

**Farre v Lours**

2020 NY Slip Op 33963(U)

November 30, 2020

Supreme Court, New York County

Docket Number: 155104/2020

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

*Justice*

-----X

VIRGINIE FARRE,

Plaintiff,

- v -

ANTOINE LOURS,

Defendant.

-----X

INDEX NO. 155104/2020  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14-23, 30-35 were read on this motion for child support.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24- 29, 36-42 were read on this motion to dismiss.

In this action, plaintiff sues the father of her children for various relief.

By order to show cause (mot. seq. 001), plaintiff seeks orders: (1) directing defendant to pay \$9,995 in housing costs per month for a rental apartment located at 10 East 29th Street in Manhattan, or a comparable rental in the event that the apartment becomes unavailable during the pendency of this motion, for the use of plaintiff and the parties' three minor children during the duration of this proceeding; and (2) directing defendant to assist plaintiff secure the apartment including, but not limited to, providing her a one-half month's security deposit, executing a guarantee for the landlord, providing full financial disclosure in support of the guarantee and paying for suitable renters' insurance. Defendant opposes.

By notice of motion, defendant moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint (mot. seq. 002). Plaintiff opposes.

The motions are consolidated for disposition.

### I. PLEADINGS (NYSCEF 1)

Plaintiff alleges that she and defendant engaged in a 17-year romantic partnership, during which they had three children, all currently under the age of 12. They never married but held themselves out as spouses.

Defendant worked in the financial industry and earned a multi-million dollar annual income. He also accumulated real estate and investment assets worth millions of dollars, including homes in Manhattan and Long Island, both of which he paid for in cash and are titled in his name alone.

Plaintiff contends that at defendant's request and upon his assurances of financial security and support, she moved to numerous countries and gave up her own lucrative employment opportunities to live with defendant and support him and later, their family. Defendant repeatedly told plaintiff that they would share their finances, and that what was his, was theirs, and other words to that effect.

When the parties purchased their apartment in Manhattan, plaintiff claims that she paid for some of the appliances and furniture and the decorator's fee, and paid some monthly bills, including the maintenance, from 2013 to 2016, when she lost her job. She also paid for a nanny, babysitter, and other expenses, and contributed her time toward the renovation of the Long Island home, paying for various sundries, including kitchen appliances.

In 2020, defendant began dating another woman, at which point he told plaintiff that the two homes were his property alone and asked her and the children to move out of them.

Plaintiff advances a claim for fraud as her first cause of action, based on defendant's "various misrepresentations, in sum and substance, that he would treat his earnings from his career in finance during their relationship, as well as the assets, investments, and investment

income these earnings generated, as the parties' jointly held property on a 50/50 basis including, but not limited to, [the two homes]." She alleges that defendant knew his representations were false when he made them and that after he began dating the other woman, he considered the homes to be his property and attempted constructively to evict plaintiff and their kids from them. Plaintiff also maintains that defendant intended to induce her reliance on his promises, "so that he could continue profiting from [her] acting as the primary (and often sole) childcare provider for the parties' 3 children, a do-it-all professional for his real-estate properties, and as his virtual wife in all but formal title," and that plaintiff justifiably relied on his representations based on their long-term relationship.

She alleges damages consisting of:

- (1) compensatory damages of not less than 50 percent of the parties' joint assets accumulated during the parties' partnership including, but not limited to, the two homes, his "squirreling away of these financial assets," and depriving her of financial information;
- (2) lost income in destroying her career in reliance on defendant's promises; and/or
- (3) lost savings by contributing more funds to the parties' housing expenses and childcare costs than she otherwise would have if defendant had not represented that the assets belonged to both of them.

As a second cause of action, plaintiff alleges constructive fraud, in that the parties were in a fiduciary and confidential relationship by virtue of their partnership, which caused plaintiff to repose her confidence in defendant and trust that the assets that they jointly accumulated would be equally shared.

In a third cause of action, plaintiff alleges that defendant fraudulently induced her to compromise her career in numerous ways, to accept almost exclusive responsibility for their children's care, and to act as a real estate professional for him, as his personal assistant, and as a property manager for their homes. In order to so induce plaintiff, defendant falsely represented

that he would treat the assets earned by him and the homes purchased by him as their jointly held property, and that defendant knew that these promises were false when made and made them with the intent to induce plaintiff to take on all of these roles. Moreover, defendant's false promises were material and had plaintiff known of their falsity, she would not have sacrificed her career and taken on these roles.

Plaintiff alleges that she is entitled to a constructive trust in her fourth cause of action, in that, based on all of her allegations, allowing defendant to renege on his promises would unjustly enrich him by permitting him to abscond with the assets the parties had accumulated during their 17-year financial partnership, simply because defendant was the primary breadwinner and had assets in his name alone, and because plaintiff had agreed to facilitate his career in finance by caring for their children almost exclusively for the past 11 years, home-making for him, and generally attending to his family affairs. Plaintiff thus seeks a constructive trust on 50 percent of the remaining earnings from defendant's career during the parties' relationship, as well as the assets, investments, and investment income those earnings generated including, but not limited to, the cash value of his severance package from one of his jobs and the two homes.

In her fifth cause of action for unjust enrichment, plaintiff claims that defendant received numerous benefits from plaintiff during their relationship related to his career and finances, their children, and their real estate purchases, and that to permit defendant to retain these benefits at plaintiff's expense would be unjust.

Plaintiff seeks a partition in her sixth cause of action, alleging that she and defendant owned their two homes as joint tenants with rights of survivorship, and that they are unable to agree on the sale of the homes and division of the proceeds thereof. Specifically, defendant refuses to sell the homes or divide the proceeds if there is a sale, and based on the nature of the

homes, they cannot be partitioned. Thus, based on her contributions to the homes, plaintiff asserts entitlement to 50 percent of the proceeds of their sale.

In her seventh cause of action, plaintiff contends that defendant breached his fiduciary duty to her as her partner for 17 years by committing misconduct against her, as detailed above, through false representations and promises, and caused her to suffer damages.

Plaintiff alleges that she is entitled to *quantum meruit* in her eight cause of action, as she provided services to defendant as his “virtual-wife,” defendant accepted her services, and she expected to be compensated for these services by sharing in the assets gained during their relationship.

In her ninth and tenth causes of action, plaintiff seeks custody of the children and child support.

As an eleventh cause of action, plaintiff seeks a judgment declaring that she is a joint tenant of the homes, and that therefore defendant may not evict her from them.

## II. MOTION TO DISMISS

### A. Standard

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence.

(Kaisman v Hernandez, 61 AD3d 565, 566 [1st Dept 2009]; Kliebert v McKoan, 228 AD2d 232, 232 [1st Dept 1996], lv denied 89 NY2d 802 [1996]).

A pleading may also be dismissed for failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, “accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable

inference, and determine only whether the alleged facts fit within any cognizable theory.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

## B. Non-family law claims

### 1. Defendant’s contentions (NYSCEF 25)

Defendant argues that all of plaintiff’s claims, except those seeking child support and the custody claims, sound in common law marriage and palimony which does not exist in New York and thus state no cognizable legal causes of action. Observing that New York State does not recognize common law marriage, defendant maintains that any claims based on a quasi-marital relationship are barred. While unmarried couples may contract with each other concerning the distribution of assets in the event of the termination of their relationship, such contracts must be express and specific, and no such contract exists here. Defendant otherwise asserts that plaintiff fails to plead these claims sufficiently under these circumstances.

### 2. Plaintiff’s opposition (NYSCEF 37)

Plaintiff contends that she has set forth the elements of a constructive trust as she gave up her career and took care of defendant’s children and homes in reliance of his promises that they would share in his finances and assets. She argues that the prohibition against common law marriage does not bar her claim, and as defendant promised her joint ownership of the two homes and held her out as their joint owner, she is entitled to a declaration of joint tenancy and a partition. Plaintiff denies that the statute of frauds bars her *quantum meruit* claim or that her breach of fiduciary duty claim is duplicative of her fraud claim as the parties had a special confidential relationship. She contends that she adequately pleads her fraud claims, as defendant made fraudulent misrepresentations to her and she justifiably relied on them to her detriment.

### 3. Reply (NYSCEF 42)

Defendant observes that plaintiff does not distinguish the seminal case he cites addressing the prohibition on claims based on an impermissible common law marriage, nor does she address why it does not require dismissal of her common law claims. While a party may be compensated for services rendered outside of a personal relationship, that is not what is alleged here, he claims. He also maintains that plaintiff's fraud claims are insufficiently pleaded or unsupported by facts, and that the breach of fiduciary duty claim is duplicative of the fraud claim as it is based on the same alleged misrepresentations and arises out of the same relationship.

Defendant denies that plaintiff has pleaded a claim for a constructive trust in these circumstances and distinguishes the caselaw cited by plaintiff. He also denies that a joint tenancy was created or that a partition is permitted, absent any legal interest by plaintiff in the homes.

### 4. Analysis

New York State does not recognize common law marriage; it prohibits it (*Matter of Mott v Duncan Petroleum Transp.*, 51 NY2d 289 [1980]), and while unmarried parties may contract with each other as to the distribution of assets in the event that their relationship ends, such a contract must be explicit and specific, not inferred (*see eg Morone v Morone*, 50 NY2d 481 [1980] [no action may be based on implied contract for personal services between unmarried people living together]; *Potter v Davie*, 275 AD2d 961 [4<sup>th</sup> Dept 2000] [“no agreement will be inferred in these circumstances based upon the quasi-marital relationship between the parties or the rendition and acceptance of personal services”]). No such contract is alleged here.

In *Morone*, the plaintiff alleged that she and the defendant lived together and held themselves out to the community as husband and wife for long enough to constitute a common law marriage and that defendant had acknowledged that their children were his. She alleged that

since the inception of their relationship, she performed domestic duties and business services at the defendant's request and with the expectation that she would be fully compensated for them. She also contended that the defendant had always accepted her services knowing that she expected compensation for them, and suggested that the defendant recognized the unity of their economic fortunes, having filed joint tax returns. (*Id.* at 484-485). The Court dismissed the claim as impermissibly based on a common law marriage, observing that historically, an "explicit and structured understanding of an express contract" is required. Thus, the Court "declined to recognize a contract which is implied from the rendition and acceptance of services."

The Court in *Morrone* based its reluctance to imply a contract in such circumstances on the reasonable inference that when people live together, the services are rendered gratuitously "because they value each other's company or because they find it a convenient or rewarding thing to do." Moreover, the Court observed, an attempt to "sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error." And, without an express agreement, it is difficult to assess testimony which is essentially evanescent. Thus, the Court declined to accept the "substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid." (*Id.* at 488 [citations omitted]).

In *Trimmer v Van Bomel*, a cause of action for *quantum meruit* was likewise dismissed. There, the plaintiff alleged that he had devoted time and attention to the defendant, complied with her wishes concerning his deportment, habits, and associations, acted as her companion, accompanied her to restaurants, traveled with her, and accepted gifts and jewelry,

clothing, and motor cars from her, which the court found, “are of a nature which would ordinarily be exchanged without expectation of pay.” (107 Misc 2d 201 [Sup Ct, New York County 1980]).

Here, the basis of plaintiff’s claims is that she was virtually or practically defendant’s wife, and that, therefore, now that the relationship has ended, she is entitled to some portion of the assets gained or acquired during their relationship, such as the two homes, or to damages based on the efforts and sacrifices she made during the relationship. Given the prohibition against common law marriage, those claims which are based on the existence of such a marriage are akin to those offered to a married person during or as a result of a divorce, and are not legally cognizable. (*See Pizzo v Goor*, 50 AD3d 586 [1st Dept 2008] [dismissing claims for fraud, unjust enrichment, imposition of constructive trust, among others, arising from parties’ unmarried cohabitation agreement]; *Potter*, 275 AD2d at 963 [court properly dismissed claim for dissolution of alleged domestic partnership and distribution of assets absent express agreement between parties]; *Donnell v Stogel*, 161 AD2d 93 [2d Dept 1990] [cohabitation without marriage does not give rise to property and financial rights normally associated with marriage]; *Kastil v Carro*, 145 AD2d 388 [1st Dept 1988], *app dismissed* 74 NY2d 650 [1989] [dismissing claim based on personal and sexual relationship between parties wherein defendant allegedly promised payments to plaintiff to take care of her for life]; *Tompkins v Jackson*, 11 Misc 3d 1128[A], 2009 NY Slip Op 50319[U] [Sup Ct, New York County 2009] [denying claims for breach of contract and *quantum meruit* based on unmarried couples’ relationship and defendant’s alleged promises to give everything he had to plaintiff and take care of her forever]).

Even if considered on their merits, plaintiff’s claims fail for the following reasons.

a. Fraud-related claims (fraud, constructive fraud, and fraudulent inducement)

The fraud claims, as pleaded, do not reflect that defendant's alleged promises or representations were made with the present intent to deceive plaintiff. Rather, the allegations reflect that the promises were honored, as the parties shared defendant's earnings and homes for years until the parties' relationship ended. (*See eg Harrington v Murray*, 169 AD2d 580 [1st Dept 1991] [fraud claim dismissed absent evidence that defendant never intended to honor promise to buy plaintiff home and pay related costs]; *see also Satler v Merlis*, 252 AD2d 551, 552 [2d Dept 1998] [plaintiff's allegation of fraud based on defendant's promise that house he purchased and in which she lived would be hers forever was dismissed as it was promise of future intent, not misrepresentation of existing fact made to induce action or inaction by plaintiff; "cause of action alleging fraud may not be based on disappointment that a promised future benefit did not materialize"]).

Plaintiff's alleged sacrifice of her career in return for defendant's false promises related to their future together does not constitute reasonable reliance as "the law does not recognize a cause of action for sacrificing career opportunities in order to act as a 'wife.'" (*Jennings v Hurt*, 160 AD2d 576, 578 [1st Dept 1990], *app dismissed* 76 NY2d 870 [1990]). Similarly, a claim that defendant falsely promised to support plaintiff in exchange for her having his children and giving up her career is void as against public policy. (*Id.*).

Plaintiff's allegations that defendant promised to share his earnings, that what was his was theirs, and that he considered his property to be their joint property, among other similar alleged promises, are insufficiently specific. (*Id.* [claim based on defendant's alleged breach of promise to support plaintiff in future too vague to support cause of action]).

Moreover, a fraudulent inducement claim is not viable absent an allegation that a party was induced to enter into a contract or agreement, which is not alleged here. (*Hawthorne Group*

*v RRE Ventures*, 7 AD3d 320 [1st Dept 2004] [fraudulent inducement claim requires misrepresentation extraneous to contract]).

b. Constructive trust

The equitable remedy of a constructive trust requires a showing of: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment. (*Sharp v Kosmalski*, 40 NY2d 119 [1976]).

Plaintiff's cause of action for a constructive trust related to the homes fails to state a cause of action absent an allegation that she contributed financially for the purchase of the homes or otherwise transferred any of her interests in reliance on a promise to share in the homes. Moreover, it is undisputed that defendant solely paid for the homes and that plaintiff lived in them for years rent-free. (*Compare Jennings*, 160 AD2d at 578 [no claim for constructive trust for apartment owned by defendant absent property interest by plaintiff in apartment]; *Potter*, 275 AD2d at 963 [claim for constructive trust on condominium dismissed as plaintiff did not show she transferred interest in condominium in reliance on promise, or that defendant was unjustly enriched as defendant alone paid for property and plaintiff lived in it for years rent-free], with *Chen v Kao*, 97 AD3d 730 [2d Dept 2012] [defendant promised to give plaintiff one-half interest in apartment and she transferred money to defendant in reliance on promise]; *Watson v Pascal*, 65 AD3d 1333 [2d Dept 2009] [constructive trust imposed on apartment where plaintiff and defendant were in romantic relationship and obtained mortgage together as co-borrowers, and plaintiff paid for remodeling and for mortgage for seven years]).

The cases relied on by plaintiff are inapposite. In *Massey v Byrne*, a triable issue was raised as to the claim for a constructive trust in relation to the parties' business relationship, not their personal one, where the plaintiff allegedly moved and sacrificed his time and other

professional opportunities to benefit their business. (112 AD3d 532 [1st Dept 2013]). In *Ferguson v Murphy*, the plaintiff claimed that she had an interest in the property at issue for the constructive trust as it was acquired through the sale of another property which she had contributed to procuring and renovating. (273 AD2d 34 [1st Dept 2002]). In the other cases cited by plaintiff, the party seeking a constructive trust made substantial monetary contributions to the property at issue.

Here, as discussed above, plaintiff made minimal contributions to the homes in general and none to their purchase. Moreover, plaintiff does not distinguish *Pizzo v Goor*, 50 AD3d 586 or *Jennings*, 160 AD2d 576, in which the Appellate Division, First Department, held that a constructive trust could not be imposed based on promises made during an unmarried romantic relationship.

*Sylvester v Sbarra* is on point. There, the parties were involved in a romantic relationship, and moved into an apartment purchased by the defendant. After the relationship ended, the plaintiff sought a constructive trust on the apartment, on the grounds that the defendant made representations that implied that the apartment was jointly owned by them and that the plaintiff had made certain purchases in reliance on that promise. The Court dismissed the claim, finding that the plaintiff's expenditures "were not over and above that which could be attributed to the give and take of the relationship," and thus were not made in reliance of the defendant's promises of joint ownership. Moreover, as the defendant paid all mortgage and real estate taxes, he was not unjustly enriched. (268 AD2d 424, 425 [2d Dept 2000]).

Plaintiff does not allege a sufficient basis for the imposition of a constructive trust on defendant's finances as her claim essentially sounds in equitable distribution, which is not available to unmarried partners. (*See eg. Dee v Rakower*, 112 AD3d 204 [2d Dept 2013] [no

basis for imposing constructive trust on unmarried partner's retirement account as allegation of equitable, versus legal, right to share in pension on equal basis insufficient]; *see also Saff v Saff*, 61 AD2d 452, 456 [4<sup>th</sup> Dept 1978], *app dismissed* 46 NY2d 969 [1979] [plaintiff not entitled to constructive trust over defendant's separately-owned personal property based on his statements to her that "what is mine is yours" and "you're my wife," as "(s)uch representations undoubtedly reflected the emotions of a happier time but they most assuredly did not constitute a promise by respondent that he held one half of his corporate stock as trustee for" plaintiff]).

Moreover, plaintiff's allegations do not demonstrate that defendant would be enriched unjustly by keeping the money he alone earned and in which plaintiff shared and to which she enjoyed access for many years. (*See Saff*, 61 AD2d at 458 [plaintiff "has been more than adequately compensated for her efforts and in ways fully to be expected in a marriage . . . (a)ll of (defendant's) earnings from the company were deposited in the couple's joint accounts and were used to support (her). Generous purchases of property and investments were made from these funds for her and (defendant's) income has been sufficient to enable her to travel and to enjoy the satisfying social and athletic life which she described . . ."]).

c. Unjust enrichment and *quantum meruit*

These claims related to the homes are barred by the statute of frauds. (*Snyder v Bronfman*, 13 NY3d 504 [2009]; *cf Baron v Suissa*, 167 AD3d 685 [2d Dept 2018] [while equitable claims related to real estate subject to statute of frauds, plaintiff alleged exception to statute by contending that defendant promised to retitle property in both their names upon plaintiff's divorce and plaintiff, in reliance on promises, contributed \$100,000 toward purchase price]).

Moreover, given the parties' unmarried relationship, plaintiff's rendition of "services" to defendant and his acceptance of same cannot provide the basis for these claims. (*See eg, Morone v Morone*, 50 NY2d 481 [1980] [no action may be based on implied contract for personal services between unmarried people living together]; *Pizzo v Goor*, 50 AD3d 586 [1st Dept 2008] [dismissing claims for fraud, unjust enrichment, imposition of constructive trust, among others, arising from parties' unmarried cohabitation agreement]; *Matos v Gadman*, 173 AD2d 442, 442 [2d Dept 1991] ["since New York courts have declined to recognize an action based upon an implied contract for personal services between unmarried persons who live together, the court should have dismissed the plaintiff's third cause of action to the extent that it asserted an implied agreement to recover for personal services rendered"]).

d. Partition and declaration of joint tenancy

As it is undisputed that plaintiff did not purchase the homes and has no legal ownership interest therein, there is no basis for granting a partition or declaring her a joint tenant of the homes. (*See Kurdlanski v Kim*, 111 AD3d 676 [2d Dept 2013] [plaintiff not likely to succeed on partition claim absent evidence of ownership interest in condominium unit]).

e. Breach of fiduciary duty

As plaintiff's breach of fiduciary duty claim relies on the same facts underlying her fraud claims, it is fatally duplicative. (*Cf Goldin v TAG Virgin Islands, Inc.*, 149 AD3d 467 [1st Dept 2017] [breach of fiduciary duty claim not duplicative of fraud claim as different alleged acts at issue]).

C. Child support and custody claims

As Family Court has original jurisdiction over these claims absent a pending divorce proceeding between the parties in Supreme Court, and as defendant has filed a paternity petition

in Family Court which currently pends, the claims for child support and custody cannot be adjudicated here. (*Cf Poliandro v Poliandro*, 119 AD2d 577 [2d Dept 1986], *app dismissed* 68 NY2d 908 [1986] [Family Court has original jurisdiction over child custody issues unless they are incidental to divorce proceeding]; *see also* Family Court Act § 511 [Family Court has exclusive jurisdiction to determine paternity, and upon doing so, to order child support and make custody and visitation orders]).

III. MOTION FOR INJUNCTION

As plaintiff’s claims are all dismissed, her application for an injunction is denied as academic.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for an injunction is denied (mot. seq. 001); it is further

ORDERED, that defendant’s motion to dismiss (mot. seq. 002) is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

11/30/2020

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE