

Pik Sim G. Liu v Kim Sum Kenneth Pung
2019 NY Slip Op 31187(U)
April 15, 2019
Supreme Court, Kings County
Docket Number: 518100/16
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of April, 2019.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

-----X

Pik SIM G. LIU,

Plaintiff,

- against -

Index No. 518100/16

KIM SUM KENNETH PUNG,

Defendant.

-----X

The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-3</u>
Opposing Affidavit (Affirmation) _____	<u>4-6, 7-8</u>
Reply Affidavit (Affirmation) _____	<u>9</u>

Upon the foregoing papers, defendant Kim Sum Kenneth Pung (Kenneth) moves, pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7) and/or 3212 (b), for an order dismissing the second amended complaint.

The parties, Kenneth and plaintiff, Pik Sim G. Liu (Grace), are brother and sister. Kenneth and Grace have two sisters, Amy Lee and Sylvia Facella, who are not parties to this action. This dispute concerns real property that Grace and her husband sold to Kenneth, and Grace's claims that other real property, rental income, stocks and life insurance that their

parents (Phong Pung and So Ying Pung) transferred to Kenneth before they died should be divided among all four siblings as part of their mother's estate.

Grace and her husband allege the following: They agreed to sell their residence at 2250 East 22nd Street in Brooklyn (2250 Property) to Kenneth at a discounted price if Kenneth agreed to remodel the first floor to accommodate their elderly mother. She and her husband were several years behind on their mortgage payments, and they listed the 2250 Property for sale after they received a foreclosure notice. She and her husband gave up a \$430,000 offer which had been made for the 2250 Property. On July 21, 2012, Grace transferred the 2250 Property to Kenneth for \$360,000. Kenneth told Grace and her husband that "all of the money was used to pay off the mortgage," but Grace "recently discovered that only \$276,860.59 was paid to the bank . . ." and she "never received a single penny from the transfer".

According to Grace, the parties had agreed that the profit she would have had from the \$430,000 offer would count as her contribution to the 2250 Property and she would have an 'equal share' in the Property. Kenneth promised that he would return half ownership to Grace or her daughter upon the passing of their Mother. Their mother made an audio recording "stating her dying wishes," that Kenneth "fulfill his promise to return half of the interest of the 2250 Property back to [Grace] by adding [her] oldest daughter...to the deed".

Kenneth allegedly completed renovations at the 2250 Property in late 2013, after which their Mother and Grace's family moved into the 2250 property. Kenneth allegedly

requested that Grace pay \$1,000 per month for household expenses. Grace took care of the Mother until she passed away in December 2015, after which Kenneth refused to transfer half of his interest in the 2250 Property back to Grace. Kenneth allegedly claimed that he put significant money into renovating and decorating the house and “refused to disclose the total cost and fees of the work done on the 2250 Property”. Grace alleges that “at least \$68,000.00 of the total cost and fees expended on renovations actually belonged to their Mother, which allegedly included rental income that Kenneth collected on their mother’s behalf and their father’s insurance benefits.

The 722 Property

Grace alleges that in 2007, the parties’ parents started to transfer all their valuable assets to Kenneth so that they could qualify for Medicaid, including 722 Avenue U in Brooklyn (722 Property). The 722 Property has a commercial laundromat on the ground floor, which the parents transferred to their eldest daughter, Amy Lee, and two rental units.

Before the transfer of the 722 Property, at a family meeting, the parents allegedly asked all four children if they wanted to add their names to the new deed because the parents wanted the 722 Property to be equally divided among their four children after they passed away. Grace alleges that “[a]ll three sisters chose to pass for the convenience of one person to handle problems that may arise with the property”. At the meeting, Kenneth allegedly promised that he would not keep the 722 Property for himself after the parents passed away as this was the parents’ wish. Grace alleges that she and her sisters “had an understanding

... that [Kenneth] would manage the 722 Property for all four children's best interests and eventually divide the property amongst the siblings when the parents pass away".

Rental Income, the Laundromat, Stocks and Life Insurance

Grace also alleges that Kenneth agreed to collect the rent at the 722 Property on their mother's behalf, but Kenneth kept part of the rent for himself. In 2009, Amy Lee transferred the laundromat business to Kenneth "per the parents' instruction so that [he] could manage it for the benefit of all four children". Grace further alleges that her parents "gave [Kenneth] money for [him] to purchase and manage stocks for [their] benefit," Kenneth "included himself as a joint owner of all the stocks that the parents owned" and, after their parents passed away, Kenneth became the owner of the stocks.

In addition, Grace alleges that their mother transferred ownership of her Metlife insurance policy to Kenneth so she could qualify for Medicaid. Grace alleges that, although their mother asked Kenneth to share the insurance proceeds with his siblings, Kenneth "received and kept to himself the entire amount of the Mother's insurance money". Grace further alleges that "[d]espite many discussions and arguments among the four children and [their] repeated requests [that Kenneth] equally divide all the assets that the Mother wished to leave to all four children, [Kenneth] claims that all the assets of the Mother's estate belong to him and him alone".

The Pleadings

Grace's second amended complaint, filed on May 29, 2018, asserts nine causes of action for: (1) unjust enrichment; (2) fraud; (3) fraudulent inducement; (4) breach of fiduciary

duty; (5) promissory estoppel; (6) equitable estoppel; (7) constructive trust regarding the 2250 Property; (8) constructive trust regarding the 722 Property; and (9) constructive trust regarding their parents' stocks and life insurance proceeds.

On June 29, 2018, Kenneth answered the second amended complaint, denied the material allegations therein and asserted affirmative defenses, including the statute of frauds.

Kenneth's Summary Judgment/Dismissal Motion

Kenneth filed the instant motion for an order dismissing the second amended complaint, pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7) and/or 3212 (b). Kenneth submits an affidavit attesting that, on or about July 5, 2012, Grace and her husband agreed to sell to me the [2250 Property] for the purchase price of \$360,000 (the 'Contract of Sale'). Kenneth submits a copy of the fully executed Contract of Sale, which reflects that Grace and Tony were represented by counsel. Paragraph 28 (a) of the Contract of Sale provides that:

“[a]ll prior understandings, agreements, representations and warranties oral or written, between Seller and Purchaser are merged in this contract, it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract”

Paragraph 7 of the Rider to the Contract of Sale provides that “Purchaser agrees to take the premises subject to the Seller,” “Seller shall stay in the premises after the closing” and “no landlord/tenant relationship is intended to be created by this provision.”

Regarding the 722 Property, Kenneth attests that, on or about September 4, 1984, his parents purchased the 722 Property “and included me . . . on the deed,” and submits a copy of the 1984 deed reflecting that the 722 Property was transferred to Kenneth and his parents.

Kenneth also attests that “[o]n September 27, 2007, our parents . . . transferred their 50% interest in the 722 Property to me and retained a life estate for themselves,” and submits a copy of the 2007 life estate deed filed in the City Register’s office on September 27, 2007 under CRFN 0005228899.

Kenneth further attests that “[o]n September 28, 2007, ownership of MetLife Insurance Company Policy 926100978A was transferred” to him from his mother, and submits a March 13, 2017 letter addressed to him from MetLife confirming that he became the owner of the life insurance policy as of September 28, 2007. In addition, Kenneth attests that on or about January 10, 2010, his mother transferred her MetLife policyholder shares to him, and submits “completed transfer forms” with his mother’s signature authorizing BNY Mellon Shareowner Services to transfer ownership of all shares to Kenneth.

Kenneth also attests that “[s]tarting in or about 1999, I had a joint investment account with my father . . . at Ameritrade, formerly known as TD Waterhouse,” and he collectively submits copies of the 1999, 2001, 2002, 2003 and 2008 statements for that joint account. Kenneth attests that he had a joint account with his mother at Ameritrade, and he submits copies of the 2001, 2002, 2005 and 2008 through 2016 statements for that joint account.

Regarding the laundromat, Kenneth attests that “[o]n or about February 2009, Ocean City Laundromat Inc., the company owned by our sister Amy Lee . . . sold its assets to 722 Ave U Laundromat Inc., the company that [he] formed to operate a laundry business at the 722 Property.” Kenneth submits the February 26, 2009 Closing Statement for the sale reflecting that: (1) the sales price was \$40,000.00; (2) “Seller acknowledges payment in

full”; (3) Amy Lee was represented by counsel; and (4) both parties executed the Closing Statement.

Grace's Opposition

Grace, in opposition, argues that summary judgment “would be premature at this stage of litigation... the parties have yet to complete discovery [and] depositions have yet to have been conducted.” Grace asserts that “there are significant and essential facts that still need to be discovered through oral examination of [Kenneth],” including “what [he] knows about the parent’s money he borrowed, the promises he made to the parents and siblings regarding the 722 Property and the promise to [her] regarding the 2250 Property . . .” Grace contends that without deposing Kenneth, she “does not know his side of the story and [her] position cannot be adequately defended.”

Regarding her first cause of action for unjust enrichment concerning the 2250 Property, Grace specifically asserts that she “did not bring a breach of contract claim based on the Contract of Sale because [Kenneth] violated a separate and distinct agreement . . . wherein [she] promised she would take care of Mother and forego a higher profit of the house in exchange for half the house back.” Essentially, Grace contends that Kenneth was unjustly enriched because he got the benefit of Grace taking care of his Mother.

Grace argues that her second causes of action for fraud, her third cause of action for fraudulent inducement, her fifth cause of action for promissory estoppel and her sixth cause of action for equitable estoppel regarding the 2250 Property are not subject to dismissal

because Kenneth promised and agreed that he would return half ownership to her in return for the undervalued price of the property and her care of their Mother.

Grace further contends that her fourth cause of action for breach of fiduciary duty states a valid claim regarding the 2250 Property because a fiduciary relationship was created by their close family bond, and Kenneth breached that duty by refusing to give Grace her “share” of the 2250 Property. And that there are triable issues of fact that preclude summary judgment dismissing her seventh cause of action for a constructive trust for the 2250 Property because Kenneth denies that Grace promised she would take care of their Mother and forego a higher profit of the house in exchange for half the house back.

Regarding her first cause of action for unjust enrichment, Grace contends that Kenneth was unjustly enriched because he retained their parents’ rental income from the 722 Property, insurance proceeds and stocks, which should have been part of the parents’ estates. Grace thus argues that money from the 722 rental income belonged to the parents’ estate and, as “a beneficiary of her parents’ estate she has a claim against Kenneth. Grace argues that it is against equity that Kenneth should retain their parents’ insurance when he was supposed to divide it among the siblings pursuant to her Mother’s wishes. Grace also asserts that “there is an issue of fact as to whether Kenneth owns the stock outright or they belong to the parents’ estate.

Similarly, Grace argues that her second cause of action for fraud based on Kenneth’s receipt of their “parents’ assets” states a valid cause of action because she “is a successor in

interest to the parents by being an heir and beneficiary of the parents' estate" and their "parents transferred the 722 Property on reliance of [Kenneth's] promise" "that he would not keep the 722 Property to himself after the parents passed away."

Regarding the fourth cause of action for breach of fiduciary duty, Grace argues that there is a fiduciary relationship between her and Kenneth because "this was a close family relationship between a sister and a brother" and "[t]his family bond should be considered as creating a fiduciary relationship . . ." Grace contends that Kenneth "breached that duty by not giving [her] her share in the . . . 722 Property and the parents' assets."

Grace argues that her fifth cause of action states a valid claim for promissory estoppel regarding her parents' assets, including the 722 Property, because it alleges a "sufficiently clear and unambiguous promise" by Kenneth "to the parents and siblings that he would not keep the 722 Property to himself . . ."

Grace contends that her eighth cause of action for a constructive trust for the 722 Property sufficiently alleges that Kenneth "promised not to keep the 722 Property to himself therefore the siblings forewent the chance to be name[d] on the deed and the parents transferred the 722 Property to [Kenneth]." Grace asserts that she has "an actual prior interest" in the 722 Property because she "is a successor in interest to the parents by being an heir and beneficiary of the parent's estate."

Finally, Grace contends that summary judgment dismissing her ninth cause of action for a constructive trust for her parents' stocks and life insurance proceeds is unwarranted

because there are questions of fact regarding “what happened to the life insurance policies” and “whether [Kenneth] owns the stock outright or [it] belong[s] to the parents’ estate . . .”

Discussion

The 2250 Property

Regarding the 2250 Property, Kenneth seeks summary judgment, pursuant to CPLR 3212 (b), dismissing the first cause of action for unjust enrichment and the seventh cause of action for a constructive trust. Kenneth also seeks dismissal of all claims regarding the 2250 Property, pursuant to CPLR 3211 (a) (1), (a) (5) and/or (a) (7), including: (1) the first cause of action for unjust enrichment; (2) the second cause of action for fraud; (3) the third cause of action for fraudulent inducement; (4) the fifth cause of action for promissory estoppel; and (5) the sixth cause of action for equitable estoppel.

In order to state a cause of action for unjust enrichment “[a] plaintiff must show that (1) the other party was enriched, (2) at [plaintiff’s] expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotations omitted]). “The doctrine of unjust enrichment invokes an ‘obligation imposed by equity to prevent injustice, *in the absence of an actual agreement between the parties concerned*” (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [emphasis added]). “[A] party may not recover in

... unjust enrichment where the parties have entered into a contract that governs the subject matter” (*Pappas*, 20 NY3d at 234 [quoting *Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 (2008)]).

As Grace and her husband’s sale of the 2250 Property to Kenneth was governed by the parties’ July 5, 2012 Contract of Sale, that portion of the first cause of action for unjust enrichment that relates to Grace’s sale of the 2250 Property fails, as a matter of law.

Grace’s argument ignores the fact that the parties’ Contract of Sale for the 2250 Property contains a merger clause, which precludes Grace from presenting evidence of an alleged oral agreement with Kenneth regarding the 2250 Property, as a matter of law (*see Connolly v Certilman Balin Adler Hyman, LLP*, 122 AD3d 790, 791 [2014] [holding that unjust enrichment claim was properly dismissed because “(t)he merger clause of the Partnership Agreement governs the particular subject matter at issue”]).

The merger clause in the Contract of Sale for the 2250 Property specifically states that “neither party rel[ies] upon any statement made by anyone else that is not set forth in this contract.” It also precludes Grace’s second and third causes of action for fraud and fraudulent inducement, respectively. The Appellate Division, Second Department has held that “a cause of action alleging fraudulent inducement may not be maintained if specific disclaimer provisions in the contract of sale disavow reliance upon oral representations” (*Tarantul v. Cherkassky*, 84 AD3d 933, 934 [2011], quoting *Laxer v Edelman*, 75 AD3d 584, 586 [2010]). For this same reason, Grace’s second cause of action for fraud is also subject to

dismissal (*see Natoli v. NYC P'ship Hous. Dev. Fund Co.*, 103 AD3d 611, 613 [2013]).

Grace's fifth cause of action for promissory estoppel regarding the 2250 Property is also subject to dismissal. Grace could not rely on an oral promise, as a matter of law, based on the disclaimer in the Contract of Sale. "The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made and an injury sustained in reliance on that promise" (*AHA Sales, Inc. v Creative Bath Prod., Inc.*, 58 AD3d 6, 20-21 [2008] [internal quotations omitted]). For the same reason, Grace's sixth cause of action for equitable estoppel is also subject to dismissal because Grace cannot prove "reliance upon the conduct of the party estopped," which is an element of that claim (*see Wallace v BSD-M Realty, LLC*, 142 AD3d 701, 703 [2016]).

Grace's seventh cause of action for a constructive trust regarding the 2250 Property likewise, must be dismissed. "To obtain the remedy of constructive trust, a party is generally required to establish four factors, or elements, by clear and convincing evidence: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment flowing from the breach of the promise" (*Seidenfeld v Zaltz*, 162 AD3d 929, 934-935 [2018]). Contrary to Grace's assertion, "[t]he mere fact that the parties are siblings, standing alone, is insufficient to support a fiduciary relationship" (*Castellotti v Free*, 138 AD3d 198, 209 [2016]). In addition, as previously discussed, Grace cannot establish either reliance or unjust enrichment.

Accordingly, the first, second, third, fifth, sixth and seventh causes of action are

dismissed *only* to the extent that they are based on the 2250 Property.

The first cause of action for unjust enrichment is also based on allegations regarding the rental income from the 722 Property which allegedly should have become part of the Mother's estate and wrongfully retained all the insurance and other assets.

The second cause of action for fraud is also based on the allegation that Kenneth fraudulently misrepresented that he would manage the parents' assets for all four siblings in order to induce Grace not to add her name to the titles to those assets, while his true intent was to keep all the parents' assets to himself. The fourth cause of action for breach of fiduciary duty is based on the allegation that the parents transferred titles to the 722 Property, the stocks and the life insurance policies to Kenneth with the intent that he would manage those assets for the benefits of all four children while the parents were alive and equally divide those assets among the four children when the parents passed away. The fifth and sixth causes of action for promissory estoppel and equitable estoppel allege that Kenneth promised to manage the parents' assets for the benefit of all four children. The eighth and ninth causes of action seek the imposition of constructive trusts regarding the 722 Property, the stocks and life insurance proceeds that the parties' parents transferred to Kenneth before they died.

Grace asserted the foregoing claims on behalf of herself and her two non-party sisters, Amy Lee and Sylvia Facella, as potential intestate beneficiaries of their parents' estate, and thus, those claims, under Second Department appellate authority, should appropriately be

transferred to the Surrogate's Court for resolution (*see Soscia v Soscia*, 35 AD3d 841, 843 [2006]; *Ahders v Ahders*, 176 AD2d 230, 230 [1991]; *Coccellato v Coccellato*, 168 AD2d 872, 872 [1990]). Accordingly, it is

ORDERED that Kenneth's motion is granted to the extent that the first, second, third, fifth, sixth and seventh causes of action are dismissed *only* to the extent that they relate to the 2250 Property, and is otherwise denied; and it is further

ORDERED that Grace's remaining claims against Kenneth relating to their deceased parents' assets, including the 722 Property, stocks and life insurance proceeds (the first, second, fourth, fifth, sixth, eighth and ninth causes of action), are hereby severed and transferred to the Kings County Surrogate's Court for further disposition; and it is further

ORDERED that the Kings County Clerk's office is hereby directed to deliver the case file to the Chief Clerk of the Surrogate's Court.

This constitutes the decision and order of the court.

ENTERED WITH,



J. S. C.

Karen B. Rothenberg
Justice, Supreme Court