

**Bennerson v Thame**

2013 NY Slip Op 30443(U)

February 28, 2013

Supreme Court, Queens County

Docket Number: 10096/2012

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

DENISE BENNERSON,  
Plaintiff,

Index  
No. 10096 2012

- against -

Motion  
Date February 1, 2013

HAROLD GEORGE THAME, etc.,  
Defendant.

Motion  
Cal. No. 5

Motion  
Seq. No. 1

Conference/Oral Argument  
Date February 25, 2013

The following papers numbered 1 to 10 read on this motion by defendant for an order granting him summary judgment dismissing the complaint and vacating the lis pendens.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-5
Answering Affirmation - Exhibits.....	6-9
Papers.....	10

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff, defendant's daughter, commenced the instant action by filing a copy of the summons and verified complaint and lis pendens on May 14, 2012, seeking the imposition of a constructive trust. According to the complaint, defendant and his wife, Joyce Thame (plaintiff's mother), purchased the subject premises in September 1960, as tenants by the

entirety.<sup>1</sup> Plaintiff resided in the premises throughout her life until her eventual marriage in 2006.

Plaintiff alleges, without providing a copy thereof, that in or about 2005, defendant executed his Last Will and Testament, providing that, “in the event his wife, Joyce Thame, did not survive him, all of his right, title and interest in the Premises shall pass to plaintiff.” Prior to, and at the time of said execution, plaintiff, “at her sole cost and expense,” provided care for her parents. Thereafter, over the objection of both plaintiff and her mother, defendant permitted his out-of-wedlock son to live with the Thames in the home. As a result, plaintiff became concerned about the fate of her interest in the premises, since she knew that, based upon repeated promises by her parents, the premises would pass solely to her by deed or inheritance. At that time, defendant acknowledged the care that plaintiff had provided to her parents, and promised that he would transfer title to plaintiff after the death of his wife.

Plaintiff further states that, upon Mrs. Thame’s death in August 2010, defendant became the sole owner of the premises by virtue of the property being held as a tenancy by the entirety. Thereafter, defendant – at various times – reiterated his promise to transfer title to the premises to plaintiff. Plaintiff, in reliance thereon, continued to provide defendant – at her sole cost and expense – management of his financial affairs. Beginning in November 2011, about the time defendant began a relationship with a woman named Patricia Lawrence, defendant began to exclude plaintiff from these affairs, which included terminating a power of attorney in which she was previously appointed, and withdrawing monies held in defendant’s bank accounts, which had been maintained by plaintiff. In January 2012, defendant told plaintiff that he would no longer honor the agreement to transfer title to the premises to her. Plaintiff contends that she “relied on the representations and promises of defendant . . . that he would transfer all of his right, title and interest in the Premises to plaintiff,” that she “would not have made the payments or undertaken the care provide [sic] to defendant and to the Premises absent defendant’s representations and promises,” that defendant has “refused to transfer the Premises to plaintiff,” that defendant “has breached his agreement to transfer the Premises to plaintiff,”<sup>2</sup> and that defendant “will be unjustly enriched by his refusal to transfer title to the Premises to plaintiff as agreed and as promised, as plaintiff would not have provided the financial assistance and/or care to defendant and would not have maintained the Premises or made expenditures on the Premises absent defendant’s agreement.” As such, plaintiff avers that she is entitled to the imposition of a constructive trust.

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1. The deed provided to the court is dated July 24, 1961.
  2. Plaintiff has not alleged a cause of action for breach of contract.

Defendant has answered the complaint and has asserted three counterclaims against plaintiff. The first counterclaim seeks money damages in connection with plaintiff having commenced a frivolous suit. The second counterclaim seeks damages for plaintiff's misuse of the Power of Attorney he executed. The third counterclaim seeks the return of documents alleged to have been removed from defendant's home.

In support of his motion for summary judgment dismissing the complaint, defendant submits an affidavit in which he states, inter alia: that plaintiff did not maintain the premises; that plaintiff did not provide financial assistance to him or his wife; and that he never promised – in writing or otherwise – to convey the premises to plaintiff.

In opposition, plaintiff indicates that defendant indeed made a promise to transfer title to the home to her. Before the death of his wife, defendant made the promise because he did not want to leave the home to enter an assisted living facility. In exchange for his promise, he induced plaintiff to help him and his wife stay in the home and, upon his wife's death, he would transfer title to plaintiff while he continued to live there. In reliance on that promise, from 2005 to 2010, plaintiff traveled from Syracuse to the home “approximately once every two weeks” to bring her parents:

“household supplies, meals, food and other necessary items, again at my own expense. I would help my parents with their bills and paperwork, and I would clean and organize the house, and do laundry. I scheduled doctor's appointments, and when feasible, took my parents to such appointments. My efforts, coupled with those of their church friends and a hired cleaning woman, clearly allowed my parents to remain in the house and not be placed in a facility. On several occasions during this period, my father told me how much he appreciated what I was doing, how he didn't want to be placed in a facility, and that the house ‘world be mine’ after my mother passed away.”

Plaintiff further states that, after her mother's passing, her relationship with her father began to deteriorate and that, when she confronted him in early 2011 about the promises he made, defendant claimed never to have promised her anything.

It is well established that a plaintiff must plead and prove four essential elements in order to demonstrate entitlement to a constructive trust: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment caused by breach of the promise (*Sharp v Kosmalski*, 40 NY2d 119; [1976]; *Gaentner v Benkovich*, 18 AD3d 424, 426-427 [2005]; *Satler v Merlis*, 252 AD2d 551 [1998]).

While the parties appear to focus particularly on whether there was a promise to convey and whether plaintiff indeed provided services in reliance on that promise, it must be noted that, in order to establish the existence of a constructive trust, in particular, “it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed” (*Eickler v Pecora*, 12 AD3d 635, 636 [2004], quoting *Bontecou v Goldman*, 103 AD2d 732, 733 [1984]; see *Ladone v Ladone*, 121 AD2d 512, 513 [1986]). Moreover, 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” (*Sharp v Kosmalski*, 40 NY2d at 121 [1976]). In such cases, equity converts the legal holder into a trustee (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]).

That essential prerequisite is not present here and, accordingly, plaintiff’s claim must fail. In particular, plaintiff has failed to show a legally cognizable transfer in reliance on any promise made by defendant, or unjust enrichment by defendant (*Doxey v Glen Cove Community Dev. Agency*, 28 AD3d 511, 512 [2006]; *Gaentner v Benkovich*, *supra* at 427; *Satler v Merlis*, *supra*). Here, plaintiff – admittedly – never had an actual prior interest in the subject premises. Plaintiff acknowledges that her parents bought the home and took out a mortgage on the property in 1961. She further acknowledges that it was her mother and father who worked over years, using their own wages to pay the mortgage and that “[a]fter thirty years of jointly making payments, in July, 1991, the mortgages my parents had . . . were fully paid.” She also concedes that, as a result of their having held title as tenants by the entirety, title properly rested in defendant after his wife’s death.<sup>3</sup>

Thus, when plaintiff cannot show that she had some interest in the premises prior to the alleged promise, plaintiff is required to show that an equitable interest developed through her expenditure of money, labor, and time in the property” (*Marini v Lombardo*, 79 AD3d 932, 934 [2010], leave to appeal denied 17 NY3d 705 [2011]; see *Rock v Rock*, 100 AD3d 614 [2012]). Neither does plaintiff make this showing, rendering her unable to establish the “transfer” element. Rather, plaintiff proffers facts which suggest that she expended money and effort in the care of *her parents* (by “purchasing meals, supplies, cleaning, etc.”), rather than the expenditure of monies, labor, or time on the property itself.<sup>4</sup> Plaintiff never indicates that she spent sums of money toward the maintenance, repair, or improvement of the house,

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3. Plaintiff also indicates that this is not an action to enforce any promise to make a disposition of property pursuant to a will.

4. It is noted that plaintiff presents no documentary evidence to demonstrate that monies were spent in connection with the premises (or in connection with the care of her parents, for that matter), or how much was spent over the relevant period of time.

such that she can be said to have established an equitable interest therein. As such, defendant is entitled to summary judgment dismissing plaintiff's complaint.

With respect to defendant's second and third counterclaims, defendant has not demonstrated the absence of issues of fact, as plaintiff has specifically contradicted the allegations set forth therein. With respect to defendant's first counterclaim, defendant does not demonstrate, prima facie, why he would otherwise be entitled to the recovery of costs and attorneys fees (*see 214 Wall Street Associates, LLC v Medical Arts-Huntington Realty*, 99 AD3d 988 [2012]).

Finally, while the court notes that plaintiff's arguments in opposition appear to fit more within the elements of an action sounding in breach of contract or promissory estoppel, neither of those claims were pleaded in the complaint.<sup>5</sup>

The court should also note that, while plaintiff alludes to defendant's relationship with Patricia Lawrence as questionable (being 40 years his junior) and one of "undue influence," plaintiff and her attorney specifically represented to the court on the record during oral argument of this matter, as well as in the papers submitted in opposition, that there is no allegation that defendant lacks the mental capacity to make his own decisions.

Accordingly defendant's motion for summary judgment is granted to the extent that the complaint is dismissed, and the Queens County Clerk, upon service of a copy of this order with notice of entry, is directed to cancel the notice of pendency filed in this matter forthwith. The branch of the motion for summary judgment in defendant's favor on his counterclaims is denied.

Dated: February 28, 2013

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J.S.C.

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5. The court notes that it is not making any representations as to the potential merit of any such unpleaded causes of action.