

Gates v Gates
2024 NY Slip Op 35472(U)
April 11, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 608457/2019
Judge: George M. Nolan
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SHORT FORM ORDER

INDEX No. 608457/2019CAL. No. 202300694RPSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY**PRESENT:**Hon. GEORGE M. NOLAN
Justice of the Supreme CourtMOTION DATE 9/28/23 (002)MOTION DATE 11/15/23 (003)ADJ. DATE 11/16/23

Mot. Seq. # 002 MG

Mot. Seq. # 003 MD; CASEDISP

-----X
GEORGE GATES, as an administrator of the
goods and chattels of MANUELA D. GATES,

Plaintiff,

- against -

NANCY GATES,

Defendant.
-----XJAKUBOWSKI, ROBERTSON, MAFFEI,
GOLDSMITH & TARTAGLIA, LLP
Attorney for Plaintiff
969 Jericho Turnpike
Saint James, New York 11780GREENBERG TRAURIG, LLP
Attorney for Defendant
900 Stewart Avenue, Suite 505
Garden City, New York 11530

Upon the following papers read on this e-filed motion for, inter alia, summary judgment : Notice of Motion/Order to Show Cause and supporting papers by defendant, filed September 6, 2023 ; Notice of Cross-Motion and supporting papers by plaintiff, filed October 19, 2023 ; Answering Affidavits and supporting papers by plaintiff, filed October 18, 2023 ; Replying Affidavits and supporting papers by defendant, filed November 2, 2023 ; Other ; it is

ORDERED that the motion of defendant for, inter alia, summary judgment dismissing the complaint against her is granted; and it is further

ORDERED that the cross motion by plaintiff for leave to amend the complaint is denied.

This action arises out of an agreement entered into by decedent Manuela Gates, her daughters defendant Nancy Gates and Susan Maxwell, Susan's then husband George Esandrio, and PSJ&G in March 9, 1994. The agreement states that two properties owned by Manuela Gates located at 10 Radnor Court in Hicksville, New York and 24 Washington Avenue in Sound Beach, New York were being foreclosed upon as they were security for a debt incurred by Susan, George Esandrio, and PSJ&G (hereinafter known

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collectively as obligors). In essence, the agreement states that the subject properties were conveyed to defendant in consideration of her having obtained mortgage loans to avoid foreclosure, and that the obligors agreed to pay defendant certain amounts to make the monthly mortgage payments, among other things. The complaint alleges that defendant refused to reconvey the properties to the estate, that she collected rents and income derived from the properties to the detriment of plaintiff, and that she refused to account for the sums collected. It further alleges that defendant converted funds belonging to plaintiff, breached the agreement, and merely held title to the properties as a trustee, while committing waste.

Defendant now moves for summary judgment, arguing that the obligors failed to perform their duty to repay her the money she had advanced under the agreement, and thus she had no obligation to reconvey the properties to decedent. Defendant also moves to cancel the two notices of pendency filed by plaintiff against the subject properties. In support of the motion, defendant submits, among other things, copies of the pleadings, the agreement, check receipts, excerpts of the parties' deposition testimony, and her own affidavit. Plaintiff opposes the motion and cross-moves to amend the complaint, adding a cause of action for the imposition of a constructive trust. Plaintiff argues that triable issues of fact remain as to whether defendant breached the agreement.

Defendant states in her affidavit that she has two siblings, plaintiff George Gates and Susan Esandrio, and that their mother, decedent Manuela Gates, passed away on February 9, 2018. She states that prior to March 1994, Manuela owned property in Hicksville, where she resided until her death, and property in Sound Beach, which was used as a family summer vacation home as well as a rental property. She states that Susan and her then husband, George Esandrio, opened a dry-cleaning business, and that they convinced Manuela to mortgage both properties as security for a loan for the business. She states that in 1993, the subject properties were in foreclosure due to the failure to make the monthly payments on the mortgage. She states that both Susan and Manuela lacked the funds to refinance the mortgage loan, so she agreed, at her family's request, to pay the outstanding amount due on the defaulted loan, and by obtaining mortgage loans in her name to refinance the loan in default. She states that Manuela told her that \$259,000 was required to resolve the 1993 foreclosure action. She states that in 1994, she entered into an agreement with Manuela, Susan, George Esandrio, and PSJ&G, the dry-cleaning company, to obtain loans to pay the amount due on the defaulted loan and other costs related to the 1993 foreclosure action.

Defendant further states in the affidavit that pursuant to the 1994 agreement, Manuela transferred title to the subject properties to her, and she advanced the required payments to satisfy the liens. She states that she agreed to reconvey the properties back to Manuela on the condition that the obligors repay her within three years of the closing. She states that she advanced a total of \$48,365 to satisfy liens, pay title insurance premiums, unpaid taxes, and other costs. She states that these costs were never repaid to her by the obligors, though Susan repeatedly said that she would repay the money. She states that while the agreement required the obligors to make the monthly payments to her no less than 15 days prior to the due date, Susan would make payments directly to the bank and the payments were always late. She states that the obligors' repeated failure over the many years to make timely payment had a devastating effect on her credit score. She further states that while the agreement required the obligors to pay the taxes and insurance for the properties, she has made some of those payments which have not been repaid by the obligors. Finally, she states that she sent the obligors a written notice of default on August 8, 2023.

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Susan states in an affidavit that she, George Esandrio, and Manuela Gates invested in a dry cleaning business in the early 1990s, and that Manuela obtained loans secured by the subject properties to raise money to support the business. She states that the business failed and the properties went into foreclosure. She states that her mother asked defendant for assistance, and that defendant offered to obtain mortgage loans secured by the subject properties. Susan states that title to the houses was transferred from their mother to defendant, and that there was a written agreement relating to the transaction. She states that she was under the belief that once the mortgage loans were satisfied, the houses would be transferred back to their mother, and that she and George Esandrio would be responsible for paying the mortgages and carrying charges of the homes. She also understood that she was responsible for repaying defendant approximately \$22,000 in closing costs incurred in connection with the loans. Susan states in her affidavit that after the closing for the mortgage loans, her financial situation worsened as she divorced George Esandrio and had little income. She states that she explained to defendant that she was not in a position to pay the closing costs and that defendant told her not to worry and they would work it out later. She states that defendant never formally demanded any specific sum of money or informed her what amount was owed. Susan states that prior to the commencement of this action, she offered significant money to repay the debt, but could not get an actual number from defendant as to what was owed and her offers to repay were refused. She states that from 1994 until the two mortgage loans were fully paid off, she has paid over \$600,000, including taxes and insurance, while Manuela has contributed \$500 a month and retained the rental income from the properties.

The subject agreement states, in relevant part, as follows:

It is hereby agreed that the "Obligors" shall pay to Nancy Gates a sum sufficient to make both monthly mortgage payments (including principal, interest, taxes and insurance, if required) no less than 15 days prior to the due dates of each mortgage payment. In addition, the said "Obligors" shall pay to Nancy Gates, promptly when billed the aggregate of: repair bills, maintenance charges of all sorts and all other costs necessary to keep the realty in good condition less all net rentals received from any occupants of the said realty. This shall be both a joint and several obligation of the said "Obligors."

In addition, the "Obligors" shall pay all closing costs incident to the procural and closing of the said mortgages; attorneys fees of Alan Snowe (attorney for Manuela Gates and the "Obligors" in the New York Foreclosure Action); attorneys fee of those involved in the said foreclosure; their own attorney; the attorneys for Nancy Gates; any moneys advanced by Nancy Gates to cover a shortage of the amounts needed to close said mortgages, (including the \$22,100 mentioned hereinabove); all within three years of the said closing, except for the legal fees of Alan M. Snowe, Esq., which shall be paid pursuant to said attorneys agreement with the "Obligors" and Manuela Gates. These shall again be joint and several obligations of the "Obligors" and the attorney fees of Alan M. Snow, Esq. shall also be the obligation of Manuela Gates.

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If the said mortgages procured by Nancy Gates are paid in full (including interest) and all other payments required hereunder are made without default, Nancy Gates shall promptly reconvey the said parcels of realty to Manuela Gates, without any payment from Manuela Gates therefor.

In the event of an uncured default for 15 days in any of the payments required hereby, Nancy Gates may: sell either or both parcels of realty, satisfying only the outstanding mortgage(s) to the extent possible; continue mortgage payments herself and have sole ownership of the realty without obligation to reconvey or to refund monthly advances by “Obligors”; or take any other action permitted by law to enforce this agreement. Thirty (30) days written notice of such election need to be given only to Manuela Gates and Susan J. Esandrio by Certified Mail RRR at the last addresses provided by each.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court’s function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

As to the first and fourth causes of action, the elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of the contract, and resulting damages (*see LMEG Wireless, LLC v Farro*, 190 AD3d 716, 140 NYS3d 593 [2d Dept 2021]; *Liberty Equity Restoration Corporation v Park*, 160 AD3d 628, 75 NYS2d 47 [2d Dept 2018]). Here, the subject agreement specifically states a condition precedent to defendant reconveying the parcels to Manuela was the mortgages having been paid in full and all other required payments made without default. It is undisputed that the obligors did not pay all closing costs incident to the procural and closing of the mortgages; thus, they failed to perform their obligations under the subject agreement. In opposition, plaintiff fails to raise a triable issue of fact as to whether the obligors satisfied their obligations under the agreement. While counsel for plaintiff argues that it would be unfair for defendant retain ownership of the properties after Manuela and Susan paid the mortgages, taxes and carrying charges for 25 years and fully satisfied both mortgages, no cause of action for unjust enrichment was asserted. Moreover, while plaintiff counsel contends that the obligors were frustrated or prevented from performing the contract, there is no explanation as to how that was the case. Susan merely testified at her deposition that when she discussed the debt with defendant and her intention to repay it, defendant would tell her they would “worry about it later.” Although Susan states in her affidavit that she offered defendant

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“significant money” to repay the debt, but that defendant did not inform her of the amount and refused her offers, such statement appears to be an attempt to raise a feigned issue of fact (see *Kaplan v DePetro*, 51 AD3d 730, 858 NYS2d 304 [2d Dept 2008]; *Makaron v Luna Park Hous. Corp.*, 25 AD3d 770 809 NYS2d 520 [2d Dept 2006]). Thus, defendant’s application for summary judgment dismissing the first and fourth causes of action is granted.

The second cause of action, which seeks an accounting, requires “the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (see *Greenbery v Wiesel*, 186 AD3d 1336, 131 NYS3d 36 [2d Dept 2020]). Here, the mother-daughter relationship of the parties itself is insufficient to warrant the concluding that a fiduciary basis was established (see *Doheny v Lacy*, 168 NY 213, 61 NE 255 [1901]). However, to assert a claim for an accounting, a plaintiff must allege that he or she demanded an accounting, which the defendant refused to provide (see *Mawere v Landau*, 130 AD3d 986, 15 NYS3d 120 [2d Dept 2015]). Plaintiff failed to do so. Thus, this cause of action is dismissed.

With regard to the third cause of action, conversion is the unauthorized “exercise of dominion over or interference with” a specific identifiable piece of property in defiance of the owner’s rights (*Petty v Barnes*, 70 AD3d 661, 894 NYS2d 85 [2d Dept 2010]; *Gilman v Abagnale*, 235 AD2d 989, 653 NYS2d 176 [3d Dept 1997]). However, a claim to recover damages for conversion cannot be predicated on a mere breach of contract (see *Priolo Communs. v MCI Telecomms. Corp.*, 248 AD2d 453, 669 NYS2d 453 [2d Dept 1998]). Here, plaintiff’s claim for conversion of rental income is dismissed as defendant is the titled owner of the subject properties.

The fifth cause of action, which alleges that defendant held title of the properties as trustee and committed waste, is dismissed. Here, there is no evidence that defendant held title to the properties as trustee. The subject agreement states specifically that Manuela conveyed the subject properties to defendant in consideration of the mortgages being executed by defendant to avoid foreclosure. Contrary to the assertion of plaintiff’s counsel, the fifth cause of action did not seek the imposition of a constructive trust.

With regard to plaintiff’s cross motion, leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment (see CPLR 3025 [b]; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 830 NYS2d 262 [2d Dept 2007]). However, a court should deny a motion for leave to amend a petition if the proposed amendment is palpably insufficient, would prejudice or surprise the opposing party, or is patently devoid of merit (see *Town of Southampton v Chiodi*, 75 AD3d 604, 606, 907 NYS2d 25 [2d Dept 2010]; *Ward v Bennett*, 214 AD2d 741, 745, 625 NYS2d 609 [2d Dept 1995]). Further, to obtain the equitable remedy of a constructive trust, a plaintiff must establish the following elements: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance of such promise, and (4) unjust enrichment (see *Sharp v Kosmalski*, 40 NY2d 119, 386 NYS2d 72 [1976]; *Rowe v Kingston*, 94 AD3d 852, 942 NYS2d 161 [2d Dept 2012]; *Watson v Pascal*, 65 AD3d 1333, 886 NYS2d 440 [2d Dept 2009]).

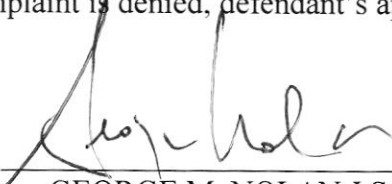
Plaintiff’s cross motion for leave to amend the complaint to include a cause of action for constructive trust is denied. Here, the proposed claim for a constructive trust is palpably insufficient, as the existence

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of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter (*see Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 521 NYS2d 653 [1987]; *Hamrick v Guralinick*, 146 AD3d 606, 44 NYS3d 749 [1st Dept 2017]; *After Midnight Co. LLC v MIP 145 East 57th Street, LLC*, 146 AD3d 446, 43 NYS3d 749 [1st Dept 2017]). Moreover, defendant would be prejudiced by the late addition of the proposed claim, which contradicts the original theory of the case (*see Peso v American Leisure Facilities Mgt. Corp.*, 277 AD3d 48, 716 NYS2d 13 [1st Dept 2000]). While plaintiff's original theory was that the defendant breached the contract by failing to reconvey the subject properties, plaintiff now contends that there is no valid and enforceable contract and proposes a cause of action seeking a constructive trust. Furthermore, plaintiff was aware of the facts upon which the motion was based since the commencement of the instant action and offered no explanation for waiting until the eve of trial to seek leave to amend the complaint (*see Yong Soon Oh v Hua Jin*, 124 AD3d 639, 1 NYS3d 307 [2d Dept 2015]; *Keating v Nanuet Bd. of Educ.*, 44 AD3d 623, 843 NYS2d 157 [2d Dept 2007]; *Pellegrino v New York City Tr. Auth.*, 177 AD2d 554, 576 NYS2d 154 [2d Dept 1991]).

Accordingly, as defendant's application for summary judgment dismissing the complaint is granted and plaintiff's cross motion for leave to amend the complaint is denied, defendant's application to cancel the two notices of pendency is granted.

Dated: April 11, 2024



GEORGE M. NOLAN J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION