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Panish v Panish
2005 NY Slip Op 50881(U)
Decided on April 15, 2005
Supreme Court, Suffolk County
Loughlin, J.
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Decided on April 15, 2005

Supreme Court, Suffolk County

<p>Karen Panish, Plaintiff,</p> <p>against</p> <p>Sam Panish, Defendant.</p>

05-01111

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SAM PANISH

Defendant Pro Se

Daniel J. Loughlin, J.

ORDERED, that the motion by plaintiff for a preliminary injunction, the motion by defendant to dismiss, the cross-motion by plaintiff to strike and the motion by defendant to cancel a notice of pendency are determined as follows.

The plaintiff and her husband Larry Panish resided in a home located at 2 Dongan Way in East Hampton. Title to the premises is in the name of the defendant Sam Panish, Larry's father. The plaintiff commenced an action for divorce against Larry which is currently pending before Justice Kent. The plaintiff also commenced this action against the defendant seeking to impose a constructive trust upon the property. The plaintiff alleges that the property was purchased with marital funds and that the defendant, an attorney, acted as their lawyer with respect to the transaction. The plaintiff moves for a preliminary injunction enjoining the defendant from transferring or encumbering the property. The defendant moves, pursuant to CPLR 3211, to dismiss the complaint on the grounds that the complaint is untimely and fails to state a cause of action. In addition, the plaintiff cross-moves to strike the defendant's memo of law and the defendant moves to cancel the notice of pendency filed by the plaintiff.

In order to demonstrate a constructive trust, four elements must be established: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon and (4) unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119; *Neos v Neos*, 262 AD2d 467 [2d Dept 1999]). Here, the defendant claims that he did not have a confidential relationship with the plaintiff. However, in addition to the family relationship between the parties, the complaint alleges that the defendant acted as the plaintiff's attorney with respect to transactions concerning the property. Since an attorney-client relationship is by definition a "confidential" one (*see Dillon v*

Dean, 158 AD2d 579 [2d Dept 1990]), the plaintiff has satisfied the first element. The defendant also contends that there was no promise or transfer because he purchased the property with his funds and the deed and mortgage were solely in his name. However, the closing statement identifies the purchaser as "Sam Panish, as nominee for Larry Panish" and the defendant's checks purportedly used for the down payment came from his "attorney at law special account". The complaint alleges that marital funds were used to purchase the property and the plaintiff claims that title was placed in the defendant's name in order for Larry Panish to avoid creditors. The plaintiff also contends that she expended in excess of \$70,000 of her own money for improvements on the property and that the defendant agreed that title would be placed in her name. The plaintiff's allegations regarding the contribution of money toward the purchase and renovation of the home are sufficient to satisfy the transfer in reliance element (see *Gottlieb v Gottlieb*, 166 AD2d 413 [2d Dept 1990]). While the defendant sharply disputes the plaintiff's claims, the allegations in the complaint, which must be [*2] accepted as true on a motion to dismiss (see *Leon v Martinez*, 84 NY2d 83), are sufficient to state a cause of action for a constructive trust.

An action to impose a constructive trust is governed by a six year statute of limitations which begins to run at the time of the wrongful act giving rise to a duty of restitution (see *Mazzone v Mazzone*, 269 AD2d 574 [2d Dept 2000]). "A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition * * * or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property" (*Jakacic v Jakacic*, 279 AD2d 551, 552 [2d Dept 2001] quoting *Sitkowski v Petzing*, 175 AD2d 801, 802 [2d Dept 1991]). Here, the defendant contends that the action is untimely since he acquired the property in 1996. However, the complaint does not appear to allege that the defendant acquired the property wrongfully but rather, that he refused to reconvey the property at a later date. Thus,

the defendant has not established that the action is time-barred (*see Jakacic v Jakacic, supra; Maric Piping Inc v Maric*, 271 AD2d 507 [2d Dept 2000]; *Sitkowski v Petzing, supra*). Accordingly, the defendant's motion to dismiss is denied.

The plaintiff moves for a preliminary injunction to enjoin the defendant from, inter alia, transferring or encumbering the property. It is well settled that in order to obtain a preliminary injunction the movant must demonstrate a likelihood of ultimate success on the merits, irreparable harm unless the injunction is granted and that the equities are balanced in her favor (*see Aetna Ins. Co v Capasso*, 75 NY2d 860; *Grant Co v Srogi*, 52 NY2d 496, 517). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that would render a judgment ineffectual (*see Moy v Umeki*, 10 AD3d 604 [2d Dept 2004]). Here, the plaintiff's allegations are sufficient to support a cause of action for a constructive trust. Although the defendant sharply disputes the allegations, the presence of issues of fact does not require the denial of the motion (*see Moy v Umeki, supra*). Indeed, the denial of a motion for a preliminary injunction would be inconsistent with the purposes of the equitable doctrine of constructive trust, namely to prevent a breach of trust and to restore to the plaintiff real property which she alleges belongs to her (*see Hightower v Reid*, 5 AD3d 440 [2d Dept 2004]). In this case, the plaintiff and her children are apparently living at the premises, which was the marital residence, and a divorce action is also currently pending. Under these circumstances, the balancing of equities warrants the granting of the preliminary injunction to maintain the status quo (*see Moy v Umeki, supra; Hightower v Reid, supra*). Accordingly, the motion for a preliminary injunction is granted. However, the plaintiff is required to post an undertaking (*see CPLR 6312[b]; Moy v Umeki, supra; Hightower v Reid, supra*). If the parties cannot stipulate to an appropriate amount, the parties shall submit papers to the Court regarding the amount of the undertaking no later than May 18, 2005.

The branch of the defendant's motion to strike certain paragraphs of the complaint is granted to the extent that paragraphs 8, 9, 10 and 11 are stricken since they are irrelevant to this action (*see [*3]CPLR 3024[b]*). The branch of the motion to strike portions of the ad damnum clause is denied as premature. The plaintiff's

cross-motion to strike the defendant's memo of law is also denied. Finally, the defendant's motion to cancel the notice of pendency or compel the plaintiff to file an undertaking is denied. A notice of pendency is proper in a constructive trust action (*see Peterson v Kelly*, 173 AD2d 688 [2d Dept 1991]). In addition, the plaintiff is required to post an undertaking in connection with her motion for a preliminary injunction.

Dated: *April 15, 2005*

DANIEL J. LOUGHLIN, J.S.C.

FINAL DISPOSITION ~~X~~ NON-FINAL DISPOSITION

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