

Shouela v Shouela
2021 NY Slip Op 31315(U)
April 19, 2021
Supreme Court, Kings County
Docket Number: 501280/2021
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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ELI SHOUELA,

Plaintiff, Decision and order

- against - Index No. 501280/2021

ISAAC SHOUELA and 1515 CHURCH AVENUE
REALTY LLC,

Defendants, April 19, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint, and cancel the notice of pendency filed by the plaintiff on the grounds it fails to state a cause of action and is barred by the Statute of Frauds. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The complaint alleges that the plaintiff faced a judgement in a divorce proceeding. He turned to his brother Isaac the defendant for advice. Isaac recommended that Eli transfer properties to him to avoid satisfying any judgement and that when such proceeding terminated he would transfer the properties back to Eli. Thus, in October and November 2015 Eli transferred properties located at 1797 East 22 Street, 1821 East 22 Street, 1946 East 21 Street and 1721 East 8 Street all located in Kings County. Following the conclusions of the divorce proceedings Eli asked Isaac to return the properties but Isaac has refused. This lawsuit followed. Eli has asserted causes of action for a constructive

trust, unjust enrichment and promissory estoppel relating to those properties. Isaac has now moved seeking to dismiss those causes of action.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Plumitallo v. Hudson Atl. Land Co., 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). It is well settled that in order to impose a constructive trust the following four elements must be proven. There must be a confidential or fiduciary relationship, a promise, a transfer in reliance of the promise and unjust

enrichment (Sharp v. Kosmalski, 40 NY2d 119, 386 NYS2d 72 [1976]). These elements are not applied rigidly but flexibility is employed, especially to promote and satisfy the demands of justice (Sanxhaku v. Margetis, 151 AD3d 778, 56 NYS3d 238 [2d Dept., 2017]). Essentially, as expressed by Justice Cardozo in Beatty v. Guggenheim Exploration Co., 225 NY 380, 122 NE 378 [1919], "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (id).

The defendant counters there cannot possibly be a constructive trust in this case since he paid for three properties, namely 1728 East 8 Street, 1821 East 22 Street and 1946 East 21 Street. However, there are certainly questions of fact whether the defendant paid for the properties as he contends. The Real Estate Property Transfer Reports signed by both parties for all three properties state the sale price for the three properties was zero. That crucial document undermines defendants assertion payments were made for the three properties. The defendant argues that since the properties were in foreclosure and the transfers were effectuated pursuant to Tax Law §1402 the transfer documents do not show any purchase price. Indeed, the defendant asserts "this is the only conceivable explanation" (see, Affirmation in Further Support,

¶38). That equivocal explanation does not resolve the factual issues that exist and does not conclusively establish the properties were purchased. It is mere conjecture to assert the properties were purchased yet documents signed which contradict that should be ignored by other documents that have not been presented to the court. Therefore, the entire nature of the transactions between the two brothers is clouded in factual ambiguity which demands further discovery.

Further, even if Isaac did not pay for the properties there is no basis to conclude the plaintiff cannot assert a constructive trust claim. First, according to the complaint there was clearly a confidential relationship between the two brothers, a promise made, a transfer of an asset in reliance upon the promise and unjust enrichment flowing from the breach of the promise (Mei Yun Chen v. Mei Wan Kao, 97 AD3d 730, 948 NYS2d 426 [2d Dept., 2012]). The complaint alleges the plaintiff transferred the properties to the defendant in reliance on a promise and that such property is being held whereby a trust should be imposed (Kalmon Dolgin Affiliates Inc., v. Tonacchio, 110 AD3d 848, 973 NYS2d 304 [2d Dept., 2013]). Second, the mere fact the transfer was made to avoid financial consequences in an unrelated divorce proceeding is not a basis to deny the existence of a constructive trust. The alleged fraudulent transfer did not involve Isaac, rather it involved Eli's wife. In any event the complaint states that a

fraudulent conveyance matter was discontinued in 2019 (see, Complaint ¶26). Thus, the court is not condoning or sanctioning improper conduct. However, as between Eli and Isaac no such fraudulent transfer took place. Isaac argues that he texted Eli and told him that he would pay him for the properties. A review of the text reveals that while that offer was made there are no terms mentioned and the texts lack proper context. Indeed, Isaac also considered, along with Eli, speaking to an attorney about declaring bankruptcy. Thus, the texts do not conclusively establish Isaac paid for the properties, rather, it was one suggestion among many. Moreover, the complaint alleges that both brothers acted improperly attempting to hide these properties. The defendant asserts that only the plaintiff acted improperly and that the defendant paid for them thereby acting appropriately. However, that contention is disputed in the complaint which must be deemed true and as noted there are factual questions in this regard.

Therefore, at this stage of the proceeding without any discovery the plaintiff has properly alleged the existence of a constructive trust and the motion seeking to dismiss that cause of action as well as the unjust enrichment cause of action is denied.

Moreover, the statute of frauds is not a bar to claims based upon a constructive trust (Toobian v. Golzad, _AD3d_, _NYS3d_, 2021 WL 1287021 [2d Dept., 2021]).

Therefore, the motion seeking to dismiss the complaint is

denied in all respects.

So ordered.

ENTER:

DATED: April 19, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC