

**Cole v Cole**

2025 NY Slip Op 34434(U)

November 19, 2025

Supreme Court, Kings County

Docket Number: Index No. 530746/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 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 19<sup>th</sup> day of November, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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MICHELLE COLE and RICARDO H. COLE,

Plaintiffs,

Index No.: 530746/2021

-against-

**DECISION AND ORDER**  
(Mot. Seq. No. 1)

RAY COLE,

Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affirmation in Support/Exhibits .....	11 – 16
Affirmation in Opposition/Memorandum of Law/Affidavits.....	21 – 24
Reply Affirmations/Exhibits.....	26 – 30

Upon the foregoing papers, Defendant Ray Cole (“Defendant” or “Ray”) moves, pursuant to CPLR 3212, for summary judgment against Plaintiffs Michelle Cole (“Michelle”) and Ricardo H. Cole (“Ricardo”) (collectively, “Plaintiffs”) (Mot. Seq. No. 1). Plaintiffs oppose the motion.

On or about December 2, 2021, Plaintiffs filed a summons and complaint, asserting a cause of action for a constructive trust on real property located at 735 Crescent Street in Brooklyn, New York (the “Property”). Plaintiffs are married and Ricardo and Ray are brothers. According to Plaintiffs, they intended to purchase a two-family home, reside on one of the floors, and rent the other unit. Plaintiffs allege that they agreed, along with Ray, to purchase the Property together and that each would own one-third. Since Plaintiffs lacked sufficient credit, they all agreed that Ray would purchase the Property and take out a mortgage in his name only. Plaintiffs allege that they all agreed Ray would hold Plaintiff’s two-third interest in trust until their names were added to the deed. Plaintiffs aver that they contributed approximately \$26,000 in cash towards the down

payment and closing costs. After the Property was purchased in 2008, Plaintiffs moved into one of the apartments and the others were utilized as rental units. Plaintiffs assert that they paid their two-thirds share of all expenses, including the mortgage, insurance, and property taxes. According to Plaintiffs, Ray refused to have their names added to the deed. In August of 2020, Plaintiffs allege that Ray presented Michelle with a termination notice and “made other statements and [took] other actions which manifest[ed] his intention to claim ownership of the property for himself and to disavow the equity ownership rights of” Plaintiffs (NYSCEF Doc No. 1, ¶ 11).

Ray filed an answer and asserted counterclaims for unjust enrichment and ejectment. In his answer, Ray acknowledges that he and his brother Ricardo agreed to purchase a property together and both contributed to the \$48,500 down payment and closing costs (Ricardo \$23,000 and Ray \$25,500). Ray denies that Michelle was involved in the transaction. Rather than each owning a third, Ray asserts that he and his brother each had a 50% equitable interest in the Property, which was purchased for \$349,000. According to Ray, the parties shared the expenses on the Property equally until 2018 when Ricardo expressed his desire to purchase Ray’s share. Ultimately, Ray avers that Ricardo agreed to sell his interest in the Property to Ray,<sup>1</sup> and Ricardo requested that the money be turned over to Michelle. Ray asserts that he did pay Michelle \$230,000, and in exchange Plaintiffs agreed to vacate the Property. However, according to Ray, Michelle and her children remain in the Property, and she has refused to contribute towards the rent or mortgage since January 2020.

In his motion, Ray argues that he is the sole legal and equitable owner of the Property. Since Ray paid the Plaintiffs \$230,000<sup>2</sup> for the 50% equitable interest owned by Ricardo, Ray argues that Plaintiffs no longer have any interest in the Property. Without an equitable interest in the Property, Ray contends that Plaintiffs cannot seek a constructive trust. In addition, Ray contends that he is entitled to ejectment of Michelle from the Property.

In opposition, Plaintiffs assert that summary judgment should be denied because there are issues of fact. While Ray contends that there were only two parties to the agreement, Plaintiffs aver that there were three. Plaintiffs also dispute Ray’s claim that there was a purchase of Ricardo’s

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<sup>1</sup> According to Ray, “Michelle Cole became concerned that she would not be able to meet her obligation as it related to paying the mortgage and other bills on the property and asked the defendant if they could move forward with selling Ricardo’s interest in the property to the defendant” (NYSCEF Doc No. 12, ¶ 16).

<sup>2</sup> In support, Ray attached copies of two checks, dated February 1, 2020: one for \$30,000 and another for \$200,000, which were purportedly signed and cashed by Michelle Cole (NYSCEF Doc No. 14).

interest in the property. In their affidavits, Plaintiffs assert that they contributed to the mortgage payments. In her affidavit, Michelle claims that they used the rent from the tenants at the Property to pay the mortgage and other expenses. She also claims to have handled the leases and collected the rents from the tenants. In his affidavit, Ricardo states that there was never an agreement between him and Ray to sell his interest and that his interest was never 50%—it was one-third.

In reply, Ray first argues that Plaintiffs' opposition is untimely since it was filed the night before the return date. Nonetheless, Ray maintains that he met his prima facie burden establishing entitlement to summary judgment by producing evidence he purchased the Property, made a downpayment of more than 50% of the deposit, made payments towards the mortgage, and paid Plaintiffs \$230,000 for Ricardo's 50% interest in the Property. Ray avers that Plaintiffs made conclusory claims and failed to submit any documentary evidence showing they contributed towards the Property. According to Ray, Plaintiffs failed to provide details of the amount they spent towards the mortgage or produce a lease or other documentation corroborating Michelle's assertion that Plaintiffs rented a part of the Property to a tenant to continue to make mortgage payments. In his reply affidavit, Ray contends that when he agreed to buy out Plaintiffs' interest, the Property was valued at \$785,600.<sup>3</sup> Ray asserts that after the cost to refinance<sup>4</sup> was removed and the previous mortgage was paid off, he paid Ricardo by making a check for \$230,000 payable to Michelle.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact’” (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). When evaluating a motion for summary judgment, “facts must be viewed in the light most favorable to the nonmoving party” (*Vega v Restani Const Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]). “The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact” (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make such a showing requires

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<sup>3</sup> The appraisal, dated October 30, 2019, lists the value as \$785,000 (NYSCEF Doc No. 30).

<sup>4</sup> According to Ray, he refinanced the Property to take out 50% of the equity.

denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (*see Gesuale v Campanelli & Assocs.*, 126 AD3d 936, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

To obtain a constructive trust, a party must establish the existence of (1) a fiduciary or confidential relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (*Delidimitropoulos v Karantinidis*, 186 AD3d 1489, 1490 [2d Dept 2020]). “The ultimate purpose of a constructive trust is to prevent unjust enrichment, and it will be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest” (*Broderson v Parsons*, 106 AD3d 677, 679 [2d Dept 2013] [alterations and internal quotation marks omitted]).

Upon review of the documents submitted, the Court finds that Ray has not proffered sufficient evidence to establish the absence of any triable issues of fact. First, while the parties agree that some ownership of the Property would be shared, there is a dispute as to the amount of the ownership interest. While Ray argues that he and his brother Ricardo would each own 50%, Plaintiffs assert that the three of them would each own one-third. Second, Ray does not dispute that Ricardo contributed to the down payment and closing costs. However, whether Plaintiffs contributed \$26,000 (as they allege) or \$23,000 (as Ray asserts), these amounts do not equate to two-thirds of the total. Thus, there is a question as to whether the transfer reflects the alleged promise as articulated by Plaintiffs. Third, though Plaintiffs deny that there was any agreement to sell Ricardo’s interest, they do not address, or refute, Ray’s claim that Michelle received payment for it. Nonetheless, Ray has not adequately established that the payments purportedly deposited by Michelle represented Ricardo’s 50% interest. In his affidavit, Ray merely states that “[a]fter the cost to refinance was removed and the previous mortgage was paid off,” he paid Ricardo (via Michelle) \$230,000.

Therefore, the Court finds that Ray has not met his prima facie burden showing entitlement to summary judgment dismissing Plaintiff's complaint or on his counterclaim for ejectment.

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment (Mot. Seq. No. 1) is denied in its entirety.

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot.

This constitutes the decision and order of the court.

E N T E R,



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Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph**  
**Supreme Court Justice**