

Ae Ran Kang v Hyung Yook Kim

2014 NY Slip Op 30041(U)

January 9, 2014

Supreme Court, New York County

Docket Number: 153187/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 153187/2013
KANG, AE RAN
vs.
KIM, HYUNG KOOK
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-5

Answering Affidavits — Exhibits _____ | No(s). 6-9

Replying Affidavits _____ | No(s). 10-11

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 1/9/2014

 J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
AE RAN KANG,

Plaintiff,

Index No.
153187/2013

- against -

DECISION

Mot. Seq. 01

HYUNG YOOK KIM,
JEAN JEEHYUN KIM,
JOHN DOE, and JANE DOE,

Defendants.

-----X

HON. EILEEN A. RAKOWER

Plaintiff, Ae Ran Kang (“Plaintiff”) brings this action to impose a constructive trust on property owned by Defendants, Hyung Kook Kim (“Mr. Kim”) and Jean Jeehyun Kim (collectively, “Defendants”), for a declaratory judgment recognizing Plaintiff’s interest in said property, and for an injunction prohibiting Defendants from transferring or encumbering their interests in the subject property without Plaintiff’s consent. The disputed property is three condominiums, located at 310 W. 52nd St., Unit 4B and Storage Unit 58, New York, New York, 10001, Block 1042 and Lot 1308 and 1373, 247 W. 46ths St., Unit 4001, New York, New York, 10001, Block 1018 and Lot 1308, and 205 West 76th St., Unit 1103, New York, New York, 10024, Block 1168 Lot 1036, held in Mr. Kim’s name, and one condominium, located at 205 East 85th St., Unit 7A, New York, New York 10028, Block 1168 Lot 1036 held in Mr. Kim’s daughter, Defendant Jean Jeehyun Kim’s, name. Plaintiff alleges that subject properties are marital assets, based on a wedding ceremony that took place between Plaintiff and Defendant Kim, on or about February 16, 2007, at the Regis Hotel, located in New York, even though this marriage was not officially registered. Plaintiff has filed notices of pendency on the subject properties in connection with the instant claim.

In connection with the purported marital relationship, Plaintiff has also commenced an action against Mr. Kim in the Seoul Family Court, for equitable distribution and spousal maintenance. Both Plaintiff and Mr. Kim are citizens of Korea. Defendant Jean Jeehyun Kim is a dual citizen of Korea and the United States.

Defendants move to dismiss Plaintiff's complaint, with prejudice, on *forum non conveniens grounds*, pursuant to CPLR 327(a), for failure to state a cause of action, pursuant to CPLR 3211(a)(7), and for lack of subject matter jurisdiction over the parties' marriage.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (see CPLR §3211[a][7]).

The elements of constructive trust are: 1) a confidential or fiduciary relationship; 2) a promise; 3) a transfer in reliance on the promise, and; 4) unjust enrichment. *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976).

Plaintiff's amended complaint alleges a confidential relationship between Plaintiff and Mr. Kim, that Mr. Kim promised to invest in certain condominiums, located at 310 W. 52ndw St., Unit 4B and Storage Unit 58, New York, New York, 10001, Block 1042 and Lot 1308 and 1373, and 247 W. 46ths St., Unit 4001, New York, New York, 10001, Block 1018 and Lot 1308, for Plaintiff's and Mr. Kim's joint benefit, and that Plaintiff transferred her share of jointly held bank accounts in reliance on Mr. Kim's promise. Plaintiff's amended complaint further alleges that Mr. Kim holds title to these condominiums in his sole name, and that he is unjustly enriched as a result.

However, Plaintiff's amended complaint does not allege a confidential or fiduciary relationship between Plaintiff and Defendant Jean Kim, nor does Plaintiff allege a promise respecting Defendant Jean Jeehyun Kim, or any transfer in reliance thereon.

Accordingly, accepting Plaintiff's allegations as true, Plaintiff's amended complaint adequately pleads a cause of action for constructive trust regarding the condominiums located at 310 W. 52ndw St., Unit 4B and Storage Unit 58, New York, New York, 10001, Block 1042 and Lot 1308 and 1373, 247 W. 46ths St., Unit 4001, New York, New York, 10001, Block 1018 and Lot 1308, and 205 West 76th St., Unit 1103, New York, New York, 10024, Block 1168 Lot 1036, which are held in Mr. Kim's name. Even accepting Plaintiff's allegations as true, however, the four corners of Plaintiff's amended complaint do not assert a cause of action for constructive trust against Defendant Jean Jeehyun Kim, and Plaintiff's complaint fails to adequately plead a claim for constructive trust on property held in Defendant Jean Jeehyun Kim's name.

The common law doctrine of *forum non conveniens*, codified in CPLR §327, permits a court to dismiss an action when, "in the interest of substantial justice the action should be heard in another forum . . . and the burden is on the party challenging the forum to demonstrate that the action would be best adjudicated elsewhere . . . [a]mong the factors to be considered are the residence of the parties, the location of the various witnesses, where the transaction or event giving rise to the cause of action occurred, the potential hardship to the defendant in litigating the case in New York, and the availability of an alternative forum." (*Grizzle v. Hertz*, 305 AD2d 311[1st Dept. 2003]). These factors must weigh heavily in the defendant's favor before a plaintiff's choice of forum should be disturbed.

In support of Defendants' motion to dismiss Plaintiff's Complaint on *forum non conveniens* grounds, Defendants argue that Plaintiff and Defendant Kim are residents of South Korea, that an alternative forum is available, and that litigating the matter here would involve applicability of foreign law, which imposes a greater burden on the court and the litigants. Defendants argue that Korean domestic relations law governs the relationship between Plaintiff and Mr. Kim, and that the instant claim for a constructive trust is duplicative of Plaintiff's claim for equitable distribution, which is currently pending in South Korea.

Plaintiff, in turn, argues that New York is a proper forum because the dispute concerns real property located in New York, and because the actions and transactions that give rise to the instant claim also occurred in New York. Specifically, Plaintiff argues that Plaintiff and Mr. Kim celebrated their marriage in New York, and that Plaintiff and Mr. Kim opened a joint bank account in New York that was used to purchase and make mortgage payments on the properties in question. Additionally, according to Plaintiff, the joint bank account in New York continues to be used to collect rental income from said properties, and to pay mortgage fees, maintenance, and taxes on each of the condominiums. Plaintiff further argues that the real estate closings on the subject properties occurred in New York, and that the mortgagees are financial institutions located in the United States. As a result, Plaintiff contends, this action has a substantial nexus to New York.

Additionally, Plaintiff argues that no alternative forum is available because Korean law does not recognize a cause of action for constructive trust. Moreover, Plaintiff asserts causes of action against Mr. Kim, as well as his daughter, Defendant Jean Jeehyun Kim. Plaintiff argues that she would not be able to obtain relief against Defendant Jean Jeehyun Kim in any proceeding brought in Korean Family Court. Thus, Plaintiff contends, Korea is not an available alternative forum for this dispute.

“The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation.” (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 [1984]). Plaintiff’s claims are based on transactions that occurred in New York, for real property located in this state. Mr. Kim has “demonstrated his availability to this forum by his prior business activities here.” (*Aon Risk Servs. v. Cusack*, 102 A.D.3d 461, 463 [1st Dep’t 2013]). Accordingly, Defendants do not meet their burden of establishing that New York is not a convenient forum for the instant litigation.

Finally, this is not an action to adjudicate the parties’ marital status. Accordingly, Defendants’ motion to dismiss Plaintiff’s complaint based on lack of subject matter jurisdiction over Plaintiff and Mr. Kim’s marriage, is without merit.


Wherefore, it is hereby,

ORDERED that Defendants' motion to dismiss Plaintiff's complaint is granted only to the extent that Plaintiff's claims as against Defendant Jean Jeehyun Kim are severed dismissed, and the clerk shall enter judgment accordingly, and it is further,

ORDERED that Plaintiff's claims as against Defendant Hyung Kook Kim shall proceed, and it is further,

ORDERED that the notice of pendency filed on property located at 205 East 85th St., Unit 7A, New York, New York 10028, Block 1168 Lot 1036 is vacated.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JANUARY 9, 2014 
HON. EILEEN A. RAKOWER ^{J.S.C.}

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE