

**Palmeri v Palmeri**

2013 NY Slip Op 32584(U)

October 15, 2013

Sup Ct, Suffolk County

Docket Number: 21333/2012

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 21333/2012

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_  
ROBERT A. PALMERI,

Plaintiff,

-against-

MICHAEL PALMERI,

Defendant.  
\_\_\_\_\_

ORIG. RETURN DATE: OCTOBER 24, 2012  
FINAL SUBMISSION DATE: JANUARY 31, 2013  
MTN. SEQ. #: 001  
MOTION: MOT D

**PLTF'S/PET'S ATTORNEY:**  
SINNREICH KOSAKOFF & MESSINA, LLP  
267 CARLETON AVENUE  
3<sup>RD</sup> FLOOR - SUITE 301  
CENTRAL ISLIP, NEW YORK 11722  
631-650-1200

**DEFT'S/RESP ATTORNEY:**  
RICHARD WEISS, ESQ.  
481 MAIN STREET - SUITE 304  
NEW ROCHELLE, NEW YORK 10801  
914-235-0833

Upon the following papers numbered 1 to 7 read on this motion \_\_\_\_\_  
**FOR DISMISSAL**

\_\_\_\_\_  
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers  
4, 5; Memorandum of Law in Opposition 6; Reply Affirmation 7; it is,

**ORDERED** that this motion by defendant, MICHAEL PALMERI, for an Order: (1) pursuant to CPLR 3211 (a) (7), dismissing plaintiff's complaint in its entirety for failure to state a cause of action; (2) pursuant to CPLR 3211 (a) (10), dismissing plaintiff's complaint for failure to name a necessary party, more particularly "the Estate of Jeanette Palmeri"; (3) pursuant to CPLR 3211 (a) (1), dismissing plaintiff's complaint based upon the documentary evidence; and (4) pursuant to CPLR 3211 (a) (5) and 213, dismissing plaintiff's complaint based upon the statute of limitations, is hereby **GRANTED** to the extent set forth hereinafter. The Court has received opposition hereto from plaintiff ROBERT A. PALMERI.

On or about July 17, 2012, plaintiff ROBERT PALMERI (hereinafter "Father") commenced the within action against defendant MICHAEL PALMERI (hereinafter "Son") by the filing of a summons and verified complaint asserting three causes of action, to wit: (1) imposition of a constructive trust; (2) conversion; and (3) for an accounting, in connection with the purchase of real property commonly known as 20 Virginia Pine Lane, Bay Shore, New York (hereinafter "Premises"), and the Father's subsequent provision of the sum of \$350,000 to the Son.

By deed dated August 31, 2005, the Son acquired title to the Premises, a condominium unit, for the purchase price of \$415,500, and the Father and his deceased wife, Jeanette Palmeri (the Son's mother), received a life estate in the Premises. The Son informs the Court that the Premises was purchased utilizing his own funds, with the agreement that his parents would have a life estate in the Premises. Further, the Son alleges that it was agreed his parents would be responsible for the carrying charges of the Premises, and that upon the sale of their prior residence, his parents would give him the sum of \$350,000 which he would use to pay for his parents' living and medical expenses. Since 2005, the Father has lived at the Premises and until her death in 2009, Jeanette Palmeri also resided at the Premises. The Son contends that he has been paying all of the expenses in connection with the Premises, save the monthly common charges and utilities.

The issues herein relate to the ownership interest of the Premises, and the Son's use of the \$350,000, which was given by the Father and Jeanette Palmeri to the Son on or about October 20, 2005, after the purchase of the Premises. The Father contends that the \$350,000, which was a portion of the proceeds of the sale of their prior residence, was given to the Son, in trust, to be used for the Father and Jeanette Palmeri's benefit. If the \$350,000 had not been given to the Son in trust, the monies would allegedly have been used to purchase the Premises. The Son does not dispute that the \$350,000 given to him was for the benefit of his Father and Jeanette Palmeri; in fact, the Son acknowledges that he received the "sum of \$350,000 . . . to pay for their housing, living and medical expenses." However, the Son does dispute the Father's claim that but for depositing the \$350,000 in trust for the benefit of the Father and Jeanette Palmeri, the Father would have used said monies to purchase the Premises thereby conferring a fee title interest to the Father and Jeanette Palmeri, instead of the deeded life estate interests.

The Son has now moved to dismiss the Father's complaint on the grounds set forth hereinabove.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (see *Baptiste v Harding-Marin*, 88 AD3d 752 [2011]; *Rakusin v Miano*, 84 AD3d 1051 [2011]). The equitable claim for the imposition of a constructive trust is governed by a six-year statute of limitations, which begins to run upon the occurrence of the wrongful act from which a duty of restitution arises (*Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688 [2012]). “A determination of when a wrongful act triggering the running of the Statute of Limitations occurs depends upon whether a constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property” (*Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688, 690, quoting *Maric Piping v Maric*, 271 AD2d 507, 508 [2000] [internal quotation marks and citations omitted]).

Here, the Court finds that the Son has demonstrated that the Father’s cause of action to impose a constructive trust upon the Premises was not timely commenced within six years after the Son purchased the Premises by deed dated August 31, 2005 (see CPLR 213 [1]; *Morris v Gianelli*, 71 AD3d 965 [2010]; *Zane v Minion*, 63 AD3d 1151 [2009]). Contrary to the Father’s argument, the imposition of a constructive trust is sought with respect to the Premises, not the \$350,000. The Father alleges in his complaint that the Son “promised and agreed that he would purchase and hold [the Premises] for the benefit of his parents, and in trust for them,” but that the Son “intends to hold title to [the Premises] in his own name, and for his benefit, in violation of his promise to his parents.” Therefore, the Court finds that in accordance with the Father’s complaint, the Son allegedly acquired title to the Premises wrongfully on August 31, 2005, more than six years prior to the commencement of the instant action. Accordingly, the Father’s First cause of action is time-barred.<sup>1</sup>

Regarding the Father’s Second cause of action, conversion is the “unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights” (*Vigilant Ins. Co. of*

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<sup>1</sup> The Court notes that notwithstanding the allegations in the complaint, the deed of August 31, 2005, did in fact grant a life estate in the Premises to the Father and his wife, with the Son merely acquiring a remainder interest.

*Am. v. Hous. Auth.*, 87 NY2d 36 [1995], quoting *Employers' Fire Ins. Co. v Cotten*, 245 NY 102, 105 [1927]). For statute of limitations purposes, an action for conversion is subject to a three-year limitation period (see CPLR 214 [3]), and accrual runs from the date the conversion takes place (see *Sporn v MCA Records*, 58 NY2d 482 [1983]) and not from discovery or the exercise of diligence to discover (see *Varga v Credit-Suisse*, 5 AD2d 289 [1958], *affd* 5 NY2d 865 [1958]). In the instant matter, the Father alleges that the Son is wrongfully exercising dominion and control over the \$350,000, and that the Father has made due demand for access to and control of said monies, which has been wrongfully denied by the Son. It is undisputed that the Father voluntarily gave the Son the aforementioned monies and, on this record, it is unclear when the Father made a demand for access and control thereof. Accordingly, at this juncture, the Court finds that the Second cause of action for conversion shall not be dismissed on statute of limitations grounds (see *Matter of Rausman*, 50 AD3d 909 [2008]).

With respect to the Third cause of action for an accounting of the \$350,000, a proceeding to compel a fiduciary to account is governed by the six-year statute of limitations set forth in CPLR 213 (1), which begins to run when the fiduciary or trust relationship ends (see *e.g. Matter of Hiletzaris*, 105 AD3d 740 [2013]). Again, on this record it is unclear when the relationship of trust between the Father and Son ended, thereby starting the running of the Statute of Limitations. Thus, the Third cause of action shall survive this motion to dismiss.

Where a defendant moves to dismiss an action, pursuant to CPLR 3211 (a) (1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether the plaintiffs have a cause of action and not whether they may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]).

Here, the Court finds that the documentary evidence submitted, as supplemented by the affidavit of defendant, do not resolve all factual issues as a matter of law with respect to the \$350,000. Moreover, upon favorably viewing the facts alleged, and affording the Father "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether he can ultimately establish the truth of his allegations before the trier of fact, the Court finds that the Father has sufficiently pleaded causes of action for conversion and an accounting.

Finally, although the Son argues that the Estate of Jeanette Palmeri is a necessary party herein and that the complaint must be dismissed in its absence, CPLR 1001 provides in pertinent part that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (CPLR 1001 [a]). The Court finds that the Estate of Jeanette Palmeri is not a necessary party, as the Father is the surviving spouse of Jeanette Palmeri, the Executor of her estate, and according to her Last Will and Testament, the successor to all of Jeanette Palmeri's real and personal property. As such, the Court finds that this ground cannot serve as a basis for dismissal.

In view of the foregoing, the Son's motion is **GRANTED** solely to the extent that the Father's First cause of action is hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: October 15, 2013

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION