

<b>Choudhari v Choudhari</b>
2020 NY Slip Op 33553(U)
October 21, 2020
Supreme Court, Kings County
Docket Number: 503545/2017
Judge: Bernard J. Graham
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

Index No. 503545/2017

MOHAMMAD CHOUDHARI,

Plaintiff(s),

**DECISION**

-against-

Present:

MUSTAFA CHOUDHARI,

Defendant(s).

**Hon. Judge Bernard J. Graham**  
Supreme Court Justice

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this Motion :**  
Defendant’s Motion to Amend the Complaint and Plaintiff’s Cross-Motion for Partial Summary Judgment:

<b>Papers</b>	<b>Numbered</b>
Defendant’s Notice of Motion and Affirmation in Support ....	<u>1-2</u>
Plaintiff’s Cross-Motion and Aff. in Support.....	<u>3-4</u>
Defendant’s Aff. in Opp. To Cross-Motion.....	<u>5</u>
Defendants Supplemental Aff. in Opp to Cross-motion.....	<u>6</u>
Plaintiff’s Affirmation in Opposition.....	<u>7</u>
Plaintiff’s Reply Affirmation.....	<u>8</u>
Other: <u>Defendant’s Memorandum of Law</u>	<u>9</u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

***Decision:***

In this captioned lawsuit, the defendant, Mustafa Choudhari (“Mustafa”) (by his former attorneys)<sup>1</sup> has moved to amend his answer pursuant to CPLR §3025(b) to add a counterclaim for a constructive trust. The plaintiff, Mohammad Choudhari (“Mohammad”) by his attorneys,

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<sup>1</sup>Defendant Mustafa Choudhri had been represented by the office of Rubin and Licatasi, Esq.’s who had submitted an answer on his behalf. On or about September 23, 2019, the Lanin Law PC office, by Scott Lanin, was substituted as counsel for Mustafa Choudhari. Lanin Law PC has also submitted supplemental opposition to the plaintiff’s Cross-Motion.

has cross-moved pursuant to CPLR §3212 for partial summary judgment and a determination of the ownership rights of certain real property involved in this dispute pursuant to Article 15 of the RPAPL.

At issue in this dispute is the ownership of two (2) parcels of real property in Brooklyn, New York which are known as 1474 Broadway, Brooklyn, New York (“1474 Broadway”) and 1472 Broadway, Brooklyn, New York (“1472 Broadway”).

Both 1474 Broadway and 1472 Broadway, according to the undisputed evidence, were owned solely by plaintiff Mohammed in fee title after Mohammed had purchased both properties in 1986 from the City of New York. (See Ex’s “A” and “B” annexed to Plaintiff’s Affirmation in Support of the Cross-Motion for Partial Summary Judgment).

The instant litigation was initiated by plaintiff Mohammed based on allegations that defendant Mustafa had committed deed fraud by executing new deeds for the subject properties in which he included himself as a one-half owner of the properties with his brother (Plaintiff Mohammad). Defendant disputes these allegations and seeks to offer an affirmative defense based on the principal of “constructive trust” and additionally arguing that he had legal authority for the deed transfers based on holding a power of attorney that had previously been given to him by the plaintiff.

For the reasons set forth below, the Court denies the defendant Mustafa’s motion to amend his complaint to add a counterclaim for constructive trust. The Court grants the plaintiff Mohammad’s cross-motion for partial summary judgment, finding that the transfers of title in the subject properties were done fraudulently by the defendant Mustafa who committed deed fraud in the execution of both deeds in question and summary judgment is appropriate.

**Procedural History:**

Plaintiff Mohammed filed a summons and complaint on February 22, 2017 for “quiet title” pursuant to RPAPL §1515, alleging that defendant Mustafa had committed deed fraud in the transfer of partial ownership of the 1474 Broadway property.

An answer was filed on April 20, 2017 on behalf of defendant Mustafa. Defendant Mustafa included a counter claim for \$250,000 for alleged loans made by defendant to the plaintiff.

After the lawsuit was commenced it is alleged that defendant Mustafa fraudulently transferred a one-half ownership interest in the second property, 1472 Broadway, by deed dated March 22, 2017. (Copies of the deeds transferring interests in both properties are annexed to Plaintiff's Motion for Summary Judgement as Ex.'s "C" and "F").

Plaintiff filed a second lawsuit by summons and complaint on June 8, 2017 (index number 511353/2017) to quiet title regarding the 1472 Broadway property and for unjust enrichment. Defendant filed an answer to the second summons and complaint on June 22, 2017.

The two lawsuits were consolidated by order of this Court on April 11, 2018.

An order to show cause was filed on behalf of plaintiff Mohammed on or about July 5, 2017 which sought to stay any transfers of the subject properties and the order was signed by the undersigned.

On or about June 13, 2018 defendant, by his attorneys, filed a motion to amend his answer to add a cause of action for a constructive trust.

Defendant has filed the instant cross-motion for partial summary judgment pursuant to RPAPL Article 15 seeking a determination as to the ownership of both 1472 and 1474 Broadway (the "subject properties").

Argument was heard before the undersigned, by virtual conference, on August 6, 2020.

**Plaintiff's Contentions:**

Plaintiff Mohammed had acquired fee simple title to both 1472 Broadway and 1474 Broadway from the City of New York in December 2018 (copies of the deeds issued to plaintiff are annexed as Ex. "A" and "B" to the Cross-Motion for Summary Judgment).

The first deed transfer occurred on October 12, 2016, in which title to 1474 Broadway was transferred by deed from Mohammad Choudhari to Mohammad Choudhari and Mustafa Choudhari in equal shares. (See Ex. "C" annexed to the Cross-Motion).

The second transfer of property occurred on March 22, 2017 when title to 1472 Broadway was transferred from Mohammad Choudhari to Mohammad Choudhari and Mustafa Choudhari in equal shares. (See Ex. "F" annexed to the Cross-Motion).

Plaintiff's counsel, Mohammad Akif Saleem, Esq., has submitted affidavits of two notaries public, Luis Aquasvivas (Ex "O") and Freddy G. Paralta (Ex. "P") whose names appear as notary public on the 1474 deed and the 1472 deeds, respectively, which are the subject of this litigation. Mr. Aquasvivas gives sworn testimony that he notarized the 1474 Broadway deed based on being misled that the signor of the deed was the plaintiff, Mohammed Choudari. In the case of the 1474 Broadway deed which was notarized by Freddy G. Peralta, Mr. Peralta claims that his signature on the notarization was forged and that he did not notarize the document.

In addition, and to further corroborate his allegations, plaintiff has submitted credible evidence in the form of documentation obtained from the Department of Homeland Security, Customs and Border Protection which released travel records of Mohammad Choudhari's entering and leaving the United States. These records are strong evidence that Mohammad Choudhari was not present in the United States at the time the October 2016 deed was purportedly signed by Mohammed for the transfer of 1474 Broadway. (See Ex. "N" annexed to the Cross-Motion for Summary Judgment).

The defendant's counsel argues in opposition to the plaintiff's cross-motion for summary judgment, that the cross-motion should be denied because there is no sworn affidavit of personal knowledge annexed to the motion (see Affidavit of Jeanine A. Oberter, Esq. in Opposition to the Plaintiff's Cross-Motion). However, the Court has reviewed the motion papers and agrees with the plaintiff that an affidavit of personal knowledge has been submitted in support of the cross-motion, in the form of Mohammad Choudhari's affidavit dated June 30, 2017 which is annexed as Ex. "K" to the cross-motion for partial summary judgment.

#### **Defendant's Contentions:**

Initially, it was submitted by attorneys representing defendant Mohammad (ie, the office of Rubin and Licatesi, Esq's.) that the property transfers of the subject properties were appropriate as the litigants had intended that both Mohammad and Mustafa would share the properties and

invest in other property and that the deed changes put forth by Mustafa Choudari reflect that agreement. (See Supplemental Affidavit of Mustafa Choudhari in Opposition to Motion for Summary Judgment, par. 5.)

Mustafa Choudhari details the (at one time) close relationship between the two brothers and the supposed intertwined business interest that Mustafa had with his brother, Mohammad. This close relationship extended to purchasing of property in Pakistan as well as working together in the management of the 1472 and 1474 Broadway properties. Mustafa contends that it was always understood that Mustafa and Mohammed were to jointly own the subject properties. According to Mustafa, at some point, around 2016, the relationship deteriorated leading to the current litigation. (Mustafa Aff. Par. 15).

The opposition by the defendant Mustafa to the cross-motion for summary judgment has been supplemented by Mustafa's current counsel (Scott Lanin, Esq.) who argues that the signing of the deeds by Mustafa to transfer a one-half interest in both of the subject properties was done properly and legally based on a power of attorney dated January 14, 2006, that was given to Mustafa by Mohammad. (See Defendant's Memorandum of Law in Opposition to the Plaintiff's Cross-Motion for Summary Judgment).

Defendant argues that the deeds in question were signed by Mustafa Choudhari and Mustafa Choudhari had authority to do so based on the power of attorney given to him. Mustafa had been given power of attorney by Mohammad as early as 1991 and there were a series of powers of attorney signed by Mohammad, with the last one being issued in 2006 (see Doc. 63 efiled by Defendant). It is defendant's position that the principal, Mohammad, had never revoked or terminated the power of attorney and that it remained in full force and effect and entitled Mustafa to issue both deeds which redistributed the ownership of the subject properties to include Mustafa as a half owner of each.

Counsel for Mustafa does acknowledge that each of the two subject deeds does not conform with the signing requirements of an agent who is signing on behalf of a principal (see GOL §5-1507). The signing by an agent on behalf of a principal as per GOL §5-1507 requires either the agent to sign their own name and state that they are an agent of the principal; or that the agent sign the principal's name and indicate that they signed the principals name as agent; or provide some other disclosure. In this case defendant Mustafa simply signed his brother's name without any reference to Mustafa being an agent for Mohammad. This "omission" by the defendant Mustafa is described by defendant's counsel as "inadvertent" and "immaterial". (See

Memorandum in Opposition, pg. 9).

As to the error in the signing of the deeds by Mustafa, counsel argues that the disclosure of the agency status of the signer (ie. Mustafa here) is only relevant for the purpose of alerting a third party of the agency. Counsel cites the case of *Keyes v Metropolitan Trust Co. of City of New York*, 220 NY 237 (1917) in which the Court upheld the contract which was signed by an agent even though it lacked the disclosure of the agency because there was not a third party with an interest at stake.

Finally, counsel for the defendant also argues that the law governing signing requirements for an agent (GOL §5-1507) only applies to a document that requires a hand-written signature. Counsel argues that the subject deeds signed by Mustafa Choudhari could have been signed electronically, as the law has been amended to include electronic signatures. Using this logic, it is defendant's position that the disclosure of Mustafa's role as an agent was not required.

### **Discussion**

#### **Constructive Trust:**

The Court has reviewed the written statements of Mustafa Choudhari and his counsel as they describe a close relationship between two brothers who were involved with acquiring property both in Brooklyn and in Pakistan. It is credible that Mohammed had left the United States for long periods of time and that his brother, Mustafa, was managing the subject properties and maintaining them.

However, other than having a close relationship between the two brothers, the other necessary requirements of a constructive trust can not be found here.

To find the existence of a constructive trust as a remedy in a court of equity "the following four requirements are posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." *Janke v Janke*, 47 AD2d 445, affd 39 NY2d 786 (see also *Vassel v Vassel*, 40 AD2d 713 affd 33 NY2d 533). In this instance there is no evidence of a "promise" made by the plaintiff to the defendant nor any reliance by the defendant on such a promise. The defendant submits vague, self-serving testimony as to the understanding between the parties but nothing specific or definitive. While a formal written agreement is not needed,

there is no evidence that Mohammed had made any promise nor had there been a transfer of property which would be viewed as a transfer that was to benefit Mustafa (see *Sinclair v Purdy*, 235 NY 245; *Sharp v Kosmalski*, 40 NY2d 119 [1976]).

It is also noted that the evidence shows that Mohammad Choudhari purchased both properties in 1986 and there is no evidence that Mustafa contributed to the purchase or had formalized an agreement with Mohammad which could be construed as holding property in a constructive trust.

For these reasons, the Court denies the defendant's motion to amend the defendant's answer to include the counterclaim of constructive trust. A motion to amend the pleadings is generally to be liberally construed unless the new claim is "palpably insufficient" or "devoid of merit". *Ruby Land Development, Ltd. v Toussie*, 4 AD3d 518, 519 [2d Dept. 2004]. Given the lack of admissible evidence supporting the claim for a constructive trust the defendant's motion to amend the pleadings is denied.

#### **Power of Attorney:**

Counsel for the defendant Mustafa has introduced an argument to justify the transfers of each of the subject properties which is based on having authority given to defendant through a power of attorney signed by plaintiff several years prior. This argument, which was not raised initially by defendant's prior counsel appears to be an attempt to offer an alternative theory to the "constructive trust" defense introduced by defendant's prior counsel. Defendant seeks to legitimize the deed transfers by reliance on the fact that plaintiff Mohammad had given several powers of attorney to defendant Mustafa, prior to the deed transfers in question. Defendant's counsel has submitted evidence of a power of attorney from Mohammad to Mustafa which was executed in 2006 (Doc. No. 63) and submits that there had been several earlier power of attorneys forms given to the defendant beginning in 1994. (See Supplemental Aff. of Mustafa Chaudri, par. 9, 10, in support of Defendant's Motion).

The Court has considered the existence of the power of attorney forms, and has viewed the documents in a light most favorable to the defendant, as the Court is required to do in a summary judgment motion. Nonetheless, the Court finds that the defendant can not claim that his actions in transferring the subject properties were done in accordance with the power of attorney given to

him and he thus violated the law and his fiduciary obligation to the plaintiff.

First, there are sworn statements by each notary public whose name appears on the subject deeds that they were either misled as to the identity of the transferor or that they never signed the deed. (See Affidavits of Luis M. Aguasvivas and Freddy G. Peralta, Ex's. "O" and "P" in Support of the Cross-Motion for Summary Judgment). In addition to these facts, it is uncontested that Mustafa signed his brother's name without any disclosure that he was doing so with authority given to him by Mohammed. These facts together lead to the only possible conclusion that the defendant herein committed deed fraud by forging his brother's name.

Defendant's counsel seeks to explain the deed transfers as being within the authority of Mustafa as agent of his brother Mohammad and that the power of attorney given to him had never been revoked. This argument fails due to the fact that Mustafa signed his brother's name (without disclosure of his authority as agent) on or about March 22, 2017 and the record indicates that Mohammed had already brought a lawsuit to challenge the first deed transfer on February 22, 2017 as being a forgery. It would be impossible to justify the proper use of a power of attorney by Mustafa to add himself as an owner of a property after his brother (ie. the principal) had gone to court to invalidate the first transfer.

Defendant also fails to establish that Defendant utilized the power of attorney so as to benefit his principal (plaintiff Mohammad) which is an inherent requirement of using a power of attorney. (See *Moglia v Moglia*, 144 AD2d 347). It is also required that the attorney in fact is "under a duty to act with the utmost good faith toward the principal in accordance with the principals of morality, fidelity, loyalty and fair dealing." *Semmier v Naples*, 166 AD2d 751, 752 (appeal dismissed 77 NY2d 936).

GOL §5-1507 spells out the necessity of disclosing the principal and agent relationship when a person is using a power of attorney. (See GOL §5-1507(1)(a)). This was not done in this case. The Court also notes that the same section, in subdivision "2" reads as follows:

"(a) the agent has actual authority to engage in the transaction" (GOL §5-1507(2)(a)).

The evidence in this case makes it impossible to conclude that defendant Mustafa had actual authority from defendant Mohammad to transfer one-half of each of the subject properties to himself. There is no evidence that Mohammad wished to give one-half of his property to Mustafa and, most importantly, when Mohammad realized that the 1474 Broadway property had

been deeded to Mustafa as a one-half owner, he instituted a lawsuit to allege deed fraud in February 2017. The second transfer in March, 2017, involving 1472 Broadway took place one month after the lawsuit was commenced which eliminates any possibility that Mustafa had done so with the “actual authority” of the principal.

The Court has reviewed the only case cited by defense counsel in support of the argument that the agency of the signer of a document does not need to be disclosed (*Keyes v. Metropolitan Trust Co. of the City of New York*, 220 NY 237 [1917]) and concludes that the *Keyes* case is clearly differentiated by its facts. While *Keyes* upheld a contract signed by an agent who failed to disclose his agency, the contract was with a third party and there was no prejudice to the principal. The instant case involves a clear economic harm to the principal; an agent who signed the principal’s name without authority; and an agent who deceived the notary public or forged the notary public’s name.

Finally, the defendant has made the argument that the disclosure of an agent (GOL §5-1507) is only required when a “hand-written” signature is required. Defendant submits that the deeds in question in this case are not governed by the disclosure requirements of agency because the deeds, with the advent of technology, may now be signed electronically. This argument is unpersuasive and has no bearing in this case. No support is given for eliminating the long-held rules regarding appointment of an agent by power of attorney and the argument has no purchase.

**Conclusion:**

After reviewing the evidence submitted in this matter, the Court finds that it is abundantly clear that defendant Mustafa Choudhari engaged in an unauthorized signing of his brother’s name on two separate deeds to obtain one-half of each valuable real estate asset. His actions were deceptive and without any authority and were solely for his own personal benefit.

In so doing, the deeds for the ownership of 1472 Broadway and 1474 Broadway are the products of forgery and such deeds are void ab initio. It has long been recognized that a forged deed “is invalid and void for any purpose”. *Marden v Dorothy*, 160 NY 39 [1899] (see also *Caccioppoli v Lemmo*, 152 AD 650 [2d Dept, 1912]).

As stated above, defendant has not submitted sufficient evidence to support a defense based on constructive trust and the defendant's motion to amend his answer is denied.

The plaintiff, in submitting the instant cross-motion for summary judgment has made a prima facie case for judgment as a matter of law, in that he has submitted proof that the two deeds which are the subject of this action contained the unauthorized signature of Mohammed Choudhari and that the notaries public were deceived or had their signature forged. The evidence is overwhelming that defendant Mustafa engaged in deceptive practices by forging the plaintiff's name to each deed. Accordingly, there are no questions of fact and plaintiff's cross-motion for summary judgment is warranted. (See *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

The attempt to argue that the deeds in question are valid based up a prior power of attorney fails due to the fact that there was no disclosure of the agency given to defendant and the deeds, therefore, are defective and the product of fraud. Beyond the technical defects, the evidence shows that defendant Mustafa had no authority to utilize a power of attorney given to him by his brother and the transfers were obviously not made to benefit his brother, the plaintiff herein.

Defendant has failed to raise a triable issue of fact which would require a trial by jury in this case as to the RPAPL Art. 15 claims that title must be determined to exist in the name of Mohammad Chaudhari alone. (See *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Smalls v Aji Indus., Inc.*, 10 NY3d 733 [2008]).

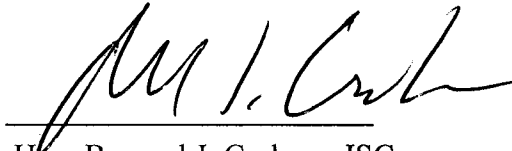
Accordingly, partial summary judgment is granted to the plaintiff herein. The deed dated October 12, 2016 (for the transfer of partial ownership of 1474 Broadway) and the deed dated March 22, 2017 (for the transfer of partial ownership of 1472 Broadway) both of which were filed by defendant, are declared null and void and of no effect and the County Clerk is directed to remove the deeds from its records.

Those allegations raised in the defendant's counterclaims related to debts owed to the defendant by the plaintiff have not been dismissed and may proceed to trial.

This shall constitute the decision and order of this Court.

Dated: October 21, 2020

ENTER:



Hon. Bernard J. Graham, JSC

**HON. BERNARD J. GRAHAM**

KINGS COUNTY CLERK  
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