Paitchell v Goldman
2024 NY Slip Op 30859(U)
March 12, 2024
Supreme Court, New York County
Docket Number: Index No. 654563/2021
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART 18**
Justice

----------X

MICHAEL PAITCHELL and SHARI BROWN,

Plaintiffs,

- against -

DAVID GOLDMAN and RICHARD GOLDMAN, individually and as Executors of the Estate of Joanne Paitchell,

Defendants.

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INDEX NO. 654563/2021

MOTION DATE 03/22/2022, 08/10/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on these motions to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for SUPPLEMENT THE RECORD.

I. FACTS

These motions center on a post-nuptial agreement between Harold Paitchell (Harold) and Joanne Paitchell (Joanne), both deceased (Agreement, NY St Cts Elec Filing [NYSCEF] Doc No. 30). On August 14, 1984, Harold and Joanne purchased a condominium unit 3N, located at 12 East 12th Street in Manhattan (the Property) as tenants by the entirety (Unit Deed, NYSCEF Doc. No. 29). On October 18, 1984, Harold and Joanne entered into an Agreement which provided:

> "WHEREAS each party has children of a prior marriage and has accumulated certain assets in his/her individual name and desires to make provisions for said children; and
>
> WHEREAS, the parties intend to purchase certain space known as 3 North, a condominium at 12 East 12th Street, New York, N.Y., in which they shall reside . . .

> all property acquired after May 6, 1984 shall be marital property. Each party shall receive and accept from the other's estate after his/her death one-half of the jointly held property outright and a life interest in the remaining one-half...and each party shall execute a will to that effect. If the property is sold after the death of one spouse, the other spouse may, but is not required to, give one-half the proceeds to the deceased spouse's children in full satisfaction of all claims. In the alternative one-half of the proceeds shall be held in trust . . . and upon death of the survivor the principal . . . shall be paid to the deceased's children.
>
> The entire proceeds . . . may be used to purchase another residence. In such event, upon the death of the survivor, one-half of the proceeds shall be paid to the deceased's children"

(Agreement at 1, 3). Paragraph 7 of the Agreement directed Harold and Joanne to "execute a will and any other agreement necessary" to realize the "full force and effect" of the Agreement (*id.* at 4). Harold died on August 25, 1986 (Probate Petition for Harold's Estate, NYSCEF Doc No. 31) and his estate was distributed pursuant to his will, dated April 6, 1986 (Harold's Will, NYSCEF Doc No. 32). Joanne died on August 22, 2020 (Probate Petition for Joanne's Estate, NYSCEF Doc No. 36). Joanne had a will dated July 20, 2020 (Joanne's Will, NYSCEF Doc No. 35).

Plaintiffs Michael Paitchell (Michael) and Shari Brown (Shari) are Harold's adult children and two of his heirs.[1] Defendants David Goldman (David) and Richard Goldman (Richard) are Joanne's adult children and two of her heirs. David and Richard are also co-executors of her will.

On July 19, 2021, Surrogate Court, New York County, issued a decree granting probate of Joanne's will and letters testamentary to David and Richard (NYSCEF Doc No. 37). On July 22, 2021, plaintiffs filed a notice of pendency against the Premises (NYSCEF Doc No. 41) and filed this suit. Plaintiffs complain that Joanne did not honor her end of the Agreement, as her will left her entire estate to her own children. Plaintiffs assert claims for breach of the Agreement, the imposition of a constructive trust, and for a declaratory judgment that half of the Property should pass to them.

[1] Harold's third child, Paul Paitchell (Paul) died in 2014.

There are two motions and a cross-motion currently before the Court. In motion sequence number 001, plaintiffs seek summary judgment on their breach of contract and constructive trust claims, but do not move for summary judgment on the declaratory judgment claim. Defendants oppose and cross-move for cancellation of the notice of pendency. Defendants' cross-motion also seeks summary judgment dismissing the complaint or, in the alternative, seeks to stay this action and compel arbitration pursuant to the Agreement. In motion sequence number 002, plaintiffs seek to supplement the first motion with new evidence. Defendants oppose, asserting prejudice.

The Court consolidates motion sequence numbers 001 and 002 for disposition. The Court addresses defendants' application for a stay and arbitration first, plaintiffs' motion to supplement second, the parties' applications for summary judgment third, and defendants' request to cancel the notice of pendency last.

II. CROSS-MOTION TO STAY AND COMPEL ARBITRATION (MTN SEQ 001)

Characterizing the agreement as a "purported agreement," defendants contend the Court should order a stay of this action and compel arbitration of plaintiffs' breach of contract claim pursuant to CPLR § 7503 and the arbitration clause at paragraph 17 of the Agreement, which provides "[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration . . . and judgment upon the award . . . may be entered in any court having jurisdiction thereof" (Agreement at 7). CPLR § 7503 (a) creates a cause of action to "apply for an order compelling arbitration."

The parties agree that plaintiffs' breach of contract claim arises out of or relates to the Agreement, which contemplates arbitration. Plaintiffs contend defendants waived their right to arbitrate by failing to raise arbitration as one of their nine affirmative defenses and actively participating in this action for nine months, including filing an answer and amended answer,

serving discovery, and engaging in motion practice before cross-moving to compel arbitration. Plaintiffs argue that defendants' litigation conduct bars arbitration as defendants may not "create [their] own unique structure combining litigation and arbitration" (*De Sapio, v Kohlmeyer*, 35 NY2d 402, 406 [1974]).

Defendants contend their litigation conduct was minimal and is consistent with their right to arbitrate, as there has been no preliminary conference or exchange of discovery. Defendants contend their motion was filed as an urgent necessity to cancel the notice of pendency, and so their right to arbitrate is unaffected. Also, defendants assert that arbitration is the basis for their stated affirmative defenses of failure to state a cause of action, failure to seek proper remedies, and lack of capacity to sue.

Defendants' arguments are unpersuasive. Defendants rely heavily on *Neesemann v Mt. Sinai W.* (198 AD3d 484 [1st Dept 2021]) and *Matter of Long Is. Power Auth. Hurricane Sandy Litig.* (165 AD3d 1138 [2d Dept 2018]). In *Neesemann,* the First Department found that the simultaneous service of an answer and discovery demands did not amount to a waiver of arbitration (198 AD3d at 485-486). However, that court noted that defendant raised an affirmative defense apprising that plaintiff of its intent to seek arbitration (*id.*). That court further noted there was no preliminary conference order and no discovery by defendant (*id.* at 486). Here, defendants did not mention arbitration in their answer or amended answer and served discovery demands separately. Further, as far as defendants rely on *Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, that court held a pre-answer motion to dismiss did not constitute waiver of arbitration as "a defendant is entitled to have the sufficiency of a complaint tested before a duty to seek arbitration arises" (165 AD3d at 1143 [internal quotation marks and citations omitted]). Unlike those defendants, the defendants here did not make a pre-answer motion to dismiss but answered and sought

discovery. Third, defendants did not seek arbitration in their first motion, brought in November 2021; instead, defendants waited until plaintiffs moved for summary judgment to then cross-move for arbitration in May 2022 (*see Preiss/Breismeister Architects v Westin Hotel Co.-Plaza Hotel Div.*, 56 NY2d 787, 789 [1982] [holding no waiver when there is a motion for protective relief and a demand for arbitration]).

Defendants failed to put plaintiffs on notice of their intent to pursue arbitration. Consequently, this branch of the cross-motion is denied. Defendants waived their right to arbitrate as their degree of participation in this action for close to nine months "manifest[ed] an affirmative acceptance of the judicial forum...inconsistent with a later claim that only the arbitral forum is satisfactory" (*Nishio v Hutton & Co.*, 168 AD2d 224, 224 [1st Dept 1990], quoting *De Sapio*, 35 NY2d at 405, *see Poole v West 111th St. Rehab Assoc.*, 82 AD3d 647, 647 [1st Dept 2011] [defendants waived their right to arbitrate as they failed to assert arbitration "as a defense in their answer," requested discovery, filed a dispositive motion, and actively participated in the action for about "nine months before notifying plaintiff of their intention to seek arbitration"]).

III. SUPPLEMENT THE RECORD (MTN SEQ 002)

Plaintiffs move to supplement the record of their summary judgment motion to include newly discovered evidence in support of their ownership claim in the condominium unit (NYSCEF Doc No. 74). Specifically, plaintiffs proffer letters from Joan Goldberg, dated October 7, 1986, and February 23, 1993, and an estate statement of account appended to the 1993 letter (NYSCEF Doc Nos. 72 and 75, respectively). Both letters are addressed to plaintiffs and Paul, relate to Harold's estate, and identify the author as an attorney. Additionally, Shari, in her affidavit, describes Goldberg as "Joanne's attorney who handled my father's estate" (NYSCEF Doc No. 70 at 3).

For the reasons stated on the record at oral argument, Motion Sequence 002 is granted and the additional exhibits may be considered on the motion for summary judgment. Moreover, the Court finds the additional exhibits admissible. As defendants have argued extensively about the significance of the exhibits, or lack thereof, in connection with motion sequence 002, no additional briefing is needed regarding those exhibits in motion sequence 001.

IV. SUMMARY JUDGMENT (MTN SEQ 001)

A. Standing

Plaintiffs first argue they have standing to bring these claims as third-party beneficiaries under the agreement, as children have the right to commence an action to enforce certain promises made by a parent in a marital agreement (*see Drake v Drake*, 89 AD2d 207, 212 [4th Dept 1982]). Defendants did not oppose this argument and therefore defendants have abandoned the affirmative defense (*see Sancino v Metropolitan Transp. Auth.*, 184 AD3d 534, 534-535 [1st Dept 2020]).[2] Regardless, plaintiffs have standing to commence this action. The Agreement clearly states Harold's and Joanne's intentions to benefit their respective children, and the benefit to the plaintiffs from the agreement is now immediate, as both signatories have died (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Mendel v Henry Phipps Plaza West, Inc.*, 6 NY3d 783 [2006]; *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314 [1983]; *Stagen v Neu*, 221 AD3d 554, 556 [1st Dept 2023] [permitting plaintiff to pursue his breach of contract claim as "the prominent mention of plaintiff in paragraph 6 of the Settlement Agreement evinces the contracting parties' intent to benefit him"]).

[2] Defendants, in their opposition to the motion, refer to the agreement as the "purported agreement" and assert that there is a question as to whether a contract was made. These assertions are not a substitute for addressing plaintiffs' argument on standing.

B. Failure to Join a Necessary Party

In their opposition to plaintiffs' motion, defendants contend they are prejudiced by plaintiffs' failure to include Paul's estate as a necessary party. According to defendants, a judgment may lead to a similar lawsuit commenced by Paul's estate requesting the same relief. Defendants also posit Paul's estate could possess pertinent documents or information. Plaintiffs respond that defendants can conduct third-party discovery from Paul's estate, if necessary, but it is not a necessary party.

Paul died before 2020, the year in which Joanne executed her will at issue and before plaintiffs' causes of action accrued (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993] [stating that "a breach of contract cause of action accrues at the time of the breach"]; *Maric Piping v Maric*, 271 AD2d 507, 508 [2d Dept 2000] [stating that a "claim for the imposition of a constructive trust is governed by [a] six-year [s]tatute of [l]imitations...which begins to run at the time of the wrongful conduct...giving rise to a duty of restitution"]). As the Agreement contemplates actions for the benefit of Harold's and Joanne's children, not their estates, heirs, and beneficiaries, Paul's estate is not a necessary party to this action.

C. Cross-Motions for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.,* 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v*

Prospect Hosp., supra; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

1. Breach of Contract

To obtain summary judgment on a cause of action for breach of contract, a plaintiff must establish: "[1] the existence of a contract, [2] the plaintiff's performance thereunder, [3] the

defendant's breach thereof, and [4] resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). On the first element, plaintiffs' evidence is the signed written Agreement between Joanne and Harold. Plaintiffs represent that the agreement complies with EPTL § 13-2.1 (a) (2), which requires contracts to make testamentary provisions to be in writing and signed by the party to be charged. Additionally, plaintiffs quote *Haynes v Haynes* (200 AD2d 457, 457 [1st Dept 1994]), which states there is a "heavy presumption that the deliberately prepared and executed postnuptial agreement manifest[s] the true intention of the parties." Plaintiffs contend Harold's will constitutes his performance, but then Joanne breached the agreement in 2020 by executing a will that did not leave the half of the Property that she received from Harold to Harold's children. Plaintiffs contend they suffered damages from Joanne's breach as they did not receive an amount equal to 50% of the unit's fair market value or a 50% ownership interest in the unit.

As further support for their position that the Agreement is enforceable, plaintiffs include a lengthy excerpt from *Wagner v Wagner* (58 AD2d 7, 8-12 [1st Dept 1977]), in which the court considered a joint will between a husband and wife that gave all the property to the surviving spouse, and upon their death, to the children. The First Department held that the mutual promises in that will constituted sufficient consideration to enforce the contract (*id.* at 11-12). That court further held the surviving spouse "was free during his lifetime to use the property so received but he could not make a testamentary disposition contrary to the agreement or a gift, as he did here, to defeat the purpose of the agreement" (*id.* at 11).

In opposition, and also seeking summary judgment dismissing the claim, defendants dispute whether the Agreement is enforceable, questioning whether there was sufficient consideration to support the Agreement, as Harold and Joanne had taken title to the Property as

tenants by the entirety. As such, the surviving spouse already had the right to remain in the property during his or her lifetime before the Agreement's execution. Defendants also dispute whether Joanne breached the Agreement's terms and whether the cause of action is ripe. Defendants contend Harold breached the Agreement before Joanne executed her 2020 will, as he had not made provisions for Joanne's children in his will.

The Agreement is enforceable. As Harold and Joanne purchased the Property as tenants in the entirety, the surviving spouse would have "absolute ownership of the property upon the other spouse's death" (*Lequerique v Lequerique*, 60 AD3d 504, 505 [1st Dept 2009]). While defendants contend there is insufficient consideration, the consideration on both sides in the Agreement is the assurance that the children of the first spouse to die will eventually inherit their parent's original half-interest in the Property. The Agreement provided that each spouse was to "execute a will to that effect." However, neither spouse's final will contained language to effect this Agreement. The April 6, 1986, Last Will and Testament of Harold Paitchell (NYSCEF Doc. No. 32) did not have any provision for transferring half the interest in the Property to Joanne's children in the event she pre-deceased him and he received absolute ownership of the Property. As Harold also breached the Agreement, the breach of contract claim fails and summary judgment dismissing this claim will be granted to the defendants.

2. Constructive Trust

To obtain a constructive trust, a plaintiff must establish: "(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Panetta v Kelly*, 17 AD3d 163, 165 [1st Dept 2005]). Plaintiffs point out the first element is met since Harold and Joanne were husband and wife, the epitome of a confidential relationship (*Goodman v Goodman*, 84 AD2d 344, 346 [1st Dept 1982]). For the second element,

plaintiffs allege that paragraph 2 of the Agreement contains Harold and Joanne's express promise "to execute a will that gave the other a life interest in the predeceasing spouse's interest in the marital property" (NYSCEF Doc No. 26 at 19). As discussed previously, plaintiffs acknowledge that other language within this paragraph permits the surviving spouse to sell the property but insist that such language did not excuse Joanne's obligation to fulfill her express promise. In the alternative, plaintiffs allege that a promise is implied by the agreement itself. For the third element, plaintiffs maintain that Harold, through his will, transferred the unit in reliance on Joanne's promise. The fourth element generally requires "that a party hold property under such circumstances that in equity and good conscience he ought not to retain it" (*Simonds v Simonds*, 45 NY2d 233, 242 [1978] [internal quotation marks and citation omitted]). Plaintiffs attest that such circumstances are present in this action and cite to the *Matter of Melvin Blake* (2000 NYLJ LEXIS 995 [Sup Ct, NY County 2000]) for illustration. *Matter of Blake* concerned individual wills executed by domestic partners Frank Purnell and Melvin Blake, each of which left his estate to the other (*id.* at *1). Their wills further provided that the survivor's estate would be distributed such that Purnell's nephews and the children of a deceased nephew would receive half and Blake's family would receive the remainder (*id.*). Purnell died first. Blake inherited Purnell's estate and then executed a new will that did not provide for Purnell's family (*id.* at *1-2). The court denied a motion to dismiss Purnell's nephews' petition for a constructive trust and opined that Blake cannot "accept the benefits of the alleged mutual promise and then renege on his promise to provide for petitioners" (*id.* at *6). In this case, plaintiffs argue that Joanne accepted the benefit of Harold's performance of the mutual promise via a transfer effectuated by Harold's will, and then she executed a will that reneged on her promise to provide for Harold's children.

In opposition, defendants argue plaintiffs are not entitled to summary judgment because, at a minimum, there are triable issues of fact as to the remaining three elements. Defendants assert the second element is not satisfied as paragraph 2 of the agreement is ambiguous with respect to what is being promised. For example, the Agreement provides: "[i]f the property is sold after the death of one spouse, the other spouse may, but is not required to, give one-half the proceeds to the deceased spouse's children in full satisfaction of all claims" (NYSCEF Doc No. 45 at 13, quoting NYSCEF Doc No. 30 at 3). Defendants argue that the use of the word "may" does not denote a binding obligation. For the same reason, they highlight that the third sentence speaks to the possibility of a trust being created if the unit was sold during the surviving spouse's lifetime. Defendants next argue that the third element is disproved, and the *Matter of Blake* is inapposite, since Harold and Joanne acquired title to the unit as tenants by the entirety. This argument is the basis of defendants' cross-motion for summary judgment (*see supra* at 16).

To refute the fourth element, defendants rely upon the fact that Joanne paid plaintiffs $170,000. The affidavits from David and Richard identically state: "I was also told by mother that she had made transfers to the children of Harold Paitchell at the direction of Joan Goldberg, Esq. representing the payment of what my mother owed to them after the death of Harold Paitchell" (NYSCEF Doc Nos. 46 and 47 at 2). Defendants further aver that plaintiffs' reading of the agreement would unjustly enrich plaintiffs at the expense of defendants, since "[s]ince the death of Harold Paitchell, [Joanne and] her Estate paid all of the charges including any renovations to the unit without contribution from the family of Harold Paitchell" (NYSCEF Doc Nos. 46 and 47 at 2).

In reply, plaintiffs defend their reading of the agreement and the need for a constructive trust to prevent unjust enrichment. Plaintiffs criticize defendants' discussion of the second and

third sentences in paragraph 2 of the agreement as irrelevant, as Joanne did not sell the property during her lifetime. Similarly, plaintiffs reject defendants' argument concerning the third element.

The claim for a constructive trust fails for lack of a transfer made in reliance on the promise. The bequest in Harold's will purportedly giving Joanne a life estate in the Property, relied on by plaintiffs to fulfill the requirement of a transfer, is a nullity. As Harold and Joanne were tenants by the entirety, as discussed above, Joanne received "absolute ownership of the property upon" Harold's death (*Lequerique v Lequerique*, 60 AD3d at 505). As far as it is argued that the Agreement transformed the tenancy by the entirety to a tenancy in common, in which each spouse could bequeath their interest in the Property to another party, such a transformation may be performed "by certain definitive acts: a conveyance of the property in which both spouses join; a judicial decree of separation, annulment or divorce; or execution of a written instrument that satisfies the requirements of section 3-309 of the General Obligations Law, which permits division or partition of real property held in a tenancy by the entirety if clearly expressed in such an instrument" (*Matter of Estate of Violi*, 65 NY2d 392, 395 [1985]). The Agreement did not clearly state that intention. Further, if the Agreement had transformed the tenancy by the entirety to a tenancy in common, there would be no unjust enrichment, as the life tenancy granted Joanne by Harold's will would have ended when she died and his interest in the Property would not be part of her estate or subject to her will. Therefore, the plaintiffs' motion for summary judgment on this claim is denied, the defendants' motion for summary judgment on this claim is granted, and this claim is dismissed.

3. Declaratory Judgment

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy

whether or not further relief is or could be claimed" (CPLR § 3001). A court "may decline to hear the matter if there are other adequate remedies available" (*Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]). Plaintiffs do not move for summary judgment on this claim. Defendants move generally, including on this claim, arguing this cause of action is based on a dispute regarding entitlement to the value of the Property, which has not been sold. Plaintiffs clarify that the claim seeks a declaration that half the interest in the Property should pass to plaintiffs, pursuant to the Agreement. As the plaintiffs have clarified that this dispute is about ownership of the one-half interest in the Property and not for monetary damages, this claim will also survive.

V. CANCEL NOTICE OF PENDENCY (MTN SEQ 001)

Defendants also cross-move to cancel the notice of pendency. CPLR § 6501 provides that "[a] notice of pendency may be filed in any action . . . in which the judgment demanded would affect the title to, incumbrance of, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property." CPLR § 6514 (b) permits "[t]he court, upon motion of any person aggrieved" to order the cancellation of a notice of pendency "if the plaintiff has not commenced or prosecuted the action in good faith." On a CPLR § 6514 (b) motion, the court's inquiry "is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR [§] 6501" (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]). The court may not "investigate the underlying transaction" in making this determination (*id.* at 321). Nor can the court consider "[t]he plaintiff's likelihood of success on the merits" (*551 W. Chelsea Partners LLC v 556 Holding LLC*, 40 AD3d 546, 548 [1st Dept 2007]).

Relying on *Yonaty v Glauber* (40 AD3d 1193, 1195 [3d Dept 2007]), defendants' core argument is that the court must look past "the labels assigned to plaintiff[s]' causes of action and

the relief sought" to ascertain whether the action truly affects the title or possession of the contested real estate. Defendants assert that none of plaintiffs' causes of action meet this criterion and this action concerns the proceeds from the eventual sale of the unit, not ownership thereof. Defendants stress that paragraph 2 of the Agreement permitted the surviving spouse to use the entire proceeds from the unit's sale to purchase a new residence. Plaintiffs contend that if they were to prevail on these causes of action, they would be deemed tenants in common with defendants owning 50% of the Property, since Joanne did not sell the Property, so their claims do affect title.

The Court agrees with plaintiffs and thus denies this branch of defendants' cross-motion (*see Don v Singer*, 73 AD3d 583, 583 [1st Dept 2010] [affirming the extension of a notice of pendency in an action to impose a constructive trust upon real property reasoning, in part, that the "action affects the title to, or the possession, use or enjoyment of real property"] [internal quotation marks and citations omitted]). The plain wording of the complaint reflects that the surviving cause of action does not concern monetary damages. In their complaint, plaintiffs seek a judgment declaring that they should receive half of the Property pursuant to the Agreement. This claim will also survive.

The Court has considered the parties' remaining contentions and finds them unavailing. Accordingly, it is

ORDERED that plaintiffs' motion to supplement the record (Motion Sequence 002) is hereby granted; and it is further

ORDERED that plaintiffs' motion for summary judgment (Motion Sequence 001) is hereby denied; and it is further

ORDERED that defendants' cross-motion for summary judgment and other relief (Motion Sequence 001) is granted in part and denied in part. It is granted as far as the breach of

contract and constructive trust claims are dismissed, and denied in that the declaratory judgment claim will survive and the portion of defendants' motion seeking to cancel the notice of pendency is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary status conference by Microsoft Teams on April 3, 2024, at noon, with the Teams link to be provided by the court. This constitutes the decision and order of the court.

3/12/2024
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE