Paitchell v Goldman
2025 NY Slip Op 30650(U)
February 21, 2025
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** *Justice* **PART** **18**

INDEX NO. 654563/2021

MOTION DATE 05/02/2024

MOTION SEQ. NO. 003

MICHAEL PAITCHELL, SHARI BROWN

Plaintiff,

- v -

DAVID GOLDMAN, RICHARD GOLDMAN,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 122, 123, 124, 125, 126, 127, 128, 129 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Plaintiffs move to reargue this Court's Decision and Order (filed March 15, 2024, NYSCEF Doc. No. 85) denying their motion (Motion Sequence No. 001) for summary judgment and granting defendants' cross-motion for summary judgment dismissing plaintiff's claims for breach of contract and the imposition of a constructive trust.

The standards for reargument are well settled. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [quotations omitted]). Motions for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group,* 16 AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but

were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro,* 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola,* 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.,* 40 AD3d 481, 482 [1st Dept 2007]).

Plaintiffs contend this Court erred in its prior determination denying plaintiffs' motion for summary judgment on their breach of contract claim because the Court determined the plaintiffs failed to establish their father, Harold Paitchell (Harold), had performed on his agreement with defendants' mother, Joanne Paitchell (Joanne), that they would provide in their respective wills for both spouses' children to receive interests in their condominium apartment at 12 East 12th Street after the death of the surviving spouse.

Plaintiffs allege the Court erred on the breach of contract claim by failing to be swayed by evidence that Joanne or her attorney admitted an obligation or intention to give plaintiffs a share of the apartment or her estate, or that she would owe the plaintiffs half of the value of the condominium; the agreement between the spouses did not require the execution of a will to be enforceable; Harold's failure to make a will providing for the disposition of the condominium in the event he was the surviving spouse is irrelevant, or at least not a material breach; and finally, his not bequeathing his half of the condominium to his children constitutes his performance. This motion is largely a rehashing of the underlying motion.

It is blackletter law that "[a] material breach of a contract excuses the nonbreaching party's performance and precludes the breaching party from bringing a claim under the contract" (*EXRP 14 Holdings LLC v LS-14 Ave LLC*, 228 AD3d 498, 499 [1st Dept 2024]; *Grace v Nappa*, 46 NY2d 560, 567 [1979]). Harold failed to take the action required by paragraph 7 of the agreement, to execute a will which would effectuate what was contemplated by the agreement.

Plaintiffs stand in his shoes and have failed to support their argument this was not a material breach. While plaintiffs cite *E. Empire Constr. Inc. v Borough Constr. Group LLC* (200 AD3d 1, 6 [1st Dept 2021]) to argue that Harold never breached because he did not repudiate the agreement, that case notes that abandoning performance is also sufficient, even though the discussion of the magnitude of the breach is not in the context of enforceability, but in the context of whether a notice to cure is required.

As far as plaintiffs argue Joanne waived the breach, they rely on *Burnside v Foglia* (208 AD2d 1085 [3d Dept 1994]). In *Burnside*, there was a dispute whether the plaintiff's husband had loaned or gifted money to the defendant. The Third Department noted that the defendant had repaid some of the funds, indicating an understanding that it was a loan. *Burnside* contains nothing about taking on a contractual obligation while waiving reciprocal performance. Plaintiffs also cite a 1903 case from the Fourth Department, *Matter of Baker* (83 AD 530, 531 [4th Dept 1903]). In 1899 Mr. Baker promised his intended bride "that if the marriage should occur and she should survive him, he would make provision by his last will and testament for the payment to her from his estate of the sum of $20,000 [in exchange for waiving] her dower and other rights in her husband's estate (*id.* at 530-531). They then married. Shortly thereafter, Mr. Baker died with his sister as his heir. The sister agreed to give his widow $10,000 in addition to the $10,000 the widow received from Mr. Baker's life insurance policy. The court considered whether money which the sister paid to the widow was subject to a transfer tax and decided that the money was not a taxable transfer because it was given in payment of a debt owed by the decedent, "the outgrowth of a contract entered into between the decedent and the claimant, which was founded upon a perfectly good and valuable consideration" (*id.* at 533). *Matter of Baker* is easily distinguished from the facts at bar, as Baker married the claimant in that case, at least partly performing on that agreement,

but Harold's performance is missing here. The lack of performance under the parties' parents' agreement also makes the 1918 case plaintiffs cite from the First Department similarly unavailing, as that court notes "the securities transferred to Mrs. Vanderbilt were . . . transferred for a valuable consideration in satisfaction of an agreement" (*In re Vanderbilt's Estate*, 184 AD 661, 667 [1st Dept 1918], *affd sub nom. In re Vanderbilt's Estate.*, 226 NY 638 [1919]). These cases are therefore irrelevant. Plaintiffs have failed to show waiver.

Plaintiffs also argue Joanne informed them after their father's death that she would make a will in accordance with the agreement and abide by the agreement, giving them half of the interest in the cooperative after her death, and that plaintiffs relied on that statement. Plaintiffs have not alleged a claim based on this alleged conduct or specified how they reasonably relied on these communications to their detriment.

Plaintiffs also argue this Court erred on the constructive trust claim. The elements of a constructive trust claim are: a confidential or fiduciary relationship; an express or implied promise; a transfer made in reliance on the promise; and unjust enrichment (*see Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980] [citations omitted]). The elements need not be rigidly applied (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]["Although the. . . factors are useful in many cases[,] constructive trust doctrine is not rigidly limited"]; *Robinson v Day*, 103 AD3d 584, 587 [1st Dept 2013]).

Plaintiffs contend the Court should have granted them summary judgment on the constructive trust claim because Domestic Relations Law allows spouses to override the manner in which the law would determine legal title for their marital property, and as the condominium was marital property, the terms of the agreement overrode the fact that the spouses obtained the property as tenants by the entirety. Plaintiffs rely on NY Domestic Relations Law § 236, Part

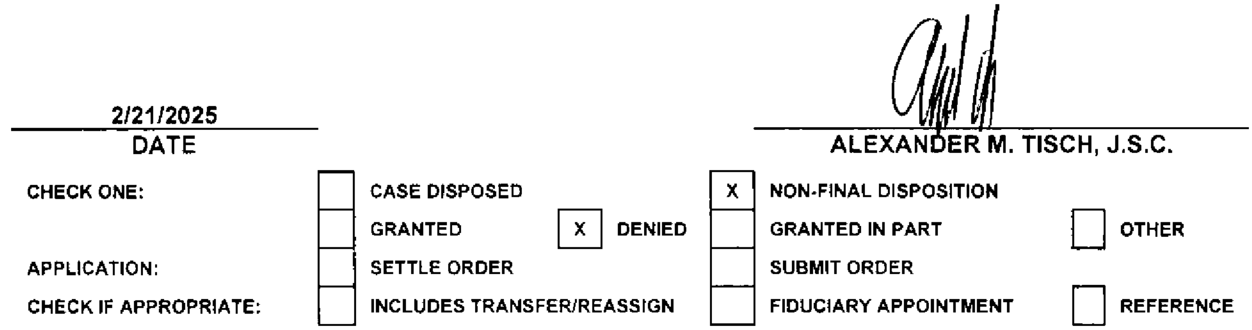
B(1)(c), which defines "marital property" and refers to the authority given to spouses by § 236, Part B(3). However, § 236, Part B(1)(c) of Domestic Relations Law defines marital property for the purpose of determining the division of assets in the event of a divorce. Part B(3) of that section relates to the ability of the spouses to make an agreement (pre or post nuptial) which will be valid in a matrimonial action. That is not the situation here. Plaintiffs cite no cases supporting their theory that the couple could transform a Tenancy by the Entirety into a Tenancy in Common by virtue of their unconsummated agreement.

Finally, plaintiffs also contend it was unjust for Joanne to have enjoyed ownership of the condominium after her husband's death and not to fulfill her part of the bargain by returning half of its value to his children after hers, and that Harold had made a transfer in reliance on Joanne's promise by not providing in his will for the disposition of his interest in their condominium. Plaintiffs provide neither supporting evidence or law for their argument, undercutting it by trying to explain the lack of a provision in his will to perform his obligation under the agreement as "a scrivener's error by his attorney." Plaintiffs fail to provide supporting evidence how one missing term in Harold's will was scrivener's error but another constitutes evidence of performance.

As far as plaintiffs seem to also be making an argument for unjust enrichment, "[u]njust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). To plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408,

quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). There was a contract between the spouses and Harold failed to perform, obviating any quasi-contract claim. The Court has considered plaintiffs' other arguments and finds them without merit.

For the reasons discussed above, the Court declines to use its discretion to grant leave to reargue, and plaintiffs' motion is hereby DENIED. This constitutes the decision and order of the Court.



2/21/2025
DATE

ALEXANDER M. TISCH, J.S.C.

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