

Genco v Genco

2013 NY Slip Op 33865(U)

February 8, 2013

Sup Ct, Kings County

Docket Number: 52465/11

Judge: Delores J. Thomas

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At an IAS Part 5T of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of February, 2013

P R E S E N T:

HON. DELORES J. THOMAS,
Justice.

-----X
RICHARD GENCO,

Plaintiff,

- against -

Index No. 52465/11

DANIELLE GENCO,

Mot. Seq. #'s 8 & 9

Defendant.

-----X

The following papers numbered 1 to 20 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1 - 11</u>
Opposing Affidavits (Affirmations) _____	<u>12 - 18</u>
Reply Affidavits (Affirmations) _____	<u>19 - 20</u>

Upon the foregoing papers, motion sequence numbers 8 and 9 in the above captioned divorce action (the Divorce Action) and motion sequence number 1 in the action captioned *Danielle Genco v Phyllis Genco and Joseph Genco* (Index No. 15592/12) (the Constructive Trust Action) are consolidated for disposition. Defendant in the Divorce Action, Danielle Genco (Danielle), moves for an order: (1) pursuant to Judiciary Law § 753, punishing plaintiff Richard Genco (Richard) for civil contempt in that he willfully neglected and/or disobeyed lawful orders and mandates of this court by failing to pay money as ordered by

decision dated April 30, 2012; (2) pursuant to Judiciary Law § 751, punishing Richard for criminal contempt by imprisonment on the ground that he willfully failed to comply with the provisions of the orders issued by this court and dated April 30, 2012 and May 16, 2012; (3) directing Richard to pay \$4,692.21 directly to her, representing arrears that accrued under the court orders; (4) awarding her a money judgment against Richard in the amount of \$4,692.21; (5) pursuant to Domestic Relations Law (DRL) § 237, directing Richard to pay her counsel fees in the amount of \$5,000, relative to the prosecution of the instant motion and underlying enforcement proceedings, and upon Richard's failure to pay all or any portion of said fees within the time frame prescribed by this court, directing the County Clerk to enter a money judgment against Richard in favor of Danielle's attorney, Anthony A. Carronna, Esq., plus interest at the rate of 9%; (6) ordering Richard to pay \$8,400 to Mr. Caronna, as directed in the order of this court dated May 16, 2012; (7) awarding a money judgment in favor of Mr. Caronna in the amount of \$8,400; (8) ordering Richard to pay \$1,500 directly to Mr. Caronna, pursuant to the order of this court dated May 9, 2012; and (9) holding Richard in contempt of court without the need for a hearing in the absence of issues of fact or setting the matter down for an immediate hearing (motion sequence number 8). By separate motion, Danielle moves for an order: (1) pursuant to CPLR 1001(a) and/or 1002, joining Phyllis Genco (Phyllis) and Joseph Genco (Joseph), as the owners and landlords of property located at 1868 West 12th Street, #1, Brooklyn, New York 11223, the former marital residence, which she claims is marital property (the Property); (2) pursuant to CPLR 2201,

staying the landlord-tenant holdover proceeding captioned *Phyllis Genco v Danielle Genco*, currently pending in the Housing Court under Index No. 60306/12 (the Eviction Proceeding); (3) pursuant to CPLR 602, consolidating the Divorce Action with the Constructive Trust Action; (4) preventing Phyllis and Joseph from any further efforts to evict her from the Property until the youngest child of Richard and Danielle attains the age of 18; and (5) imposing a constructive trust over the Property (motion sequence number 9). In the Constructive Trust Action, Phyllis and Joseph move for an order: (1) referring the action to this part for consolidation with the Divorce Action; (2) pursuant to CPLR 3212, granting them summary judgment dismissing Danielle's complaint as against them; (3) pursuant to NYCRR 130-1.1, granting Joseph sanctions and attorneys' fees against Danielle for filing this frivolous action against him (motion sequence number 1).

Facts and Procedural Background

Danielle and Richard were married on April 20, 2001 and have three children, a son born on September 20, 2001, a daughter born on March 16, 2004 and a daughter born on March 6, 2007.

By deed dated August 20, 2001, Phyllis inherited the Property from her mother. On June 25, 2010, Danielle and Richard executed a Separation Agreement (the Separation Agreement). On April 18, 2011, Richard commenced the Divorce Action. By petition dated March 1, 2012, Phyllis commenced the Eviction Proceeding. On August 6, 2012, Danielle commenced the Constructive Trust Action.

The Separation Agreement

As is relevant to the motions now before the court, the Separation Agreement provides that:

"The Marital Residence. The Husband and Wife previously resided together as tenants of the premises known as 1868 West 12th Street, #1, Brooklyn, New York 11223 (hereinafter referred to as the "Apartment"). The wife shall be exclusively entitled to reside at the Apartment. The rent and any other expenses incurred in connection with the Agreement shall be paid exclusively by the Wife subject to the provisions contained below in Article 6."

(Art 2, p 2).

"Personal Property. . . . The husband shall all auto insurance payments for the Wife's automobile and shall be responsible for the repair and maintenance costs of said vehicle."¹

(Art 3, p 2).

"Maintenance and Support. The Husband agrees to pay to the Wife, as and for her maintenance and support, the rent as charged by the owner of the Marital Residence (which is currently \$700.00 per month inclusive of gas and water), the electric utility bill for the marital residence and the cable/internet/telephone utility bill for the marital residence until the earlier of the death of the Wife or June 1, 2013. The Marital Residence is currently owned by the mother of the Husband. Should any action be taken by any owner of the Marital Residence to evict the Wife, the Husband shall pay for an equivalent apartment (in the number of square feet, bedrooms and other amenities) in the immediate vicinity of the Marital

¹ The court assumes that this provision was intended to provide that the husband is responsible for paying for insurance for Danielle's vehicle, although a word was left out of the above quoted sentence.

Residence and pay the costs of moving, any security deposit, monthly rental and the utilities specified above.”

(Art 6, p 3).

“**Child Support.** The Husband shall pay to the Wife, as and for the support and maintenance of each minor Child, the sum of One Hundred Dollars (\$100.00) per week totaling \$300.00 per week currently for each minor Child, payable in advance on Monday of each week. . . .

“Husband shall be responsible for payment of one hundred (100%) percent of all costs incurred for or on behalf of the children in connection with organized extracurricular activities which involve fees and costs for attendance, uniforms, equipment and supplies [including, but not limited to, Cub Scouts, Boy Scouts, Brownies, Girl Scouts, school programs (i.e., band, athletics, clubs), sports activities or lessons and music or dance lessons]. Husband shall pay his obligation for the children’s extracurricular activities within ten (10) days of receipt of any bill, invoice or statement for such expense, regardless of whether same is in the form of direct payment to the creditor or reimbursement to the other parent.”

(Art 8, p 6-7).

“**Legal Representation.** In connection with this Agreement, the Wife has had the benefit of the advice of Polizzotto & Polizzotto, LLC, independent counsel of her own selection. **The Husband has been advised to select and obtain counsel to represent him in this matter.** The Husband has instead elected to execute this Agreement without the benefit of an attorney. The Husband shall pay to the Wife the sum of \$1,500.00 for the attorneys’ fees of the Wife in connection with the preparation, negotiation and execution of this Agreement. Nothing herein shall be construed as a waiver or denial of the right of either party to secure payment of attorneys’ fees as provided by law for any breach by the other of any provision of this Agreement.”

(Art 13, p 9) (emphasis in original).

With regard to attorneys' fees, the Separation Agreement provides under Article 17, general provisions, that:

"In the event either party herein defaults with respect to any obligation hereunder, except with respect to payment of basic child support by Husband, and such default is not remedied within fifteen (15) days after receipt of written notice by certified mail, return receipt requested, to the defaulting party specifying said default, the defaulting party agrees to indemnify the other party against and to reimburse him/her for any and all costs, expenses and reasonable attorneys' fees resulting from or made necessary by the bringing of any suit or other proceeding to enforce any of the other party's right to recover any amount to be paid to him/her by the defaulting party pursuant to this Agreement, provided such suit or other proceeding results in a judgment decree or order in favor of the other party. It being specifically understood that no notice of default is required regarding Husband's failure to pay basic child support."

(Art 17, p 10).

Prior Court Orders

On April 30, 2012 the Honorable Debra Silber:

"ORDERED that until further order of the court [Richard] shall continue to pay for the carrying charges and utility expenses associated with the defendant's residence as dictated by the parties' Separation Agreement. [Richard] shall not depart from any obligation dictated by the Separation Agreement. The Separation Agreement shall govern in this case until further order of the court."

By order dated May 9, 2012, Judge Silber ordered Richard to pay \$1,500 by May 25, 2012, to Danielle's attorney, to be held in escrow to pay the forensic evaluator.

By decision and order dated May 16, 2012, Judge Silber decided motion sequence numbers 1 through 6 in the Divorce Action. As is relevant to the motions now before the court, Richard was ordered to pay Danielle's counsel fees in the amount of \$8,400 in two installments, one due on or before July 1, 2012 and the other due on or before September 1, 2012, without prejudice to further applications for additional sums and subject to reallocation. Danielle was also granted an order requiring Richard to pay for her car insurance and all repairs; although the decision stated that Danielle claimed that repairs in the amount of \$582.03 were not paid, no money judgment was awarded. That decision further held that the court was without jurisdiction over the owner of the building, Phyllis, so that it could not grant any relief with regard to the request for an order seeking to prevent Danielle's eviction from the former marital residence. Richard's motion for an order lowering his child support payments and terminating his maintenance payments was denied.

By order dated September 6, 2012, the Honorable David I. Schmidt referred the Constructive Trust Action to this part. By order dated November 27, 2012, the Divorce Action and the Constructive Trust Action were consolidated and all stays were vacated. Accordingly, these demands for relief will not be addressed in this decision. Further, that branch of Danielle's motion seeking to join Phyllis and Joseph as parties to the Divorce Action is denied as moot, since the court already has jurisdiction over them by virtue of the consolidation.

Contempt/Money Judgments

Danielle's Contentions

In support of that branch of her motion seeking to hold Richard in contempt and for the entry of money judgments, Danielle alleges that despite the explicit order set forth in the May 16, 2012 Decision, Richard has refused to pay her \$300 per week in child support, which has resulted in arrears in the amount of \$2,300 accruing. In addition, she claims that he has not paid the cost of car insurance in the amount of \$1,381, car repairs in the amount of \$624 and a car inspection in the amount of \$37; the cost of the children's extracurricular activities, i.e., baseball in the amount of \$157 and flag football in the amount of \$60; and the cost of a prom autograph book, \$63, for a total of \$4,622. Similarly, Danielle alleges that Richard did not pay her attorneys' fees in the amount of \$8,400 or the fee of the forensic evaluator in the amount of \$1,500, and that he should be ordered to pay her \$5,000 for attorneys' fees incurred in making the instant enforcement motion. Danielle contends that since Richard was obligated to pay these amounts, he should be held in contempt for his failure to do so and money judgments should be entered against him.

In support of her contention that Richard can afford to pay support as set forth in the Separation Agreement and as ordered by the court, Danielle argues that he has acknowledged that he earns \$70,000 per year. Further, he prepares his own tax returns, which are self-serving and do not accurately reflect his income; Danielle contends that for this reason, the court should not rely upon the returns to evidence his income. She also claims that despite

Richard's claim that his business, Luna Welding (Luna), is no longer in existence, Luna has many clients who call her home looking for him. She therefore concludes that Luna continues to do business and hence to generate income. Danielle also notes that Richard's lifestyle, which includes paying the rent on his own apartment, buying a new motorcycle and getting new tattoos and body piercings, also compels the finding that he earns more than \$400 a week, as he represented to the court.

Richard's Contentions

In opposition, Richard alleges that he did not wilfully refuse to comply with the prior orders of the court, contending that he does not have the money to pay the amounts that he was ordered to pay. He explains that while he was behind in the payment of support when Danielle made her earlier motion, he paid the \$1,300 that was due. Richard contends that in the instant motion, Danielle has changed the time line and fails to credit him with the payments that he made.

Richard also claims that although he lacks the computer skills necessary to remove the Luna web page from the internet, the business has been closed for some time, since it was not earning enough money to cover its overhead or to pay him. Richard thus argues that he has no place to weld, he owns no truck or welding tools and the phone calls from the number on the web are no longer forwarded to him, so that he is no longer receiving any income from the business. Richard alleges that the only income that he now receives is from Hughes Brothers, his current employer.

Richard also argues that Danielle continues to interfere with his visitation with his children. In this regard, he asserts that Danielle has already broken his bond with his son. Nonetheless, he states that he would never request that she be “locked up” because of the damage that it would do to the children.

Discussion

Danielle is not entitled to an order holding Richard in contempt:

“Pursuant to Domestic Relations Law § 245, where a spouse fails to make payments of money pursuant to an order or judgment entered in a matrimonial action, the aggrieved spouse may apply to the court to punish the defaulting spouse for contempt, but only if ‘it appears presumptively, to the satisfaction of the court,’ that payment cannot be enforced by other means such as enforcement of a money judgment or an income execution order (*id.*; see *Jones v Jones*, 65 AD3d 1016, 1016 [2009]). In order to punish the defaulting spouse for contempt, the aggrieved spouse is not required to exhaust all alternative remedies; proof that alternative remedies would be ineffectual is sufficient (see *Rosenblitt v Rosenblitt*, 121 AD2d 375, 375 [1986]).”

(*Moore v Moore*, 93 AD3d 827, 828 [2012]). Danielle has not satisfied this burden.

More specifically, to establish that she has no adequate remedy at law, Danielle alleges, in conclusory fashion, that Richard has no assets that can be seized or garnished, and since Luna is his business, his wages cannot be garnished. In the same affirmation, counsel alleges that Richard attached copies of pay stubs from his current employer on previous motions, but claims that the employer is a friend who will create any pay stub that Richard requests. There is no allegation, however, that Danielle made any effort to enforce the court

ordered payments of child support by means of an income execution or that this remedy would be ineffectual. Accordingly, those branches of her motion seeking to hold Richard in contempt are denied.

The court further finds that Danielle is entitled to a money judgment for those sums that Richard failed to pay her attorney, as directed by the court in the above discussed decisions. Accordingly, Mr. Caronna is awarded a money judgment in the amount of \$8,400. Mr. Caronna is also awarded a money judgment in the amount of \$1,500, pursuant to the order of the court dated May 9, 2012, with said sum to be held in escrow by him to pay the forensic evaluator.

Danielle fails to establish that she is entitled to any of the other money judgments that she seeks. In so holding, the court notes that she does not annex any proof of payment of the expenses that she claims are owed, nor does she demonstrate that she demanded payment from Richard by certified mail, return receipt requested, as required pursuant to Article 8 of the Separation Agreement.² The court also finds that the cost of a prom autograph book cannot be characterized as an extracurricular expense. Finally, although Danielle alleges that Richard owes her \$2,300 in child support arrears, Richard claims that Danielle does not properly credit him with the payments that he made. The court therefore refers the issue of the amount of money that Richard owes to Danielle for child support, extracurricular expenses and expenses for car repairs and insurance, if any, to a Special Referee for a

² Although the May 2012 Decision refers to \$582.03 that Richard owes for car repairs at page 39, it is not clear if that sum is part of the \$624 demanded in the instant motion.

hearing.

The court also declines to award Danielle any additional attorneys' fees at this stage of the proceeding. As a starting point in this analysis, it is first noted that "[w]here a stipulation of settlement provides the basis for an award of an attorney's fee, the terms of the agreement control" (*Arato Arato*, 15 AD3d 511, 512 [2005], citing *Millard v Millard*, 246 AD2d 349 [1998]; accord *Leiderman v Leiderman*, 50 AD3d 644 [2008] [where an unambiguous stipulation of settlement provided that if either party defaulted with respect to any obligation set forth therein, the nondefaulting party, if successful in enforcing the terms of the stipulation by either judgment or settlement, would be paid a reasonable attorneys' fee and related expenses and costs incurred in the enforcement, the terms of that provision would control]; *Matter of Berns v Halberstam*, 46 AD3d 808, 809 [2007] [where the parties have agreed to provisions in a settlement agreement which govern the award of attorneys' fees, the agreement's provisions, rather than statutory provisions, control]; *Riemer v Riemer*, 31 AD2d 482 [1982], *aff'd* 31 NY2d 881 [1972] [a valid and subsisting separation agreement is a bar to an application for counsel fees]). Thus, Danielle's reliance upon DRL § 237 in seeking an award of counsel fees is misplaced.

Further, although Danielle premises her demand for counsel fees herein upon Mr. Caronna's assertion that fees of at least \$5,000 will be incurred in connection with the instant order to show cause, he does not attach an affidavit of services that itemizes this cost. Thus, neither Richard nor the court is able to determine if the charges are reasonable. Such an

itemized bill is also of particular importance in view of the fact that there are numerous motions pending before the court and pursuant to Article 17 of the Separation Agreement, which is quoted above, Danielle is only entitled to recover the fees attributable to Richard's default under the Agreement if he is given proper notice of his alleged default and if she is successful on the motion. Thus, attorneys' fees are not recoverable with respect to that branch of the motion seeking to hold Richard in contempt, since no such relief was awarded (*see e.g. Sweeney v Sweeney*, 71 AD3d 989, 992-993 [2010]). Similarly, the attorneys' fees incurred by Danielle in her efforts to establish a constructive trust over the Property, or in opposing the motion by Phyllis and Joseph for summary judgment in the Constructive Trust Action, are not recoverable since the relief that she seeks is unrelated to the enforcement of the Separation Agreement, so that the attorney's fee provision is not applicable to those matters (*see e.g. Matter of Tanenbaum v Caputo*, 81 AD3d 839 [2011]). Thus, that branch of Danielle's motion seeking an additional award of attorneys' fees is denied.

Constructive Trust Action

Inasmuch as the remaining claims for relief made by Danielle are predicated upon her requests to have a constructive trust imposed upon the Property and to stay the Eviction Proceeding because of her claimed ownership interest therein, the court will first address the motion by Phyllis and Joseph for summary judgment dismissing the complaint and Danielle's request to impose a constructive trust on the Property.³ In so doing, it is also noted that since

³ Although Danielle does not so characterize her demand for relief, it shall be treated as a
(continued...)

the facts pertaining to the claim are discussed in more detail in the motion by Phyllis and Joseph and Danielle's opposition thereto, the court will structure its analysis around that motion.

The Motion to Dismiss

In support of their motion, Phyllis and Joseph first argue that it is not disputed that Phyllis acquired title to the Property when her mother, Rose Reale, died in 2001 and bequeathed the Property to Phyllis. Thus, it is not argued or alleged that Danielle ever owned an interest in the Property that she transferred to Phyllis. They therefore contend that since such a transfer of title is necessary to establish entitlement to the imposition of a constructive trust, Danielle cannot succeed in her action. Phyllis and Joseph also argue that Danielle never paid any expenses for the Property, since the documentary evidence attached to their moving papers indicates that Phyllis paid all expenses, including sewer costs; gas and heating bills; real estate taxes; and the costs for insurance, exterminating, repairs and maintenance. Copies of bills, checks and bank statements attached to the moving papers evidence these payments. In this regard, Phyllis and Joseph also point out that Danielle admits that she has no funds of her own, so that any expenses that may have been paid would have been paid by Richard. Moreover, Phyllis and Joseph argue that to the degree that Danielle could have paid any expenses for the Property, the payments should be construed to be the payment of rent.

³(...continued)

motion for summary judgment. Accordingly, the court declines to consider Danielle's motion as one seeking a preliminary injunction, as Phyllis and Joseph do in their papers.

Phyllis and Joseph also allege that the Separation Agreement establishes that Danielle knew that Phyllis owned the Property, that she could not live at the Property unless rent was paid and that she understood that she could be evicted. They further argue that the Separation Agreement cannot be used as a vehicle to establish any right to own and/or to occupy the Property, since neither Danielle nor Richard hold any ownership interest therein. In addition, they assert that if there was a promise to transfer the Property to Danielle, Phyllis would not be unjustly enriched, so that there is no viable cause of action for the imposition of a constructive trust for this reason as well. They also claim that since Danielle fails to produce any writing setting out a promise to convey the Property to her, the claim is barred by the Statute of Frauds. Finally, Phyllis and Joseph contend that there is no basis to conclude that Phyllis would leave the Property to Danielle and Richard, to the exclusion of her husband and her two other children.

Danielle's Claim

In support of her claim that she is entitled to an ownership interest in the Property, Danielle argues that the Property is marital in nature and subject to equitable distribution in the Divorce Action. Danielle alleges that Phyllis agreed and promised to transfer title of the Property to her and Richard if they left their home in Florida to reside at the Property and to take care of it, and Richard opened the welding business that he had always been talking about. In reliance upon this promise, Danielle asserts that she moved back to Brooklyn to live at the Property. Danielle goes on to assert that while they resided at the Property, she

and Richard made the necessary repairs, collected the rent, paid the carrying charges, kept up the lawn and landscaping, shoveled the driveway, took care of garbage collection and cared for the Property as if they owned it; Danielle and Richard also opened a welding business. When their marriage began to deteriorate and Richard filed the instant Divorce Action, Phyllis reneged on her promise and commenced the Eviction Proceeding. Danielle therefore concludes that unless a constructive trust is imposed on the Property, Richard, Phyllis and Joseph will be unjustly enriched at her expense

Danielle further explains that it makes sense that Phyllis would transfer title of the Property to Richard, since Richard is not Joseph's son and Phyllis and Joseph have two daughters. Danielle also notes that Phyllis and Joseph co-own approximately three properties and Joseph, individually, owns approximately six other properties and businesses. Thus, it is reasonable to believe that the properties owned by Joseph will go to his biological daughters and that the only property owned by Phyllis, individually, will go to Richard. Danielle contends that this transfer is also reasonable because Richard grew up in the house located at the Property. These allegations are supported in an affidavit from Danielle's mother, in which she alleges that she and Phyllis were friends and that Phyllis talked about her intention to leave the Property to Richard and Danielle if they returned from Florida, took care of the building and Richard opened a welding business.

Danielle goes on to argue that reliance upon the Separation Agreement in support of Phyllis and Joseph's motion for summary judgment is misplaced. First, Danielle argues that

Richard never paid any rent to Phyllis. Danielle then contends that when the Separation Agreement was executed, the intent was to put in writing who would have custody of the children, not to divide their marital property and businesses. In addition, since Danielle was not represented by counsel when the Separation Agreement was executed, she was not aware of her right to raise the issue of imposing a constructive trust upon the Property. Finally, Danielle contends that the fact that the Separation Agreement states that the Property is held in Phyllis' name does not compel a contrary conclusion, since this statement does not preclude a claim by her that she has an ownership interest therein. Danielle therefore concludes that she should not be deemed to have waived the right to raise the issue in the Constructive Trust Action.

Danielle also asserts that the documentary evidence submitted in support of the motion does not negate her contention that she and Richard gave Phyllis cash to pay the costs associated with maintaining the Property. Further, since Phyllis and Joseph own more than one property, money spent at Lowe's and/or Home Depot was not necessarily spent on the Property at issue herein.

Movants' Reply

In reply, Phyllis and Joseph argue that even assuming that Danielle's arguments are true, without so conceding, summary judgment dismissing her complaint should still be granted. More specifically, they aver that since Danielle does not offer any proof that she transferred anything of value to Phyllis in support of her claim, she fails to establish that

Phyllis and Joseph were unjustly enriched, particularly since Danielle and Richard did not pay any rent while living at the Property. In this regard, Phyllis and Joseph point out that the claim that Danielle and Richard contributed cash to the upkeep of the Property is made in counsel's affidavit, so that it is without any probative value. Phyllis and Joseph also contend that at best, Danielle and Richard engaged in limited caretaker activities. Phyllis and Joseph go on to argue that Danielle's claim of a "promise" is, at most, an unenforceable argument to agree. Finally, they point out that Danielle must be presumed to have understood the meaning and terms of the Separation Agreement that she signed, particularly since she was represented by counsel when the Agreement was executed.

The Law

As a threshold issue, the court notes that although "General Obligations Law § 5-703 requires that a conveyance, or a contract for the conveyance, of an interest in real property be in writing . . . the Statute of Frauds is not a defense to an action seeking the imposition of a constructive trust" (*Maynor v Pellegrino*, 226 AD2d 883, 884 [1996] [internal citations omitted]; accord *Berger v Berger*, 81 AD3d 765 [2011]).

Turning to the merits of the parties' claims, it is well settled that "[a] constructive trust is an equitable remedy, and may be imposed [w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688, 691 [2012], quoting *Rowe v Kingston*, 94 AD3d 852, 853 [2012] [internal quotation marks and citation omitted];

accord Kilkenny v Kilkenny, 54 AD3d 816, 818 [2008]). In determining whether to impose a constructive trust, the court is “given broad scope to flex in response to all human implications of the transaction, to remedy whatever knavery ingenious wrongdoers can invent, to give expression to the conscience of equity, and to satisfy the demands of justice” (*Nastasi v Nastasi*, 26 AD3d 32, 38 [2005] [internal citations omitted]).

It is equally well settled that:

“A constructive trust is an equitable remedy (*see Simonds v Simonds*, 45 NY2d 233, 241 [1978]) and its purpose is to prevent unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119, 123 [1976]). In general, to impose a constructive trust, four factors must be established: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (*id.* at 121). 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 (*see Simonds v Simonds*, 45 NY2d at 241; *see also Latham v Father Divine*, 299 NY 22, 27 [1949]).”

(*Marini v Lombardo*, 79 AD3d 932, 933 [2010], *lv denied* 17 NY3d 705 [2011]).

Discussion

It is clear that Danielle is premising her demand for the imposition of a constructive trust on her contention that Phyllis promised to transfer title to the Property to her and Richard. It is beyond dispute, and not contested by Danielle, that the enforcement of an oral promise to convey property is barred by the Statute of Frauds (General Obligations Law § 5-703[1]). Since it is also well settled that the Statute of Frauds defense cannot serve to defeat a claim for the imposition of a constructive trust, Danielle must establish entitlement

to this relief if she is to succeed in proving that she should be given an ownership interest in the Property (*see e.g. Berger*, 81 AD3d at 765; *Maynor*, 226 AD2d at 884).

In addressing the elements necessary to establish a constructive trust, it has been held that there is a fiduciary relationship between parties who are related through marriage (*see e.g. Marini*, 79 AD3d at 933-934, citing *Booth v Booth*, 178 AD2d 712, 713 [1991]; *Penato v George*, 52 AD2d 939, 942 [1976]). Here, Danielle and Phyllis are so related.

In addressing the second element, a promise, it has been held that the remedy of imposing a constructive trust “is flexible and a constructive trust may be imposed even without an express promise where, given reliance upon the confidential relationship of the parties, ‘a promise may be implied or inferred from the very transaction itself’” (*Watson v Pascal*, 65 AD3d 1333, 1334 [2009], quoting *Sharp*, 40 NY2d at 119). In this case, Danielle alleges that Phyllis expressly promised to transfer title of the Property to her and Richard.

In addressing the third element, a transfer of title, the court rejects the contention raised by Phyllis and Joseph that Danielle cannot establish entitlement to the imposition of a constructive trust because she never held an interest in the Property that she transferred to Phyllis. In so holding, the court notes that:

“We recognize that the case law cited by defendants holds that a party may not impress a constructive trust on realty absent the relinquishment of some interest in the parcel in reliance on a promise to convey (*see, Bontecou v Goldman*, 103 AD2d 732, 733; *Scivoletti v Marsala*, 97 AD2d 401, *affd* 61 NY2d 806; *Matter of Wells*, 36 AD2d 471, 474, *affd* 29 NY2d 931). The law of constructive trusts, however, is not confined to reconveyance situations. The third element necessary to

impress a constructive trust speaks to a transfer in reliance on a promise without qualifying the underscored term. In our view, the transfer concept extends to instances, as here, where funds, time and effort are contributed in reliance on a promise to share in the result (*see, e.g., Spodek v Riskin*, 150 AD2d 358 [1989]; *Washington v Defense*, 149 AD2d 697 [1989]). This court has recognized that a constructive trust may be imposed in the marital context where the proponent has expended funds or effort in reliance on a promise (*see, Tidball v Tidball*, 93 AD2d 954, 955; *Motyl v Motyl*, 35 AD2d 1051, 1052; *see also, Tomaino v Tomaino*, 68 AD2d 267, 268; *Janke v Janke*, 47 AD2d 445, *affd* 39 NY2d 786)."

(*Lester v Zimmer*, 147 AD2d 340, 342 [1989]; *accord Rock v Rock*, ___ AD3d ___, 953 NYS2d 165, 168 [2012]).

Thus, it is sufficient that a party seeking the imposition of a constructive trust, who had no actual prior interest in the subject property, shows that an equitable interest developed through the expenditure of money, labor, and time in the property (*see e.g. Marini*, 79 AD3d at 934, citing *Washington*, 149 AD2d at 699). Similarly, "[t]he contribution of money toward the purchase of the property has been found to be sufficient to satisfy the transfer in reliance element" (*Maynor*, 226 AD2d at 885), as is "the contribution of money and work toward the purchase of the land and the construction of the home" (*Gottlieb v Gottlieb*, 166 AD2d 413, 414 [1990]).

It has also been held, however, that one fails to establish a transfer where the evidence establishes that improvements undertaken at the subject premises over the years were principally made for the benefit of the party seeking to impose the constructive trust and his or her family, so that the operating expenses paid should be considered rent for use of the

premises, rather than having been made in reliance upon an alleged promise to convey (*see e.g. Marini*, 79 AD3d at 934; *accord Rowe*, 94 AD3d at 854 [defendants' argument that their investment in the property gave them an ownership interest was without merit, since although they were responsible for the care and maintenance of the property for eight years, they were living on the premises together with their family, collecting rent, and reaping the tax and home equity benefits associated with owning a home]; *In re Leeton*, 160 AD2d 702, 704 [1990] [expenditures made to improve and maintain the subject premises by a person seeking to impose a constructive trust could be satisfactorily explained by the desire to improve the surroundings in which he and his family lived and the fact that he made mortgage, tax and other payments on the property during the time he resided there could be considered as rent for the use of the property]).

Moreover, Danielle fails to offer any proof that she or Richard made any contributions to the cost of maintaining the Property while they resided there. In this regard, the assertion made by Danielle's attorney, in his affirmation, that cash contributions were made, is without probative value (*Capelin Assoc. v Globe Mfg.*, 34 NY2d 338 [1974]; *Shackle v Cary*, 59 AD3d 700 [2009]; *Guzman v Mike's Pipe Yard*, 35 AD3d 266 [2006]). Finally, as discussed above, even if Danielle and Richard did make contributions to the cost of maintaining the Property, any such payments are more properly characterized as the payment of rent (*see e.g. Rowe*, 94 AD3d at 854; *Mariani*, 79 AD3d at 934; *In re Leeton*, 160 AD2d at 704).

Danielle also fails to establish that Phyllis would be unjustly enriched if the court

declines to impose a constructive trust on the Property. Most significant in so holding is the fact that Phyllis acquired title as a bequest from her mother; there is no claim by Danielle that she or Richard made any contribution to the purchase price. Thus, there can be no argument that Phyllis did not acquire title in good conscience. The court also notes that while Danielle alleges that she and Richard collected the rent for the Property, she fails to advise the court whether the rental income was thereafter turned over to Phyllis; if Danielle and Richard retained the rental income, any claim by Danielle that Phyllis would be unjustly enriched if a constructive trust is not imposed is further weakened. It must also be noted that Danielle referred to Phyllis's offer as a "fantastic opportunity," sufficient to convince her and Richard to sell their home in Florida and to return to Brooklyn. This admission also supports the conclusion that it would be Danielle and Richard who were enriched by Phyllis' offer to transfer title to the Property to them, and that Phyllis would reap little, if any advantage (*see generally 1133 Laconic v Lartrym Servs.*, 85 AD3d 992, 993 [2011] [the real property tax payments that the plaintiff paid prior to, and during its possession of the subject real property, did not constitute an unjust enrichment of the defendant]).

Further, as argued by Phyllis and Joseph, Danielle did not make any claim for equitable distribution of the Property in the Separation Agreement. Thus, since her motion seeking to set aside the agreement was denied by Judge Silber in the May 2012 Decision, she cannot now seek to repudiate that agreement and seek additional property, claiming a right to equitable distribution. In this regard, it is also noted that Danielle's claim that the

Separation Agreement was only intended to address custody issues cannot withstand scrutiny. More specifically, the Agreement states, in the final whereas clause on page 1, that “the parties hereto wish to resolve their dispute amicably and desire to adjust their respective property rights, to provide for the equitable distribution of their marital estate and to effectuate a final and irrevocable settlement of all property and financial claims between them.” The Agreement goes on to address the distribution of the parties’ personal property, debts, bank accounts, spousal maintenance, health insurance coverage, child support, income taxes, estate rights, attorneys’ fees and Luna. As is of particular relevance herein, the Agreement provides that:

“The partes acknowledge that the husband is the owner of a sole proprietorship known as Luna Welding and Fabrication which property is marital and to which the Wife is entitled to a 50% interest. In the event of the termination of the marriage, the sole proprietorship or any other successor business thereto shall be valued and determined as of said date of the termination of the marriage.”

(Art 3, p 2-3). The inclusion of this paragraph in the Agreement compels that conclusion that if Danielle had intended to reserve her right to claim an interest in the Property, that provision would have been included as well, particularly in view of the inclusion of detailed provisions addressing Danielle’s right to exclusive occupancy of the former marital residence and Richard’s obligations to her and the children in the event that she is evicted. Finally, the Separation Agreement states that Danielle was represented by counsel in connection with the Separation Agreement.

Accordingly, the court finds that the facts as alleged by Danielle are insufficient to establish an entitlement to the imposition of a constructive trust. From this it follows that the motion by Phyllis and Joseph for summary judgment dismissing the complaint in the Constructive Trust Action is granted (*see generally Mei Yun Chen v Mei Wan Kao*, 97 AD3d 730 [2012]; *Henderson v Thorpe*, 73 AD3d 978, 979 [2010]; *Osborne v Tooker*, 36 AD3d 778, 779-780 [2007]; *Squiciarino v Squiciarino*, 35 AD3d 844, 845 [2006]). Similarly, having held that there is no basis upon which to award Danielle an ownership interest in the Property, there is no basis to support a finding that she is entitled to continue in possession of the Property. Thus, that branch of her motion seeking to stay the Eviction Proceeding is also denied.

Sanctions

The Parties' Contentions

In support of their request for sanctions against Danielle, Phyllis and Joseph argue that Danielle's action against Joseph, who has no ownership interest in the Property, is frivolous. Movants assert that Danielle was aware of this because a letter dated June 14, 2012 sent to this court, with a copy sent to Danielle's attorney, stated that filing an action against Joseph would be improper for this reason.

In opposition, Danielle argues that Joseph is a necessary party to this action. More specifically, Danielle contends that since Phyllis was married to Joseph when she inherited the Property, Joseph would have a claim to it pursuant to the equitable distribution law in the

event that he and Phyllis divorced because of efforts and/or contributions made by him to the Property, citing DRL § 236(B)(5)(d)(7).

The Law

“In its discretion, a court may award costs and financial sanctions against an attorney or party resulting from frivolous conduct” (*Flaherty v Stavropoulos*, 199 AD2d 301, 302 [1993], citing 22 NYCRR 130-1.1 [a]). Rule 130-1.1(c)(1) provides that conduct is frivolous if “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” or if it “is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another” (see generally *Kornblum v Kornblum*, 34 AD3d 749, 751 [2006], citing *Kucker v Kaminsky & Rich*, 7 AD3d 491, 492 [2004], *lv denied* 3 NY3d 607 [2004]). “Enforcement of the sanctions rule is essential to deter conduct that wastes judicial resources and inhibits the proper administration of the court system” (*Gordon v Marrone*, 202 AD2d 104, 111 [1994], *lv denied* 84 NY2d 813 [1995]). “Where . . . the frivolous action of counsel results in improper use of the court’s time as well as that of counsel, sanctions [are] properly assessed” (*CCS Communication Control v Kelly Intl. Forwarding Co.*, 166 AD2d 173, 175 [1990]).

It is also well established that pursuant to 22 NYCRR 130-1.2, the court is required to state “the reasons why the court found the amount . . . imposed to be appropriate.” As one court has stated, “there is no mathematical formula with which to compute the amount. All a court can do in such a case is to estimate what amount will sting sufficiently to

communicate its demand for improved professional conduct without imposing excessive hardship” (*Candolfi v New York City Tr. Auth.*, 156 Misc 2d 964, 970 [1992]). Thus, a sanction in the amount of \$5,000 was held to be appropriate where the court considered factors including:

“(1) the attorney has abused the judicial process; (2) the attorney has caused the unnecessary expense of the court’s resources to respond to a wholly frivolous motion, one that is completely without merit in law and which cannot be supported by any reasonable argument; [and] (3) there is a need to prevent the attorney from engaging in further frivolous motion practice in this or any future matter.”

(*Drummond v Drummond*, 305 AD2d 450, 451-452 [2003], *lv denied* 1 NY3d 504 [2003]).

Discussion

Herein, the court finds that commencing the Constructive Trust Action against Joseph is frivolous. This conclusion is dictated by the fact that Danielle admits that Joseph currently holds no ownership interest in the Property. In reaching this conclusion, the court declines to hold that the possibility that a spouse may acquire a right to property in the event of divorce is sufficient to constitute the claim of present interest in said property. If the court were to accept this reasoning, the right of a married person to hold property individually, in his or her name, would be abrogated. There is no basis in law or reason to support such a far reaching holding.

Moreover, in this case, there is no evidence of allegation that Phyllis and Joseph are

seeking a divorce.⁴ Further, under the circumstances of this case, although Joseph could claim an equitable share in the Property if he and Phyllis were to file for divorce and he could establish that any appreciation in value is attributable to his contribution or efforts (*see e.g. Kilkenny*, 54 AD3d at 818-819), Danielle also alleges that Phyllis and Joseph own numerous other properties. Hence, any award for appreciation could be satisfied out of the allocation of the marital properties that Phyllis and Joseph jointly own. That the commencement of the Constructive Trust Action against Joseph is frivolous is also supported by above discussion finding that Danielle's request that a constructive trust be imposed on the Property is found to be without any evidentiary support and completely lacking in merit.

Accordingly, for these reasons, and to prevent further unnecessary actions and/or motions, Danielle's attorney, an experienced matrimonial lawyer, is fined \$5,000.

Conclusion

For the foregoing reasons, Danielle's motions are granted to the extent of awarding a money judgment against Richard in favor of Mr. Caronna in the amount of \$8,400, and a second money judgment in favor of Mr. Caronna and against Richard in the amount of \$1,500, to be held in escrow to pay the forensic evaluator. The issue of the amount of money that Richard owes to Danielle for child support, extracurricular expenses and expenses for car repairs and insurance, if any, is referred to a Special Referee for a hearing; unless

⁴ The court also recognizes that if a contested divorce action between Phyllis and Joseph were currently pending, and Joseph had interposed a claim to the Property, a different result might be reached.

Danielle and Richard agree that the Special Referee shall hear and determine the issues, the Special Referee shall hear and report.

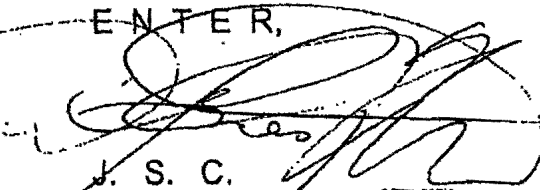
The motion by Phyllis Genco and Joseph Genco for an order dismissing the complaint in the Constructive Trust Action is granted.

Phyllis and Joseph's request for sanctions is granted to extent of sanctioning Danielle's attorney, Anthony A. Caronna, Esq., \$5,000, which funds shall be deposited with the Lawyers' Fund for Client Protection. The court shall give notice of the award of sanctions payable by sending a copy of this order to the Lawyers' Fund at 119 Washington Avenue, Albany, New York, 11210.

All other relief requested is denied. Settle order on notice.

Plaintiff, defendant and defendant's attorney shall appear in Part 5T, room 924 on Monday, March 4, 2013 at 9:30 a.m. for a status conference and referral to the Special Referee.

The foregoing constitutes the order and decision of this court.

ENTER,

J. S. C.
Hon. Delores J. Thomas JSC