

Schiller v Maurer
2012 NY Slip Op 32739(U)
October 31, 2012
Supreme Court, Suffolk County
Docket Number: 10-44998
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-17-12
ADJ. DATE 5-8-12
Mot. Seq. # 004 - MD
005 - XMotD
006 - XMotD

-----X	
JOHN A. SCHILLER,	ADAM B. KAUFMAN & ASSOCIATES, PLLC
	Attorney for Plaintiff
Plaintiff,	585 Stewart Avenue, Suite 302
	Garden City, New York 11530
- against -	SHERRY L. WEINDORF, ESQ.
	Attorney for Defendant John J. Maurer
	1776 Broadway, 21st Floor
	New York, New York 10019
JOHN J. MAURER and SUZANNE MAURER,	WINTER & GROSSMAN, PLLC
	Attorney for Defendant Suzanne Maurer
Defendants.	585 Stewart Avenue, Suite 300
	Garden City, New York 11530
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant John J. Maurer, dated March 21, 2012, and supporting papers; (2) Notice of Cross Motion by the plaintiff, dated April 10, 2012, and supporting papers (including a Memorandum of Law dated April 10, 2012); (3) Notice of Cross Motion by the defendant Suzanne Maurer, dated April 9, 2012 and supporting papers (including Memorandum of Law dated April 9, 2012); (4) Affirmation in Opposition by the defendant John J. Maurer, dated April 26, 2012, and supporting papers; (5) Reply Affirmation by the plaintiff, dated May 3, 2012, and by the defendant Suzanne Maurer dated May 1, 2012, and supporting papers; (5) Other (~~and after hearing~~ ~~counsel's oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions are decided as follows: it is

ORDERED that the motion by defendant John J. Maurer for an order dismissing the complaint pursuant to CPLR 3211 (a) (3), (4), (5), and (7), CPLR 3013, and CPLR 3016 (b) is denied; and it is further

ORDERED that the portion of the cross motion by the plaintiff for an order dismissing the counterclaim of the defendant John J. Maurer is granted; and it is further

ORDERED that the portion of the cross motion by the defendant Suzanne Maurer for an order dismissing the cross claim of the defendant John J. Maurer is granted; and it is further

ORDERED that portion of the cross motion by plaintiff for an order granting him sanctions or attorney's fees in the sum of \$3,000.00 and the cross motion by defendant Suzanne Maurer for an order granting her sanctions or attorney's fees in the sum of \$2,500.00 are referred to a hearing to be scheduled at the next conference of this matter.

Plaintiff, the father of defendant Suzanne Maurer and father-in-law of defendant John J. Maurer, commenced this action to impose a constructive trust or an equitable lien in his favor against marital property owned by the defendants (*i.e.* "the marital residence" known as 19 Thornwood Drive, Dix Hills, New York), and in which plaintiff resides with defendant Suzanne Maurer. He seeks the right to exclusively occupy a portion of the residence pending its sale, or other disposition as directed by the court, contribution from the defendants for the reasonable costs, expenses, and carrying charges associated with the residence, and counsel fees. An action for divorce ("the divorce action") between the defendants is currently pending in New York County (it is entitled "John J. Maurer, plaintiff v Suzanne Maurer, defendant" Index No. 306249/2010), wherein equitable distribution of the parties' assets, including the marital residence, is to be determined. The Appellate Division recently upheld the denial of a motion by defendant John J. Maurer in the divorce action for an order consolidating it with this action (*Maurer v Maurer*, 96 AD3d 417, 944 NYS2d 880 [1st Dept 2012]) on the grounds that the divorce action was ready for trial and this action was not ready, and that the constructive trust action is properly venued in Suffolk County.

It is undisputed that the defendants were married on June 1, 1986 (and have one issue of the marriage who is over the age of 21 years) and purchased the marital residence in or about 2001 with marital funds and marital debt. Sometime during 2002 plaintiff and his wife¹ used their funds (a sum between \$112,000.00 and \$150,000.00, the exact amount being in controversy) to enlarge the marital residence in order to move in and live with the defendants. Defendant John J. Maurer moved out of the marital residence in 2009 and commenced a divorce action in New York County in 2010. Plaintiff has paid a proportionate share of the utility expenses in connection with the marital residence. In or about January 2011, plaintiff commenced the within action alleging that defendants promised that he could reside in an apartment in their house for the remainder of their lives upon his payment of a portion of his life savings to improve and enlarge their home. He maintains that in reliance upon the confidential and fiduciary relationship, he paid a sum of \$150,000.00 for the said improvements, moved into the premises and paid a portion of the utilities thereat, and that he is entitled to an equitable lien or constructive trust as to his share of the property.

Thereafter, defendant John J. Maurer commenced a tort action claiming that plaintiff and defendant Suzanne Maurer "conspired to abuse process by having [plaintiff] Schiller file and maintain this action." Defendant John J. Maurer maintains that this action was brought to "impair and impede [his] rights to

¹Plaintiff's wife was incapacitated as a result of an unrelated accident and resides in a nursing home at the present time.

equitable distribution of the Marital Home in the Divorce Action.” In this action, he cross-claimed against defendant Suzanne Maurer alleging that she “conspired to deprive [him] of his equitable interest in the marital home in the divorce action and asserted “as his Counterclaim against plaintiff the claims and demands as stated in his separate action entitled: ‘John J. Maurer against John A. Schiller and Suzanne Maurer.’ Supreme Court of the State of New York, County of New York, Index No. 300850/11” and demands judgment in the sum of \$300,000.00 on the cross claim and on the counter claim.

Defendant John J. Maurer now moves for an order dismissing the complaint in this action on the grounds that it is not stated with sufficient particularity, it is barred by laches or the statute of limitations and the statute of frauds, it fails to state a cause of action for equitable relief, the same issues are pending in the divorce action, the complaint was asserted to interfere with equitable distribution and is an abuse of process, and the complaint fails to allege any wrongdoing by defendants and promotes a “conspiracy between plaintiff and defendant Suzanne Maurer ... to tortiously interfere with, obstruct, delay, and impede the right of defendant John J. Maurer to equitable distribution”. Plaintiff and defendant Suzanne Maurer each cross move for orders dismissing the counterclaim/cross claim on the ground that each fails to state a cause of action and awarding costs and imposing sanctions against defendant John J. Maurer on the ground that the motion to dismiss was made to harass and intimidate plaintiff and co-defendant Suzanne Maurer.

It is well settled that an action for a constructive trust may be maintained to remedy a situation where property has been acquired under such circumstances that the record owner should not, in good conscience, retain the beneficial interest in such property (*see Sharp v Kosmalski*, 40 NY2d 119, 386 NYS2d 72 [1976]; *Quodrozzi v Estate of Quodrozzi*, ___ AD3d ___, 2012 NY Slip Op 6593 [2d Dept 2012]; *Rowe v Kingston*, 94 AD3d 852, 942 NYS2d 161 [2d Dept 2012]). In order to impose the equitable remedy of a constructive trust, generally four factors must be considered: “(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment”(*Sharp v Kosmalski*, *supra* at 121; *see also Rowe v Kingston*, *supra*; *Marini v Lombardo*, 79 AD3d 932, 912 NYS2d 693 [2d Dept 2010] *appeal denied* 17 NY3d 705, 929 NYS2d 97 [2011]). “However, as these elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established” (*Rowe v Kingston*, *supra* at 853).

Here, although the Court is not in position at this time to determine if a constructive trust has been established, it is clear that plaintiff has plead the basic elements of a constructive trust (*i.e.* he alleges that he was in a “confidential” relationship with his daughter and son-in-law, they promised to permit him to live with them in their home, he transferred over \$100,000.00 so that their home could be enlarged for him to live with them, and they would be unjustly enriched if he is unable to live in the home or receives no remuneration from them upon the sale of the home). Thus, it is clear that plaintiff has the capacity to sue, and that the pleading states a cause of action and is plead with sufficient particularity to give notice of the elements of the cause of action, so that a dismissal pursuant to CPLR 3211 (a) (3) and (7) and CPLR 3013 is not warranted. Similarly, a dismissal is not proper pursuant to CPLR 3211 (a) (4) since plaintiff cannot obtain this relief in the divorce action pending between defendants since he is not a party thereto. Although an express promise may not be found upon the conclusion of this matter, since no written contract is alleged, a constructive trust may be imposed nonetheless, as a court of equity may impose a constructive trust if it finds that a promise was implied or inferred from the entirety of the transaction (*see, Sharp v Kosmalski*, *supra*). Therefore, it would be improper to dismiss the complaint pursuant to CPLR 3211 (a)

(5) under the statute of frauds doctrine. Finally, as plaintiff does not plead a cause of action founded in fraud, a motion to dismiss pursuant to CPLR 3016 (b) is entirely inapplicable, inappropriate and unsupported by the submissions of defendant John J. Maurer.

A conspiracy to commit a tort is not recognized in New York as an independent cause of action, a claim of this type is dependent upon an underlying tort and cannot stand on its own (*Scott v Fields*, 85 AD3d 756, 925 NYS2d 135 [2d Dept 2011]). In order to establish a claim sounding in abuse of process, three elements must be proven: (1) regularly issued process (civil or criminal), (2) an intent to do harm without justification or excuse, and (3) use of the process in an improper manner to obtain a secondary objective (*Curiano v Suozzi*, 63 NY2d 113, 116, 480 NYS2d 466 [1984]). Malicious motive alone does not amount to a cause of action for abuse of process (*Curiano v Suozzi*, *supra*), nor will the act of instituting a civil action by service of a summons and complaint or bringing an action based upon an improper motive, by itself, give rise to such a cause of action (*Muro-Light v Farley*, 95 AD3d 846, 944 NYS2d 571 [2d Dept 2012]; *Cozzani v County of Suffolk*, 84 AD3d 1147, 923 NYS2d 348 [2d Dept 2011]).

The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (*Ryan v New York Tel. Co.*, 62 NY2d 494, 501-502, 478 NYS2d 823 [1984]; *Breslin Realty Dev. Corp. v Shaw*, 72 AD3d 258, 263, 893 NYS2d 95 [2d Dept 2010]). Once the party seeking the benefit of collateral estoppel establishes that the identical issue was “material” (emphasis supplied) to a prior judicial or quasi-judicial determination, the party to be estopped bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*see, id.*).

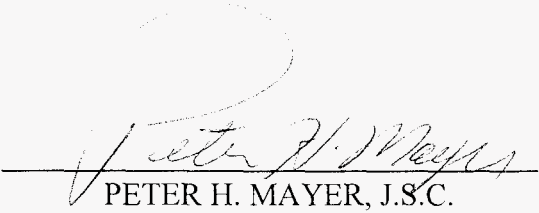
Here, defendant John J. Maurer has not alleged in his cross claim or counter claim the three elements necessary to plead a cause of action for abuse of process by either the plaintiff or defendant Suzanne Maurer. It is clear that his claim against defendant Suzanne Maurer, that she “conspired to deprive [him] of his equitable interest in the marital home in the divorce action,” fails to state a cause of action. This action, brought by plaintiff against him, in and of itself cannot constitute a conspiracy, and was not undertaken by defendant Suzanne Maurer, thus it cannot be the basis of an abuse of process claim against her as she did not even issue process. Therefore, the cross claim against defendant Suzanne Maurer must be dismissed. For the same reasons and because the counter claim against plaintiff specifically bases its allegations upon those contentions stated in a complaint brought by defendant John J. Maurer in a separate and distinct lawsuit which is still pending, the counter claim must be dismissed.

NYCRR § 130-1.1 permits the court, in its discretion, to award any party in any civil action, costs in the form of reasonable attorney’s fees, resulting from frivolous conduct, which it defines as conduct which is completely without merit in law and which cannot be supported by a reasonable argument for a modification or reversal of existing law. In this instance it appears that the motion to dismiss brought by defendant, as well as the cross and counter claims asserted by him, have no basis in law, as is indicated hereinabove. If they are found to be without merit, made for the purpose of harassing or maliciously injuring plaintiff or defendant Suzanne Maurer, they will constitute frivolous conduct and an award of costs in the form of attorneys’ fees will be appropriate (*see Palumbo v Palumbo*, 78 AD3d 1139, 911 NYS2d 665 [2d Dept 2010]; *Kamen v Kamen-Diaz*, 40 AD3d 937, 837 NYS2d 666 [2d Dept 2007]). Accordingly, a

Schiller v Maurer
Index No. 10-44998
Page No. 5

hearing to determine if sanctions are warranted, and if so, the amount to be paid, will be scheduled by the Court at the next conference of this matter.

Dated: 10-31-12


PETER H. MAYER, J.S.C.