Sirota v Shtarkman
2023 NY Slip Op 34619(U)
December 19, 2023
Supreme Court, Kings County
Docket Number: Index No. 512436/2017
Judge: Lisa S. Ottley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

----------x

RIMMA SIROTA,

Plaintiff,

-against-

ALEKSANDR SHTARKMAN AND ALLA SHTARKMAN,

Defendants.

----------x

BENCH TRIAL DECISION

Index No. 512436/2017

HON. LISA S. OTTLEY, J.S.C.

A bench trial of this matter was held before this court on December 5 through December 9, 2022, and the parties were provided an opportunity to submit post-trial memoranda. Plaintiff, Rimma Sirota commenced this action pursuant to Article 9 of the Real Property Action and Proceedings Law, against the defendants, Aleksandr Shtarkman and Alla Shtarkman seeking (1) the partition and sale of the property known as 2514 East 26th Street, Brooklyn, New York, (2) the imposition of a constructive trust, (3) repayment of a loan and (4) outstanding costs for construction.

Rimma Sirota testified that she and her partner of twenty-five years, Boris Motovich, in 1999 purchased the subject property known as 2514 East 26th Street, located in Brooklyn, New York, demolishing the existing structure and then building a luxury four thousand square feet, three story home with a finished basement. Plaintiff testified that she along with Mr. Motovich purchased the property as a joint venture. Plaintiff secured a mortgage for the subject property and both the deed and mortgage were in her name only. (See, Plaintiff's Exh. "1" in evidence). She testified that at the time, Mr. Motovich, who was her business partner for this joint venture, was married and did not want his name on the deed to the subject property. Ms. Sirota further testified that in 2000, she transferred fifty percent interest of the property to her sister, Alla Shtarkman, and her brother-in-law, Aleksandr Shtarkman. Plaintiff testified that there was an oral agreement between plaintiff and defendants which required two things of the defendants: (1) to make mortgage payments on the existing mortgage and (2) to contribute towards the construction costs, which defendants agreed to do, but failed to do by not making payments towards the construction and falling behind on the mortgage payments. The plaintiff further testified that she paid off the mortgage in 2016 (See, Satisfaction of Mortgage, Plaintiff's Exh. 9 in evidence), and in 2017 informed the defendants that she would pay them $650,000.00 to move out of the home, as well as forgive the loan she gave to defendants, and costs owed to Boris Motovich for the construction of the home. She testified that the total owed is $171,000.00 plus interest from 2004 for the loan, and $92,000.00 plus interest from 2001 for the outstanding cost of construction for the subject property.

The Joint Venture

First, this court will address the issue as to whether Rimma Sirota, who is a named party on the deed of the subject property in question, has standing to assert a claim on behalf of Boris Motovich, for monies owed to his company and/or Mr. Motovitch individually, for the cost of construction of the subject property as a partner in the joint venture.

A plaintiff generally has standing only to assert claims on behalf of himself or herself. Although, there are situations in which representative or organizational standing is permitted. *See, Carper v. Nussbaum*, 36 A.D.3d 176, 825 N.Y.S.2d 55 (2nd Dept., 2006), *citing*, (*see* CPLR 1004; *Rudder v. Pataki*, 93 N.Y.2d 273, 278, 689 N.Y.S.2d 701, 711 N.E.2d 978; *Matter of Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 9, 377 N.Y.S.2d 451), where one does not, as a general rule, have standing to assert claims on behalf of another (*see Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773, 570 N.Y.S.2d 778; *Matter of Hebel v. West*, 25 A.D.3d 172, 175, 803 N.Y.S.2d 242).

In the case at bar, the plaintiff and Boris Motovich testified that they have a business relationship, a joint venture for the subject property. A joint venture has been defined as an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, efforts, skill, and knowledge. *See, McBride v. Dispenza*, 39 Misc.3d 1221(A), 972 N.Y.S.2d 144. The plaintiffs have the burden of establishing the existence of a joint venture. *See, DeVito v. Pokoik*, 150 A.D.2d 331, 540 N.Y.S.2d 858 [2nd Dept., 1989]. Neither the plaintiff's complaint, evidence nor testimony at the time of trial established the existence of a joint venture. While it was established that the plaintiff, Rimma Sirota and Mr. Boris Motovich have a personal relationship, as well as the fact that Ms. Sirota is an employee of one of Mr. Motovich's businesses, the plaintiff failed to set forth the indicia of their joint venture. The indicia of a joint venture are: (1) acts manifesting the intent of the parties to be associated as joint venturers; (2) mutual contributions to the joint undertaking through a combination of property, financial resources, effort, skill, or knowledge; (3) a measure of joint proprietorship and control over the enterprise; and (4) a provision for the sharing of profits and losses. The testimony as to why Mr. Motovich's name is not on the deed which was due to his marital status, and him not wanting his wife to be able to have a claim to the subject property, does not, in this court's view, manifest an intent of the parties to be associated as joint venturers. In addition, the plaintiff testified that she secured the mortgage with her personal finances. Furthermore, as to the effort, skill, and knowledge of Mr. Motovich as to the building of the home, again, there is nothing in the complaint which alleges that plaintiff and Mr. Motovich's partnership as a joint venture is seeking to recover damages. The complaint seeks a partition and sale of the property and the imposition of a constructive trust. In addition, the failure to allege any agreement to share the burden of losses is fatal to plaintiff's assertion of a joint venture. *DeVito v. Pokoik*, *supra*. Moreover, the court finds that the testimony from both the plaintiff and Mr. Boris Motovich presented conflicting inferences as to the property, their intent, and the credibility as to their joint venture is questionable.

This court finds that the plaintiff, Rimma Sirota, lacks standing to assert the claim for $92,000.00 on behalf of Boris Motovich and/or the Bonyard Construction Company. Plaintiff cannot recover monies owed to the contractor, Boris Motovich, or his company, who if owed money should and could have commenced an action against the defendant to collect monies due to him and/or his company. However, there was testimony and a handwritten ledger/paper which was admitted into evidence by both sides establishing that the defendants had agreed and were paying towards the construction costs of the subject property. In fact, defendants testified that there was an outstanding balance of $92,000. Therefore, the outstanding balance could be attributed to adjusting the rights of the parties as it relates to the partition and sale of the property, so each receives the proper share of the property.

As to the invoices submitted by the plaintiff to establish the costs of the construction, the court finds that the invoices which are not marked paid and only indicated that they are estimates/proposals (See, Plaintiff's Exhs. 4, 5, 6 and 10), for work to be done at the subject property fail to establish proof of payment.

The Loan

The transfer of fifty percent (50%) interest of the subject property was between Rimma Sirota and the defendants, Aleksandr Shtarkman and Alla Shtarkman. (See, Plaintiff's Exh. "2" in evidence). Ms. Sirota testified that she transferred fifty percent interest of the property she owned to the defendants because she and Alla Shtarkman agreed to have their mother live with them at the subject property. She further testified that her sister, Alla Shtarkman took advantage of the love she had for their mother, and she had no legal obligation to give fifty percent interest of the home to the defendants. Plaintiff testified that she did not, at the time the deed was signed, receive any value from the defendants. Ms. Sirota stated that in June of 2000, the defendants gave her $40,000, which was made payable to Mr. Motovich's construction company. In terms of the oral agreement between the parties, Ms. Sirota testified that the defendant agreed to pay $250,000.00 toward construction of the home and to take over the mortgage. (See, 12/5/22 of Trial Transcript, p. 31, lines. 24-25). She further testified that the defendants did in fact make payments toward the mortgage and were timely until they fell behind in payments. Plaintiff testified that defendant, Alla Shtarkman informed her that they were having financial problems and were unable to cover the mortgage payments in full. She testified that she began providing her sister with monthly payments to meet the mortgage, which she stated was a loan, not a gift and had the expectation of being repaid the money. Ms. Sirota testified that defendants refused to repay the loan and she is owed $272,000.00 to date which includes interest at 10%. Plaintiff further testified that she paid $5,400.00 toward real estate taxes in 2019, but no share was paid by the defendants, and a total of approximately $82,000.00 is owed as of December 5, 2022. She also testified that the defendants made payments toward the construction costs but a balance of $92,000.00 remains outstanding.

Defendant, Alla Shtarkman testified that a personal loan never existed between the parties. Defendants argue that the issue of a personal loan was raised for the first time at trial,

and there was no writing evidencing that a personal loan was given to the defendants in 2004. Defendants argue that plaintiff's failure to set forth a cause of action for the personal loan is waived.

To plead a cause of action for breach of contract, a plaintiff usually must allege that: (1) a contract exists. *See, 34-06 73, LLC v. Seneca Insurance Company*, 39 N.Y.3d 44, 178 N.Y.S.3d 1 [2022], *citing* (*see, e.g. Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 181–182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [2011]); (2) plaintiff performed in accordance with the contract (*see e.g. Pope v. Terre Haute Car & Mfg. Co.*, 107 N.Y. 61, 65–66, 13 N.E. 592 [1887]); (3) defendant breached its contractual obligations (*see, Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751, 923 N.Y.S.2d 118 [2d Dept. 2011]) ["In order to state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached"]; and (4) defendant's breach resulted in damages (*see, Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 22 N.Y.3d 799, 805–806, 988 N.Y.S.2d 527 [2014] [compensatory damages]; *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 95, 595 N.Y.S.2d 931 [1993] [nominal damages]; *Milan Music, Inc. v. Emmel Communications Booking, Inc.*, 37 A.D.3d 206, 829 N.Y.S.2d 485 [1st Dept. 2007]).

With the above principles in mind, the court examined the plaintiff's complaint and concludes that the plaintiff failed to give notice to defendants of the transactions or occurrences in which plaintiff could base a claim for repayment of a personal loan. In plaintiff's original complaint, plaintiff failed to reference the personal loan or monies paid to the defendants which plaintiff identified as the parties' oral agreement that she alleges defendants breached. Furthermore, the plaintiff did not move to amend the complaint nor conform the pleadings to the proof established at trial. *See, Endothelix, Inc. v. Vasomedical, Inc.*, 202 A.D.3d 620, 164 N.Y.S.3d 558 (1st Dept., 2022). However, even if plaintiff had moved to conform the pleadings to the proof, the plaintiff failed to establish sufficient proof nor present sufficient evidence that a loan existed between the parties. *See, DiSario v. Rynston*, 138 A.D.3d 672, 30 N.Y.S.3d 129 (2nd Dept., 2016). In addition, there are two specific causes of action alleged by the plaintiff in her complaint: (1) partition and sale of the subject property; and (2) imposition of a constructive trust which was addressed by the Hon. Lawrence Knipel in an order dated October 8, 2021, page 12 states in part as follows:

> Here, plaintiff seeks partition and sale of the property with an adjustment of the equities of the parties in determining the distribution of the sale proceeds and institution of a constructive trust to account for the defendants' unjust enrichment as a result of their failure to contribute their "due share" over the years. Defendants' counterclaims seek partition on equitable terms, so that they can terminate co-ownership. Notably, the pleadings here do not place title or the original deed at issue or seek to rescind said deed (C.f. Tornamme v. Tornabe, 153 NYS2d 823 [Sup Ct. Kings County, 1956]). The focus herein is the obligations and financial duties of the parties after the deed was executed and how the defendants fell short of those obligations, if at all. The relief sought

in the complaint and movant's counterclaims is clearly equitable in nature.

The court notes that defendants' argument as to the oral agreement, not being enforceable under the Statute of Frauds would not have prevailed. Had plaintiff stated a cause of action for breach of contract, the elements of a claim for breach of contract are the existence of the contract, the plaintiff's performance thereunder, the defendant's breach thereof and resulting damages. *See*, Gade v. Carmili, 68 Misc.3d 1204(A), 129 N.Y.S.3d 660 (Sup. Ct., N.Y. Co., 2020). Pursuant to the statute of frauds, an agreement not reduced to writing is void, if, by its terms, it cannot be performed within one year of its making. *See, General Obligations Law 5-701[a][1]*. Where the loan is at issue, the plaintiff would have to produce evidence of the loan agreement and failure to pay. If an oral loan agreement lacks a specified time for repayment, it is payable on demand. *See*, Gade v. Carmili, *supra*. Furthermore, an oral agreement may be enforceable so long as the terms are clear and definite, and the conduct of the parties evinces mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. *See*, J.D. v. A.D., Jr., 54 Misc.3d 1221(A), 54 N.Y.S.3d 610 (Sup. Ct. Richmond Co., 2017), *citing* Kramer v. Greene, 142 A.D.3d 438 (1st Dept., 2016).

Constructive Trust

In ascertaining whether a constructive trust should be imposed upon a property interest, four factors are considered: (1) the existence of a fiduciary or confidential relationship, (2) promise, express or implied, (3) a transfer in reliance on the promise, and (4) unjust enrichment. *See*, Kissane v. Cashman, 217 A.D.3d 932, 191 N.Y.S.3d 727 (2nd Dept., 2023). However, these factors are not talismanic and merely serve as a useful guide. If a party holds property "under circumstances that in equity and good conscience he ought not retain it," a constructive trust will be imposed. *See*, CoCo v. CoCo, 107 A.D.2d 21, 485 N.Y.S.2d 286 (2nd Dept., 1985), *citing* Miller v. Schloss, 218 N.Y 400, Ptachewich v. Ptachewich, 96 A.D.2d 582, 45 N.Y.S.2d 277.

The court notes that a constructive trust over real property can be imposed even where an underlying agreement is not in writing. *See*, Thomas v. Thomas, 70 A.D.3d 588, 89 N.Y.S.3d (1st Dept., 2010). The complaint alleges that the defendants, Aleksandr, and Alla Shtarkman promised that they would assume mortgage payments for the subject property, as well as the maintenance and expenses for the subject property, which would be to the plaintiff's benefit, and those misrepresentations were relied upon by Rimma Sirota, to her detriment resulting in the defendants' unjust enrichment. A constructive trust has been defined as "the formula through which the conscience of equity finds expression," and as a remedy to be erected whenever necessary to satisfy the demands of justice. *See*, CoCo v. CoCo, 107 A.D.2d 21, 485 N.Y.S.2d 286 (2nd Dept., 1985), *citing* Latham v. Father Divine, 299 N.Y. 22, 286 N.Y.S.2d 72 (1949). The essential purpose of a constructive trust is to prevent unjust enrichment. *See*, Sharp v. Kasmalski, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976). Where the property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. *See*, CoCo v. CoCo, *supra.*

In the case at bar, based upon the trial testimony, the court finds that a confidential relationship existed between the plaintiff and defendants, there was an implied promise and a transfer in reliance on the promise of fifty percent interest in the subject property to defendants, as well as unjust enrichment. For the defendants to claim that they did not promise to make payments on the mortgage and at the same time testify that they made mortgage payments and the payments towards the costs of construction, stopped making mortgage payments, paid real estate taxes, and continue to reside in the subject property, is sufficient evidence to impose a constructive trust. A constructive trust will be imposed whenever necessary to satisfy the demands of justice and its applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them. *See*, *Latham v. Father Divine*, 299 N.Y. 22, 286 N.Y.S.2d 72 (1949).

Plaintiff alleged that the transfer of fifty percent interest in the subject property was not the result of plaintiff receiving monetary value. The court finds plaintiff's testimony credible, as to there being no money exchanged at the time of the transfer for fifty percent interest in the subject property. The payment of $40,000 thereafter in 2000 (See, Plaintiff's Exh. 12 on paper/ledger indicating payment for $40,000 payable with check #847 by Defendant), has been attributed to the costs of construction as it was testified to by defendants. Furthermore, the plaintiff, to avoid defaulting on the mortgage paid the mortgage in full, which is not rebutted by the defendants.

Partition & Sale

The ownership interest of the parties to this action is fifty percent to the plaintiff and fifty percent to the defendants. They are tenants in common who have a right to maintain an action to partition real property pursuant to RPAPL 901[1]. The remedy of partition has always been subject to equitable considerations between the parties, and this court has the authority to adjust the rights of the parties, so each receives his or her proper share of the property and its benefits. *See*, *Brady v. Varrone*, 65 A.D.3d 600, 884 N.Y.S.2d 175 (2nd Dept., 2009).

The parties are not opposed to the partition and sale of the subject property. Therefore, the court must address the unresolved and disputed amounts each party claims to have paid in relation to the mortgage, insurance, real estate taxes, water bills and construction costs for the subject property.

The plaintiff purchased the subject property in 1999 and secured a mortgage for the subject premises as the sole purchaser of the property in the amount of $188,000.00. Interestingly, while both parties claim to have proven that they satisfied their obligations as per an agreement pertaining to their respective interests in the property, such as the mortgage, real estate taxes, home insurance and New York City water charges, the proofs submitted are limited, as well as lacking. For example, while plaintiff submitted the recording document for the satisfaction of mortgage (Plaintiff's Exh. 9), it does not establish the amount paid by the plaintiff to satisfy the mortgage. A payoff statement would have established the amount paid

by the plaintiff when the mortgage was satisfied. The satisfaction of the mortgage merely states the amount of the mortgage secured at the time of purchase, as opposed to what was paid at the time the mortgage was satisfied. In addition, neither party testified as to what the monthly mortgage payments were and the checks/statements submitted varied at times. As to the insurance for the subject property, there was no testimony nor proof submitted as to what the yearly insurance premium was for the subject property from year to year, nor proof of payment to the insurance company for the subject property. In fact, the plaintiff when asked at trial, could not recall what the amounts were for either the mortgage or the insurance for the subject property. In addition, while both sides submitted checks written to different insurance companies, such as Travelers, Phoenix, Liberty Mutual and others, none testified with specificity that either all or one of these companies issued homeowner's insurance for the subject property. This court cannot, without testimony and/or documentary proof determine if the insurance companies paid were for the subject property. Unfortunately, neither party kept the best records as to payments made regarding the subject property. Based on the proofs submitted, the court ascertained that the amounts paid by both parties for the subject property are as follows:

The Mortgage

There is no dispute as to the plaintiff having satisfied the mortgage. Based on the proof offered and admitted into evidence, the court painstakingly went through the documents and finds as follows in terms of payments made by the parties for the mortgage:

Plaintiff's Proofs

Exhibit 9 – The **Satisfaction of Mortgage** as opposed to a payoff letter only indicates that the amount satisfied as:

$188,000.00

Exh. 3 & 21 Checks/Proofs admitted made payable to HSBC by Plaintiff: $47,154.55
(Mortgage Payments)

New York City Department of Finance.....No proofs were submitted to establish payments were made by plaintiff. Plaintiff testified that she paid five thousand four hundred dollars ($5,400.00). However, there was no submission of proof to establish the payment.

Exh. 21 - **New York City Water Board** Checks/Proofs show Plaintiff paid: $1,065.00

Defendants' Proofs

The proofs admitted into evidence included checks, xerox copies of checks both the front and back, payment receipts and bank statements. (See, Exhibits: C, U, V, W, Z, AA, BB) Again, the court took the time to go through the many submissions to determine if any were duplicative (which some were) and determined as follows based on the proofs admitted into evidence.

Exh. C, U, V, W, Z, AA, BB – **Mortgage Payments** $239,548.90

Exh. C, U, V, W, Z, AA, BB – **NYC Department of Finance** 27,610.00

Exh. C, U, V, W, Z, AA, BB – **NYC Water Board** 12,490.79

As to the outstanding balance which defendant owes for the costs of construction in the amount of $92,000.00 plus interest at 9% from 2001, the amount should be deducted from defendants' share of the proceeds from the partition and sale of the property. The defendants did not dispute nor negate that the $92,000.00 was the amount outstanding for the construction costs.

Accordingly, the court grants the partition and sale of the subject property known as 2514 East 26th Street, Brooklyn, New York, and finds that a constructive trust is warranted based upon the testimony and proofs established at trial, and it is hereby,

ORDERED, that the property which was last appraised by the parties on January 26, 2022 by Neglia Appraisals, is to be appraised by the court appointed appraiser, **BETSY MAK APPRAISAL GROUP, LLC, located at 135-14 40 Road, #601, Flushing, NY 11354** with an email address and telephone number as follows: betsymak@hotmail.com and 718-886-2800, and it is further

ORDERED, that the sale of the property is to be handled by the court appointed Broker, **Carl F. Forbes, Esq.,** at **CFJ Law PLLC, located at 1623 Flatbush Avenue, Suite 236, Brooklyn, New York 11210** with an email address and telephone number as follows: cfj@cfjlawnyc.com and 347-450-7334, and it is further

ORDERED, that the plaintiff and defendants are responsible for their own attorneys' fees relating to this case, and the request for attorneys' fees to be paid by one party on behalf of the other is denied.

This constitutes the decision, after trial of this matter.

Dated: Brooklyn, New York
December 19, 2023

KINGS COUNTY CLERK
FILED
2024 FEB -8 A 10:

HON. LISA S. OTTLEY J.S.C.

HON. LISA S. OTTLEY