

Alleyne v Hazell

2023 NY Slip Op 32280(U)

June 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 522658/2021

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 22nd day of June, 2023.

P R E S E N T: HON. CARL J. LANDICINO, JSC
-----X

DEBORAH ALLEYNE,

Plaintiffs,

- against -

TED HAZELL,

Defendants.

-----X

Index No.: 522658/2021

DECISION AND ORDER

Motions Sequence #1

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	10, 12,
Opposing Affidavits (Affirmations).....	16,
Reply Affidavits (Affirmations)	18
Memorandum of Law.....	11, 15, 17

After a review of the papers and oral argument, the Court finds as follows:

The Plaintiff Deborah Alleyne (hereinafter the "Plaintiff") has commenced this action and raises causes of action for 1) constructive trust, 2) unjust enrichment, 3) conversion, 4) promissory estoppel, 5) an equitable lien, 6) constructive fraud, and 7) relief pursuant to Article 15 of the RPAPL to quiet title, all in relation to the property located at 535 Bradford Street, Brooklyn, New York (hereinafter the "Property or Premises"). The Plaintiff alleges in her complaint that she had an understanding with Defendant Ted Hazell (hereinafter the "Defendant"), her cousin, that she would provide the initial funding for the purchase of the Premises, and he would obtain the mortgage and financing. The Plaintiff represents that she was not qualified for financing at that time. The Plaintiff further contends that the parties had agreed that the Plaintiff would make ongoing payments toward the mortgage and that the Plaintiff and Defendant would be the owners of the property.

The Defendant now moves (motion sequence #1) for an order pursuant to CPLR 3211(a)(7), dismissing the Plaintiff's first through sixth causes of action. The Plaintiff opposes the motion.

CPLR 3211(a)(7)

On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss.

Kinnear v. Cefoli, 184 AD3d 628, 123 N.Y.S.3d 509, 510 [2d Dept 2020].

Pursuant to CPLR § 3013, “[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” Furthermore, “[a]lthough on a motion to dismiss plaintiffs’ allegations are presumed to be true and accorded every favorable inference, conclusory allegations--claims consisting of bare legal conclusions with no factual specificity--are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 NY3d 358, 373, 892 N.Y.S.2d 272, 278 [2009].

“[W]here evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one” (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530, 530 [2007]; see *Meyer v. Guinta*, 262 AD2d 463, 464 [1999]). A motion to dismiss based on documentary evidence may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v. Martinez*, 84 NY2d at 88, *Lucia v. Goldman*, 68 AD3d 1064, 1065 [2009]; *Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, 402 [2009]).

Feggins v. Marks, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019].

In any event, “[w]hether 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.” *Endless Ocean, LLC v. Twomey*,

Latham, Shea, Kelley, Dubin & Quartararo, 113 AD3d 587, 589, 979 N.Y.S.2d 84 [2d Dept 2014] quoting *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38, 827 N.Y.S.2d 231 [2d Dept 2006].

First Cause of Action- Constructive Trust

The Court finds that the Plaintiff has sufficiently plead a cause of action for constructive trust. “The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment.” *Williams v. Eason*, 49 A.D.3d 866, 868, 854 N.Y.S.2d 477, 479 [2nd Dept, 2008]. “However, as these elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established.” *Marini v. Lombardo*, 79 A.D.3d 932, 933, 912 N.Y.S.2d 693, 696 [2nd Dept, 2010]; *O'Brien v. Dalessandro*, 43 A.D.3d 1123, 1124, 843 N.Y.S.2d 348, 349 [2nd Dept, 2007]; *Cruz v. McAneney*, 31 A.D.3d 54, 59, 816 N.Y.S.2d 486, 490 [2nd Dept, 2006]. This is because “[a] constructive trust is an equitable remedy and its purpose is to prevent unjust enrichment.” *Tyree v. Henn*, 109 A.D.3d 906, 907, 971 N.Y.S.2d 319, 320 [2nd Dept, 2013], quoting *Marini v. Lombardo*, 79 A.D.3d 932, 912 N.Y.S.2d 693 [2nd Dept, 2010]; see also *Simonds v. Simonds*, 45 N.Y.2d 233, 380 N.E.2d 189 [1978]. In the instant matter, the Plaintiff alleges that the Defendant, who is her cousin, served as a borrower to purchase the property, made a promise to the Plaintiff involving the Plaintiff’s ownership of the property, she relied on that promise, and made significant financial payments relating to acquisition, carrying charges and repairs, resulting in the Defendant’s unjust enrichment as the purported sole title owner of the property. See *Diaz v. Diaz*, 130 AD3d 560, 13 N.Y.S.3d 455 [2d Dept 2015], and *Broderson v. Parsons*, 106 AD3d 677, 678, 964 N.Y.S.2d 259 [2d Dept 2013] [confidential relationship, cousins].

The Court also finds that the cause of action for constructive trust is not barred by the statute of frauds. “The statute of frauds is not a defense to a properly-pleaded cause of action to impose a constructive trust on real property.” *Cilibrasi v. Gagliardotto*, 297 AD2d 778, 779, 747 N.Y.S.2d 801 [2d Dept 2002]; *see also Mackenzie v. Croce*, 54 AD3d 825, 864 N.Y.S.2d 474 [2d Dept 2008].

Additionally, the Court finds that the claim for a constructive trust is not time barred. “A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property.” *Jakacic v. Jakacic*, 279 AD2d 551, 552, 719 N.Y.S.2d 675, 677 [2d Dept 2001], quoting *Sitkowski v. Petzing*, 175 AD2d 801, 572 N.Y.S.2d 930 [2d Dept 1991]. The Defendant argues that the cause of action accrued on November 12, 2010, when he purportedly removed a non-party mutual cousin from title ownership. However, that transfer does not constitute one in which the Defendant wrongfully withheld the property from the Plaintiff. The Court finds that the cause of action accrued as stated in the pleading, December of 2020, when the Plaintiff alleges that she requested that a deed be drawn reflecting the true respective interests of the parties. Plaintiff indicated her concern due to the Defendant’s apparent planned marriage. The Defendant apparently refused the request. The commencement of the action was well within the statutory period. The cause of action accrued when the Defendant “first repudiated any alleged agreement to convey to the Plaintiff her interest in the property.” *Cilibrasi v. Gagliardotto*, 297 AD2d 778, 779, 747 N.Y.S.2d 801 [2d Dept 2002].

Second Cause of Action- Unjust Enrichment

The Court finds that the Plaintiff's claim for unjust enrichment is sufficiently plead and should not be dismissed. "To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party'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." *Robertson v. Wells*, 95 AD3d 862, 864, 944 N.Y.S.2d 194, 196 [2d Dept 2012]. However, an unjust enrichment claim has its limitations in relation to a constructive trust claim since it would only result in a money judgment rather than a judicially imposed lien. See *Clark v. Locey*, 196 A.D.3d 794, 151 N.Y.S.3d 456, 459-60 [3rd Dept 2021]. A review of the cause of action for unjust enrichment shows that the Plaintiff has properly pled such a cause of action and that it is not duplicative of the constructive trust claim. See *Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski*, 14 A.D.3d 644, 789 N.Y.S.2d 508 [2d Dept 2005].

Third Cause of Action- Conversion

The Court finds that the Plaintiff's claim for conversion should be dismissed. A review of the cause of action for conversion shows that the Premises are the subject of this cause of action. "[N]o cause of action sounding in conversion will lie where the property that is the subject of the dispute is real property." *Crawford v. Smith*, 130 AD3d 968, 969, 14 N.Y.S.3d 474, 475 [2d Dept 2015]; see also *C & B Enterprises USA, LLC v. Koegel*, 136 AD3d 957, 958, 26 N.Y.S.3d 185, 187 [2d Dept 2016]. Accordingly, the Plaintiff's cause of action for conversion is dismissed.

Fourth Cause of Action- Promissory Estoppel

The Court finds that the Plaintiff's claim for promissory estoppel is sufficiently stated and should not be dismissed. "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.” *Williams v. Eason*, 49 AD3d 866, 868, 854 N.Y.S.2d 477, 479 [2d Dept 2008]. As stated above, the statute of frauds should not lead a court to dismiss a cause of action where the Plaintiff has plead that there was an alleged oral agreement. Moreover, this cause of action is not duplicative of the constructive trust claim. *See Salatino v. Salatino*, 13 AD3d 512, 513, 786 N.Y.S.2d 570, 571 [2d Dept 2004].

Fifth Cause of Action- Equitable Lien

The Court finds that the Plaintiff’s claim for an equitable lien is sufficiently articulated and should not be dismissed. “The existence of an equitable lien requires an express or implied contract concerning specific property wherein there is a clear intent between the parties that such property be held, given or transferred as security for an obligation.” *Ryan v. Cover*, 75 AD3d 502, 502, 904 N.Y.S.2d 750, 751 [2d Dept 2010], *quoting Datlof v. Turetsky*, 111 AD2d 364, 365, 489 N.Y.S.2d 353, 355 [2d Dept 1985]. “An equitable lien may be granted in favor of a person who, due to the nature of his or her relationship with a property owner, has relied upon that owner’s unfulfilled promise to convey the property, and as a result has expended funds to preserve or improve it in anticipation of the conveyance.” *Rock v. Rock*, 100 AD3d 614, 617, 953 N.Y.S.2d 165 [2d Dept 2012], *quoting Fallica v. Manzollilo*, 210 AD2d 660, 661, 619 N.Y.S.2d 409 [3rd Dept 1994]. The complaint has sufficiently stated a cause of action for an equitable lien.

Sixth Cause of Action- Constructive Fraud

The Court finds that the Plaintiff’s claim for constructive fraud is duplicative of the constructive trust claim. “[A] constructive trust is a fraud rectifying remedy generally available where, in the context of a confidential relationship, a promisee, in reliance on a promise, transfers something of value, thereby

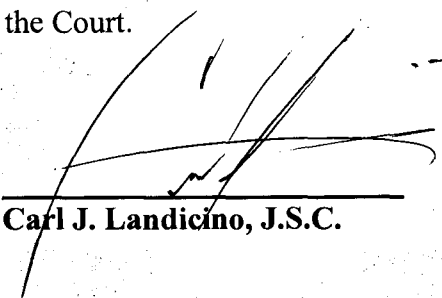
unjustly enriching the promisor.” *Schwab v. Denton*, 141 AD2d 714, 715, 529 N.Y.S.2d 825, 826–27 [2d Dept 1988]. Similarly, “[t]he elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial exception that the element of scienter upon the part of the defendant, his [or her] knowledge of the falsity of his representation, is dropped ... and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his [or her] confidence in the defendant and therefore to relax the care and vigilance he [or she] would ordinarily exercise in the circumstances.” *Levin v. Kitsis*, 82 AD3d 1051, 1054, 920 N.Y.S.2d 131, 135 [2d Dept 2011], quoting *Brown v. Lockwood*, 76 AD2d 721, 432 N.Y.S.2d 186 [2d Dept 1980]. In addition, the Plaintiff has not clearly articulated a specific misrepresentation made by the Defendant. Accordingly, the Court finds that the sixth cause of action for constructive fraud is duplicative of the constructive trust claim and is therefore dismissed.

Based upon the foregoing, it is hereby ORDERED as follows:

The Defendant’s motion (motion sequence #1) for an order pursuant to CPLR 3211(a)(7), is granted solely to the extent that the Plaintiff’s Third Cause of Action (Conversion) and Sixth Cause of Action (Constructive Fraud) are dismissed. The remaining causes of action shall continue, and the complaint is amended in accordance herewith.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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