

**Wald v Wald**

2022 NY Slip Op 33324(U)

October 2, 2022

Supreme Court, New York County

Docket Number: Index No. 154892/2022

Judge: Lisa S. Headley

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

**PRESENT:** HON. LISA HEADLEY **PART** **28M**

*Justice*

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KENNETH WALD	INDEX NO. <u>154892/2022</u>
Plaintiff,	MOTION DATE <u>06/24/2022</u>
- v -	MOTION SEQ. NO. <u>001</u>

ABIGAIL WALD,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 27

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Before the Court is the Order to Show Cause filed by plaintiff, Kenneth Wald (“plaintiff”), for an order to specifically restrain defendant Abigail Miriam Wald from selling the property, 52 Morton Street, Apartment #2, New York, NY 10014 (“subject property”), which is the subject of this action. Defendant, Miriam Abigail Wald (“defendant”), filed opposition. Plaintiff filed a reply.

Plaintiff commenced this action to: a) restrain the defendant from selling the subject property located at 52 Morton Street, New York, N.Y. 10014; b) to quiet the title in the name of plaintiff; c) to restrain the defendant from using her Power of Attorney; d) to create a constructive trust over the defendant’s assets; e) to award plaintiff damages for defendant’s breach of fiduciary duty and conversion; and f) to award plaintiff court costs, attorney’s fees and pre-judgment interest against defendant.

In support of the Order to Show Cause, the movant-plaintiff submits his attorneys’ affirmation, the deed for the subject property, plaintiff’s UBS management account record from November 2016, December 2016 and March 2019, and the sale listing on realtor.com for the subject property. In this Order to Show Cause, the plaintiff requests that this Court restrain Abigail Miriam Wald from taking any action in furtherance of the sale of the property. The plaintiff is the defendant’s father. Plaintiff asserts that he is the rightful owner of the subject property and that he purchased the subject property in the defendant’s name, and was voluntarily omitted from the deed. Further, the plaintiff argues that the purchase price for the property was \$2,350,000 in February 2017, and the property has recently been listed for sale at the price of \$3,350,000. The plaintiff argues that he will suffer considerable monetary loss, permanent and irreparable harm if the defendant is not restrained from selling the subject property.

In opposition, the defendant submits her personal affidavit, the plaintiff’s living trust, the power of attorney and letters from UBS bank. Defendant argues, *inter alia*, that the emergency motion for preliminary injunctive relief is not supported by an affidavit and competent proof as it is solely based on an attorney affirmation. The defendant argues that the plaintiff fails to allege sufficient facts to show that the plaintiff is likely to succeed on the claims and that plaintiff will suffer permanent and irreparable harm and, therefore, the temporary restraining order restraining

defendant from selling the subject property should be denied.

Defendant argues that the complaint cannot be considered as an affidavit of fact to support the Order to Show Cause because the plaintiff's affidavit, which is signed and notarized in Maryland, is not admissible because it is not accompanied by a certificate of conformity as required under *CPLR* §2309. Defendant argues that the allegations in the complaint are "bare" and do not state unequivocally that the subject property would only belong to the plaintiff. Defendant also argues that there is no reference to any writing or legal documentation showing the alleged agreement between the plaintiff and defendant. The defendant argues that the alleged oral agreement that the apartment would belong solely to the plaintiff, but would be used by the defendant is void as a matter of law under the Statute of Frauds since an estate or interest in real property cannot be created unless it is authorized in writing. *See, Gen. Oblig. Law* §5-703(1). Defendant argues, *inter alia*, that her father agreed to give her the money to purchase the property, although there was no written agreement to show that plaintiff had any interest in the property, and that plaintiff would be entitled to the proceeds of the sale. Plaintiff contends that the money used to purchase the property was a gift.

Further, the defendant alleges that there is an unlikelihood of success on the merits because the first and second causes of action for breach of fiduciary duty and conversion, respectively, are barred by the 3-year statute of limitations. Here, the allegations in the complaint are based on the alleged transfer of money that took place in 2016, and the action was subsequently filed in 2022, more than 3 years after such alleged transaction took place. In regard to the power of attorney, defendant submits that the power of attorney does not grant defendant any powers to act and to withdraw money from the plaintiff's account because the power of attorney appoints defendant and plaintiff's niece, Shelly Wald, as successor agents under the power of attorney. Defendant asserts that the primary agent to the power of attorney is her mother, Harriett Wald. Plaintiff contends that plaintiff may revoke the power of attorney for any reason, and that she has never used the power of attorney for any act whatsoever to obtain anything for herself or anyone else.

The defendant further argues that the plaintiff has failed to demonstrate whether plaintiff would suffer irreparable harm because the purchase of real estate property was an investment, and any loss he would suffer would be an economic loss, which is compensable in money damages. Lastly, the defendant argues that, in fact, the balance of equities would be in favor of the defendant because she would suffer substantial hardship if she is required to put on hold her right to sell the subject property because her future plans to relocate and study to attend law school in California would also be put on hold.

In reply, plaintiff argues, *inter alia*, that the defendant admitted that plaintiff paid for the property, although she claims it was a gift, she admitted in her affidavit that it was a loan. Plaintiff contends that he has demonstrated an immediate and irreparable harm if defendant sells the property worth more than \$3 million without any compensation to the plaintiff.

### **DISCUSSION**

It is well settled that in order for a party to establish entitlement to a preliminary injunction, "a movant must establish a likelihood or probability of success on the merits, irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction." *Stockley v. Gorelik*, 24 A.D. 3d 535, 536 (2d Dep't 2005). Movants must show that the irreparable injury is "material and actual for which monetary compensation is inadequate." *New York County Lawyers' Ass'n v. State*, 192 Misc. 2d 424, 433 (N.Y. Sup. Ct. New York County 2002); *See also*, *300 W10th 19b LLC v. Bd. of Managers of Towers on the Park Condominium* (N.Y. Sup Ct. New York County 2022).

After oral argument, and upon a thorough and careful review of the Order to Show Cause, the opposition papers, affirmations, affidavits and exhibits presented, the court finds that the plaintiff failed to submit any evidence or written instrument to support that there was an agreement with his daughter to use the purported funds from the plaintiff's UBS account for the purchase of the subject property for the plaintiff's interests. Plaintiff's attorney affirmation is not evidence for the court to consider that plaintiff loaned his daughter money to purchase the subject property, and that plaintiff intended to maintain his interest to such funds and the subject property. "[A] bare affirmation of... [an] attorney who demonstrated no personal knowledge ... is without evidentiary value and thus unavailing." *Zuckerman v City of New York*, 49 N.Y.2d 557, 563 (1980). Further, the moving papers are devoid of a written contract for the purchase of the subject property, which is required under the law. *NY Gen Oblig §5-701* states in part, that "every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by lawful agent, if such agreement, promise or undertaking is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the **purchase**, sale, exchange, renting or leasing **of any real estate** or interest therein[.]" *NY Gen Oblig §5-701(a)(10)*. (Emphasis added).

Here, both the plaintiff and defendant presented the deed of the subject property, which indicates the defendant, Abigail Wald, as the sole buyer. Further, it is undisputed that the funds to acquire the subject property were provided by the plaintiff, however, there is a dispute as to whether the money used to acquire the property was a loan, as claimed by the plaintiff or was a gift, as claimed by the defendant. Nonetheless, the plaintiff has established a likelihood of success on the merits because, although there is no written agreement, a trier of the fact may find that the monies for the purchase of the property was a gift or a loan that defendant has to pay back.

Further, the Court finds that the plaintiff has failed to demonstrate that he would suffer irreparable harm, as he has the ability to recover economic damages in this action. However, this Court finds that a balance of the equities weighs in favor of denying injunctive relief because if such injunctive relief was issued by this Court, the defendant would be refrained from selling the subject property, in which she is solely named on the deed, during the pendency of the litigation.

Lastly, the plaintiff requests a constructive trust, and the Court, hereby grants such relief in this instance. "A constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. The elements of a constructive trust are a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment." *Clark v. Locey*, 196 A.D.3d 794, 151 N.Y.S.3d 456 (3d Dep't 2021). The purpose of a constructive trust is to prevent unjust enrichment. Accordingly, for the reasons stated herein, the Order to Show Cause is granted to the extent only of allowing the defendant to pursue the sale of the property at 52 Morton Street, Apt. 2, New York, N.Y. 10014 and the court is ordering defendant to create a constructive trust as it concerns the sale of the property at 52 Morton Street, Apt. 2, New York, N.Y. 100014.

Accordingly, it is hereby

**ORDERED** that plaintiff's Order to Show Cause seeking a preliminary injunction to restrain the defendant from selling the property at 52 Morton Street, Apt. 2, New York, N.Y. 100014 is **GRANTED IN PART**, and it is further

**ORDERED** that defendant Abigail Wald is allowed to pursue the sale of the property at 52 Morton Street, Apt. 2, New York, N.Y. and is ordered to create a constructive trust for the assets as it concerns the sale of the property at 52 Morton Street, Apt. 2, New York, N.Y. 10014; and it is further

**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon the defendant with notice of entry.

This constitutes the Decision/Order of the Court.

  
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LISA S. HEADLEY, J.S.C.

10/2/2022

DATE

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