

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24  
Justice

MARIE AUFFERMANN	Index Number <u>3724</u> 2005
- against -	Motion Date <u>May 1,</u> 2007
GALE DISTL	Motion Cal. Number <u>2</u>
x	

The following papers numbered 1 to 11 read on this motion by defendant Gale Distl for an order granting summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice Motion-Affirmation-Affidavit-Exhibits(A-E)...	1-5
Opposing Affirmation-Exhibits(1-14).....	6-8
Reply Affirmation-Exhibits(F-G).....	9-11

Upon the foregoing papers it is ordered that this motion is determined as follows:

This court in an order dated March 27, 2006 denied the defendant's motion for summary judgment on the grounds that discovery had not been conducted, and therefore factual issues existed which could not then be resolved. Although the defendants also moved to dismiss the complaint on the grounds of statute of limitations, contrary to plaintiff's assertions, this court made no determination as regards that grounds. The within motion for summary judgment therefore, is not one for reargument. Although "[m]ultiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause" (Flomenhaft v Fine Arts Museum of Long Is., 255 AD2d 290 [1998]; see Giganti v Town of Hempstead, 186 AD2d 627, 628, [1992]) a subsequent summary judgment motion may be properly entertained when "it is substantively valid and [when] the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts" (Detko v McDonald's Rests. of N.Y., 198 AD2d 208, 209 [1993]; see also Rose v Horton Med. Ctr., 29 AD3d 977 [2006]; Post v Post,

141 AD2d 518 [1998]; Freeze Right Refrig. & Air Conditioning Servs. v City of New York, 101 AD2d 175 [1984]). Inasmuch as the factual issues regarding the nature of the relationship between the mother and daughter, including family and fiduciary relationships, have now been eliminated or resolved through discovery, the court will entertain the within motion for summary judgment (see Freeze Right Refrigeration & Air Conditioning Services, Inc. v New York, *supra*; see also, Dhillon v Bryant Assocs., 306 AD2d 40[2003]).

Plaintiff Marie Auffermann is the mother of defendant Gail Distl. Plaintiff resides at 189-14 44<sup>th</sup> Avenue, Flushing, New York. Gail Distl resides two houses apart from her mother at 189-27 44<sup>th</sup> Avenue, Flushing, New York. Marie Auffermann's mother Minnie Lampasso in a deed dated April 5, 1980 transferred sole ownership of the house at 189-14 44<sup>th</sup> Avenue to herself and Marie, as joint tenants, with the right of survivorship, for consideration of \$10.00. Upon Ms. Lampasso's death in 1980, Marie became the sole owner of this property.

In the past, Marie and her daughter Gail enjoyed a close relationship. On March 6, 1995, prior to undergoing surgery for kidney cancer, Ms. Auffermann and her daughter went to the offices of Sandra Guiducci, a lawyer, for the purposes of preparing the subject deed, whereby Marie, transferred sole ownership of said real property to herself and her daughter Gail Distl, as joint tenants with the right of survivorship, for consideration of \$10.00. She later returned to Ms. Guiducci's office for the purpose of drafting a will, which she executed on March 21, 1995. Marie and Gail maintained a joint checking account, and while her mother was in the hospital Gail paid her mother's bills, with her knowledge and consent. Marie recuperated at her daughter's home. In March 1995, Ms. Auffermann did not have a close relationship with her son Walter, a widower, who has three daughters. Gail and Walter have also had a difficult relationship. Gail's daughter now lives with her grandmother Marie, and Walter and his daughters also live with Marie. Marie and Gail no longer enjoy a close relationship.

On February 16, 2005 Marie Auffermann commenced this action to impose a constructive trust, and to recover damages for fraudulent inducement to enter into the deed, and for unjust enrichment.

A cause of action to impose a constructive trust or equitable lien is subject to a six-year limitations period (see CPLR 213[1]; Mazzone v Mazzone, 269 AD2d 574, 574-575, [2000]) that "commences to run upon the occurrence of the wrongful act giving rise to a duty of restitution" (Ponnambalam v Ponnambalam, 35 AD3d 571 [2006] [citation and internal quotation marks omitted]; see Boronow v

Boronow, 111 AD2d 735, 737 [1985]; affirmed 71 NY2d 284 [1988]; Kitchner v Kitchner, 100 AD2d 954 [1984]). "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 (see Augustine v Szwed, 77 AD2d 298, 300-301 [1980]; Bey Constr. Co. v Yablonski, 76 AD2d 875 [1980]), 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 (see Augustine v Szwed, supra at 301)" (Maric Piping v Maric, 271 AD2d 507, 508 [2000]; Morando v Morando, \_\_\_ AD3D \_\_\_, [June 12, 2007], 2007 NY Slip Op 5239; 2007 N.Y. App. Div. LEXIS 7442; Sitkowski v Petzing, 175 AD2d 801, 802 [1991]). Here, it is asserted that the property was wrongfully acquired, so that the statute of limitations accrued on March 6, 1995 and expired on March 6, 2001.

Plaintiff's assertion that the statute of limitations was tolled until September 15, 1999 when she received a letter from the Department of Taxation regarding the transfer and a potential gift tax, pursuant to the doctrine of equitable estoppel, is without merit. The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense (Zumpano v Quinn, 6 NY3d 666, 673 [2006]). Where the parties deal at arm's length, defendant will be equitably estopped from raising the statute of limitations if plaintiff was induced by fraud, misrepresentation, or deception to refrain from filing a timely action (Id. at 674). In those circumstances, plaintiff is also required to demonstrate reasonable reliance on defendant's misrepresentations, that is subsequent and specific actions by defendant that kept plaintiff from timely bringing suit (Id.). However, where a fiduciary relationship exists, the requirements for equitable estoppel are relaxed. Since a fiduciary is under an obligation to inform the beneficiary of the facts underlying the claim, concealment will give rise to an estoppel even if there was no actual misrepresentation (Id. at 675).

Plaintiff does not allege any specific misrepresentation by her daughter which would have prevented her from commencing suit in a timely fashion. Although a confidential relationship exists between a parent and child(see e.g. Djamoos v Djamoos, 153 AD2d 871 [1989]; Farano v Stephanelli, 7 AD2d 420, 424 [1959]), there is no evidence that a fiduciary relationship existed between the parties. Plaintiff's reliance on the accountant's letter of September 15, 1999 letter, and the parties' joint checking account, to establish the existence of a fiduciary relationship, is rejected. The

aforementioned letter was addressed to Ms. Distl and not Ms. Auffermann, and states that the audit division was been unable to reach Ms. Auffermann. However, Henry Frankenberg, an accountant, in a letter dated July 5, 1999, "Re; Auffermann, Marie," responded to a Notice of Estimated Deficiency dated June 18, 1998, in which he stated that Ms. Auffermann added her daughter Gail Distl to the deed only for administrative purposes and did not intend to convey title or dispose of her house or any portion thereof by gift. This letter also refers to correspondence dated July 30, 1997. Since this letter protesting the proposed gift tax was apparently sent on behalf of Ms. Auffermann, and refers to notices and letters dating back to 1997, plaintiff cannot rely upon the letter sent to Ms. Distl in order to establish a fiduciary relationship. Ms. Auffermann's counsel's claim that she was unaware that there was a transfer of her ownership interest in the property at the time the deed was executed on March 6, 1995 is rejected. Plaintiff retained counsel on March 6, 1995 in order to effectuate the transfer of a portion of her ownership interest in the property and had an opportunity to discuss the legal consequences of her act with her counsel.

Plaintiff's reliance upon the existence of the joint checking account in order to establish a fiduciary relationship is also rejected. The mere existence of a joint account does not establish a fiduciary relationship as regards the subject real property. In addition, although the defendant used this account to pay her mother's bills, as well as her own bills, Ms. Auffermann does not claim that Gail utilized more than her share of these funds.

The court therefore finds that the doctrine of collateral estoppel is not available here. Since plaintiff's cause of action to impose a constructive trust was commenced more than six years after the alleged wrongful transfer of the property by deed on March 6, 1995, the cause of action to impose a constructive trust is barred by the statute of limitations (see Soscia v Soscia, 35 AD3d 841 [2006]). Defendant's request to dismiss the first cause of action, therefore, is granted.

The court further finds that even if the statute of limitations was not a bar, plaintiff cannot succeed on her claim for the imposition of a constructive trust. In order to succeed on a cause of action to impose a constructive trust, a plaintiff must establish "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment" (Sharp v Kosmalski, 40 NY2d 119, 121 [1976]; see Simonds v Simonds, 45 NY2d 233, 241-242 [1978]; Weiss v Weiss, 186 AD2d 247, 249 [1992]). Plaintiff alleges in her complaint that the transfer of the subject premises to her daughter was without consideration and

therefore her daughter has been unjustly enriched; that she was under duress and undue influence exerted by the defendant and would otherwise not have executed the deed; and that she would not have executed the deed had she known that it would effectively alter her legal title to the property.

As noted above, a confidential relationships exists between a parent and child. However, an examination of the deed reveals that it recites a nominal consideration of \$10.00, and therefore the claim that this was a "no consideration" deed is rejected. Marie Auffermann's deposition testimony establishes that the allegation of duress and undue influence on the part of the defendant lacks a factual basis. Ms. Auffermann stated that prior to undergoing surgery for kidney cancer, she went to the law offices of Sandra Guiducci, an attorney, on March 6, 2005, accompanied by her daughter Gail. She stated that she requested that Ms. Guiducci prepare the subject deed for her, as she did not know whether she would survive the operation. She did not recall if she had a conversation with Gail about adding her name to the deed prior to going to the lawyer. She stated that Ms. Guiducci and Gail were present when she signed the deed, that she did not feel any pressure when she signed the deed and that she was only distressed about her medical condition and whether she would survive the surgery. Ms. Auffermann stated that she did not recall if Ms. Guiducci told her what the term "joint tenants with the right of survivorship" meant, did not recall if on March 6, 1995, she knew what this term meant and did not recall if she asked Ms. Guiducci to put this language into the deed. Ms. Auffermann, however, had an opportunity to discuss the terms of the deed with her attorney, including the meaning and legal significance of the term "joint tenancy with the right of survivorship," and there is no evidence that her daughter prevented her from doing so.

Plaintiff's deposition testimony also establishes that, contrary to the allegations set forth in the complaint, defendant did not promise that she would look after the plaintiff or care for her in exchange for the transfer of the real property. Ms. Auffermann explicitly stated that Gail did not make any such promise. Rather, Ms. Auffermann stated that prior to going to the lawyer's office, the only promise Gail made was that she would take care of her three granddaughters, Diana, Christie and Allison, the children of Walter and his deceased wife Rosemary, after her mother's death. Plaintiff's complaint, however, makes no reference to any such promise. Ms. Auffermann stated she told Ms. Guiducci that she wanted her interest in the house to go to Walter's daughters when she died, and was advised not to do so in the deed, and that "she [Marie] figured that she [Gail] would give her share to Walter's daughters.. that after my death she [ Gail] would have

to sell the house and give my grandchildren money.. my share, my half." Only one of Walter's daughters is now an adult, and in March 1995 they were all minors. Ms. Auffermann stated that at some unspecified later date, Gail told her in a telephone conversation that she would not take care of Walter's children. Ms. Auffermann also stated that after the deed was executed, she returned to Ms. Guiducci's office to have a will drawn up, which was executed on March 21, 1995. The will makes no reference to Walter's children, and Ms. Auffermann stated that she did not tell her attorney her wishes and desires as regards these grandchildren.

Plaintiff is also unable to establish that the defendant has been unjustly enriched as a result of the transfer of real property, with the right of survivorship. A joint tenant's right of survivorship cannot, in itself, constitute unjust enrichment, as it cannot be known which joint tenant will out live the other. In addition, a joint tenant may unilaterally sever the right of survivorship (see Real Property Law § 240-c). Although Gail is now a joint tenant with her mother, Marie continues to have sole possession and occupancy of the subject premises, and each party maintains separate residences and pays their own expenses. Plaintiff does not allege that Gail promised to pay the expenses related to the maintenance of the subject property. Although plaintiff asserted at her deposition that she had paid for all of the expenses related to the subject property and that her daughter had not made any such financial contributions, she also conceded that her daughter does not have the funds to share in these expenses, and that her daughter has had financial difficulties and that she has given money to her daughter.

Defendant's request to dismiss the second cause of action for fraudulent inducement to enter into the subject deed is granted. In an action to recover damages for fraud, "the plaintiff must prove a representation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Richmond Shop Smart, Inc. v Kenbar Development Center, LLC, 32 AD3d 423, 424 [2006], quoting, Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 [1996]). Ms. Auffermann, alleges in her complaint that she relied upon the defendant's promises and representations that she would take care of her, and that these promises and representations were false when made, that the defendant knew that they were false and that she had no intention of taking care of the plaintiff, were made without regard to the facts and were intended to deceive the plaintiff and to induce her to transfer title to the premises to the defendant. Plaintiff alleges that she did not discover that the truth of the

defendant's intentions until mid-2004. At her deposition, plaintiff retracted her allegation of fraud and stated that there wasn't any fraud in this transaction. Furthermore, plaintiff stated that her daughter did not make any promise or representation that she would take care of her. Plaintiff clearly cannot maintain this cause of action.

Defendant's request to dismiss the third cause of action for unjust enrichment is granted. A cause of action for unjust enrichment (or quasi-contract) requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff (Cruz v McAneney, 31 AD3d 54 [2006]; Clifford R. Gray, Inc. v LeChase Construction Services, LLC, 31 AD3d 983 [2006]). The essence of an unjust enrichment cause of action is that one party is in possession of money or property that rightly belongs to another (Clifford R. Gray, Inc. v LeChase Construction Services, LLC, 31 AD3d at 983). In her complaint, plaintiff alleges that prior to March 6, 1995, the defendant repeatedly asked and badgered her to execute the subject deed, while she was being treated for kidney cancer, and that the transfer of title on March 6, 1995 was without consideration, thus unjustly enriched and benefitted the defendant at the expense of the plaintiff. These claims are not supported by plaintiff's deposition testimony and the evidence presented does not support a claim for unjust enrichment.

The court notes that on August 22, 2006 Marie Auffermann executed a deed whereby she transferred her interest in the subject property to herself and her son Walter Auffermann as joint tenants with right of survivorship, for consideration of \$10.00. This deed was recorded on November 8, 2006. Ms. Auffermann thus severed the right of survivorship previously given to Gail Distl (See Real Property Law § 240-c [1] [b] and [2]). Therefore, at present, Marie Auffermann, and Walter Auffermann are joint tenants, and each have a 25% interest in the property, with a right of survivorship as to the other's share. Gail Distl is also a joint tenant in the property with a 50% interest, but no longer has a right of survivorship.

In view of the foregoing, defendant's motion to dismiss the complaint in its entirety is granted.

Dated: July 27, 2007

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AUGUSTUS C. AGATE, J.S.C.