

Gomez v Eleni, LLC
2012 NY Slip Op 33748(U)
October 18, 2012
Supreme Court, Suffolk County
Docket Number: 7548/2008
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

CONFIDENTIAL

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 7548/2008
CALENDAR NO.: 2009006100T

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MARGARET GOMEZ,

DECISION AFTER TRIAL

Plaintiff,

PLAINTIFF'S ATTORNEY:
McNULTY - SPIESS, P.C.
214 Roanoke Ave., P.O. Box
Riverhead, New York 11901

-against-

ELENI, LLC and TED LOUCOPOULOS,

DEFENDANTS' ATTORNEY:
JEFFREY W. WALLER, LLC
140 Fell Court, Suite 303
Hauppauge, New York 11788

Defendants.

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Plaintiff's complaint seeks a judgment imposing a constructive trust and compelling the transfer of title to commercial premises known as 57 Mall Drive, Centereach, New York. A five day non-jury trial was held on May 11, 12, 13,14 & 18, 2010 during which a total of nine witnesses testified. Upon conclusion of the testimony the Court reserved decision and the attorneys for both parties submitted post-trial memoranda together with proposed findings of fact and conclusions of law.

The undisputed testimony established during trial revealed that plaintiff Margaret Gomez (Gomez) and the father of defendant Ted Loucopoulos, James Loucopoulos (Loucopoulos), had been childhood friends. The relationship was described by Gomez as one equivalent to sister and brother. Since 1980 the Gomez and Loucopoulos families lived side by side as neighbors celebrating holidays and sharing Sunday coffee together. Family members referred to plaintiff as "Aunt Margaret" and to James Loucopoulos as "Uncle Jimmy".

In 1984 the plaintiff's husband, Antonio Gomez, formed a partnership known as Unico Realty Associates (URA) for the purpose of erecting an industrial building on commercial premises known as 57 Mall Drive. Although plaintiff was listed as a URA partner, she was never actively involved in any of her husband's business dealings. Antonio Gomez operated a construction company from the building known as Unico Service Corporation. Financing for the development in the sum of \$1.2 million was furnished through bonds issued by the Suffolk County Industrial Development Agency (SCIDA). The agreement provided that SCIDA retained title to 57 Mall Drive which it leased back to URA until payment for the bonds was made by URA. Upon completion of payment SCIDA was obligated to convey title to URA.

Antonio Gomez died in August, 1996. At the time the URA/SCIDA mortgage was in default. There is no dispute by either party that at this time James Loucopoulos ("Uncle Jimmy") offered and arranged through his company, defendant Eleni, LLC, to pay the remaining balance of the monies due and owing to SCIDA in order to prevent his childhood friend, Margaret Gomez, from losing the premises to foreclosure. James Loucopoulos had formed Eleni, LLC, as a jointly owned limited liability company with his son, defendant Ted Loucopoulos.

On February 19, 1997 URA (by Margaret Gomez) assigned its rights to receive title to 57 Mall Drive from SCIDA to Eleni, LLC., in exchange for Eleni, LLC's payment of approximately \$581,000.00 representing the sums required to redeem the SCIDA bonds and to satisfy the outstanding payments in lieu of taxes. By quit claim deed dated February 19, 1997 and recorded on February 26, 1997, SCIDA conveyed title to 57 Mall Drive to defendant Eleni, LLC. Almost two months later the defendant Eleni, LLC. executed a mortgage dated April 15, 1997 on the premises in favor of the Bank of Smithtown agreeing to re-pay the sum of \$612,500.00. The remaining principal balance of the mortgage is in excess of \$300,000.00.

By lease dated March 1, 1997 Eleni, LLC, agreed to rent the premises to Phoenix Environmental, Inc. (Phoenix) for a five year period. Phoenix was a corporation owned by the Gomez family which occupied and operated its business from 57 Mall Drive as Eleni LLC's tenant for the next ten years. When the five year lease expired Phoenix became a month to month tenant and continued to be obligated to make monthly lease payments which ranged between \$5,500.00 and \$8,300.00. During the tenancy Phoenix was often delinquent in making timely lease payments. By check dated March 10, 2008 Phoenix made payment to Eleni for past due rent in the sum of \$207,110.88. One month earlier plaintiff commenced this action. In 1999 Eleni LLC partitioned space in the building and began leasing to a company known as Electro- freeze. Phoenix and Electro-freeze were the only tenants in the building during this period. Eleni LLC paid all expenses incident to operating the building including real estate taxes, insurance, repairs and capital improvements and collected approximately \$1.4 million in rental income during this ten year period. The trial testimony also indicated that Loucopoulos provided additional funding to Phoenix for the purchase of equipment.

The central issue underlying this proceeding is whether, as part of the 1997 transfer of title to Eleni, LLC, James Loucopoulos made a promise to convey title back to plaintiff Gomez, his life-long friend, after ten years had passed. Plaintiff claims that "Uncle Jimmy" had every intention to save the premises for her and had promised to convey title back in ten years when Gomez's financial situation had improved. Plaintiff claims that Loucopoulos agreed to accept ten years worth of rental payments from the Gomez tenants and that upon payment of one dollar by Gomez, he would re-convey title to the plaintiff. Defendant Ted Loucopoulos (whose individual liability claims were dismissed) claims that the only promise his father made was simply to save the property for his friend and that absent documentary evidence or any credible proof from a disinterested witness to prove Gomez's contention, plaintiff's complaint must be dismissed.

Plaintiff claims that sometime in August, 2007 Gomez demanded that the defendants re-convey title to 57 Mall Drive. At the time James Loucopoulos was suffering from Parkinson's disease and dementia and had been residing in a nursing facility since 2005. Upon defendant Ted Loucopoulos's refusal to transfer title of the premises from Eleni, LLC, to Gomez the plaintiff commenced this action in February, 2008. James Loucopoulos died on December 24, 2008.

Prior to commencement of the non-jury trial the defendants sought to bar the testimony of the Gomez witnesses interested in the event concerning the terms of the transaction based upon the requirements of CPLR Section 4519 known as the "Dead Man's Statute". CPLR Section 4519 bars the testimony of a party or an interested person concerning the transaction or communication between the witness and the decedent. Defendants argued that the Gomez family members were persons "interested in the event" and therefore could not testify about conversations between the

decedent James Loucopoulos and themselves concerning the details of the premises transfer. Plaintiff claimed that none of the proposed family member, non-party witnesses qualified as interested persons under the terms of the statute. The Court permitted the non-party testimony in view of the fact that the trial was being conducted without a jury.

Four of the plaintiff's witnesses testified about conversations in which the decedent Loucopoulos spoke of the deal to re-convey title to the premises in ten years to the plaintiff in exchange for payment of one dollar. Those discussions included conversations: 1) between Loucopoulos and Robert Gomez (plaintiff's son) in a car and at Margaret Gomez's house; 2) between Loucopoulos and Michael Gomez (plaintiff's son) outside the 57 Mall Drive building; 3) among Loucopoulos and Denise McMahon (decedent's niece), McMahon's mother (decedent's sister) and McMahon's son on the back porch of Loucopoulos's home; and 4) among Loucopoulos and Donna Gomez (Robert Gomez's wife), Robert Gomez and Margaret Gomez at Margaret Gomez's house and during a graduation party. In contrast the defendant Ted Loucopoulos testified that his father and Tony Gomez kept their business dealings private and that he knew nothing about a deal to re-convey the premises to the plaintiff. Ted Loucopoulos testified that his father intended to help "Margie" by taking over the building and providing a more compassionate landlord.

Generally a constructive trust may be imposed "when property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest." (*Sharp v. Kosmalski*, 40 NY2d 119, 120, 386 NYS2d 72, 74 (1976), citing *Beatty v. Gugenheim Exploration Co.*, 225 NY 380, 386, 122 NE 378, 380 (1919); see also *Scivoletti v. Marsala*, 97 AD2d 401, 467 NYS2d 228 (2nd Dept., 1983); affirmed 61 NY2d 806, 473 NYS2d 949 (1984)). To establish a constructive trust it must be shown that there exists: 1) a confidential or fiduciary relationship; 2) a promise; 3) a transfer in reliance thereon; and 4) unjust enrichment (*Sharp v. Kosmalski*, supra.; *Gargano v. VC&J Construction Corporation*, 148 AD2d 417, 538 NYS2d 955 (2nd Dept., 1989); *Lester v. Zimmer*, 147 AD2d 340, 542 NYS2d 855 (3rd Dept., 1980)). It is the existence of a confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust and the parties need not be husband and wife for such a relationship to exist (*Sharp v. Kosmalski*, supra.). Moreover the four elements "are not rigid but are flexible considerations for the Court to apply in determining whether to impose a "constructive trust" (see *Mendel v. Hewitt*, 161 AD2d 849, 555 NYS2d 899, 900 (3rd Dept., 1990) citing *Hornet v. Leather*; 145 AD2d 814, 535 NYS2d 799 leave to appeal denied 74 NY2d 603, 543 NYS2d 396 (1990); *Lester v. Zimmer*, supra.)). Unjust enrichment occurs where a party holds or retains property under such circumstances that in equity and good conscience he ought not to retain it and does not require the performance of any wrongful act by the one so enriched (*Simonds v. Simonds*, 45 NY2d 233, 242 (1979); *Chemical Bank v. Equity Holding Corp.*, 228 AD2d 338, 644 NYS2d 709 (1st Dept., 1996)).

Based upon the credible proof presented during the trial, plaintiff has failed to establish by a preponderance of the evidence that the terms of the decedent's acquisition of the premises known as 57 Mall Drive included an agreement to re-convey the premises to the plaintiff after ten years upon payment of one dollar and that the transaction itself provided an unjust enrichment in favor of the defendant Eleni, LLC.. Absent sufficient credible evidence to prove these two elements, no legal basis exists to impose a constructive trust for the benefit of the plaintiff.

The relevant, admissible testimonial and documentary evidence shows that Eleni, LLC, was not unjustly enriched as a result of the transfer given the undisputed proof that throughout the ten

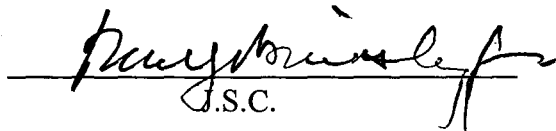
year period the defendant permitted the Gomez family business to continue operations despite its repeated failures to make required lease payments which the plaintiff claims was the primary consideration for the transaction. Moreover the defendant established that Eleni LLC made significant capital expenditures to improve the building, paid all required taxes and insurance, and extended additional financing to the Gomez business which was entirely consistent with defendant Ted Loucopoulos's testimony that the transaction consisted solely of his father's promise to save the premises for his friend and to go forward to help her family to continue to be able to conduct business with Loucopoulos as their landlord.

With respect to the issue of the terms of the decedent's promise and plaintiff's contention that the decedent promised to re-convey the premises after ten years, the credible evidence adduced during the trial weighs in favor of the defendant. The record is clear that James Loucopoulos was a sophisticated, well-intentioned businessman and friend whose motive was, without question, to save his life-long friend's property shortly after her husband had died. The actions he took evidence his intent to prevent foreclosure of the premises and to permit the Gomez family to continue to conduct business in the building that their father, Tony Gomez, had built. Loucopoulos satisfied the mortgage by paying the outstanding bonds and "pilots", and took title to the premises after the plaintiff assigned her rights to Eleni, LLC. in February, 1997. Less than two weeks later Loucopoulos entered into a five year written lease agreement with the Gomez-run business Phoenix, permitting the plaintiff's sons to continue to operate their company. One month later Eleni, LLC, mortgaged the premises and within two years the landlord divided the building so that a second tenant could occupy the premises providing a significant reduction in rent for the benefit of Phoenix. Each of these steps is consistent with actions ordinarily taken by a sophisticated businessman who recently took ownership of commercial premises. The fact that the decedent provided a written lease for the Gomez-run business but did not create any written agreement or statement to evidence his intent to re-convey the premises to the plaintiff is clearly an indication that no such promise was made. The negative tax consequences which would result to the detriment of Eleni, LLC, from a transfer of the premises ten years after acquisition for no consideration also weighs against the viability that such a promise was ever made by the decedent.

Moreover the relevant, admissible, credible testimonial evidence provided by the witnesses during the trial weighs in favor of the defendant's version of his father's promise. Although plaintiff was permitted to call four witnesses to testify about the decedent's promise, three of those witnesses were arguably interested in advancing the ten year re-conveyance promise but were nevertheless given an opportunity to testify in the non-jury trial format. Given these circumstances and the lack of any written documentary evidence to establish the terms of a promise wholly inconsistent with the actions of an otherwise well-versed businessman, plaintiff has failed to submit sufficient evidence to justify imposition of a constructive trust. Accordingly it is

ORDERED and ADJUDGED that the complaint is hereby dismissed.

Dated: October 18, 2012


J.S.C.