**Blakely v. Ewart, 21096/06**
**Decided: August 22, 2008**

Justice Jack M. Battaglia

KINGS COUNTY
Supreme Court

Plaintiff appeared by Richard Tanenbaum, Esq.

Defendant Ewart appeared by Paul Golden, Esq. of Hagan, Coury & Associates

**Justice Battaglia**

**DECISION AND ORDER**

The Verified Complaint of plaintiff James Edward Blakely purports to allege five causes of action arising out of Mr. Blakely's transfer of real property located at 923 Greene Avenue, Brooklyn, to his grandson, defendant Tatek Ewart, on May 10, 2001. As Defendant appropriately contends, however, the Verified Complaint appears to allege only two legal theories for relief, fraud and constructive trust; Plaintiff's requests for an accounting and an injunction against his eviction from the property are ancillary to those two theories.

With the instant motion, Defendant seeks dismissal of the Verified Complaint pursuant to CPLR 3212 and CPLR 3216. On January 18, 2008, however, the action had been marked "disposed" by the Clerk because Plaintiff failed to file a note of issue by January 7, 2008 as required by a Central Compliance Part Order dated June 22, 2007, as modified by a "so-ordered" stipulation dated November 18, 2007. The Central Compliance Part Order stated, "This Order does not constitute a CPLR 3216 Notice." On the return date for this motion, the parties agreed to restoration of the action to active status.

There is no dispute that Defendant mailed a 90-day notice pursuant to CPLR 3216 on January 11, 2008, which was received by Plaintiff on January 14, 2008. Nor is there any dispute the Plaintiff did not file a note of issue in

response to the notice, nor did he move to vacate it or to extend the 90-day period. And, finally, there is no dispute that, when the notice was served, Defendant had not been deposed, as required by the Central Compliance Part Order, and that he was not deposed until May 9, 2008, after the expiration of the 90-day period.

"Having been served with a 90-day notice pursuant to CPLR 3216, the plaintiff was required to file a note of issue in compliance with the notice or to move, before the default date, either to vacate the notice or to extend the 90-day period." (Picot v. City of New York, 50 AD3d 757, 757 [2d Dept 2008].) But "CPLR 3216 is extremely forgiving . . . in that it never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed." (Zito v. Jastremski, 35 AD3d 458, 458-59 [2d Dept 2006] [internal quotation marks and citations omitted].) And dismissal is appropriately refused where discovery is not yet completed, particularly where the defendant has contributed to the delay. (See Gonzalez v. County of Westchester, 28 AD3d 421, 421 [2d Dept 2006]; Goldblum v. Franklin Munson Fire District, 27 AD3d 694, 695 [2d Dept 2006]; Tolmasova v. Umarova, 22 AD3d 570, 570 [2d Dept 2005]; Davis v. Goodsell, 6 AD3d 382, 384 [2d Dept 2004]; Fuller v. Rolm Telecommunications, Co., Inc., 255 AD2d 485, 486 [2d Dept 1998].)

To the extent, therefore, that Defendant's motion is based upon Plaintiff's failure to file a note of issue in response to Defendant's 90-day notice, it is denied.

The Verified Complaint alleges that, in late 2000, Plaintiff's grandson, defendant Tatek Ewart, moved into a vacant apartment at 923 Greene Avenue, property that Plaintiff had owned since 1951, because Plaintiff was having difficulty making payment on mortgage loans. From that time until July 2006, Plaintiff's Social Security check of approximately $700 was deposited directly into Defendant's bank account, "giving him all plaintiff's money to administer" (Verified Complaint, Â¶32), because Plaintiff "trusted" his grandson "completely" to handle Plaintiff's financial affairs (id., Â¶Â¶19-20.) Plaintiff alleges further that in May 2001, when the property was transferred to his grandson, Plaintiff did not know he was selling the house, having been told by Defendant that "he would be able to save the house for [Plaintiff] by getting a new loan" (id., Â¶22.)

Defendant allegedly "promised [Plaintiff] that [he] would be able to keep his

house" (id.), and "assured" Plaintiff that he "would have the house . . . for the rest of his life" (id., Â¶27.) Plaintiff allegedly did not know he had transferred the house to Defendant until June 2006, when he received an eviction notice from Defendant. He "did not know [he] was signing a deed." (Id., Â¶25.)

Although the specified sale price was $240,000, "the liens being paid off were at least $75,000.00 less than that," "the house was worth about $500,000.00 at that time," and Plaintiff "did not receive any funds" from the transfer. (Id., 26.) By reason of the transfer, Defendant was allegedly "unjustly enriched" (id., Â¶40), and Plaintiff lost "the $300,000.00 of equity that had built up over the years" (id., Â¶47.) Although it does not appear from the Verified Complaint, Plaintiff was 81 years old at the time of the May 2001 transfer of the property to his grandson.

Although Defendant contends that the Verified Complaint does not allege fraud with sufficient particularity to satisfy CPLR 3016 (b) (see Affirmation in Support, Â¶31), Defendant does not move for dismissal on that ground. Nor does he move for dismissal pursuant to CPLR 3211 (a) (7) on the ground that the Verified Complaint fails to state a cause of action for either fraud or a constructive trust. (See for example Old Republic National Title Ins. Co. v. Cardinal Abstract Corp., 14 AD3d 678, 680 [2d Dept 2005].)

In order to succeed on this motion for summary judgment pursuant to CPLR 3212, Defendant must establish, at least prima facie, that Plaintiff cannot as a matter of law establish an essential element of the causes of action for fraud and constructive trust. Generally, "[t]he elements of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance upon the promise, and (4) unjust enrichment." (Nathanson v. Nathanson, 20 AD3d 403, 404 [2d Dept 2005]; see also Bankers Security Life Ins. Soc'y v. Shakerage, 49 NY2d 939, 940 [1980].) And, generally, "[t]o prevail on a cause of action for fraud, a plaintiff must prove '(1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations'." (Leno v. DePasquade, 18 AD3d 514, 515 [2d Dept 2005] [quoting Giurdanella v. Giurdanella, 226 AD2d 342, 343 (2d Dept 1996)]; see also Barclay Arms, Inc. v. Barclay Arms Assocs., 74 NY2d 644, 646-47 [1989] ["misrepresentation of a material fact, falsity,

scienter and deception"].)

Defendant contends that "[t]here is no basis for fraud or constructive trust, because Blakely admitted that he understood that he was transferring the premises to Ewart, and that he did so knowingly and voluntarily"; and "Blakely cannot claim that he did not understand that he had transferred the premises, or that he had believed the premises were being held in trust for him, because he admitted otherwise." (Affirmation in Support, Â¶10.) Defendant relies heavily on statements Plaintiff made at an April 2006 hearing before Justice Anthony Cutrona of this court. The proceeding was held pursuant to Section 9.43 of the Mental Hygiene Law, and, as a result, Plaintiff was sent to Woodhull Hospital for evaluation. Plaintiff testified:

"The reason for signing the house over to him, the mortgage was more than my Social Security, and I was not able to keep the mortgage payments, so I needed help. And in order to keep from losing the house which my wife and myself had owned since 1951 I had to have somebody help me pay the mortgage." (Transcript of Proceeding, April 18, 2006, at 5.)

The Court notes in the first instance that the quoted testimony is ambiguous in that Plaintiff acknowledges "signing the house over" to his grandson, while expressing the need "to have somebody help [Plaintiff] pay the mortgage." In any event, the quoted testimony was the subject of extensive questioning at Plaintiff's examination before trial, the entire transcript of which is included with Defendant's motion papers. (See Affirmation in Support, Exhibit C.)

Plaintiff acknowledged at his examination before trial that he may have "signed the house over" to his grandson, but insisted that he didn't "know what the heck he was signing." (Plaintiff's Examination Before Trial at 21-23.) Plaintiff testified further that, at the closing, he signed many documents because he "had complete confidence in his grandson" (id. at 76); he "didn't think [he] was signing anything that would give [his grandson] title to [his] house" (id. at 73); he signed "under pressure of not losing [his] house," and "to keep . . . from losing [his] house" (id. at 74-75); he first learned that his grandson was claiming ownership of the property when Defendant "began to send him eviction notices" (id. at 91-92.)

Although not entirely clear from the Verified Complaint, Plaintiff's fraud claim appears to be of fraud in the factum, rather than fraud in the inducement -

that is, that he "signed an instrument different from that which he understood it to be." (See Mix v. Neff, 99 AD2d 180, 182 [3d Dept 1984].) But Plaintiff testified at his deposition that no one, including his grandson, told him what he was signing, and that Plaintiff never asked his grandson. (Plaintiff's Examination Before Trial at 105-07.) There is no allegation in the Verified Complaint or in Plaintiff's deposition testimony that Defendant misrepresented the nature or effect of any of the papers Plaintiff signed, or that Plaintiff was in any way physically or mentally incompetent to read or understand them. (See for example Fuentes v. Aluskewicz, 25 AD3d 727, 728 [2d Dept 2006].)

A defendant seeking summary judgment does not show prima facie that it is entitled to judgment as a matter of law by simply pointing to gaps in the plaintiff's proof; rather, the moving defendant must make an affirmative showing that an essential element of the plaintiff's cause of action cannot be proved. (See Velasquez v. Gomez, 44 AD3d 649, 650-51 [2d Dept 2007]; Calderone v. Town of Cortland, 15 AD3d 602, 602-03 [2d Dept 2005]; Mennerich v. Esposito, 4 AD3d 399, 400 [2d Dept 2004].) Defendant's affidavit in support of his motion does not in terms deny misrepresenting the nature or effect of any of the documents presented to Plaintiff for signature at the May 10, 2001 closing. But Defendant does assert that Plaintiff "offered to transfer the premises" to him as a way for Plaintiff "to remain in the premises for the time being" (Affidavit in Support, Â¶3), and that, based upon discussions "about having him transfer the premises [to Defendant] for many months," "plaintiff understood everything" (id., Â¶5.)

Defendant has established prima facie that he made no false representation to Plaintiff that would support a cause of action of fraud in the factum. Neither the Verified Complaint, verified by Plaintiff himself and, therefore, the equivalent of an affidavit (see CPLR 105 [u]), nor Plaintiff's deposition testimony, is sufficient to create a triable issue on this element of a fraud cause of action. Plaintiff has submitted an affidavit in opposition to the motion, but there is no assertion that Defendant misrepresented the nature or effect of any of the documents Plaintiff signed at the May 10, 2001 closing. Plaintiff's assertion that "no one explained anything" to him (Affidavit in Opposition, Â¶27) would appear to undermine a claim of misrepresentation more than to support it, and Plaintiff makes no showing, based upon law or fact, that Defendant had a duty to "explain anything" to him.

At best, Plaintiff has "made only conclusory allegations that [he] was

somehow tricked into executing the deed," which are "insufficient to raise a triable issue of fact as to fraud." (See Watson v. Pascal, 27 AD3d 459, 460 [2d Dept 2006].)

In his opposition, Plaintiff also asserts that "[t]he material misrepresentation made to plaintiff was that the defendant, his grandson, told him that he would help save his home of fifty years." (Affirmation in Opposition, Â¶46.) The falsity apparently was that, "[i]nstead of helping him, his grandson caused a 'closing' to occur, and caused the plaintiff to sign over the deed to the premises for zero consideration." (Id.) "Further, the defendant attempted to subsequently evict his own grandfather from the premises." (Id.)

If these assertions are meant to allege something other than, or in addition to, the alleged fraud in the factum addressed above, the assertions relate to promises or statements of future intention that are not actionable as fraud. (See Roney v. Janis, 77 AD2d 555, 556-57 [1st Dept 1980]; aff'd 53 NY2d 1025 [1981]; Lincoln Place LLC v. RVP Consulting, Inc., 16 AD3d 123, 124 [1st Dept 2005]; Cerabono v. Price, 7 AD3d 479, 480 [2d Dept 2004]; Rand v. Laico, 282 AD2d 444, 444 [2d Dept 2001]; Satler v. Merlis, 252 AD2d 551, 552 [2d Dept 1998].)

To the extent, therefore, that Defendant's motion seeks summary dismissal of Plaintiff's alleged cause of action for fraud, the motion is granted.

To the extent, however, that Defendant's motion seeks summary dismissal of Plaintiff's alleged cause of action for a constructive trust, the motion must be denied.

In addition to the Plaintiff's deposition testimony, Defendant supports his motion with copies of various documents related to the May 10, 2001 closing. A Residential Contract of Sale dated March 7, 2001, but apparently signed at the closing, recites a total purchase price of $240,000, with no downpayment and a balance due at closing of $187,200. The difference between the purchase price and the amount due at closing, $52,800, is explained with the statement, "Seller has given gift of equity to Buyer in the amount of $52,800." There is also a statement, "Seller gives Buyer 6 percent Sellers (sic) consession (sic)," which is not explained, and no such amount is reflected in the numbers. No time or place is specified for a closing.

A Settlement Statement dated May 10, 2001 shows, among other

adjustments, that Defendant received financing from IDYMAC Bank in the amount of $187,200; payoff of an existing mortgage loan in the amount of $150,509.93; a cash amount due from Buyer of $73,583.40; and a cash amount due Plaintiff of $85,620.07. There is a copy of the front of a check in the amount of $75,583.40 (not $73,583.40) drawn by Defendant to Plaintiff's order, with "Down Payment" written on memo line; and a writing signed by Plaintiff and Defendant holding the bank harmless from Plaintiff's acceptance of a personal check in the amount of $73,583.40 (not $75,583.40) "as and for the balance due of purchase price (sic) at closing." There is nothing that reflects payment to Plaintiff of the difference between the amount due from Buyer and the amount due to Seller.

According to Defendant, the "lender required [him] to provide [his] grandfather with [the] check"; the "deal" was that Defendant "would not . . . actually provide . . . any funds"; Plaintiff "would not deposit the check"; and "as he promised, he never deposited it." (Affidavit in Support, Â¶4.) There is no explanation for Plaintiff's apparent transfer of the property without consideration, or for the apparent deception of the lender.

A Lease Agreement dated April 15, 2001 was also apparently executed at the May 10 closing, providing for a one-year term beginning May 1 at a monthly rental of $1,200. There is no explanation for the dates, nor as to the source of the funds in light of Plaintiff's $700 monthly Social Security. Defendant acknowledges that he moved into 923 Greene Avenue because "plaintiff apparently could not afford the mortgage payments" on the property. (Id., Â¶3.) One suspects that this Lease Agreement may also have been for the lender's benefit.

It is noteworthy that, according to Defendant, he and his grandfather were represented by separate counsel on the transaction, although Plaintiff denies that he had any representation. A review of these documents necessarily leads to questions about the attentiveness of any attorney who participated.

Defendant purports to negate all of the essential elements of a constructive trust, but there is at least a triable issue issue of fact as to each of them. Although a family relationship is not necessary to the kind of "confidential relationship" that will support a constructive trust, a confidential relationship has been easily found to exist between spouses (see Foreman v. Foreman, 251 NY 237, 242 [1929]); parent and child (see Squiciarino v. Squiciarino, 35 AD3d 844, 845 [2d Dept 2006]); siblings (see McNeill v. Mohammad, 32

AD3d 829, 830 [2d Dept 2006]); and, indeed, between grandparent and grandchild (see Thaw v. Thaw, 27 F2d 729, 731 [2d Cir 1928].) One court has said that "where a young member of the family is also in a confidential relationship, either of business or advisor, a gift from an older member of the family is presumptively invalid." (Id. at 733.)

Here, in addition to the family relationship, there is the undisputed deposit of Plaintiff's Social Security check, which, from all that appears, is Plaintiff's sole income, into Defendant's bank account. Even if, as Defendant contends, "[a] relationship that is characterized by an arms-length contract, which was negotiated by attorneys, is not the stuff of fiduciary relationships" (Briggs v. Good Year Tire & Rubber Co., 79 F Supp 2d 228, 238 [WDNY 1999]), there is no evidence of arms-length negotiations here, and Plaintiff specifically denies that he was represented by counsel in connection with the May 10, 2001 transaction (see Plaintiff's Examination Before Trial at 86.) Plaintiff's expression at his deposition of misgivings about his grandson cannot vitiate a confidential relationship cemented by Plaintiff's transfer of total control over his income to his grandson.

Defendant is correct that Plaintiff denies any agreement with Defendant for a transfer back of the property (see id. at 77), but the doctrine of constructive trust is not limited to a promise to retransfer real property (see Nastasi v. Nastasi, 26 AD3d 32, 38 [2d Dept 2005].) Rather, the doctrine "is given broad scope to flex in response to all human implications of the transaction, to remedy whatever knavery ingenious wrongdoers can invent, to give expression to the conscience of equity, and to satisfy the demands of justice." (Id.)

"Even without an express promise, . . . courts of equity have imposed a constructive trust upon property transferred in reliance upon a confidential relationship." (Sharp v. Kosmalski, 40 NY2d 119, 122 [1976].) In the absence of a "promise in words," the Court of Appeals found "it . . . inconceivable that [a] plaintiff would convey all of his interest in property which was not only his abode but the very means of his livelihood without at least tacit consent upon the part of the defendant that she would permit him to continue to live on and operate the farm." (Id.)

As noted above, Plaintiff alleges that Defendant "promised" him that he "would be able to keep his house," and that Defendant "assured" him that he "would have the house . . . for the rest of his life." (Verified Complaint,

Â¶Â¶22, 27.) That is sufficient to establish at least triable issues as to a promise and a transfer in reliance upon the promise. Courts have imposed a constructive trust under similar circumstances. (See Squiciarino v. Squiciarino, 35 AD3d at 845.)

Finally, and most importantly, is the question of unjust enrichment. "The essential purpose of a constructive trust is to prevent unjust enrichment." (Coco v. Coco, 107 AD2d 21, 24 [2d Dept 1985].) "A person may be deemed to be unjustly enriched if he (or she) has received a benefit, the retention of which would be unjust." (Sharp v. Kosmalski, 40 NY2d at 123.) "A conclusion that one has been unjustly enriched is essentially a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties." (Id.) "It is a conclusion reached through the application of principles of equity." (Id.)

Defendant's own showing on this motion is that Plaintiff transferred real property to him without consideration (see Coco v. Coco, 107 AD2d at 25-26), even if the property had a fair market value at the $240,000 stated purchase price, rather than at twice that amount as alleged by Plaintiff. And if Plaintiff were forced to vacate the house, notwithstanding an understanding that he would be permitted to live there for the remainder of his life, then there is at least a triable issue as to whether Defendant has been unjustly enriched.

Defendant seeks to short-circuit such an inquiry, however, by relying on the principle that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (See Clark-Fitzpatrick, Inc., v. Long Is. R.R. Co., 70 NY2d 382, 388 [1987]; see also Goldman v. Metro. Life Ins. Co., 5 NY3d 561, 572 [2005].) He cites authority from the Second Circuit (see In Re: First Central Financial Corp., 337 F3d 209, 213-16 [2d Cir 2004]) and the Eastern District (Petrello v. White, 412 F Supp 2d 215, 232-33 [EDNY 2006]) that applies this limiting principle to claims for imposition of a constructive trust.

No New York state court, however, has so held. In Frydman v. Credit Suisse First Boston Corp. (272 AD2d 236 [1st Dept 2000]), the court applied the principle to an alleged cause of action for unjust enrichment, but did not apply it to an alleged cause of action for imposition of a constructive trust (see id. at 238.) The principle has also been applied to an alleged cause of action for breach of fiduciary duty where the alleged breach was inconsistent

with a written agreement on the same subject. (See Calle v. Barclays Bank P.L.C., 48 AD3d 301, 302 [1st Dept 2008].)

The existence of a written agreement addressing the subject matter may appropriately preclude a finding of unjust enrichment, and therefore the imposition of a constructive trust, in some contexts. In other contexts, however, particularly those in which the confidential relationship is based upon a familial or personal relationship and the subject is similarly non-commercial, precluding the claim simply because of the existence of a writing covering the subject matter would be decidedly inappropriate.

In the first place, since the doctrine of constructive trust contemplates a transfer of an interest in property, and since most transfers will be effectuated or evidence by a writing, strict literal application of the principle would necessarily annul the doctrine. It seems apparent, moreover, that the same vulnerabilities that would justify the characterization of the relationship as fiduciary or confidential would likewise lead the beneficiary to trust in the provisions of any writing dictated, perhaps literally, by the trustee. Indeed, here one might fairly so understand Plaintiff's allegations.

At the least, if a written agreement is to be given dominance in the realm of constructive trust, there should be a clear and substantial inconsistency between the terms of the writing and the alleged breach of trust. And so, where the claimed breach of fiduciary duty was a banker's disregard of plaintiff's oral instructions with respect to certain accounts, the claim was disallowed in the face of a provision in the agreement governing the accounts that all communications must be in writing in order to be effective. (See Calle v. Barclays Bank P.L.C., 48 AD3d at 302.)

Here, from the materials submitted by Defendant on this motion, the only possible assertion of inconsistency between the Plaintiff's allegations and any written contract other than the transfer documents themselves - and not an assertion made by Defendant in his moving papers - might be raised by the Lease Agreement. As previously noted, the Agreement was for a one-year term and not for Plaintiff's life. But, putting aside the other questions concerning the Agreement that have been voiced, there is no necessary inconsistency between the Agreement and Plaintiff's claim. Indeed, Plaintiff continued to live in the house beyond the year, and until July 2006 his monthly Social Security allowance was directly and exclusively available to Defendant for payment of necessary expenses.

The undisputed circumstances surrounding the transfer of 923 Greene Avenue to Defendant, including questions raised by the deed and related documents submitted on this motion, warrant the denial of the motion. Whatever else might be said of the parties' understanding of their arrangement in May 2001, it is clear that it has not worked out as planned. Whether the arrangement should be adjusted by the court remains to be seen, as the decision on this motion determines only that there are issues of fact to be resolved. As the Court suggested on the return date, it may be that the parties would be well-advised to make any adjustment themselves.

In sum, the motion is granted only to the extent that the alleged cause of action for fraud is dismissed, and is otherwise denied.