was contingent upon her marriage to Matthew. This is disputed by plaintiff who contends that her payment of 50% of the purchase price was not a gift but was to procure a 50% interest in the Premises. It is submitted that there exists a question of fact as to the ownership rights of plaintiff and that a constructive trust should be established for the benefit of plaintiff.

“Here, the complaint properly pleads the elements of a cause of action to impose a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (citations omitted)” (*Bodden v. Kean*, 86 AD3d 524, 526 [2d Dept. 2011]). Whether, *inter alia*, plaintiff's relationship with defendants satisfied the initial requisite of a confidential or fiduciary relationship is a factual issue (*Crown Realty Co. v. Crown Heights Jewish*

*Community Council*, 175 AD2d 151 [2d Dept. 1991]).

“The documentary evidence submitted by the defendant . . . failed to resolve all factual issues as a matter of law and to conclusively dispose of the plaintiff’s claim” (*Martin v. New York Hosp. Med. Ctr. of Queens*, 34 AD3d 650 [2d Dept. 2006]). Without commenting on plaintiff’s likelihood of success, the court finds that the documentary evidence submitted by defendant does not, as a matter of law, resolve whether a constructive trust should be imposed (*see, generally, Fern v. International Business Machines Corp.*, 204 AD2d 907, 909 [3d Dept. 1994]).

CPLR 3013 provides, as follows: “Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” “[T]he essential facts required to give ‘notice’ must be stated” (*Foley v. D’Agostino*, 21 AD2d 60, 63 [1<sup>st</sup> Dept. 1964]). “In considering the legal sufficiency of these allegations, plaintiff must be given the benefit of every possible favorable inference (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the complaint should not be dismissed if ‘upon examination of the four corners of the pleading . . . the factual allegations contained therein indicate the existence of a cause of action’ (citations omitted) ” (*Reifenstein v. Allstate Ins. Co.*, 92 AD2d 715 [4<sup>th</sup> Dept. 1983]).

With regard to plaintiff’s second cause of action for conversion, defendants submit that conversion applies to personal property as opposed to real property and, therefore, the pleading fails to state a cause of action for conversion. Plaintiff argues that she is not seeking to recover damages for real property but rather to recover damages for conversion of personal property and monies she contributed towards the Premises.

Defendants seek to dismiss the third cause of action for detrimental reliance claiming that the relief sought is barred by New York’s heart balm statute contending that the money damages sought are due to Matthew having broken off his engagement with plaintiff. Civil Rights Law § 80-a abolishes causes of action for alienation of affections, criminal conversion, seduction and breach of contract to marry. Plaintiff argues that she is not barred from seeking damages for expenses endured by her in contemplation of marriage.

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Taking the above factors into consideration, the court finds that plaintiff's Amended Verified Complaint states potential causes of action for a constructive trust/unjust enrichment, conversion and detrimental reliance. Accordingly, defendant's motion to dismiss the complaint is denied.

To insure that this action does not languish, all parties or their counsel are directed to appear on November 21, 2011, at 9:30 a.m. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

Dated: 10-27-11

  
THOMAS P. PHELAN, J.S.C.

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**ENTERED**  
OCT 31 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE