

Xiaopei Jiang v Xiaofeng Hu
2018 NY Slip Op 30576(U)
March 30, 2018
Supreme Court, New York County
Docket Number: 159543/16
Judge: Laura E. Drager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 31**

-----X
XIAOPEI JIANG,

PLAINTIFF,

INDEX NO. 159543/16

-AGAINST-

**DECISION AND ORDER
Motion Sequence No. 1**

XIAOFENG HU and MINXUAN HU,

DEFENDANT.
-----X

LAURA E. DRAGER, J.S.C.:

Defendant Xiaofeng Hu moves, pursuant to CPLR 3211(a), to dismiss this action in which Plaintiff seeks imposition of a constructive trust and related relief, concerning ownership of an apartment at xx West Street, Apt. 29E, New York, NY ("Apt. 29E") titled in the names of the Plaintiff and the two Defendants who are the Plaintiff's daughter and son-in-law.¹

The Plaintiff ("Mother") opposes the motion. Co-Defendant, Minxuan Hu ("Daughter") submits an affidavit requesting that this motion be denied and in support of her Mother's claims.

The Mother's Complaint raises three causes of action: (1) to impose a constructive trust on Apt. 29E; (2) for a declaratory judgment that the Mother is the sole owner of Apt. 29E; and (3) for unjust enrichment and a money judgment against the Defendants for the value of any benefits received by them in connection with their ownership interest in Apt. 29E.

Defendants have not filed an Answer to the Complaint. Instead, Defendant Xiofeng Hu ("Son-in-law") filed this motion seeking dismissal of all claims in the Mother's Verified Complaint. The Son-in-law asserts that the Complaint fails to state causes of action for a

¹ This action was transferred to this court by Justice Robert R. Reed, to whom the action initially was assigned, by order dated February 16, 2017.

Jiang v. Hu
Index No. 159543/16

Motion Sequence No. 1
Page 2

constructive trust, unjust enrichment or for a declaratory judgment pursuant to CPLR 3211(a)(5) and (7). The Son-in-law also asserts that, under CPLR 3211(a)(3), the Mother lacks capacity to bring this action under the fugitive disentitlement doctrine and the doctrine of unclean hands because the Mother is a fugitive under an outstanding warrant for her arrest issued by the United States District Court for the District of Virginia. The Son-in-law also seeks dismissal under CPLR 3211(a)(4) claiming the pending Divorce Action between the Defendants will result in a duplication of the issue pending in this action. The Son-in-law also seeks dismissal under CPLR 3211(a)(5) claiming the statute of limitations has run and the statute of frauds bars Plaintiff's claims.

SUMMARY DISMISSAL

On a motion for summary dismissal pursuant to CPLR 3211, "the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court must assume the truth of the allegations in Plaintiff's Verified Complaint and "resolve all inferences which reasonably flow therefrom in favor of the pleader." *Sanders v Winship*, 57 N.Y.2d 391, 394 (1982). Affidavits and documentary evidence submitted in response to a motion to dismiss may properly be considered and the motion to dismiss granted if the affidavits and documents conclusively establish a defense to the asserted claim as a matter of law. *See, Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 268-269 (1st Dep't 2005), *aff'd*, 94 NY2d 659 (2000). However, where there are disputed questions of material fact a hearing is required and summary dismissal must be denied. *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335 (2011).

The Mother resides in Hong Kong, People's Republic of China. She is unable to enter the United States because her United States passport had been revoked in 2008 for immigration fraud and a federal arrest warrant remains outstanding against her. The Defendants each reside in Manhattan. The Defendants were married on March 24, 2010.

In her Complaint, the Mother alleges that In January 2013, upon being informed that the Daughter was pregnant the Mother expressed concern that the apartment occupied by the Defendants (owned jointly by the Mother and the Daughter) would be too small once the baby arrived. The Mother further claims that, on January 18, 2013, she sent both parties an email proposing that she would purchase as the sole owner a larger apartment for the Defendants, but would include the Defendants on the deed as a matter of convenience since they would be living in the apartment. She would advance the entire purchase for the larger apartment.

On April 22, 2013, the Mother and each of the Defendants signed a contract to purchase Apt. 29E. The closing occurred on August 6, 2013, with funding provided solely by the Mother. The deed for Apt.29E conveys title to the Mother and each of the Defendants. The Mother claims that at the time of the conveyance, she enjoyed a trusting and confidential relationship with the Defendants and relied on a harmonious marital relationship between the Defendants. She claims to have several written communications regarding her intent with respect to the parties' vested interest in Apt. 29E. These communications support her claim that the she never intended the conveyance to be a gift to the Defendants.

The Daughter commenced a divorce action on May 18, 2016 (the "Divorce Action"). Plaintiff filed this action on November 10, 2016.

Failure to State a Cause of Action - CPLR 3211 (a) (7)

Jiang v. Hu
Index No. 159543/16

Motion Sequence No. 1
Page 4

The Son-in-law asserts that Plaintiff's complaint fails to satisfy the elements of a claim for a constructive trust or unjust enrichment and, therefore, must be dismissed. CPLR 3211(a)(7).

A constructive trust is an equitable remedy and its purpose is to prevent unjust enrichment. "Generally, a constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not retain the beneficial interest [citations omitted]. 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 relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment. [citations omitted]." *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976). "These factors, or elements, serve only as a guideline, and a constructive trust may still be imposed even if all four elements are not established." *Tyree v Henn*, 109 AD3d 906, 907-908 (2d Dep't 2013), citing, *inter alia*, *Simonds v Simonds*, 45 NY2d 233, 241 (1978).; *Henning v Henning*, 103 AD3d 778, 780 (2d Dep't 2013). "The constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice." *Liu v. Chen*, 133 AD3d 644, 645 (2d Dep't 2015).

"Unjust enrichment "does not require the performance of any wrongful act by the one enriched (*Lengel v. Lengel*, 86 Misc.2d 460, 465-466, *supra*; *Richards v. Richards*, 58 Wis. 2d 290, 293-294, *supra*; I see, generally, 5 Scott, Trusts [3d ed.], §462.2). Innocent parties may frequently be unjustly enriched. What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it.' (*Miller v. Schloss*, 218 N.Y. 400, 407; see *Sharp v. Kosmalski*, 40 N.Y.2d 119, 123, *supra*; *Sinclair v. Purdy*, 235 N.Y. 245, 253-254)." *Simonds v. Simonds*, 45 N.Y.2d 233, 242 (1978).

A party holding title to real property may be directed to convey that title to another under the theory of constructive trust and unjust enrichment. *See, Coco v. Coco*, 107 A.D.2d 21 (2d Dep't 1985); *Tordai v. Tordai*, 109 A.D.2d 296 (3d Dep't 1985). In *Tordai*, the defendant was directed to convey title to the marital home back to the plaintiff, her Ex-Husband where, during the marriage, the plaintiff transferred sole title to the property to defendant for the purpose of sheltering the property from business creditors. Although the plaintiff never discussed the conveyance with defendant before giving her sole title, the court found an implied promise stemming from the confidential marital relationship at the time of the conveyance and plaintiff's testimony that he never intended a gift of the property to defendant and expected that, in the event of divorce, he could recover the property under a constructive trust theory. 109 A.D.2d at 997.

The court finds that Plaintiff's Complaint adequately satisfies the elements of claims for a constructive trust and unjust enrichment. The familial relationship between Plaintiff and Defendants is sufficient to satisfy the confidential relationship element. *See, Coco v. Coco*, 107 A.D.2d at 24 (mother granted constructive trust against daughter and son-in-law); *Schaffer v. Schaffer*, 17 Misc.2d 592, 593 (Sup. Ct. Spec. Term, Kings Co. 1959) (relationship between and mother and son-in-law considered confidential in the context of a constructive trust claim). Plaintiff's Complaint recites that Defendant Xiaofeng Hu is her son-in-law and Defendant Minxuan Hu is her daughter. (Ex. A, ¶ 6, Moving Papers). The complaint also recites that the Defendants maintained a confidential and fiduciary relationship with Plaintiff. (*Id.*, at ¶17). In the context of this motion to dismiss, those allegations must be accepted as true. *Leon v. Martinez, supra*, 84 N.Y.2d at 87.

The Son-in-law argues that neither the complaint nor the affidavits submitted by Plaintiff allege that the conveyance of the Apartment occurred in reliance on any promise. However, it is well-established that even where no express promise is alleged, an implied promise may be inferred from the circumstances surrounding the transaction. *Sharp v. Kosmalski*, 40 N.Y.2d at 122. The complaint asserts that on January 18, 2013 Plaintiff proposed purchasing a larger apartment for the Defendants with her own funds, that Plaintiff would have ownership of the apartment, but the Defendants could be included on the deed for “convenience.” Plaintiff asserts that this proposal gave rise to a promise by Defendants that Plaintiff would have sole ownership of the apartment. In support of that claim, Plaintiff submits an email dated January 18, 2013. (Ex. A, Aff. in Opp) in which she stated that she would pay the entire price of the apartment; she would be the sole owner of Apt. 29E but would add the Defendants to the deed since they would be living there and might benefit from a tax deduction; and that when the smaller apartment was sold, the funds would be sent to the Mother to defray her costs.

The Son-in-law objects to consideration of this email message because he claims that it is an uncertified translation of the original email message which was written in Chinese and that the translation is inaccurate. *See*, CPLR Rule 2101(b). However, the Son-in-law does not provide a certified translation that would disprove the Mother’s claims. The Son-in-law’s claim merely raises a factual dispute that cannot result in dismissal at this stage of the proceedings.

Plaintiff’s pleadings are sufficient to raise an inference that Defendant’s conduct constituted an implied promise that the Plaintiff would be the sole owner of Apt. 29E, regardless of the names on the title.

The Son-in-law also argues that since the Mother did not hold an interest in Apt. 29E prior to the conveyance to the Defendants, a constructive trust cannot lie. A prior interest in the property is not a prerequisite to finding a constructive trust. *See, Hira v Bajaj*, 182 AD2d 435, 436 (1st Dep't 1992); *see also, Henness v Hunt*, 272 AD2d 756, 757 (3d Dept 2000).

The Son-in-law also contends that the unjust enrichment claim should be dismissed because the Mother knowingly and voluntarily included him on the deed. This assertion merely suggests the Son-in-law's defense and does not warrant dismissal of the cause of action.

The Son-in-law also seeks dismissal of the declaratory judgment cause of action.

The Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief would or could be claimed. . .

CPLR 3001

"A declaratory judgment action 'requires an actual controversy between genuine disputants with a stake in the outcome'. . . If the court has jurisdiction over the subject matter, and if the dispute is genuine, and not academic, 'the dispute will be deemed justiciable and CPLR 3001 will in that regard be satisfied (internal citations omitted).'" *Watson v. Aetna Cas. & Sur. Co.*, 246 A.D.2d 57, 62 (2d Dep't 1998).

Here, Plaintiff's Complaint alleges an actual controversy between genuine disputants regarding whether Plaintiff is entitled to have sole ownership of Apt. 29E. Having found that the Plaintiff sufficiently states a claim for a constructive trust and for unjust enrichment, there is a justiciable controversy between the parties.

For these reasons, the Son-in-law's motion to dismiss for failure to state a cause of action (CPLR 3211 (a) (7)) is denied.

AFFIRMATIVE DEFENSES

The Son-in-law raises affirmative defenses based on the statute of limitations, the statute of frauds, the fugitive disentitlement doctrine and the doctrine of unclean hands, which he claims warrant dismissal of the Complaint.

Dismissal on the basis of the Statute of Limitations – CPLR 3211 (a) (5)

In his notice of motion, the Son-in-law claims the affirmative defense that the Plaintiff's causes of action are barred by the statute of limitations without any factual assertion of the basis for this claim.

Actions based on constructive trust and unjust enrichment claims are subject to a six-year statute of limitations. *See*, CPLR 213(1); *Gershel v. Christensen*, 143 A.D.3d 555, 556 (1st Dep't 2016); *Kaufman v. Cohen*, 307 A.D.2d 113, 127 (1st Dep't 2003). In the context of an action for a constructive trust, the limitations period begins to run when the defendant refuses to perform the promise (whether or implied or express) on which the constructive trust is based. *See*, *Savage v. Savage*, 63 A.D.2d 808, 809 (3d Dep't 1978).

Plaintiff's claim for a declaratory judgment is also governed by the six-year limitations period of CPLR 213(1). *See*, *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 815 (2003) (declaratory judgment action against governor falls within the residuary six-year statute of limitations).

Here, the Complaint alleges that the apartment was purchased in 2013 and the divorce action commenced in 2016. This action was also commenced in 2016. All relevant actions

Jiang v. Hu
Index No. 159543/16

Motion Sequence No. 1
Page 9

occurred well within the statute of limitations period. The Son-in-law's motion to dismiss

Plaintiff's complaint based on the statute of limitations is denied

Dismissal on Basis of Statute of Frauds – CPLR 3211 (a) (5)

Again, the Son-in-law provides no factual basis for his claim that the action must be dismissed because of the statute of frauds. The statute of frauds is not applicable to a claim for a constructive trust over real property "where [it is alleged that] a confidential relation would be abused if there were repudiation, without redress." *Foreman v. Foreman*, 251 N.Y. 237, 240 (1929). A claim for a constructive trust over real property "can be imposed even where an underlying agreement is not in writing," *Thomas v Thomas*, 70 AD3d 588, 591, 896 N.Y.S.2d 30 (1st Dept 2010). Here, no written agreement is required because Plaintiff claims that the trust and confidence she placed in Defendants would be abused if they are permitted to retain an ownership interest in Apt. 29E. As a result, the Son-in-law's affirmative defense that Plaintiff's claims are barred by the statute of frauds is dismissed.

Doctrines of Fugitive Disentitlement and Unclean Hands – CPLR 3211 (a) (3), (5)

The Son-in-law asserts that Plaintiff is barred from prosecuting this action because she is a fugitive from a December 21, 2006, arrest warrant issued against her in connection with federal criminal charges of conspiracy to commit passport fraud and unlawful procurement of citizenship or naturalization. (Ex. B, Moving Papers). According to her criminal defense attorney, the Mother was not in the country at the time of her indictment and, therefore, did not flee the jurisdiction. (Peter Kahn Aff., Opp. Papers). The arrest warrant remains outstanding (Joseph Aff. in Support, ¶151).

The fugitive disentitlement doctrine applies to individuals “who evade the law while simultaneously seeking its protection. . . The doctrine applies in civil cases provided there is a nexus between an appellant’s fugitive status and the appellate proceedings.” *Wechsler v. Wechsler*, 45 A.D.3d 470, 472 (1st Dept 2007). Plaintiff’s status as a fugitive relates to federal charges alleging passport and immigration fraud and not to issues raised in the present action. Thus, there is no nexus between Plaintiff’s status as a fugitive and the issues in this case. As a result, the fugitive disentitlement doctrine is not a bar to this action.

Alternatively, the Son-in-law asserts that the doctrine of unclean hands due to the Mother’s fugitive status warrants dismissal of this action. The doctrine of unclean hands “is never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct (citations omitted).” *National Distillers & Chemical Corp. v. Seyopp Corp.*, 17 N.Y.2d 12, 15-16 (1966) (internal quotation marks and citation omitted). In this case, there is no relation between Plaintiff’s conduct and the subject matter of this action and the Son-in-law does not claim to have been harmed by her fugitive status. As a result, the doctrine of unclean hands is not a bar to this action.

The Son-in-law argues that Plaintiff’s presence before this court will be required, at the very least, to testify at trial concerning her claims. At this juncture, that argument is unavailing because Plaintiff’s ability to re-enter the United States for proceedings in this action is not

Jiang v. Hu
Index No. 159543/16

Motion Sequence No. 1
Page 11

presently known. In any event, other arrangements could be made available to enable the taking of her testimony.²

The Son-in-law's motion to dismiss on these grounds is denied.

The Pendency of the Divorce Action - CPLR 3211(a)(4)

The Son-in-law asserts that dismissal under CPLR 3211(a)(4) is warranted because the issues raised in Plaintiff's action duplicate issues concerning equitable distribution of Apt. 29E raised in the Divorce Action.

CPLR 3211(a)(4) provides that a party may move for dismissal if:

(4) there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.

The Son-in-law points to the demand made in the Daughter's divorce complaint seeking "that [she] shall be entitled to exclusive possession and ownership of [Apt. 29E]." (Ex. C, Son-in-law's Reply Aff.). However, the Mother is not a party to the Divorce Action and the issues raised in the two actions are not comparable. Thus, this action cannot be dismissed. It may be that resolution of this action will affect any distribution possible in the Divorce Action. Since both actions are now pending in the same part, the court can oversee the resolution of both cases, including determining which action should be tried first. The motion to dismiss this action due to the pendency of the Divorce Action is denied.

Alleged Procedural Defects

² It may be appropriate for Plaintiff to appear via video transmission, such as Skype, if she is not able to be physically present. However, it is premature for the court to address whether such an appearance may be appropriate.

Jiang v. Hu
Index No. 159543/16

Motion Sequence No. 1
Page 12

Finally, although not asserted in his notice of motion, the Son-in-law raises certain procedural defects. He claims the Complaint does not give sufficient notice of the transactions or occurrences intended to be proved as required by CPLR 3013. The court rejects this argument. The Complaint gives notice that Plaintiff intends to prove that Apt. 29E was purchased with the intent that she would have sole ownership of it. It states that Plaintiff paid all the purchase money and title was placed in joint names as a convenience.

The Son-in-law also argues that the Complaint fails to meet the requirement of particularity for an action involving fraud and/or misrepresentation as required by CPLR 3016(b). That argument is unavailing because the Complaint does not assert a cause of action for fraud or misrepresentation.

To the extent that the Son-in-law argues that these alleged procedural defects require dismissal, his application is denied.

Accordingly, it is hereby

ORDERED, that the motion brought by Defendant Xiaofeng Hu to dismiss this action is denied in all respects; and it is further

ORDERED, that any relief not granted is denied.

This opinion is the Decision and Order of the court.

Dated: March 30, 2018

ENTER:



Hon. Laura E. Drager, J.S.C.