

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

<hr/>		x	Index
JAMES B. ZANE,			Number <u>1551</u> 2008
	Plaintiff,		Motion
			Date <u>September 24,</u> 2008
- against -			
			Motion
JANE MINION, et al.,			Cal. Number <u>21</u>
	Defendant.		Motion Seq. No. <u>2</u>
<hr/>		x	

The following papers numbered 1 to 12 read on this motion by the defendant to dismiss the plaintiff's complaint pursuant to CPLR 3211 and cross motion by the plaintiff pursuant to CPLR 2218 and 3211 (c) for the immediate trial of any issues of fact raised by the defendant in her motion to dismiss.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits...	5-9
Answering Affidavits - Exhibits.....	10-12

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

According to plaintiff's amended complaint, he and defendant are husband and wife, having been married since September 1, 1992. On that date, plaintiff signed and acknowledged a deed to 426 Beach 146th Street, Neponsit, New York, wherein he transferred ownership of the premises from himself to himself and defendant, as husband and wife.¹ Plaintiff alleges that defendant initially refused to accept the deed or agree to move into the subject premises after they were married due to her dissatisfaction with the condition of the property. He contends that he attempted to appease defendant

¹
Plaintiff asserts that he has resided at the premises since 1971.

and induce her to move into the premises by completely renovating and reconstructing the premises, which such reconstruction was allegedly funded by \$1,000,000.00 of plaintiff's own funds and two loans totaling \$700,000.00 from Merrill Lynch Credit Corp., which was secured by a mortgage on the premises. On May 8, 1996, after the reconstruction of the premises was completed, plaintiff delivered the deed to defendant and it was recorded on June 21, 1996.

By way of this action, plaintiff seeks to set aside the subject conveyance on the ground that it was a conditional inter vivos gift. He alleges in the complaint that he did not deliver the deed to defendant until he was induced to do so by false promises and misrepresentations made to him by defendant that she would: (1) consent to and execute any future documents necessary for plaintiff to refinance the mortgages on the premises; and (2) make a will devising her interest in the premises to plaintiff or as he otherwise instructed. Plaintiff also alleges that notwithstanding these representations defendant refused, in February 2006, to consent to the refinancing of the mortgages and also refused plaintiff's request to execute a joint will with plaintiff so as to devise defendant's interest in the subject premises to plaintiff's relatives. Plaintiff further alleges that defendant told him that she had no intention of keeping her promise or abiding by her representations that she would do so.

Plaintiff's amended complaint alleges eight causes of action, respectively, as follows: (1) rescission of gift induced by false promises and representations; (2) rescission of gift based upon breach of promise; (3) rescission of gift based upon failure of consideration; (4) imposition of a constructive trust upon defendant's interest in the premises based upon defendant's acceptance of a qualified gift; (5) disgorgement of unjust enrichment; (6) declaratory judgment declaring the respective interests of the parties, if any, in the subject premises; (7) declaratory judgment declaring abandonment of plaintiff based upon defendant's failure to provide plaintiff with love, society and companionship during times of serious ill health suffered by him during the course of the marriage; and (8) damages against defendant for fraudulent conduct.

Defendant moves for dismissal of the amended complaint in its entirety, pursuant to CPLR § 3211 (a)(1), (5), and (7), on the grounds that all causes of action are barred, inter alia, by documentary evidence, estoppel, and the statute of limitations, as well as the complaint fails to state a cause of action. Plaintiff cross-moves for an immediate trial, pursuant to CPLR §§ 2218 and

3211 (c), of any issues of fact raised by defendant's motion to dismiss.

When examining a motion to dismiss a cause of action, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, the pleadings must be liberally construed in plaintiff's favor, accepting the facts alleged as true, to determine whether the facts alleged fit within any cognizable legal theory (see Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 570-71 [2005]; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP, 96 NY2d 300 [2001]; Leon v Martinez 84 NY2d 83 [1994]). However, legal conclusions or factual allegations need not be accepted as true where they are either inherently incredible or flatly contradicted by documentary evidence (see, State v Myers, 865 NYS 2d 880 [2008]). Similarly, a motion to dismiss the complaint, pursuant to CPLR 3211 (a)(1), on the ground that the action is barred by documentary evidence may be granted where the documentary evidence utterly refutes the plaintiff's factual allegations and definitively disposes of plaintiff's claim, thereby exclusively establishing a defense as a matter of law (see, Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]; Mendelovitz v Cohen, 37 AD3d 670 [2007]; Montes Corp. v Charles Freihofer Baking Co., 17 AD3d 330 [2005]; Teitler v Max J. Pollack & Sons, 288 AD2d 302 [2001]).

In support of her motion to dismiss, defendant submits, inter alia, a copy of the deed at issue. It is well-settled that an instrument creating, transferring, or surrendering an interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law (see generally, Clarke v DeVoe, 124 NY 120 [1891]; Mattesson v Johnston, 139 AD 859 [1910]). Here, the deed demonstrates that plaintiff conveyed to defendant a one-half interest in the subject premises with the intent of making a present, complete transfer of the subject interest, which became an effective gift when he delivered the deed to her (see, Rubenstein v Rosenthal, 140 AD2d 156 [1988] [the elements of an effective gift are the intent on the part of the donor to make a present transfer, delivery of the gift to the donee, and acceptance by the donee]; see also Matter of Carroll, 100 AD2d 337 [1984]). Moreover, since plaintiff concedes that the subject conveyance was a gift and there is no contrary documentary proof to demonstrate the imposition of any conditions associated with the subject conveyance, the deed unequivocally establishes that plaintiff gave an unqualified, gift to defendant as a matter of law (cf. Matter of Estate of Jordan, 199 AD2d 998 [1993]). Having been effectuated, this gift is irrevocable (In re Maijgren's Estate, 193 Misc 814 [1948].)

In light of the foregoing evidence, this Court finds that the first, second, third, and eighth causes of action, which seek rescission of gift based upon false promises and representations, rescission of gift based upon breach of promise, rescission of gift based upon failure of consideration, and damages arising from defendant's alleged fraudulent conduct, respectively, must be dismissed on documentary evidence grounds based upon the unconditional intent reflected by plaintiff in the deed that he drafted and delivered to defendant.

Further, even assuming arguendo that defendant made false promises and representations to plaintiff that she would agree to refinance the mortgage on the subject premises and devise her ownership interest in the premises as he may direct in the future, these alleged insincere promises of future performance are of no import here as they do not provide a basis to revoke the gift on the ground of fraud (see generally, First Bank of Ams v Motor Car Funding, Inc, 257 AD2d 287 [1999]; cf. Berg v College of Staten Island Foundation, 11 Misc 3d 1079(A) [2006], or on breach of promise grounds (see Picksay v Starr 149 NY 432 [1896]; Signacon Controls Inc. v Mulray 69 Misc 2d 63 [1972])). Moreover, since consideration is not necessary for a gift, defendant's alleged lack of consideration is not a factor herein (see, Rubenstein v Rosenthal, 140 AD2d 156 [1988])).

Likewise dismissed on the basis that the action is barred by the documentary evidence are the sixth and seventh causes of action, each seeking a declaratory judgment. In order to establish a cause of action for a declaratory judgment, a plaintiff must present a justiciable controversy (CPLR § 300 Cherry v Koch, 126 AD2d 346, 350, 514 NYS 2d 30 [1987]; State v Myers 865 NYS2d 880 [2008]). The sixth cause of action, which seeks a declaration of the parties' respective interests in the subject premises, must be dismissed as academic since the documentary evidence submitted herein demonstrates that no real dispute exists as to the nature of the parties' present ownership interests (see Ozdemir v Caithness Corp., 285 AD2d 961 [2007])).

The seventh cause of action is for a declaration that defendant has abandoned plaintiff and will continue to do so until plaintiff's death such that defendant may not be considered plaintiff's surviving spouse for the purposes of EPTL 5-1.2(a)(5). Since "[c]ourts will not entertain a declaratory judgment action when any decree that the court might issue would become effective only upon the occurrence of a future event that may or may not come to pass" (Board of Educ. for City School Dist. of City of Buffalo v Buffalo Teachers Federation, Inc., 191 AD2d 985, [1993], citing

New York Public Interest Research Group v Carey, 42 NY2d 527 [1977]), and because this cause of action involves the determination of defendant's continued abandonment, an eventuality that may not come to pass, it too must be dismissed.

Lastly, the fourth and fifth causes of action alleged in the complaint must be dismissed pursuant to CPLR 3211 (a)(7) on the grounds that they fail to state a claim upon which relief may be granted. Neither the plaintiff's claim for the imposition of a constructive trust nor the cause of action for unjust enrichment can be sustained herein (see, Connell v St. Francis Monastery, 129 Misc 2d 116 [1985]).

Accordingly, the motion to dismiss all causes of action asserted in plaintiff's amended complaint is granted and the complaint is hereby dismissed with prejudice. The cross motion is denied as moot.

Dated: November 19, 2008

J.S.C.