SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Hon. RALPH T. GAZZILLO
A.J.S.C.

Francine LoMaglio,

Plaintiff(s),

Index No.: 46786/2009

- against -

Christopher Colasuonno and Diana Parisi
f/k/a Diana Colasuonno,

Defendant(s),

Christopher Colasuonno and Gina Colasuonno,

Plaintiff(s), Index No.: 28004/2010

-against-

Francine LoMaglio,

Defendant(s),

The combined, non-jury trial of both of these matters was conducted before the undersigned on December 9th, 11th, 17th, 19th, and 20th, 2013. Prior to the testimony, a number of items were pre-marked as either exhibits or directly admitted into evidence. In addition to those items, the parties relied upon the testimony of seven (7) witnesses. Called by the plaintiff in the first action were: herself (Francine LoMaglio), Diana Parisi (a defendant), and Dennis Colasuonno. The plaintiff was also recalled on rebuttal. The plaintiffs of the second action called: Christopher Colasuonno and his wife, Gina Colasuonno (both co-plaintiffs), Patricia Altamore, and Celeste DiCarlo. At the conclusion of the proceedings and in lieu of summations, each side was invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR §4213 by February 14, 2014. Due to post-trial attempts to resolve the matter, that submission date was adjourned to March 7, 2014; on that date, the Court

was notified that the matter had been settled, only to be advised that the negotiations had failed[1]. The date for submissions was, therefore, was adjourned to March 21, 2014. Those memoranda having been received and reviewed, the Court's decision is as follows:

Preliminarily, there are a number of background facts which are not in serious dispute and were stipulated and agreed to by the parties at the trial's commencement. Specifically, there is no contest that the plaintiff Francine LoMaglio began an action under index number 46786/09 pursuant to Real Property Law Article 15 seeking a determination of her claim to real property known as 58 Lama Drive, Shirley, New York. The subject premises was purchased in 1974 by plaintiff and Dennis Colasuonno. Although they never married, they cohabitated together and he is the father of her two children, defendants Christopher Colasuonno and Diana Parisi (nee Diana Colasuonno). The plaintiff lived with Dennis Colasuonno and the children at the premises until October of 1981, when he separated from the plaintiff and moved to Nevada. In February 1984, plaintiff married Anthony Lomaglio and continued to reside in the premises with the children. Approximately two years later, Dennis Colasuonno entered into an agreement with plaintiff concerning the premises wherein he acknowledged, among other things, the transfer of "his one-half interest as a tenant by the entirety . . . to Francine LoMaglio as trustee for Christopher Colasuonno and Diana Colasuonno." The deed memorializing said transfer lists both her children/defendants as joint tenants with the right of survivorship in the premises. Thereafter, the plaintiff and her children continued to reside together in the premises until the children moved away, her son in1994 and daughter in 2002.

While the record doesn't suggest either of her children's departures was the result of a disagreement, subsequent disharmony led to the plaintiff commencing the instant action. Her complaint seeks a judgment declaring her to be the sole owner of the subject premises and directing the defendants to execute a quitclaim deed disclaiming their purported interest in the property. It further alleges no trust was created in favor of defendants at the time of the transfer,

---

[1] As common sense and experience have demonstrated, a dispute (especially between members of the same family) which can be resolved by the parties' mutual agreement is always preferable to the necessity of judicial intervention and resolution. Putting aside the issues and concerns of judicial economy, any agreement in which the parties have had some voice in fashioning is more likely to be complied with than one imposed upon them. Moreover, under the former scenario their quarrel is less likely to be resurrected and, even if never forgotten, it tends to have less vitality. Lastly, it is profoundly sad to see a case such this which—in and out of the courtroom—places siblings, parents and children, members of the same family who share the same blood, pitted against each other in tenacious, adversarial as well as expensive legal and personal clashes and vendettas. Mindful of all of that and in an attempt to bring some semblance of peace to this family and the parties, the undersigned attempted to resolve this matter during and even after the trial. As witnessed by this decision, however, those efforts were unsuccessful. The Court will, therefore, determine and resolve their differences which, apparently, they either cannot or will not.

and that the recognition of any such trust would unjustly enrich defendants as they paid no consideration for the transfer. Christopher Colasuonno joined issue by filing an answer with counterclaims on December 29, 2009. He subsequently served an amended answer with counterclaims on July 15, 2010. The counterclaims allege, *inter alia*, causes of action for a partition, an accounting, breach of fiduciary duty, constructive trust and unjust enrichment. Defendant Diana Parisi did not serve an answer or otherwise appear in that action and is in default.

The agreement entered by plaintiff and Dennis Colasuonno, dated April 15, 1986, identifies Dennis Colasuonno as the "party of the first part" and the Francine LoMaglio as the "party of the second part," and acknowledges that Dennis Colasuonno is the children's natural father. The agreement further provides, in pertinent part, as follows:

> (2) The party of the first part agrees that he will provide medical insurance coverage for the aforementioned infants available through his employment until such time as the children shall attain the age of twenty-one (21) years, or the coverage is allowable for them pursuant to the company or carrier terms.
>
> (3) The party of the first further agrees that he will provide all school clothing for the two infant children, and will contribute an amount of TWENTY & 00/100 ($20.00) DOLLARS per week as and for support for the children, which amount will be forwarded to the party of the second part on Friday of each week.
>
> (4) The party of the first part acknowledges that he is executing this agreement in consideration of his having transferred his one-half interest as tenant by the entirety to premises known as 58 Lama Drive, Shirley, New York, to FRANCINE LOMAGLIO, as Trustee for CHRISTOPHER COLASUONNO and DIANA COLASUONNO, simultaneously with the execution hereof.

As to the action under index number 28004/10, that was commenced against his mother by Christopher Colasuonno and his wife, Gina. In that action, they seek various forms of relief emanating from his mother's purported wrongful retention of certain items of their personal property. This was allegedly committed by the therein defendant, Francine LoMaglio, while that property was situated at the Lama Drive premises. The action also seeks certain equitable relief. By counterclaim, his mother seeks reimbursement for certain expenses incurred to remove debris allegedly left on the premises and caused by the plaintiffs of the second action.[2]

---

[2]Unless otherwise noted, in order to facilitate this decision and its clarity, Francine LoMaglio, the plaintiff of the first action, will be noted as such and Christopher and Gina Colasuonno, the plaintiffs of the second action, will be deemed the defense.

By order of this Court dated August 8, 2011 (Pastoressa, J.), the motions for summary judgment were denied. In so opining, the Court questioned whether the intent of both Francine LoMaglio and Dennis Colasuonno was to transfer to her all of his interest in the property in to satisfy his child support obligations, or whether it was their intent to create an *inter vivos* trust on the children's behalf, and, if so, whether the children were vested with merely a right of survivorship or an interest in the property which ripened when they reached their majority. As to the counterclaims, that order also noted there existed questions of fact, some of which pivoted on the relationship between the Christopher Colasuonno and his mother, and his motivation. Specifically unresolved was whether he relied upon his mother's representations or whether acted voluntarily, motivated by his love, care and affection for her. Also, summary judgment on the counterclaims for partition and an accounting was withheld, occasioned by the unresolved issue of whether he had any interest in the property and whether he shared either a fiduciary relationship or merely a tenant/landlord relationship with his mother. Thereafter, by order of this Court dated May 7, 2012 (Pastoressa, J.), both of the actions, their claims and counterclaims were consolidated for a single trial.

TESTIMONY

What immediately follows is an unassessed and condensed version of the testimony of the various witnesses regarding the relevant and germane facts of this matter as was portrayed, purported and alleged by each.

Francine LoMaglio is 64 and has less than a high school education. She has resided at the Lama Drive premises for 39 years. It had been purchased by her and her then-boyfriend, Dennis Colasuonno, in 1974 for $32,000.00. During the time they cohabitated there, she was employed in New York City and he by the Brooklyn Union Gas Company (BUG). She stopped working when she was seven-months pregnant with the defendant Christopher Colasuonno who was born in 1976. She remained home and, in 1981, their daughter Diana was born. Soon afterward, Dennis Colasuonno left her and their children and returned to his ex-wife. The two parents had an arrangement for support of the children: he would provide her with $20.00 per week, all their school clothes and health insurance. She stated, however, that she never received either the $20.00 or the clothing allowance. In 1984 she met Anthony LoMaglio. At that time he owned an ice cream truck. They married and lived together with her children at the Lama Drive home. Dennis Colasuonno, who was then living in Lindenhurst with his parents, wanted Anthony LoMaglio to pay rent but she refused as he was her husband. During a discussion, she told Colasuonno that if he wanted her husband to pay rent, Colasuonno should pay child support. Soon thereafter they met with an attorney and told him of their wishes and desires regarding child support. He drafted an agreement (hereinafter "the agreement"), her understanding of which was that Dennis Colasuonno wouldn't have to pay the $20.00, clothing, etc., and, in exchange, he would turn over the house "in trust" to her, meaning to her that she was their "parent and guardian." On April 15, 1986, they both signed "the agreement" and the deed. She added that there had been no discussion of turning the home over to the children at any age.

After the various papers of their agreement were signed she occasionally saw him, perhaps twice a month, when he came to see the children but he never paid the $20.00 nor any school clothing expenses. (His employer did provide medical insurance). During that time, he never discussed the children receiving an interest in the home while she was alive nor any interest when they turned 21, and the first time she learned of any potential legal interest was when she tried to get a disability tax rebate from Brookhaven Township (the Town).

She discussed this with both children and the Town Attorney who indicated that the deed was invalid. On February 8, 2007, she wrote a letter to the New York State Board of Real Property Services (an agency of the Town). She annexed two letters, both of which were prepared by her daughter, Diana, after her brother, Christopher Colasuonno, had told Diana what to write. One letter was separately signed by Diana, one by Christopher but the same typewriter was used for each. At that time Christopher was not living with the witness, but they enjoyed a good relationship. The letter signed by her daughter indicated, *inter alia*, that her name and her brother's were placed on the deed "while they were minors, with [her mother's] consent, in lieu of [her] biological father paying child support, he signed his half share to [her] mother as trustee for" them. Somewhat paralleling that is the letter of her brother, Christopher Colasuonno, which, in relevant part, stated that he did "'not' consider [himself] to be an owner of these premises. [His] name was placed on the deed when [he] was 10 years old, by [his] father, solely because [his father] wanted no responsibility for it or [his father's] children. The sole responsibility for the home and children was left to [his] mother, who has resided there for 32 years. . . . [He (Christopher Colasuonno) took] no responsibility for 58 Lama Dr. Shirley, N.Y." (Plaintiff's "5" in evidence).

In December of 2009, Christopher Colasuonno and his wife and family moved into Lama Drive. They had been there for a time previously - during the 1990's - after her parents had "kicked them out." In 2009, he told his mother that he couldn't keep up with his rent and had no money so he asked to move in. At that time he had a home in Mastic on Huguenot Drive. There was no detailed agreement as to what he would have to pay beyond his share (one-half) of the cable and electric bills, plus all the taxes (which he did except for the last tax bill). After he was there for three (3) years the relationship soured. A year after her husband's 2010 death, both Christopher Colasuonno and his wife became abusive to her, wouldn't let their children talk to her, and her daughter-in-law told her she "had used up her share of the house and it was his (Christopher's) now."

Thereafter, she attempted to evict her son and his family in a landlord-tenant proceeding. They were served with papers but a clerk "at the teller booth" told her the case was improper as Christopher Colasuonno's name was on the deed. The matter never went to trial and she withdrew the paperwork. In November of 2009, she was given an Order of Protection against him "[b]ecause he held a knife up and told [her] it had [her] name on it" after she tried to evict him. He and his wife and children also left. He returned once with a Police Officer. He wanted to get something from the shed—which was locked—as he had had items in there and the house. Thereafter his wife—also in the company of a Police Officer—came to retrieve other items; she

left with a jewelry box. A week later, she returned for about 15 minutes, again with a Police Officer, but Ms. LoMaglio was in another room so she didn't see her remove anything. Her daughter-in-law returned a third time with a Police Officer; again, she was not seen removing anything. Finally, some four months later, she was there a fourth time. This time there were two "PODS" and a moving truck, movers, her daughter-in-law, and an "Aunt Patty." Later, when they were almost finished removing items, her daughter-in-law's two nephews also arrived. Over the course of two hours, furniture, dishes, china, some cooking items, pots and pans as well as cooking utensils were placed in the PODS and the moving truck. This witness said she had no knowledge as to any police report being filed by her son or his wife. When her daughter-in-law left there were no items left behind in the house or shed but she had left some furniture and mattresses on the road. The witness also stated that she complained to the police and then had the items removed for a cash payment of $760.00. (A bill, plaintiff's 10 in evidence, was produced).

An original mortgage against the property had been satisfied but in 2001 she took another from the Town to upgrade and update the property. This involved a new roof, siding, windows, removal of a tank and the re-installation of doors, attic stairs, updated electric, and re-doing the bathroom. The mortgage was for $29,000, interest-free and with no payments due until her death or the sale of the property. In order to secure this loan, she wasn't required to have her children's permission. A lien was placed on the property by the Department of Social Services (DSS) for child support and housing when the children's father, Dennis Colasuonno, left in 1981.

On cross-examination it was revealed that from 1986 to 2009 she never sought to nullify the deed. She also hadn't brought an action for child support other than through the DSS, although she could not supply any records of a child support matter being brought. She also acknowledged that the "agreement" does not speak of unpaid child support and after it, other than through DSS, she never brought an action for support of her children. Beginning in February of 1991, she still didn't receive money from Dennis Colasuonno but some "child support" from his Social Security Disability claim payments, so she never brought any other action for child support. When she signed the deed, she knew was the "trustee" as she understood that term. In 2009 her son moved back in with his family. At that time the property taxes were in arrears so they agreed that she'd convert the garage, occupy it, and he would occupy the remainder of the home. She gave him $1600.00 towards materials and he added a bathroom, septic tank, fixed a fence and floors, added a new stove and refrigerator, and installed a shed and did landscaping. When they moved in she paid the tax arrears while her daughter-in-law paid the expenses on her charge card and one-half of the utilities. From 1986 forward, Christopher Colasuonno's name appeared on tax bills and some homeowners' policies. As to the latter nomination, she claimed she did it after he lived in the house in case he lost furniture or other items (but apparently his name had appeared on the policy a year before). She added that certain tax arrears weren't paid by her son but he paid all taxes (except the last) while he was there. She wanted to change deed because the Town said it was not properly written, and she wanted it to provide that if she and her son died, his wife would be able to inherit a share. She denied carelessly storing her son's family's personal property and added that any time they wanted, they were given access to

retrieve their property. When they came with the movers and others, she gave them all the time they wanted to remove any personalty and told them they could come back. Simultaneously, she denied allegations that she gave them only two hours to remove their belongings. As to the hold-over petition, she alleged her son owed rent and there was no written rental obligation, but there was an agreement that he'd pay the taxes. She also denied seeking an Order of Protection merely as a vehicle to remove her son. Also as to the taxes, etc., Dennis Colasuonno and her mother had made the mortgage payments when she stopped working due to pregnancy. As to the letters she annexed to her request to the New York State Board of Real Property Services, her daughter prepared both and her son signed his. He left after the Order of Protection, and when he subsequently returned she saw him take something small.

On re-direct examination she admitted that the holdover petition contained a form which contained errors, including dates and the amount alleged as past-due rent ($950) which she assumed to be the tax due at that time. She also stated that since she never had a checking account she would give her son and daughter-in-law the tax money and they would pay it. Before they moved in, she had a stove and refrigerator which were in good condition; her son and his wife subsequently threw both out. She also reiterated her claim that prior to 2009 her son and his wife had asked to move in claiming he couldn't pay the rent where they were and had to get out by December. Additionally, after 1986 her children received monies from Social Security and she had brought "the agreement" between her and Dennis Colasuonno to the DSS but not to court for enforcement. Finally, she added that her son was employed doing tiling in 2009 and that he had worked on the kitchen, living room, hallway and bathroom with the help of a John Feeley.

On re-cross-examination she indicated she was unsure of the year her son and his family moved back into her home. She stated that her son's approximate monthly share of the cable was $130, electric $260, and the 2008 annual taxes were approximately in the amount of either $5845.00 or $6500.00. On occasion she gave him the cash and he prepared the checks. Returning again to "the agreement" or settlement of child support she seemed to indicate that when DSS sent her to court, she produced the "the agreement" and she and Dennis Colasuonno came to a settlement based upon it. Purportedly, "the agreement" had been reviewed by "a judge"; however, he/she didn't "sign off" on any agreement[3]. On re-direct, however, she indicated she was unsure if the matter went to court or not.

Diana Parisi testified that she is the daughter of Francine LoMaglio and sister of Christopher Colasuonno. She lived with her mother until she married at 22. Her mother raised her and provided for her, and she saw her father on Sundays but doesn't "really" have a relationship with him and hadn't seen him since 2009. Meanwhile, she has seen her mother everyday since she married and moved out of the Lama Drive house. She helped her mother with

---

[3] In his post-trial submission, Counsel for the Colasuonnos refers to a "Judge Spota"; while the Hon. Thomas Spota is the County's District Attorney, there is no "Judge Spota"in this county.

the tax payments in 2005, 2006, and 2010 to the present. This began when her stepfather, Anthony LoMaglio, became sick in 2005 and was unemployed. In 2007 her brother moved back in and she "understood" that he was to pay the taxes in lieu of rent. She also added that he had never claimed to be an owner of the home and had resided there until he was 18 or 19 years old, and, with his family, moved back again until they left in 2009. She was present and observed his wife. her aunt and cousins remove the items of personalty and place them in the PODS and a moving truck. This included boxes of belongings she had previously boxed with her mother and mother-in-law as well as furniture, televisions, all of which had "normal wear and tear." As to the construction loan, she had escorted her mother to the Town. She also admitted defaulting in this action. Additionally, she admitted that her brother had paid the taxes while he was at the house and her husband had helped with some of the renovations. She understood there was a temporary arrangement that her mother would move into the garage and her brother and family into the house and he installed a new refrigerator, stove, shed and did landscaping. As to the letters to the Town, they were prepared by her.

Dennis Colasuonno's testimony indicated that he had met Francine LoMaglio in the early 1970's. Although they never married, she used his surname, including for Social Security purposes. They had purchased the Lama Drive home on November 20, 1972 when he was employed as a BUG serviceman. In 1976 his son was born, his daughter in 1982. He left them the same year and lived with his mother, returning to see his children every Sunday. When Francine LoMaglio married and her husband moved into the Lama Drive home he still owned a portion of the property and therefore believed he was due rent. He denied "the agreement" was about child support, and claimed it was about handing over his share to the children so they would "have a place to live" and have something when they got older. It was he - and not their mother - who decided to give a share to the children as of 1986. Presently, he sees his son weekly, but hasn't seen his daughter for a number of years.

On cross-examination, he denied ever owing any child support, claimed that he had made weekly payments, and wanted Francine LoMaglio to be the trustee. He also added that he provided his children with medical coverage until they were 18. Additionally he indicated that his concern for his children prompted him to secure Social Security benefits for them when he was disabled. He also reiterated his claim that he paid child support and stated that he had purchased their clothing.

Christopher Colasuonno testified that he is employed as a tile setter and lived at the Lama Drive address until he was 21, moved out, then moved back on December 24th, 2007. This followed discussions with his mother: he would be helping her financially as his stepfather was going into the hospital and unable to afford the house—which had always been discussed as "our" property. He insisted that he never had any problems paying his bills and owned another property, 148 Huguenot Drive, Mastic. The conversation with his mother occurred in October of 2007 and it was agreed that he could move into the house and she could move into a bedroom in garage. Rent was not included as he owned the premises. This arrangement was discussed with his sister; also, his mother was to remove her tenant in basement—but she never did. Other than

the cesspool, he paid for all the labor and material and installed carpets in three bedrooms and tiles through the remainder of the house. He also did painting, and, after he moved in, renovated the electrical, drapes, kitchen and bathrooms. This included gutting the main bathroom and replacing the kitchen counter tops, sinks, faucets, dishwasher, oven, stove, refrigerator, lamps and door. He also renovated the shed, the fence, dog kennel, did landscaping, and filled-in the pool. When he moved in he took with him all of his furniture and occupied the house while his mother occupied the garage. During this period—2007 to 2009—he paid the taxes but they split the carrying charges. Once again he strongly claimed that he always pays his bills. As to tax bills, he paid cash, and he also paid the homeowners' insurance policy. He provided a number of receipts (i.e., for the shed, gate and fence). As to utilities and carrying charges, he repeated that they were split but said he paid all of the taxes plus, he believed, all of the homeowners' policy, while everything else was shared. He had a receipt for some furniture (dated 2004) as well as virtually a stack of various and miscellaneous receipts. As to the holdover proceeding, the notice was pasted on his door but nothing happened in court. He denied there was a rental agreement made on or about December 23rd for $950.00 a month and stated that prior to moving in there was never had any rental agreement with his mother. He branded the Order of Protection an outright lie and denied its allegations. After the "stay-away order" was issued he never returned other than with a sheriff. He also revealed that his mother secured an Order of Protection against his wife so they moved into her Aunt Patty's house while all their belongings remained in the Lama Drive house. Three weeks after his arrest he returned with a sheriff who gave him five (5) minutes to remove his property. This was perhaps at 8:00 or 9:00 p.m., and his mother only permitted him into the hallway and to take pictures of items within the bedrooms. He saw the living room and two bedrooms, but was not allowed to look into his bedroom. As to his property, it was crammed into two rooms, scattered about and not in boxes; he offered photos (Plaintiff's "ll" in evidence) which he purported demonstrate that the property was "scattered about."

A year after the Order of Protection issued, his wife went back to Lama Drive and placed their property in the PODS. Upon opening the PODS at his new residence, he noticed things were missing or damaged. He reviewed a document (Plaintiff's "8" in evidence) which lists items which were originally at Lama Drive but were missing, refused, stained and/or damaged. His 1998 bankruptcy papers were offered into evidence[4] apparently as a demonstration of his prior claim to ownership of the premises and as a sample of his signature. As to the latter issue, he insisted that he never signs his name "Christopher" but rather always "Chris." Therefore, he contended, the letter his mother sent to the Town was not signed by him as he would never sign in that fashion.

On cross-examination he indicated that he was not present when the PODS were loaded but later discovered that items were missing. No police report was, however, prepared. The PODS were loaded by four (4) movers as well as his wife and her Aunt Patty. The PODS stayed a day at Lama Drive and then at the Calverton warehouse for weeks, perhaps a month. He

---

[4] As the record reflects, the papers were offered despite the Court's cautioning. TR 12/19/13, pgs. 16-17.

believed that his wife may have made a claim for the missing items with the PODS company. He also indicated that in 2007 he moved from Florida back to Long Island, living for a while in his wife's grandmother's home. His furniture had been moved from Florida, to the grandmother's and then to Lama Drive. He also stated that his children may have caused some slight damage to the furniture but nothing significant. As to the work at Lama Drive, he constructed a bedroom in the garage, a bath, installed a vanity, electric, sheet rock and flooring. He also added that before he replaced them, his mother's appliances were destroyed and/or unuseable and, other than the stove, were not working. Also, she didn't have air conditioning. When he moved in he had dog, so he replaced the old, dilapidated fence and put up a new one, built a dog kennel and a shed. He also left a boat behind which was retrieved by a friend. Once again, he denied signing the letter his mother had sent to the Town.

On his final re-direct examination he gave admittedly a "ballpark" estimate of the cost of the renovations to Lama Drive; it was, in his words, "hard to say" but was "maybe" $40,000.00. Also, using photos, he displayed his boat's condition before and after it was returned to him. Finally, he indicated that since he was five years old he had been told he was a part owner of the house.

Gina Colasuonno testified that she moved to Lama Drive on Christmas Eve, 2007. Two months prior to any construction, she discussed with her mother-in-law and sister-in law the arrangements and that the only way they could help her financially was to allow them to move in. No payment of rent was discussed, but they would occupy main side of house and convert the garage. The house was in poor condition at that time due to her mother-in-law's disability. Previously, Mrs. Colasuonno and her family were renting on Mitchell Drive in Sound Beach and had owned a house in Florida since 2004. Due to a hurricane and missing her family, she "basically left the house." What followed was some litigation over the houses in Florida and Mastic Beach and apparently—her testimony was somewhat unclear—they tendered a deed in lieu of foreclosure for the Florida property. With respect to the Lama Drive 2007 renovations, that involved the removal of 60 to 90 yards of debris, including garbage, magazines, books, vanities, and debris from gutting the garage. After that there was the installation of sheet rocking, plumbing, electrical, and bath fixtures. Neither she nor her husband ever intended this to be a gift; rather it was her "obligation as her husband's wife, to help him" and she "didn't want to see [her] mother-in-law and sister-in-law lose the house and [she] thought it would be a great way for [their] family to live together easier." She added that they had no plans to move but rather to be there until their death. She also stated that they spent upwards of $40,000.00 on the project, approximately half in cash, half on her credit cards and/or financing (such as the carpeting). Her mother-in-law consented and helped in the removal of the debris. As to the carpet, she paid $2130.13; landscaping (plants and trees) was approximately $800.00. She indicated that there had been only minor landscaping previously, consisting of some bushes and trees. She further alleged that her mother-in-law had stated that property was her "husband's house that [the witness] and [her mother-in-law's grandchildren] were welcome to the day [they] died." She added that the cesspool cost approximately $800.00, the grouting and tiles for one room $267.00. Between 2007 and 2009, they had purchased everything for the main house, including fans,

countertops, fixtures, paint, electrical boxes, for upwards of $20,000.00. She had a number of invoices for boiler parts ($80.00), rentals of tools, truck, the fence and mini-blinds ($149.00). She indicated that they had agreed to pay the taxes—which were in arrears when they moved in—and brought them current. When they moved in they brought with them various items such as kitchen and bedroom furniture, utensils, televisions, speakers, personal effects, pictures, bar glasses, throw rugs, dressers, photos, jewelry, jewelry boxes. Their agreement was that they'd pay parts of utilities (3/4 of the electric, ½ the cable) the oil, water and the homeowners' policy.

Apparently there was a dispute in May of 2008. It centered on having her sister-in-law's bridal shower at the house; she refused. Money "was short" so they stopped construction. Continuous fighting began, accompanied by her mother-in-law telling her they had two weeks to get out. On June 19, 2009 the eviction notice arrived. During a confrontation, her mother-in-law indicated that they (Gina and Christopher Colasuonno) had plenty of money and didn't need to live there and she wanted to have them out and the house for her daughter. In November of 2009 her sister-in-law screamed at them and threatened them. The police were called and they arrested the tenant—John Feeley—on a Bench Warrant then returned later and arrested her husband. While the Order of Protection indicates her husband threatened his mother, the witness denied it. That night she slept at her aunt's home. When she returned to Lama Drive the next day, the locks were changed and her mother-in-law told her to get off the property.

Continuing her account of her Order of Protection issue, it was obtained against her by her sister-in-law. She denied any threatening or other such conduct. A temporary order directed her to stay away from the Lama Drive house but no final order issued. Thereafter, however, she was not "welcome back." She vacated the house in June of 2010 although she "physically left" on November 3, 2009 as after that neither she nor her children slept there. On November 4, 2009 she tried to get back in, but her key didn't work and the fence which led to a rear entrance was also locked. When she called the Sheriff in order to remove some items for her family, she was only permitted five or so minutes. She didn't take much beyond the children's backpacks, the dog and personal items for her and the children. June 2010 was the next time she had access. This was arranged by the attorneys and who scheduled two days with times. Prior to that, she had created a list of their belongings (Plaintiff's "8" in evidence). This list was comprised of everything of theirs that was in the house when this action began. Thereafter, she noticed other items were missing from the list. When she went there on June 26 2010 she entered at 9:00 a.m. with her aunt and a cousin, plus four (4) men she had hired. Prior to that, however, she had driven by the house on the evening of November 17, 2009, when she was dropping her daughter off at a nearby dance school. With her were her grandmother and her cousin Robby. At that time she saw her mother-in-law, sister-in-law, and others moving boxes from room to another room. She observed this for over an hour.

Returning to the events of June 2010, she said she had been given access for two days from 9:00 a.m. to 7:00 p.m. She arrived there at 9:00 a.m. when the supervisor of the three movers said he would not be responsible for the condition of the items to be moved. Her mother-in-law, sister-in-law, tenant, and her sister-in-law's mother-in-law were present and prevented her

from going into the master bedroom, kitchen, mother-in-law's room, the basement apartment, kitchen, and laundry room. She was physically blocked from certain areas and a bedroom had been locked. When she entered the children's bedrooms she saw all of her furniture stacked and scratched and damaged, and many items were thrown in piles while others were stained. She had a number of photographs of rooms within house to show the condition of the house, some items, the garage, fencing, renovations, as well as her belongings. She also had photographs of the house when she walked in as well as some of the trash she left behind day she moved out. She stated that she was refused her plants and their pots and that her bedroom furniture was scratched. Some of her belongings were too damaged so they were left behind, including the barbeque. She didn't remove some of the children's furniture and mattresses but took her china cabinet, her bedroom set and kitchen table and loaded them on the PODS. She also took some but not all of her Christmas decorations from the attic. By 11:30 a.m. she was locked out. Both PODS were fully loaded. Items were missing when the PODS arrived at her home but anything that was missing was not noticed until the PODS were opened. Again referring to her list (Plaintiff's "8"), she indicated items which were missing, damaged prior to loading, or refused. Thereafter, on a social media site she saw some of the items she had left behind, including some which she had left as trash. There were a number of items she was never able to place on the PODS. A list (Plaintiff's "kk" in evidence) indicated the price of the items for which she seeks money damages. The amounts she listed reflect her recollection of prices when she had purchased each, as well as items she "look[ed] . . . up . . . in stores and stuff, what they would be worth today or previous to that." Among the few receipts she offered was one for the pool - an item which was not listed as missing. Finally, she indicated that she wants the home to be sold.

On cross-examination, she indicated she had purchased the Florida home through "a jumbo loan" with another home in Mastic Beach. When they returned from Florida they resided with her mother and grandmother at Sound Beach where their furniture was moved, and then—with their furniture—they moved to Lama Drive. When they moved in, the house was in poor condition and renovations had begun months before. They rented dumpsters to remove debris. Returning to the arrest after her sister-in-law's complaint, she went back to the house that night with a sheriff because the key didn't work. She took the dog, dog's dish and food, children's items and food from the pantry. When she returned again on November 16th or 17th, the sheriff had her in front of the house. During the June 2010 return, the moving company she hired was called "Three Movers and a Truck" and they arrived with a supervisor and three (3) movers. Also present were her Aunt Patty and her cousin Joey who came later and took the children's bicycles. The PODS were locked after they were loaded and temporarily left at the Lama Drive location. Thereafter, they were stored from June 26 to August at the PODS company warehouse. She made a claim against the PODS company regarding her goods but not to the police. She reiterated that there were seven (7) people to help in the move, eight when her cousin arrived. In the 2½ hours they were there they loaded as much as they could because she had a limited number of boxes and/or packing equipment. She also said that before they had moved in they had discussed the renovations with her mother-in-law, who never requested or received any money. She also stated that she had the keys to the PODS and they were locked when they were received at her new residence.

Patricia Altamore, the aunt of Gina Colasuonno, testified that before her niece and family moved in, the Lama Drive home "was just a little messy. Lots of cats." After they moved in it was beautiful and they had gutted and stripped portions, did electric and tile work. They lived in main part, and the mother-in-law was to have her own room. In June, when Gina went back to remove her items, they arrived at 9:00 a.m. with her niece, her daughter-in-law, plus the moving men and the place was "a wreck." Francine LoMaglio, her daughter, tenant and boyfriend Jack were present. They were allowed there from 9:00 a.m. to 7:00 p.m. from the "previous judge." Everything was damaged and at 11:45 a.m. the door was shut.

Celeste DiCarlo, grandmother of Gina Colasuonno, testified that the premises was disgusting prior to December of 2007. She had gone to P.C. Richards and Home Depot with her granddaughter and husband to make purchases. On November 16th or 17th of 2009 she had driven past the Lama Drive house and saw furniture being moved.

In rebuttal, Francine LoMaglio indicated that after the June move her son and his wife never returned and there were none of their belongings in the home. She indicated that her kitchen appliances were in excellent condition before they were removed and that she has had problems with some of her son's renovations, specifically with the tile and grout and there was no Certificate of Occupancy for the garage. Also she indicated that she had landscaping prior to her son and family moving in and she produced photographs demonstrating the condition of the home prior to their residing there.

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter that which is less than reliable. Secondarily, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See e.g. Fisch on New York Evidence,* 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, the witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See e.g. N. Westchester Prof. Park Assn. v. Town of Bedford,* 60 NY2d 492 (1983); *Latora v. Ferreira,* 102 AD 3d 838 (2d Dept 2013); *Zero Real Estate Servs., Inc. v. Parr Gen. Contr. Co., Inc.,* 102 AD3d 770 (2d Dept 2013); *Hom v. Hom,* 101 AD3d 816 (2d Dept 2012); *Marinoff v. Natty Realty Corp.*, 34 AD3d 765 (2d Dept 2006).

Also worthy of examination is any witness' interest in the litigation. *See e.g.,* 1 NY PJI3d 1:91 *et seq.*, at p.172. The length of time taken by either side's case or any witness' testimony is,

however, clearly non-conclusive. What can, however, be devastating to a witness' presentation is the fact-finder's determination that a witness testified falsely about a material fact. Under such circumstances and pursuant to the maxim *falsus in uno, falsus in omnibus,* the law has long permitted—but not required—the finder of fact to disregard those portions or even *all* of the testimony. *See Deering v. Metcalf,* 74 NY 501 (1878); *see also,* 1 NY PJI3d 1:22. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See e.g. People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, there is also the purpose and goal of the trial, *viz.*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it; if the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail. *See e.g.* 1 NY PJI3d 1:23.

More specifically with respect to the matter at bar and the particular legal claims presented, the focus begins with the cause of action for partition. Such a claim may be brought by any person holding and in possession of real property as a joint tenant or tenant in common, which that person has an estate of inheritance, or for life, or for years; if successful, its result may be the sale of the property if it appears that a partition of the property cannot be accomplished without great prejudice to the owners. *Deschamps v. Deschamps*, 26 Misc3d 1221(A)(Sup Ct Kings Cty 2010). Albeit statutorily based, partition is equitable in nature and the court may require that the parties do equity between and among themselves if and when an adjusting the distribution of the property is required. *See e.g. Freigang v. Freigang*, 256 AD2d 539 (2d Dept 1998).

Preliminarily an accounting requires establishing that some property has been entrusted in the defendant. *See e.g. Stevens v. St. Joseph's Hosp.*, 52 AD2d 722 (4th Dept 1976). To exercise any right to an accounting requires the existence of a confidential or fiduciary relationship coupled with a breach of the duty that relationship imposes *viz-a-viz* the property in which the party seeking the accounting has an interest. *Dee v. Rakower*, ____ AD3d ____, 2013 NY Slip Op 07443 (2d Dept 2013); *Akkaya v. Prime Time Transp., Inc.*, 45 AD3d 616 (2d Dept 2007); *Town of New Windsor v. New Windsor Vol. Ambl. Corps, Inc.* 16 AD3d 403 (2d Dept 2005).

In an action which seeks to establish a breach of fiduciary duty, the plaintiff must "prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Guarino v. N. Country Mtge. Banking Corp,* 79

AD3d 805 at 807 (citation omitted); *see also Donovan v. Ficus Inv., Inc.*, 20 Misc3d 1139(A) (Sup Ct NY Cty 2008). The sole fact that there is a familial relationship does not create a fiduciary duty. *Juliano v. Juliano,* 42 Misc3d 1226(A) (Sup Ct NY Cty 2014); *Carnivale v. Carnivale,* 34 Misc3d 1232(A) (Sup Ct NY Cty 2012). In essence, a fiduciary relation requires high level of trust or confidence in one which results in superiority and influence, but not where the parties are on equal footing. *See e.g. Royal Warwick, S.A. v. Hotel Representative, Inc.*, Inc.25 Misc3d 878 (Sup Ct Queens 2009).

When seeking the imposition of a constructive trust, the general rule includes the requirement of a sufficient demonstration that "'the property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest.'" *Sharp v. Kosmalski*, 40 NY2d 119 at 121 (1976)(citation omitted); *see e.g. Dee v. Rakower, supra*. "In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: 1) a confidential or fiduciary relation, 2) a promise, 3) a transfer in reliance thereon and 4) unjust enrichment." *Sharp v. Kosmalski, supra,* at 121(citations omitted); *see also Dee v. Rakower, supra; Depena v. Shocker,* 83 AD3d 885 (2d Dept 2011); *In re Wieczorek,* 186 AD2d 204 (2d Dept 1992). The remedy is somewhat flexible, and in this "spirit, the promise need not be express, but may be implied based upon the circumstances of the relationship and the nature of the transaction. Similarly, courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share some interest in property, even though no transfer actually occurred." *Moak v. Raynor,* 28 AD3d 900 at 902 (3d Dept 2006) (citations omitted). However, mere reference to property as "yours" is insufficient. *M. v. F.*, 27 Misc 3d 1205(A) (Sup Ct NY Cty 2010) (also insufficient, testimony all of the work "was for us and our future," they would "work as a team," work and build "for our future," "what's mine is yours, what's yours is mine," "we're working for our family"; while expressions such as these may create a moral obligation, they are insufficient for a constructive trust.) Equally insufficient is a father's remark to his son that the property was "your new home." *Carnivale v. Carnivale, supra.*

With respect to the transfer element, its satisfaction may require an inquiry to ascertain whether it was motivated by love and affection due to a personal relationship, or due to some other rationale—such as a business interest. *Id.; Booth v. Booth*, 178 AD2d 712 (3d Dept 1991). There must, of course be some proof of the transfer, and it has been held that where it purportedly included improvements and/or maintenance, bills, receipts and other documentary evidence have been required. *Depena v. Shocker*, *supra.* Once again, however, and even when such proof has been produced, that evidence must be examined to determine whether it was part of such a relationship's "normal give and take." *Id.* at 887 (citations omitted); *see generally Morone v. Morone*, 50 NY2d 481 (1980). Even where there was a promise—express or implied—and a transfer, there may be a question as to whether the motive for the transfer was the promise or "love and affection due to [a] personal relationship." *Moak v. Raynor, supra,* at 903.

Closely related to a cause of action seeking to impose a constructive trust is one based upon a claim of unjust enrichment as "'the ultimate purpose of a constructive trust is to prevent

unjust enrichment.'" *Dee v. Rakower, supra.* This cause of action is established by proof that a) at that party's expense b) the other party was enriched, and c) permitting the latter party to retain that which is sought to be recovered would be against equity and good conscience. *Id.* In any examination of each of these three elements, the last is the most essential inquiry. *Id.*

With respect to creation of an otherwise "ordinary" trust, no specific, talismanic catechism is required to be proven, but over the years there have been some elements which typically have been required, *viz,* the intent to create a trust, the beneficiaries, the trustee or trustees, the subject property, and the duration. *In re Chantarasmi,* 35 Misc3d 345 (Surrogate's Ct., Westchester Cty 2012). It has also been stated that those elements "are 1) a settlor; 2) a trustee; 3) a beneficiary: 4) a trust res; and 5) a declaration of the terms of the disposition of the trust res." *In re Leverich's Will,* 135 Misc. 774 (Surrogates's Ct. Kings Cty 1929). To create a trust, the declaration must either be explicit, or proof of circumstances to sufficiently demonstrate the intent. *Id.* As to the satisfactorily demonstrated duration of a purported trust, "[a] trust must be manifested and proved by writing and the nature of the trust, and the terms and conditions of it, must sufficiently appear, so that the court may not be called upon to execute the trust in a manner different from that intended." *Dillaye v Greenough,* 45 NY 438, 445 (1871). Indeed, in the century-old words of an appellate court: "If it were clear that the parties intended a trust, and to my mind other hypotheses are equally warranted, how are we to know its duration?" *Fagan v. McDonnell,* 115 AD 89 at 94 (2d Dept 1906). Typically, it is appropriate to calculate the duration as the period necessary to accomplish the trust's purpose. *In re Chantarasmi, supra.* For example, a trust for a child's support has been determined to last during the child's minority, but other facts may infer the intent that it be continued into the child's majority. *Id.* Where a writing is ambiguous, extrinsic evidence may be employed to determine its meaning (*Nappy v. Nappy,* 40 AD3d 825 [2d Dept 2007]) and when a writing alleged to establish a trust is produced another age-old rule still applies: "it must be interpreted, like all other contracts and written instruments, according to the intention of the parties ascertained from the language used and all the surrounding circumstances." *Hutchins v. Van Vecchten*, 95 Sickels 115 at 121 (1893).

With respect to a gift, every valid *inter vivos* gift has three simply stated elements: intent by the donor to give, delivery of the property pursuant to that intent, and acceptance by the donee. *Matter of Szabo*, 10 NY2d 94 (1961); *Mortellaro v. Mortellaro*, 91 AD2d 862 (4th Dept 1982). The burden of proof is borne by the party asserting a gift. *Id.; In re Harper's Estate,* 24 AD2d 681 (3d Dept 1965). "'The hallmark of a gift is that it is 'a voluntary transfer of property without consideration or compensation' and the inquiry focuses on the subjective intent of the donor at the time of the conveyance.'" *Batease v. Batease*, 71 AD3d 1344 at 1346 (3d Dept 2010)(citations omitted).

There are also a number of other legal issues which arose during the trial which deserve mention. For example, there is the original purchase of the property by Francine Lomaglio and Dennis Colasuonno. The rule in such matters is, in the first instance, triggered by the timing of the transfer. When property was purchased prior to 1975 by two persons who were not legally married, any conveyance "as tenants by the entirety" only created a tenancy in common, unless it

was expressly declared to be joint tenancy. *Bucci v. Bucci,* 125 AD2d 286 (2d Dept 1986); *Place v. Cundaro*, 34 AD2d 698 (3d Dept 1970). With respect to post-1975 conveyances, however, where people who were not legally married at the time of the transfer but are indicated in the property's disposition as husband and wife a joint tenancy is created, unless the conveyance is expressly declared as tenants in common. *EPTL* 6-2.2 subd. c*; Hus v. Bosworth*, 194 AD2d 386 (1st Dept 1993); *cf. Jackson v. Pichler*, 23 AD3d 241 (1st Dept 2005)(although purportedly transferring property to the parties by the entirety, the conveyance did not describe them as "husband and wife").

It is also well-settled that Social Security disability benefits paid to a child on the basis of a non-custodial parent's disability are not credited against that parent's child support obligation. *Graby v. Graby*, 87 NY2d 605 (1996); *see In re Grant v. Grant*, 265 AD2d 19 (1st Dept 2000).

Finally, where an award of money damages is sought in a civil action, one of the basic premises in gauging the viability of such an action is the maxim of *damnum sine injuria est injuria sine damnum:* liability without damages is the same as damages without liability. In the absence of proof of both liability by the defendant as well as damages by the plaintiff, the plaintiff will typically not receive any compensation. Also, and assuming the issues of liability and damage are found in the plaintiff's favor, there is a further caveat, *viz*, the proof must contain evidence to support a valid calculation of any monetary award for the damages. Stated otherwise, an award of money damages should not be measured or determined by a whim or caprice; there must be a rational, well-established basis for any such award. Obviously, this rule is not only logical and just, it also reflects the established and historic admonition to avoid awarding damages on whim and/or naked speculation as opposed to some proven, satisfactory method which has some acceptable measure of precision. *See e.g. Goldberg v. Besdine,* 76 AD 451 (2d Dept 1902); *see also Kenford Co., v. County of Erie*, 67 NY2d 257 (1986)*; R. B. v. M.S.* , ___ Misc. 3d ___, 303455/10, NYLJ 1202642854926 (Sup NY 2014). Indeed, in addressing the issue of a claim for damaged personal property the unanimous *Goldberg v. Besdine* panel wrote,

> "There is proof as to the first cost of the articles which the plaintiff claims were injured or destroyed, but they were all in use, and had been in use for some time, and no proof was made of their condition or value at the time of the fire. Under these circumstances, the estimate of the value made by the court was necessarily conjectural, and is not based upon that reasonably precise proof which it was within the power of the plaintiff to furnish and which the law requires."

Goldberg v. Besdine, supra at 452-53.

Although the rule that requires "that damages be reasonably certain, [it] does not require absolute certainty." *Ashland Mgt. v. Janien,* 82 NY2d 395 at 404 (1993) (as long as based upon

reliable factors but without any undue speculation, damages from loss of future profits are often an approximation). *Cf. Vasquez v. Gesher Realty Corp. & B & B Mgt.*, ___Misc 3d ___, 2014 NY Slip Op 24036 (App Term 1st Dept 2014) (in the absence of articulated basis for estimated lost profits, claimed amount for damages indicated as "more or less" insufficient). Under appropriate circumstances where the proof does not provide a sufficient degree of preciseness but there is some support in the record and it is not legally erroneous, the fact-finder may rely upon "reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgement and common sense in arriving at [an] amount." *Matter of Rothko*, 43 NY2d 305 at 323 (1977).

DETERMINATIONS

The Witnesses

The initial focus of the analysis is upon the witnesses' credibility. In that regard, Francine Lomaglio was amply and sufficiently credible and her account appropriately persuasive. Despite being an obviously interested party, she was—as were all the others—a lay witness. What distinguished her from the others, however, was the general cohesiveness of her account, the sincere manner in which it was delivered, her openness and the manner in which her testimony was consistent with the other evidence. While no doubt her account was not absolutely and completely "bullet-proof" it withstood the rigors of cross-examination without any monumental damage.

Diana Parisi's testimony was similarly credible but - due to her limited knowledge - not as crucial to establishing her mother's cause of action. She appeared candid and frank. Also impressive were her responses on those occasions which might have presented her with the opportunity to embellish, exaggerate and/or otherwise "guild the lily." On each occasion, she did not. Instead, she offered succinct but suitably impressive support for her mother's account.

The same, however, cannot be said of her father, Dennis Colasuonno. His animus towards Francine Lomaglio was obvious. Equally obvious during his testimony was his recalcitrance. Moreover, his denial that the deed had nothing to do with his child support flies in the face of an uncontraverted fact: the agreement (which is devoted to his child support responsibilities) was executed simultaneously with the deed. Simply put, such testimony at best flirts with being ridiculous. Also, the undersigned is underwhelmed with his purported concern for his children's welfare and that was his motivation for executing the deed. In the first place, his testimony that he was faithful to his child support is not convincing (nor is it enhanced by the testimony that there was a DSS lien). Additionally, any inference that his Social Security Disability benefit somehow released or supplanted his child support obligation is contrary to law (*Graby v. Graby, supra; In re Grant v. Grant, supra)* and, doubtless, not supported by any proven fact. Moreover, under "the agreement" he was obligated to provide his children with medical coverage until they were 21; it ceased, however, when they were 18. Lastly the amount of his agreed obligation - $20.00 a week

for two (2) children - is far from magnanimous[5]. In sum, he was neither persuasive nor credible, and by no means did he support his son's position.

Christopher Colasuonno was, by far, the least impressive and most incredible of all the witnesses. Before even addressing the substance of his testimony, his bearing and tone carried all of the hazards which accompany an interested witness. Also, he was dogmatic, uncompromising, unyielding and, simultaneously, determined to elaborate - in his favor - on his responses and to carry his answer beyond the scope of a question. Perhaps more telling, however, were some of the items of evidence which, albeit silent, loudly contradict him. For example, the credibility of his adamant and repeated insistence that he pays all his bills is burdened by the fact that he filed for personal bankruptcy a few years ago (and the list of his debts was largely comprised of credit cards).

Secondarily, there is Plaintiff's number 4, referred to above, where—pre-litigation and during better times with his mother—he disavowed any ownership of the premises. That letter is doubly destructive to his case as it not only undercuts his position, it serves as support for his mother's contentions. Were that not harmful enough, however, he compounded his prior inconsistent written statement with another: his attempt to avoid that letter by insisting that the manner in which it was signed (i.e., "Christopher Colasuonno") was in a way he *never* followed. The record, however, reflects otherwise. For instance, a review limited to just the papers contained within the four corners of this matter's file and pleadings reveal that on multiple occasions he has signed his name "Christopher Colasuonno", the manner he now so strenuously repudiates. For examples, one need only peruse his:

a) "Verified Answer and Counterclaims" - 12/29/09;
b) "Verified Amended Answer and Counterclaims and Cross claims" - 7/21/10;
c) "Affidavit" in support of his February 11, 2011 Notice of Motion for Dismissal; and
d) his "Affidavit" in support of a dismissal/summary judgment motion of March 25, 2011.

All of these are signed in the manner he so adamantly and strenuously disavowed.

---

[5] Clearly, "the agreement" was written three (3) years prior to the implementation of the Child Support Guidelines. DRL § 240 (1-b)(b)(3)(ii); L. 1989, Ch. 567. Were that legislation in place at the time of the agreement, his obligation would be to pay 25% of his adjusted salary. Assuming ordinary, typical circumstances and extrapolating from the $20.00 he purportedly paid, his gross salary would have to have been less than $100.00 per week for his contribution to be faithful to the guidelines

Supplementing those contradictions are signatures which may be found within the documentary evidence *he* submitted. Indeed, his "exhibit GG-1" also bears his signature in the same disputed manner twice, once on each of two (2) distinct container rental agreements (dated May 9, 2008 and November 30, 2007).

Individually, each of the multiple deficiencies within his presentation are, at the very least distracting[6], and, at the very worst, beyond troubling. The most distressing, however, are those adamant denials which are contradicted by his own evidence. To capsulize: in assessing his credibility, each of the indicated problems with his testimony provide a clear distraction, collectively they are overwhelming, and the result is greater than the sum of its parts.

His entire testimony, therefore, is rejected. *Deering v. Metcalf,* 74 NY 501 (1878), *supra*; *see also* 1 NY PJI3d 1:22.

Gina Colasuonno was, on the whole, candid and, to a degree, generally credible. Obviously she was an interested witness, and obviously there is animus between and among the members of this family, but she was clearly more believable and accurate than her husband. But that comparison, however, does not render her totally and completely credible nor sufficient. Indeed, her testimony is burdened by her claim that she - along with another six to seven people - were unable to empty a handful of rooms in two hours, especially when four (4) of the workers were paid professionals. Moreover, and as noted below, her proof of the monetary damage is unsatisfying and unpersuasive.

Lastly, the final two witnesses appeared credible, even though they left little doubt which camp they were in. Even if that is overlooked, however, their understandable ignorance of some of the pivotal events diminished their contribution to the resolution the factual and legal issues of this matter.

Findings

Juxtaposing the applicable law to the credible facts and evidence the Court finds the following:

Preliminarily and chronologically, the analysis begins with the transfer of the Lama Drive premises to Francine LoMaglio and Dennis Colasuonno on November 20th, 1974. The deed conveyed the property to "DENNIS A. COLASUONNO and FRANCINE COLASUONNO, his wife . . ." and does not contain any other description of the grant or their interest. Beyond peradventure, they were not, nor were they ever, married. Therefore, that transaction only created a tenancy in

---

[6]At one point he claimed he had been told he owned the property ever since he was five years old (1981); the basis for that is a puzzlement but clearly it could not have been the deed from his father to his mother as that would not occur until 1986, some five years later.

common. *Bucci v. Bucci, supra; Place v. Cundaro, supra.*

The next inquiry emanates from the facts and circumstances of April 15, 1986, when Dennis Colasuonno and Francine LoMaglio executed the deed and "the agreement." As was raised in the August 8, 2011 order of this Court (Pastoressa, J.) and repeated above, the question is whether their intent was either to a) transfer to her all of his interest in the property in to satisfy his child support obligations (as the plaintiff contends), or b) to create an *inter vivos* trust on the children's behalf (and, if so, whether the children were vested with just rights of survivorship or a property interest which ripened upon reaching their majority)

The credible evidence more than supports the former, and the plaintiff's contentions. In fact, that evidence is not only persuasive and convincing, but when measured against any contrary arguments, is overwhelming and by much more than a mere preponderance. Indeed, as was indicated above, in the credibility competition between Francine LoMaglio and Dennis Colasuonno - the two main witnesses to the transfer and events surrounding it - she prevailed. Secondarily, it is an unrealistic stretch of one's imagination to believe that the reason they sought an attorney and the result (the deed and child support agreement) were simultaneously executed but unrelated. Moreover, and what one would naturally expect to flow from the plaintiff's contentions as to their intent is what the credible testimony also demonstrates: he failed to pay child support and she didn't pursue him for it. Their obvious rationale was their mutual understanding that the conveyance was meant to be in full satisfaction of his obligation. Additionally, and consistent with the deed-for-child-support theory is Christopher Colasuonno's pre-litigation admission (contained in Plaintiff's "5" in evidence), *viz,* that his name was placed on the deed so his father could avoid any responsibility for him and his sister. Lastly, the transfer cannot pass muster as a valid *inter vivos* gift. First of all, the burden of persuasion is shouldered by a party making the assertion. *See In re Harper's Estate, supra.* In the matter at bar, however, that has not been met. Besides being incredible, the defense's proffered evidence lacks the element of the parties' required subjective intent. *See Batease v. Batease, supra.* As a matter of fact and law, therefore, that hypothesis is rejected[7].

Similarly unpersuasive is any theory that the property was held in trust. Preliminarily, and what has been repeatedly indicated, the intent of the transfer was to satisfy Dennis Colasuonno's child support obligation. It does not credibly demonstrate any the intent to create a trust. Therefore, no trust exists. *In re Chantarasmi, supra; In re Leverich's Will, supra.* Even if, *arguendo,* the lack of the required intent were somehow overcome, there was a failure to set forth the "trust's" terms and conditions, including its duration. That defect is also fatal. *Dillaye v. Greenough, supra; In re*

---

[7] Also discarded is the contention contained within the defendants' post-trial memorandum that if the intent of the parties was to have the property transferred to Francine LoMaglio and then, on her death, to the children, the attorney would have prepared a quitclaim deed to her. By the same logic, if their intent was as an *inter vivos* trust as the defense now alleges, the attorney would have, presumably, prepared the necessary document(s).

Chantarasmi, supra.

To summarize this aspect of the controversy, the facts and the law overwhelmingly demonstrate that the transfer rendered Francine LoMaglio the sole and exclusive owner of the Lama Drive property. The *quid pro quo* was her forbearance of any right she had to pursue Dennis Colasuonno for child support.

The next analysis focuses on determining whether Christopher Colasuonno has any right, title or interest in the premises. As noted above, his various causes of action sound in partition, accounting, unjust enrichment, constructive trust, and breach of fiduciary duty. Other than the last, each of those actions generally require some cognizable interest in the property. A review of the credible evidence, however, fails to support any such interest.

Chronologically, the first claim he might have would be based upon his father's version of the grant of the property to his mother. As explained above, however, that version has been rejected. He cannot, therefore, dovetail his claim to that event. Secondarily, and as was also indicated above, his admission within his letter to the Town (Plaintiff's "5" in evidence) further undercuts any claim based upon the conveyance between his parents.

The next events deserving examination are the facts, circumstances and understandings relevant to his moving into and improving the premises. While the defense argues that the facts support a cause of action for constructive trust, an objective review of the evidence discloses the contrary. Indeed, one of the critical elements of a constructive trust is a promise, either expressed *(Sharp v. Kosmalski, supra*; *see also Dee v. Rakower, supra; Depena v. Shocker, supra; In re Wieczorek, supra)* or implied (*Moak v. Raynor, supra*). In the matter at bar, however, that element has not been proven.

For example, a review of the record fails to disclose any such promise, and indeed, neither side's post-trial memorandum has disclosed such. There is nothing to indicate that this was beyond a intra-familial accommodation and its "normal give and take" (*Depena v. Shocker*, *supra*) and/or motivated by "love and affection due to [a] personal relationship." *Moak v. Raynor, supra,* at 903. Stated otherwise, where is the promise?

At best, the only reference to any motivation was supplied by the Colasuonno's was that contained in Gina's Colasuonno 's testimony, *viz*, that the venture was the only way they could help her mother-in-law financially and that this was "her obligation as her husband's wife to help him," she "didn't want to see" him, her mother-in-law and sister-in-law lose the house, and she "thought it would be a great way for [their] family to live together easier." That testimony supports a finding that any transfer was not in reliance of any promise but due to the relationship between the parties. Such a basis, however, while answering a question of his motivation included within the above-noted prior order of this Court, does not support a constructive trust. *Depena v. Shocker, supra; Moak v. Raynor, supra.* Similarly insufficient is any reliance on the purported statement by Francine LoMaglio that Colasuonno family was welcome until they died. *M. v. F., supra.*

There is also an omission which while not pivotal is inconsistent with a determination that any reliance was justified (and indeed, in this Christopher Colasuonno can't have it both ways): If he truly believed he had any rightful claim to the property through the April 15, 1984 deed and grant from his father to his mother (as he adamantly claims), presumably his sister was similarly situated. Stated otherwise, besides him and his mother, his sister would also be an owner. It would seem logical, therefore, to assume that in some fashion she would at least have been consulted with and/or informed of the plan; conversely, not to secure her involvement would be imprudent. However, and other than some passing testimony that she was aware of what would appear to be a mutually beneficial financial accommodation between the residents of the home, there is no evidence of the sister's input, involvement and/or acquiescence. That deficiency further weakens any argument that the Christopher and Gina Colasuonno's reliance was prudent and justified.

Lastly, the absence of an adequate proof of justifiable reliance is further significant. In the above-referenced and repeated previous order of this Court underscored that reliance was an element which remained to be resolved. Notwithstanding that warning/hint, the element was not demonstrated.

Therefore, without any promise or any justifiable reliance on any promise, there can be no constructive trust. If that claim fails, so does any interest in the property, a deficiency which also is fatal to the crossclaims for a partition, accounting, and unjust enrichment. Moreover, and with respect to the latter cause of action, that the accommodation was, as noted, essentially a rental arrangement in which the Colasuonnos received value, a value which was the bargained-for benefit of the deal.

As to the remaining crossclaim for a breach of fiduciary duty, there has been no proof that the relationship between Francine LoMaglio, her daughter, and the Colasuonnos was anything beyond familial, much less has there been any showing of misconduct. In absence of such proof, the claim is insufficient. *Guarino v. N. Country Mtge. Banking Corp, supra; Royal Warwick, S.A. v. Hotel Representative, Inc., supra; Juliano v. Juliano, supra; Carnivale v. Carnivale, supra.*

Focusing now upon the second action, that emanates from the Colasuonno's claim that items of their personal property were unlawfully retained by Francine LoMaglio. By the counterclaim, she seeks money damages for the cost of removing the debris caused to be left by the Colasuonnos.

The Colasuonno's claim suffers from a number of insufficiencies. First of all, their version of the claimed wrongful withholding of their property is not persuasive, much less convincing. It so opining, the undersigned notes that the record indicates the undisputed fact that there were seven to eight people who worked for at least two hours to load the property onto a moving truck and two PODS (the latter of which they filled). It is alleged, however, that within that time those seven or eight people - *half of whom were professionals* - could not empty two, perhaps three, rooms and a shed. The undersigned is unable to comfortably embrace that contention and, at best, finds it to be irregular and suspect.

Secondarily, and even if, *arguendo*, the improbability of that position were overlooked, there remains the issue of damages. In support of the loss, the Colasuonno's have submitted a typewritten 14-page list (Defendants' "kk" in evidence) of 600 hundred or so items, including everything from a garlic press, to a livingroom sectional, to a boat. As to the purported financial loss, the schedule merely indicates an item or items followed by an amount, *viz*, "hammer, drill, screwdriver under bar $75.00", "Garlic press $15.00", "2 potato peelers $10.00", "Florida Rottweiler plaque key hanger $40.00", "Signed autograph in frame from LL Cool to Gina $1,000.00", "12 pc 14k gold etched heirloom teas set $2,000.00+?", "Box of old cell ohones (sic)- 6 phones $300.00". As was recounted above, the amounts listed reflect Gina Colasuonno's recollection of the items' purchase prices as well prices she "look[ed] . . . up . . . in stores and stuff, what they would be worth today or previous to that." Beyond that, there is precious little, i.e., no age of an item, its condition, description, or history. There is nothing more, not a thing which so much as gives a clue as to its worth[8]. This borders on - if not surpasses - naked speculation and is below an acceptable measure of precision. *See e.g. Goldberg v. Besdine, supra, Kenford Co., v. County of Erie, supra, R. B. v. M.S., supra*. Indeed, it has been claimed that these items, much like those of *Goldberg v. Besdine, supra,* were damaged or destroyed. Much like the items of that case, those of this matter had been in use for some time. However, in both that case and that at bar there was an absence of proof of an item's condition or value at the time of the loss. As such, in both cases, accepting the estimate of value would be conjectural, and not based upon reasonably precise proof.

The undersigned clearly recognizes that under the circumstances of this case reasonably certain proof might not require absolute certainty. The proffered amounts and their basis, however, do not even qualify as a "more or less". Indeed, to accept the product of this method would, in the opinion of the undersigned, result in amounts based on nothing more than indefensible estimates which do not qualify as even educated guesses. Besides being a process which has such questionable reliability it also appears at odds to the law. *Matter of Rothko, supra.* This is not to indicate that the defendants were tasked with a simple duty. Clearly, just the number of items is daunting. That does not, however, license such a cursory and anorexic presentation. Simultaneously, it should not be overlooked that the amount requested is by no means a trifle sum; that should not only serve as an inducement for a better, more robust and at least more protracted demonstration but should also underscore its importance to both sides. Stated otherwise, the effort expended did not parallel the amount requested. Indeed, and purely as a parenthetical, the method selected might not even pass muster in a small-claims action. *See e.g.* UJCA §1804; UDCA §1804. Lastly, and as indicated within the record, the undersigned - early in the case - specifically indicated

---

[8] Although there is some description of purported damage to a boat and an amount ($3,500.00), there is little to support that amount and, without at least some explanatory testimony, a photograph cannot cure the deficiency.

that valuation would be an issue[9]. That concern, apparently, was not shared[10]. To summarize, proof of both Francine LoMaglio's liability as well as the damages are lacking[11]; as such, the claim must be denied.

Lastly remains the counterclaim for the expense of removing rubbish left behind by the Gina Colasuonno. The factual proof is more than sufficient and, indeed, has been somewhat uncontested. Additionally, the proof of damages ($960.38) has been demonstrated by a paid-in-full receipt (Plaintiff's "10" in evidence). That claim is, therefore, sufficiently established.

It is, therefore, the determination of the Court that the plaintiff, Francine LoMaglio, shall have judgment on her first cause of action and be deemed the sole and exclusive owner of the premises and property. Both of the defendants of that action, Christopher Colasuonno and Diana Parisi, shall execute a quitclaim deed and any other documents required to disclaim any interest in the premises and property.

Similarly, as to her counter-claim contained within the second action, she is awarded judgment against Christopher Colasuonno and Gina Colasuonno in the amount of $960.38, plus statutory interest.

All other causes of action included within both actions are dismissed.

The foregoing constitutes the decision and order of the Court.

Submit judgment on notice.

Dated: 4/2/14
Riverhead, N.Y.

Hon. Ralph T. Gazzillo
A.J.S.C.

Non-Final Disposition

[9] TR12/11/13 (morning session) pg 26.

[10] Indeed, the cases cited by the defense in its post-trial submission (*Tanenbaum Son & Co. v. Baumann & Co.*, 261 NY 85 [1933]; *G & S Quality v. Bank of China*, 233 AD2d 215 [1st Dept 1996]) are readily distinguishable and not persuasive.

[11] Similarly lacking is any satisfactory demonstration of the facts and circumstances of any purported damage to the articles of personalty, *viz,* who did what to which item.