

Drioli v Hogan

2013 NY Slip Op 32791(U)

October 28, 2013

Sup Ct, Queens County

Docket Number: 9406/2013

Judge: David Elliot

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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

SADIE DRIOLI,

Plaintiff,

-against-

ROSEMARY HOGAN, MARIE DEFILIPPO,
LEND HOUSE INC., AND JANE FRANK

Defendants.

Index No. 9406/2013

By: **ELLIOT, J.**

Date: October 28, 2013

Motion Cal. No. 35

Motion Seq. No. 1

Motion Date: August 5, 2013

Plaintiff Sadie Drioli has moved for a preliminary injunction, inter alia, prohibiting defendant Lend House, Inc., from taking any action intended to remove her from premises known as 90-04 187th Place, Hollis, New York. Defendant Lend House, Inc. has cross moved for, inter alia, an order pursuant to CPLR 3211 (a) (1) dismissing the complaint against it. Defendant Rosemary Hogan has cross moved for, inter alia, an order pursuant to CPLR 3211 (a) (7) dismissing the complaint against her. Defendant Marie DeFilippo has cross moved for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint against her for failure to state a cause of action. Defendant Jane Frank has cross moved to dismiss the complaint against her pursuant to CPLR 3211 (a)(7).

I. The Allegations of the Plaintiff

Plaintiff Sadie Drioli, age 95, owns premises known as 90-04 187th Place, Hollis, New York, where she has lived since 1956. She now lives there with her caretaker, Peter Mauro, who first came to know her in 1980 when he rented a room in the house. The plaintiff subsists on her Social Security check.

Defendant Rosemary Hogan and defendant Marie DeFilippo are the plaintiff's nieces (plaintiff has no children). On or about March 8, 1989, the plaintiff deeded a one-half interest in the Hollis property to defendant DeFilippo. On or about July 14, 2005, the plaintiff and defendant DeFilippo deeded their interests in the Hollis property to defendant DeFilippo and defendant Hogan as tenants in common for no consideration. The plaintiff deeded the Hollis property to her nieces upon the understanding that she would continue to live in the home until her death, at which time the nieces would sell the home and use the proceeds to pay for her funeral.

On or about August 26, 2011, defendant Hogan sold her half interest in the property to defendant Lend House, Inc., for \$72,500. Defendant Hogan reached a written agreement with defendant Lend House that the plaintiff would have a life estate in the property or reached an agreement that defendant Lend House would allow the plaintiff to reside in the home until she died or vacated the premises. The agreement between Hogan and Lend House provided in relevant part: "WHERAS [sic] Seller desires to provide for the

continued occupancy of the Premises by her aunt Sadie Drioli ****1. Seller shall transfer her interest in the Premises subject to the occupancy of Drioli and Mauro. 2. Drioli and Mauro will be allowed to remain in the premises until either: (a) the death of Drioli ***.” However, the deed to Lend House does not mention this agreement, and it was never recorded. On or about November 9, 2011, defendant DeFilippo sold her half interest in the property to defendant Lend House for \$115,000. Defendant Jane Frank financed Lend House’s purchase of the property by taking back a mortgage.

Beginning in November 2012, defendant Lend House, acting through Uri Digni, one of its principals, tried to remove the plaintiff from her home by, inter alia, discontinuing delivery of heating oil, serving notices to quit the premises, and beginning a holdover proceeding in the Civil Court of the City of New York (*Lend House, Inc. v. Sadie Drioli*, Index No. 62006/13).

II. The Allegations of the Defendants

The deeds from the plaintiff to her nieces contain no language reserving a possessory interest for her, and the deeds did not put defendant Lend House on notice of any such interest. When Lend House purchased Hogan’s interest in the premises, Lend House entered into an agreement with her to allow the plaintiff to continue to reside in her home.

Defendant Lend House subsequently discovered that the plaintiff and Peter Mauro were not the only occupants of the house. Mauro had rented out rooms to others and had pocketed the proceeds. Lend House also learned that the plaintiff had fallen multiple times without receiving any medical attention and that feces, decomposing garbage, and rodents' bones were scattered about.

Lend House notified defendant Hogan about her aunt's situation, and they decided that Peter Mauro should be separated from her. As a result, Lend House and Hogan decided to terminate the agreement giving the plaintiff the right to live at the house.

III. The Cross Motion to Dismiss Brought by Defendant Lend House

A. CPLR 3211 (a) (7)

1. The First Cause of Action

The defendants are not entitled to the dismissal of the first cause of action pursuant to CPLR 3211(a) (7). In determining a motion brought pursuant to CPLR 3211(a) (7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ***." (*1455 Washington Ave. Assocs. v. Rose & Kiernan*, 260 AD2d 770, 770-771; *Esposito-Hilder v. SFX Broadcasting Inc.*, 236 AD2d 186).

The first cause of action is brought pursuant to Article 15 of the Real Property Actions and Proceedings Law for the purpose of establishing that the plaintiff has a life estate or other interest in the Hollis property. RPAPL 1501 (1) provides that a person claiming an interest in real property may maintain an action against any other person to compel the determination of adverse claims. (*See Garcia v Velaquez*, 228 AD2d 937.) RPAPL 1515 sets out the requirements for a complaint seeking to quiet title, and the plaintiff herein has met those requirements. “Essential to the maintenance of an action to determine a claim to real property is that the complaint state a claim, by the defendant, of ‘an estate or interest in the real property, adverse to that of the plaintiff’ ***.” (*East 41st Street Associates v. 18 East 42nd Street, L.P.*, 248 AD2d 112, 114, quoting RPAPL 1515[1][b]; *Barberan v. Nationpoint*, 706 F.Supp.2d 408.) The complaint adequately alleges that the defendant Lend House has asserted a claim to a fee simple absolute in the Hollis property which is adverse to the claim made by the plaintiff that she holds a life estate.

2. The Second Cause of Action

The second cause of action adequately states a claim for the imposition of a constructive trust against defendant Lend House and against the defendant nieces.

The second cause of action, which is primarily asserted against the defendant nieces, is for (1) the imposition of a constructive trust over the proceeds they received from

the sale of their interests in the property and (2) the imposition of a constructive trust over the Hollis property itself. The second cause of action alleges, inter alia, that the defendant nieces “violated Mrs. Drioli’s trust when they sold the Hollis property in 2011, before the death of Mrs. Drioli and failed to preserve Mrs. Drioli’s life estate or possessory interest in the Hollis property.”

The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment. (*See, Sharp v. Kosmalski*, 40 NY2d 119; *Lipton v. Donnenfeld*, 5 AD3d 356.) These elements serve only as a guideline, and a constructive trust may, nevertheless, be imposed, as its purpose is to prevent unjust enrichment (*see Tyree v Henn*, 109 AD3d 906 [2013]; *Broderson v Parsons*, 106 AD3d 677 [2013]). While plaintiff did not transfer the Hollis property to defendant Lend House, there may be a sufficient basis to impose a constructive trust since the facts as alleged by plaintiff are that Lend House was fully aware of the intent for plaintiff to retain a possessory interest in the Hollis property and to permit Lend House to disregard same would work an injustice.

3. The Third Cause of Action

The third cause of action, which is asserted against defendant Lend House, is for unjust enrichment. “A cause of action for unjust enrichment arises when one party

possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another ***.” (*Mente v. Wenzel*, 178 AD2d 705, 706; *see, Strong v. Strong*, 277 AD2d 533.) The plaintiff has adequately alleged that defendant Lend House took the property in fee simple absolute despite knowing that the plaintiff had a possessory interest in the property and despite a failure to compensate the plaintiff for that interest.

4. The Fourth Cause of Action

The fourth cause of action is for the reformation of the deed held by defendant Lend House. The plaintiff alleges that “[d]ue to the mutual mistake of Defendants Hogan and Lend House, Mrs. Drioli’s life estate was not reflected in the deed and was instead written in a separate agreement, even though both parties intended to give Mrs. Drioli a life estate.”

“In the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement. ***. In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement ***.” (*Chimart Associates v. Paul*, 66 NY2d 570, 573.) “It is well established that in order to reform a written agreement, it must be demonstrated that the parties came to an understanding but, in reducing it to writing, through mutual mistake or through mistake on

one side and fraud on the other, omitted some provision agreed upon or inserted one not agreed upon ***.” (*Slutzky v. Gallati* 97 AD2d 561, 561.)

“Because the thrust of a reformation claim is that a writing does not set forth the actual agreement of the parties, generally neither the parol evidence rule nor the Statute of Frauds applies to bar proof, in the form of parol or extrinsic evidence, of the claimed agreement ***.” (*Chimart Associates v. Paul, supra*, 573.)

In the case at bar, the plaintiff has adequately alleged that defendant Hogan and defendant Lend House intended to give her a lifetime possessory interest in the premises, as evidenced by their written agreement, but through mutual mistake failed to express that interest in the deed from Hogan to Lend House. The plaintiff has adequately stated a cause of action to reform the deed. (See, *Daly v. Messina*, 228 AD2d 542.)

5.The Fifth Cause of Action

The fifth cause of action, brought on a third-party beneficiary theory, alleges that “[d]efendant Lend House and defendant Hogan entered into a valid binding agreement on August 26, 2011 for the benefit of Mrs. Drioli, including occupancy of the Hollis Property until her death.”

“One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was

intended for his or her benefit, and that the benefit was direct rather than incidental ***.” (*Edge Management Consulting, Inc. v. Blank*, 25 AD3d 364, 368.) The complaint adequately alleges these elements. The agreement between Hogan and Lend House specifically states, as noted above: “WHERAS [sic] Seller desires to provide for the continued occupancy of the Premises by her aunt Sadie Drioli ****1. Seller shall transfer her interest in the Premises subject to the occupancy of Drioli and Mauro. 2. Drioli and Mauro will be allowed to remain in the premises until either: (a) the death of Drioli ***.” The contract was intended for the benefit of the plaintiff, and the benefit was direct rather than incidental. The benefit was “sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the plaintiff] if the benefit is lost ***.” (*Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314, 336; *Breen v. Law Office of Bruce A. Barket, P.C.*, 52 AD3d 635.)

The court notes that contracting parties do not have an unrestricted right to rescind a third party beneficiary agreement. “[A]fter the third person accepts, adopts or acts upon the contract entered into for his benefit, the parties thereto cannot rescind the same without his consent, so as to deprive him of its benefits ***.” (*Stein v. Severino*, 41 Misc.2d 209, 211; *Bellmon v. Blue Cross & Blue Shield of Greater New York*, 98 Misc2d 445; see *Purchase Partners II, LLC v. Westreich*, 14 Misc.3d 1228[A] [Table], 2007 WL 416012 [Text].)

B. CPLR 3211(a) (1)

CPLR 3211 provides in relevant part: “(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence***.” (*See Galvan v. 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743.) In order to prevail on a CPLR 3211(a) (1) motion, the documentary evidence submitted “must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff’s claim***.” (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see Galvan v. 9519 Third Avenue Restaurant Corp, supra; Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.) Although affidavits may be used on a CPLR 3211(a) (1) motion as “connecting links,” affidavits may not be used as proof in themselves of a fact in issue. (*See Realty Investors of USA Inc. v. Bhaidaswala*, 254 AD2d 603; *Standard Chartered Bank v. D. Chabbott, Inc.*, 178 AD2d 112; 7 Weinstein-Korn-Miller, NY Civ. Prac. ¶ 3211.06.)

The documentary evidence in this case in itself disposes of none of the plaintiff’s claims. The fact that the deeds in this case contain no language concerning the plaintiff’s alleged life estate or other possessory interest does not entitle defendant Lend House to the dismissal of the complaint against it. Contrary to the argument made by defendant Lend House, the title documents do not establish that “it was the clear intention of

the Plaintiff to convey her entire interest in fee simple to her two nieces, Rosemary Hogan and Marie DeFilippo.” There is conflicting evidence in the record concerning the plaintiff’s intentions when she executed the deeds to her nieces and concerning Hogan’s intentions when she executed a deed to defendant Lend House. The plaintiff has sought reformation of the deed held by Lend House on the very ground that it does not reflect the intentions of the parties.

C. CPLR 3211(a) (4)

CPLR 3211 provides in relevant part: “(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: *** 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States ***.”

Although defendant Lend House’s notice of cross motion states that it is brought on CPLR 3211(a) (4) grounds, the defendant did not attempt to show that there is any other action pending between the parties for the same causes of action asserted here.

D. CPLR 3211(a) (3) and (a) (10)

CPLR 3211 provides in relevant part: “(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: *** 3. the party asserting the cause of action has not legal capacity to sue; or ****10. the court should not proceed in the absence of a person who should be a party.”

Defendant Lend House alleges that the plaintiff suffers from severe dementia and that she did not have the legal capacity to retain an attorney to prosecute this action. The plaintiff is represented in this case by Gina Calabrese, Esq., Associate Director of the St. John’s School of Law. She supervises cases taken by the St. Vincent DePaul Legal Services Program, Inc., which operates the St. John’s University Consumer Justice for the Elderly Litigation Clinic. Attorney Calabrese has affirmed that she “ascertained from Mrs. Drioli herself that she understood the situation she was facing with her home and the legal action necessary to keep her home.” As such, defendant is not entitled to dismissal on these grounds.

E. Disposition

Accordingly, that branch of the cross motion by defendant Lend House which is for an order pursuant to CPLR 3211(a) (7) dismissing the second cause of action asserted against it is granted. The remaining branches of the cross motion are denied.

IV. The Cross Motion by Defendant Rosemary Hogan

A. CPLR 3211(a) (8)

It does not appear that said defendant paid the appropriate cross motion fee; this defendant cannot obviate the filing fees as per CPLR 8020 [a] (*see e.g. Blam v Netcher*, 17 AD3d 495 [2005]; *Bucceri v Frazer*, 297 AD2d 304 [2002]). In any event, the court will address defendant Hogan's assertions. The order to show cause signed by the court directed personal service upon defendant Hogan. The plaintiff's process server swears that he made "suitable" service upon defendant Hogan pursuant to CPLR 308 (2) by leaving the papers with "John" Hogan, a relative, on May 21, 2013 and by mailing the papers to the defendant on May 22, 2013. Defendant Hogan swears that the papers were just left on her doorstep. In an amended affidavit, the process server swears: "After confirming the identity of the recipient as the relative of the defendant, I attempted to hand the papers to him. He then suddenly shut the door. I left the papers at the foot of the door and stated so in a loud voice." Under the circumstances, the process server was entitled to leave the papers in the general vicinity. (*See Bossuk v. Steinberg*, 58 NY2d 916; *Duffy v. St. Vincent's Hosp.*, 198 AD2d 31.)

B. CPLR 3211(a) (5) (Statute of Frauds)

Defendant Hogan argues that the cause of action for the imposition of a constructive trust asserted against her is barred by General Obligations Law § 5-703,

“Conveyances and contracts concerning real property required to be in writing,” pertaining to estates or interests in real property other than a lease for a term not exceeding one year, and subsection (a) (1) of General Obligations Law § 5-701, “Agreements required to be in writing,” pertaining to contracts “not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime ***.” However, “the statute of frauds is not a defense to a properly pleaded cause of action to impose a constructive trust on real property ***.” (*Ubriaco v. Martino*, 36 AD3d 793, 794.)

C. CPLR 3211 (a) (7)

The second cause of action seeks, inter alia, the imposition of a constructive trust over the proceeds that the defendant nieces received from the sale of their interests in the property. The second cause of action alleges, inter alia, that the defendant nieces “violated Mrs. Drioli’s trust when they sold the Hollis property in 2011, before the death of Mrs. Drioli and failed to preserve Mrs. Drioli’s life estate or possessory interest in the Hollis property.” The second cause of action is adequately stated against defendant Hogan.

The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment. (*See Sharp v. Kosmalski, supra; Lipton v. Donnenfeld, supra.*) These elements need not be rigidly established, and a constructive trust will be imposed to satisfy the demands of justice. (*See,*

Simonds v. Simonds, 45 NY2d 233; *Lipton v. Donnenfeld*, *supra*; *Heness v. Hunt*, 272 AD2d 756.) The elements are simply guidelines which are not rigorously applied in all cases. (See *Matter of Estate of Knappen*, 237 AD2d 677; *Heness v. Hunt*, *supra*; *Johnson v. Lih*, 216 AD2d 821.) The doctrine of constructive trust gives expression to the conscience of equity, and it is used to prevent unjust enrichment in a wide range of circumstances. (See *Lipton v. Donnenfeld*, *supra*; *Jacobs v. Abramoff*, 148 AD2d 497.) “[T]he gravamen of an action to impose a constructive trust is the transfer of property in reliance upon a promise to convey, reconvey or hold the property for the benefit of another ***.” (*Matter of Estate of Chicola*, 224 AD2d 1005; see, *Whalen v. Harvey*, 235 AD2d 792; *Christou v. Christou*, 109 AD2d 1058, *affd*, 65 NY2d 853.) The promise may be express or implied. (See, *Bankers Sec. Life Ins. Soc. v. Shakerdge*, 49 NY2d 939; *Koslowski v. Koslowski*, 297 AD2d 784.)

In the case at bar, the plaintiff has adequately alleged that she had a familial relationship with the defendant nieces, that she conveyed her house to them in reliance upon their promise that she could live there until her death, that they breached the promise by selling their interests in the house without preserving her right to live there and before her death, and that they have been unjustly enriched. Under these circumstances the “essential elements” of a cause of action against the defendant nieces for the imposition of a constructive trust over the proceeds of sale are present. (See *Stapleton v. Olsen*, 69 AD2d 857, 858 [“ a confidential relationship existed between the deceased son and his mother and sister; there was a promise by him and his sister to maintain their mother for the remainder of her life

in the home which was purchased by the mother's funds, but held in the names of the two children; there was a transfer of title to the property in reliance thereon; and failure to impress a trust on the property would result in unjust enrichment.”].)

Contrary to the argument made by the defendant Hogan, “[u]njust enrichment, *** does not require the performance of any wrongful act by the one enriched ***.” (*Simonds v. Simonds, supra*, 242.) There was no need to plead fraud against defendant Hogan.

Finally, whether there was no unjust enrichment from the sale of the property because the plaintiff could not pay the carrying charges on the home is an issue of fact which cannot be decided on a mere CPLR 3211 (a) (7) motion.

D. CPLR 3212

Defendant Hogan has also cross moved for summary judgment on her alleged cross claims against defendant Lend House. Defendant Hogan has allegedly asserted cross claims against defendant Lend House for breaching the written agreement she reached with defendant Lend House that the plaintiff would have a life estate in the property. She seeks indemnification, attorney’s fees and sanctions. However, defendant Lend House alleges that it terminated the agreement with Hogan’s consent (“Hogan and Digmi *** terminated the original August 26, 2011 agreement on January 9, 2013”), thus raising an issue of fact which precludes summary judgment (*See Alvarez v. Prospect Hospital*, 68 NY2d 320.)

E. Disposition

The cross motion by defendant Hogan is denied.

V. The Cross Motion by Defendant DeFilippo

A. CPLR 3211 (a) (7)

It does not appear that said defendant paid the appropriate cross motion fee; this defendant cannot obviate the filing fees as per CPLR 8020 [a] (*see e.g. Blam v Netcher*, 17 AD3d 495 [2005]; *Bucceri v Frazer*, 297 AD2d 304 [2002]). In any event, the complaint adequately states a cause of action against defendant DeFilippo for the imposition of a constructive trust.

The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment. (*See, Sharp v. Kosmalski, supra; Lipton v. Donnenfeld, supra.*) Defendant DeFilippo argues that she made no promise to the plaintiff on March 8, 1989 about living in the home until her death and that there was no need for such a promise since the plaintiff remained a one-half owner of the property. However, an express promise is not necessary for the creation of a constructive trust

if an implied promise can be found in the circumstances of a case. (*See Sharp v. Kosmalski, supra; Quadrozzi v. Estate of Quadrozzi*, 99 AD3d 688; *Marini v. Lombardo*, 39 AD3d 824.)

In the case at bar, the plaintiff has adequately pleaded facts which support the rational inference that defendant DeFilippo at least implicitly promised that the plaintiff could remain in the home until her death, e.g., the plaintiff's longtime residency in the home, the plaintiff's advancing age, the gratuitous transfer, the motivation for the transfer, and the defendant's lack of contribution toward the expenses of the home. (*See, Byrd v. Brown*, 208 AD2d 582.)

B. Disposition

The cross motion by defendant DeFilippo is denied.

VI. The Cross Motion by Defendant Jane Frank

A. CPLR 3211 (a) (7)

On or about November 7, 2011, defendant Lend House executed a note in the amount of \$176,166 in favor of defendant Jane Frank (formerly the Dean of the Columbia University School of Engineering), which became due on November 6, 2012. Defendant Lend House secured the note by executing a mortgage encumbering the plaintiff's home, and Uri Digmi gave his personal guarantee of payment on the note. It is alleged that neither

defendant Frank nor her attorney had any knowledge of any agreement giving the plaintiff a life estate in the property. Defendant Lend House defaulted on the payment of the principal and interest due on November 6, 2012.

The plaintiff joined Jane Frank as a defendant to this action pursuant to CPLR 1001, “Necessary joinder of parties,” as a person “who might be inequitably affected by a judgment in the action,” and pursuant to RPAPL 1511, “Additional Parties,” as a person who “may have an estate or interest in the real property which may in any manner be affected by the judgment ***.” Pursuant to RPAPL 1501 (5) “[t]he interest had by any mortgagee *** of real property *** is an ‘interest in real property’ as that phrase is used in this article of the real property actions and proceedings law.” The plaintiff properly named defendant Frank as a defendant in this action pursuant to these statutes whether or not she can state a cause of action against defendant Frank. The defendant did not produce any authority to show otherwise.

B. Disposition

The cross motion by defendant Frank is denied.

VII. The Motion for a Preliminary Injunction by Plaintiff Drioli

The plaintiff seeks a preliminary injunction primarily for the purposes of prohibiting defendant Lend House and defendant Frank from interfering with her continuing occupancy of the home where she has resided since 1956 and prohibiting her nieces from dissipating the proceeds of sale from the home.

In order to obtain a preliminary injunction, plaintiff Drioli had to show (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) the weight of the equities in her favor. (*See, Aetna Insurance Co. v. Capasso*, 75 NY2d 860; *McNeil v. Mohammed*, 32 AD3d 829). The plaintiff successfully carried this burden. In regard to the first requirement, the plaintiff established a likelihood of ultimate success on the merits by making a prima facie showing that she can prove at least one of her causes of action. (*See, McNeil v. Mohammed, supra; Trimboli v. Irwin*, 18 AD3d 866; *Four Times Square Associates, L.L.C. v. Cigna Investments, Inc.*, 306 AD2d 4.) The plaintiff established that she can prove a prima facie case for, inter alia, reformation of the deed, for breach of contract upon a third-party beneficiary theory, and for the imposition of a constructive trust over the proceeds of sale. Although there may be issues of fact in this case, they do not preclude a finding of the likelihood of ultimate success on the merits. (*See, Ruiz v. Meloney*, 26 AD3d 485) In regard to the second requirement, the plaintiff demonstrated that she faces the threat of imminent eviction from the home where she has resided since 1956 because of the Civil Court proceeding and that she also faces the loss of her home through foreclosure proceedings. Moreover, under all of the circumstances of this

case, the dissipation of the funds received by the nieces would cause irreparable injury to the plaintiff. In regard to the third requirement, the imposition of a preliminary injunction is necessary to prevent the dissipation of funds and to preserve the status quo, and the defendants will suffer no significant hardship from the imposition of the preliminary injunction. The court notes that defendant Frank received the personal guarantee of Uri Digma for the repayment of the loan, and, thus, a stay of foreclosure proceedings does not leave her without a remedy.

Accordingly, the cross motion by defendant Lend House is denied. The cross motion by defendant Hogan is denied. The cross motion by defendant DeFilippo is denied. The cross motion by defendant Frank is denied. The plaintiff's motion for a preliminary injunction, inter alia, staying the summary holdover proceeding, is granted. The parties may submit affidavits for the purpose of determining the proper amount of the undertaking at the time of the settlement of the order.

Settle order.

J.S.C.