

<b>Matter of Gaddi v Gaddi</b>
2012 NY Slip Op 31023(U)
April 13, 2012
Supreme Court, New York County
Docket Number: 108956/2010
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JUDITH J. GISCHE, J.S.C.

PRESENT: \_\_\_\_\_

PART 10

Justice

Index Number : 108956/2010  
GADDI, CEFERINO  
vs  
GADDI, MARIVIC L.  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION

Note of issue & check  
cc 7/19/2012 in Pat 1009.30

FILED

APR 17 2012

APR 18 2012

Dated: \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

In the matter of  
**Ceferino Gaddi and Rosario Gaddi,**  
  
Plaintiff (s),

**DECISION/ ORDER**  
Index No.: 108956/10  
Seq. No.: 002

**-against-**

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**Marivic L. Gaddi,**  
  
Defendant (s),

for an order pursuant to RPAPL 1501 to  
compel a determination of a claim to real  
property: **Block 1344 Lot 1036**  
**335 East 51<sup>st</sup> Street**  
**Unit 4F**  
**New York, New York**

**FILED**

**APR 17 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this  
(these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def's n/m (CPLR 3212) w/BRH affirm, MG affid, exhs .....	1
Pltfs' x/m (CPLR 3025) w/ER affirm, AG, SG affids (as exhs), exhs ..	2
Def's further support, reply w/BRH affirm, MG affid, exh .....	3
Def's opp to x/m w/BRH affirm, MG affid, exhs .....	4
Plts' further support, reply w/ER affirm, CG affid (as exh), exh .....	5
Steno 2/23/12 .....	6
Various stips of adjournment .....	7

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action to compel the determination of a claim to real property. Plaintiffs  
Ceferino Gaddi and Rosario Gaddi are, respectively the brother and sister-in-law of

defendant Marivic L. Gaddi. Since issue has been joined and this motion is brought timely after the filing of the note of issue, summary judgment relief is available (CPLR 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

#### **Facts and arguments**

Ceferino Gaddi, Jr. ("Junior") is the son of Ceferino Gaddi ("Senior"), now deceased. Junior and Marivic ("Sister") are brother and sister. Rosario is Junior's wife. Other than her name appearing in the caption, there are no allegations by Rosario against the defendant.

It is unrefuted that Sister is the owner of record of the unit 4F within the condominium building known as 335 East 51<sup>st</sup> Street, New York, New York ("Unit 4F" sometimes "apartment"). The deed, made January 18, 1985, is signed by the grantor and the Sister's attorney in fact who had a power of attorney. The closing statement shows the purchase price of Unit 4F was \$95,951.20 and that none of the siblings, Rosario or Senior attended the closing. The closing statement also shows that Sister obtained a purchase money mortgage in her sole name in the amount of \$50,000.

Junior claims that Unit 4F was purchased by Sister as Senior's nominee, while Senior resided in the Philippines and Sister resided in the United States. According to Junior, Senior provided Sister with money to buy the apartment and authorized Sister to execute a note and mortgage for the balance of the purchase. Junior contends that on April 10, 2001, Senior transferred his ownership of Unit 4F to him. Junior contends this conveyance was made in a single one page document bearing the words "TO MY FAMILY." The body of this purported conveyance states as follows:

I hereby condone/forgive the "utang" made by my son,

Ceferino Jr. Considered as advances towards his inheritance, drawn against my dollar accounts maintained with my daughters Marivic, Blanca and Nenette, aggregating approximately \$21,000 which is more or less the equivalent of Php 1 million. I am also giving my son, Ceferino Jr., the apartment in New York known as Senate East Apartment 4-F unconditionally. He can transfer the title immediately from my daughter Marivic to his name. This nullifies and supercedes previous signed document(s) made by me and/or others.

Witnessed by:

Signed by:

\_\_\_\_\_ s \_\_\_\_\_

(Illegible)  
Ceferino S. Gaddi

Junior, relying on the deposition testimony of his Sister, argues that Sister could not have afforded to buy Unit 4F on her own, given her modest income and own expenses. Junior claims that Sister was evasive about where the money came to buy this – and other apartments in the same building – that she purchased during a six year period. Thus, according to Junior, who also provides the sworn affidavit of Agapito Gaddi, another sibling ("Agapito"), all these purchases were made using Senior's money which was transferred by him to the United States and as his nominee.

In Agapito's sworn affidavit, he states:

1. That I personally know my late father bought Apt. 4F in New York with his own money and placed it under the name of Marivic Gaddi [Sister] as a Tax Shield . . .
2. That in a meeting held sometime in December 2000, our family discussed the settlement of the properties of our late father, Ceferino Gaddi, Sr. and that all the loan obligations of my siblings to our late father were condoned. At that meeting, my sister, Marivic L. Gaddi admitted Apt. 4F was owned by my father and was to be transferred by him to my brother Ceferino, Jr. Prior to his death, my father gave Apt 4F in New York to Ceferino Gaddi, Jr, in lieu of his hereditary shares from any other

properties in the Philippines...

This particular affidavit was prepared in connection with litigation presently in the Philippines involving Senior's last will and testament.

In support of her motion for summary judgment, Sister provides a memorandum dated March 31, 2001, addressed "To Whom it May Concern." The memorandum is signed by Senior's children (herself and Junior included) and directed to hospital officials. In the memorandum, the siblings object to Senior being released from the hospital on a day pass because of his weakened condition. The family also states that "[Senior's] present state of mind does not allow him to make the decision to go on [a] day pass. He is being led to believe he is going to the province when he cannot physically withstand the travel..." Thus, Sister contends any "transfer" by Senior to Junior is meaningless, not only because Senior could not convey that which he did not own, he was also lacking mental capacity to do so. This particular claim is refuted by Blenvenido Suba Gaddi who states that he is a practicing physician and Senior's attending doctor while he was hospitalized. He is also Senior's first cousin. In his affidavit Dr. Gaddi states that Senior "until his death, had his mental faculty, [was] alert and lucid" Dr. Gaddi proceeds to state that he was personally present when Senior conveyed Unit 4F to "Boy" - a nickname Sister also uses when referring to Junior.

While it is undisputed that Junior satisfied the mortgage in Sister's name on Unit 4F, Sister maintains that this payment (\$30,000) was for fair consideration and that Junior cannot establish the material elements of a constructive trust which Junior now seeks to assert in his proposed amended complaint (discussed, infra). Sister contends that when she returned to the Philippines in 1999 to care for her sick father, she

appointed Junior and wife as caretakers of the apartment which was then tenanted, with instructions they could re-rent the apartment when the tenant ("Mariano") left. Instead, when the after the apartment became vacant, Junior and his wife moved in.

Junior claims he paid off the mortgage not because owed Sister any "rent" but because Senior— the true owner of Unit 4F – transferred ownership of the apartment to him and, therefore, it was his responsibility to pay the mortgage.

There are two one page documents and some emails which Junior contends memorializes the Sister's acquiescence and acknowledgment that Unit 4F was a constructive trust for her father and that Sister who was Senior's nominee, also agreed to transferred ownership of the apartment to Junior. The first document, dated May 1, 2001, bearing Sister's name, is addressed "To Whom it May Concern." This document states that:

This is to advise [you] that there has been a change of ownership of apartment 4F, 335 East 51<sup>st</sup> Str., in favor of my brother and sister-in-law, namely Ceferino L. Gaddi, Jr. and Rosario E. Gaddi respectively. Further documentation to this effect shall be submitted in due course. This certification is being issued in connection with the application of incoming tenant, Yunfang Guo, for your approval. Thank you.

Yours sincerely,

(Signature)

The next document dated May 15, 2001, also has Sister's name on it. It states as follows:

To Whom It May Concern,

Please be advised that I am transferring ownership of my condominium 4-F (Senate East) . . .in favor of my brother and sister-in-law namely Ceferino L. Gaddi, Jr and Rosario E. Gaddi respectively. I hereby authorize above named persons to transact the pay-off of the mortgage and make them as persons responsible for paying the real estate tax to the city of New York and the maintenance fee of the condominium. Thank you for your attention.

Sincerely yours,

(Signature)

In sum and substance, the emails sent by Sister state that she does not "want to have anything to do with this matter . . ." referring to a lawsuit by Mariano "...this is your problem." Sister also states "I think you should be the one to pay the homeowner's insurance for 4F. It is still in my name but you are now responsible for everything . . ." The email states further that her sister-in-law should not have used Sister's account to pay the mortgage and that Mariano's security deposit should have been applied to that payment. Both these emails are from June 2001. In a later email dated April 2002, Sister states that:

Dad did not give you the condo. It was my mother with the help [mostly] of Nenette that [you got] the condo... It is irrelevant at this point if the condo has not been transferred to you yet. It is yours and you are the one getting the rent of about \$2,000 per month...It was our agreement that the condo will be transferred only after the estate of dad is finalized...All the common properties will be divided legally. What is the FUSS?

To address claims by Sister, that the deed is dispositive proof that she is the current, sole and rightful owner of Unit 4F, Junior seeks to amend his complaint to assert a new claim for a constructive trust. Junior denies that Sister will be prejudiced in any

way by the amendment because its factual underpinnings are very similar to his present claim, she had notice of this "new" claim for some time, though not specifically pleaded, all discovery necessary to maintain this new claim has already been exchanged and it only recasts existing facts into a new legal theory.

### **Discussion**

The issue of whether Junior should be permitted to amend his complaint is addressed first. CPLR 3025 [b] provides that a party may amend its pleading, or supplement it by "setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

While the validity of a proposed amended pleading should be examined by the court to gauge its legal sufficiency and merit, this examination is not intended to supplant a motion to dismiss or for summary judgment (Hawkins v. Genesee Place Corp., 139 A.D.2d 433 [1<sup>st</sup> Dept. 1988]). On the other hand, a motion to amend must be supported by an affidavit of merits and the court must examine the proposed amendment in order to conserve judicial resources (see Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352, 354-355 [1<sup>st</sup> Dept 2005]).

Junior has rectified the omission of his sworn affidavit on the cross motion in chief by providing in his reply an affidavit restating much of what was contained in his moving papers. The affidavit places in context all the documentary proof previously provided which Sister addressed on the merits. Therefore, the curative affidavit is accepted and the cross motion will be decided on the merits. For the reasons that follow, the court permits amendment of the complaint, although the note of issue was filed.

"The Statute of Frauds will ordinarily prevent enforcement of an oral agreement to convey an interest in land (General Obligations Law § 5-703). A constructive trust will be impressed, however, when an unfulfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment" (McGrath v. Hilding, 41 NY2d 625, 628 [1977]). Junior contends that Senior gave Sister money to buy the condominium in her name with the expectation that, at the appropriate time, he would then give the property to his children as he saw fit. According to Junior, Senior transferred the property to him before his death. Subsequently Sister promised she would fulfil her father's instructions, she told Junior the apartment was "his," he paid off the mortgage which was in her name only but she will not transfer ownership to Junior.

The elements of a constructive trust are: 1) a confidential or fiduciary relationship, 2) a promise either express or implied, 3) a transfer in reliance thereon and 4) unjust enrichment (Sharp v. Kosmalski, 40 NY2d 119, 121 [1976]). In evaluating a claim for a constructive trust, "the conveyance ... should be interpreted 'not literally or irrespective of its setting, but sensibly and broadly with all its human implications.' " (Sharp v. Kosmalski, 40 NY2d at 123).

Family members are said to stand in a fiduciary relationship to one another (McGrath v. Hilding, supra [husband and wife]; Cinquemani v. Lazio, 37 A.D.3d 882 [3<sup>rd</sup> Dept 2007] [inlaws]; Maric Piping, Inc. v. Maric, 271 A.D.2d 507 [2<sup>nd</sup> Dept. 2000] [brothers]; Farano v. Stephanelli, 7 AD2d 420 [1<sup>st</sup> Dept 1959] [father and daughters]). Therefore, Junior's proposed amended complaint satisfies this element. The emails and documents Junior relies on provide, at this stage of the litigation, the factual allegations

necessary to satisfy the second element of a promise. An actual "transfer" is not necessary and this element may be satisfied if the plaintiff alleges s/he contributed funds, time or effort to the property in reliance of a promise to share some interest in it (Hennessey v. Hunt, 272 A.D.2d 756 [3<sup>rd</sup> Dept 2000]). The final prong of unjust enrichment, is satisfied as well because of Junior's claim he paid off the mortgage in Sister's name.

The proposed amendment is not time barred, as Sister argues. The statute of limitations for a constructive trust is six (6) years and it begins to run either when the constructive trustee acquires the property wrongfully, or when constructive trustee wrongfully withholds property acquired lawfully from the beneficiary because that is when the property is held adversely and the date the trustee has breached or repudiated the agreement to transfer the property (Maric Piping, Inc. v. Maric, 271 A.D.2d at 508). Here, Junior and his wife lived in the apartment without Sister's interference until May 15, 2010 when Sister sent them a letter demanding they surrender and vacate the premises. Since this claim is timely interposed and for the reasons stated, the cross motion to amend is granted only to the extent that such claims are asserted by Junior. Rosario, his wife, has not provided a sworn affidavit of merits, nor do any of the factual allegations support a claim by her. Plaintiffs may serve the amended complaint in the form proposed.

The court has considered Sister's claim of prejudice. Since the new cause of action does have distinct elements from the claim already asserted, the court will, on its own motion, strike the note of issue and upon doing so, allow Sister to conduct a limited deposition of Junior, solely as to the factual claims asserted in his new claim for a

constructive trust and make a demand for any additional relevant documentation. If Sister decides to re-depose Junior, the deposition shall take place no later than Thirty (30) Days after a copy of this decision/order appears as having being entered in SCROLL (the Supreme Court Records On-Line Library). Similarly, if If Sister decides to demand further documents, such demand shall be made no later than Ten (10) Days after a copy of this decision/order appears as having being entered in SCROLL (the Supreme Court Records On-Line Library). Responses thereto shall be within Twenty (20) Days after service thereof.

Summary judgment is usually not available unless and until issue is joined (CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 AD2d 508 [1<sup>st</sup> Dept. 1982]). Since issue has not been joined on the new claim, Sister's motion for summary judgment is premature as to the constructive trust claim, but will be decided as to the existing claim pursuant to Article 15 of RPAPL which is to compel the determination of a claim to Real Property. An action to quiet title may be brought "[w]here a person claims an estate or interest in real property . . . to compel the determination of any claim adverse to that of the plaintiff which the defendant makes . . . ." (RPAPL § 1501).

"[T]he proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Sister has proved that she is the record owner of Unit 4F. A recorded deed is presumptive proof of title (see Southern Associates, Inc. v. United Brands, Co., 67 AD2d

199 [1<sup>st</sup> Dept 1979]). Here, however, Junior has raised many disputed facts that need to be resolved before the court can apply the law:

First, there are his claims that he paid the mortgage and maintained the apartment while Sister was in the Philippines. Junior has presented evidence that the apartment may have been placed in Sister's name as a convenience by his father, that Sister was Senior's nominee and that Senior transferred the property to Junior. If that transfer is proved, then there is the alleged transfer of the apartment by Senior to Junior and later, the alleged agreement that Sister would, in fact, effectuate her father's instructions to transfer title to Junior, but failure to do so (see Byrd v. Brown, 208 AD2d 582 [2<sup>nd</sup> Dept 1994]). It is equally important that the parties are involved in litigation regarding Senior's last will and testament in the Philippines. The details of that case are unknown to the court. Viewing the evidence in the light most favorable to Junior, the non-moving party, and drawing all reasonable inferences in his favor, this motion for summary judgment must be denied (See Negrí v. Stop and Shop, 65 NY2d 625 [1985]).

Having allowed: 1) Junior to serve an amended complaint, 2) stricken the note of issue, 3) ordered limited discovery and 4) denied Sister's motion for summary judgment, clearly this case is not ready for trial. Accordingly, the court hereby schedules a compliance conference for **July 19, 2012 at 9:30 a.m. in Part 10**. At that time the court will determine whether the case is ready to certify for trial and, if it is, direct the plaintiff to file the Note of Issue.

#### **Conclusion**

It is hereby

ORDERED that the motion by defendant Marivic L. Gaddi for summary judgment is denied; and it is further

ORDERED that the cross motion by plaintiffs Ceferino Gaddi and Rosario Gaddi to serve an amended complaint is granted and plaintiffs may serve the amended complaint in the form proposed; and it is further

ORDERED that the court, on its own motion, strikes the note of issue without prejudice to refileing it at a later time as provided for in this order, supra; and it is further

ORDERED that defendant may conduct a limited deposition of plaintiff Ceferino Gaddi, solely as to the factual claims asserted in his new claim for a constructive trust; if defendant decides to re-depose Ceferino Gaddi, the deposition shall take place no later than Thirty (30) Days after a copy of this decision/order appears as having being entered in SCROLL (the Supreme Court Records On-Line Library); and it is further

ORDERED that the court hereby schedules a compliance conference for July 19, 2012 at 9:30 a.m. in Part 10; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

**FILED**

Dated: New York, New York  
April 13, 2012

**APR 17 2012**

So Ordered:

NEW YORK  
COUNTY CLERK'S OFFICE

Hon. Judith J. Sische, JSC

