

STATE OF MAINE  
YORK, SS.

SUPERIOR COURT  
Civil Action  
Docket No. RE-16-0037

TIMOTHY TIERNAN,

Plaintiff,

v.

**ORDER**

THOMAS FEENEY and  
MARY FEENEY,

Defendants.

Timothy Tiernan filed this action in March of this year against Thomas and Mary Feeney, his former in-laws, concerning property located in Lebanon, Maine. He contends that the Feeneys are not abiding by an agreement made years ago with regard to developing the property and allowing him to continue to reside there. Along with the complaint plaintiff filed a motion for ex-parte injunctive relief which sought to prevent defendants from evicting him from the property and then taking steps to sell it. The motion for ex parte relief was denied, and is now before the court as a motion for preliminary injunction seeking the same relief. Hearing on the motion was held on August 9, 2016. For the reasons that follow, the motion for preliminary injunction is granted in part and denied in part.

### **I. Facts<sup>1</sup>**

In 1998 Tiernan purchased a house and 60 acres of land at 30 Merchants Row in Lebanon, Maine. (Pl.'s Aff. ¶ 3.) Subsequently, he became disabled due to injuries and stopped working. Financial pressures, including his mortgage obligation, led him

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<sup>1</sup> The factual record of the motion before the court consists of Mr. Tiernan's 3 ½ page affidavit; his non-verified complaint with three exhibits (photocopies of the 1998 deed, a

to approach his wife's parents, the Feeneys, about purchasing his property in order to avoid foreclosure. (Pl.'s Aff. ¶ 6; Def.'s Aff. ¶ 2.)

The Feeneys agreed to help. In 2007 the parties reached an agreement whereby the Feeneys borrowed \$160,000<sup>2</sup> to pay off the balance of Tiernan's mortgage on the property as well as to pay him an additional \$30,000 in cash; Tiernan deeded the property to the Feeneys; and Tiernan and his family remained living on the property. (Def.'s Aff. ¶ 3-4; Pl.'s Aff. ¶ 10.) To do this, the Feeneys had to take out a borrow the mortgage on their own home. (Def.'s Aff. ¶ 5.) The agreement entered into by the parties also involved a business venture to develop the property and build houses for sale. (Pl.'s Aff. ¶¶ 8, 9, 11, 12, 13, 14; Def.'s Aff. ¶ 6.) Their agreement was not reduced to writing. Some terms are now in dispute.

According to Tiernan, Mr. Feeney, who had experience in these matters, would be in charge of building the houses. (Pl.'s Aff. ¶ 11.) The parties would share the net proceeds 50/50 from the venture. (Pl.'s Aff. ¶ 9.) When the land was developed, a new house for Tiernan would be built on the lot where the house is located, and he (Tiernan) would be entitled to live there. (Pl.'s Aff. ¶¶ 7-12.)

The Feeneys do not dispute that there was an agreement to develop the property. In fact, they subsequently invested an additional \$40,000 in the venture to create and secure town approval of a subdivision plan. (Def.'s Aff. ¶ 6.) Tiernan and Mr. Feeney took other steps to further the plan, including meeting with contractors, completing a course in modular development, and visiting other sites. (Pl.'s Aff. ¶¶ 13-14.) Other aspects of the agreement are disputed, including whether Tiernan would

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<sup>2</sup> Plaintiff contends that the agreed upon \$160,000 purchase price represented 50% of the property's fair market value at the time. Apparently no appraisal was done. There is no other record evidence to corroborate Tiernan's valuation.

be entitled to retain the lot on which the house is located and remain living there in perpetuity.

In the years that followed, circumstances changed substantially. The economy stalled and the housing market collapsed. As a result, the plan to develop the property faltered. The land was never subdivided; no houses were built. (Pl.'s Aff. ¶ 15; Def.'s Aff. ¶ 6.) Plaintiff and his wife divorced. (Pl.'s Aff. ¶ 16.) Tiernan and the Feeneys had a falling out. (Pl.'s Aff. ¶ 17.)

According to the Feeneys, the agreement had always required Tiernan to pay them half of the monthly mortgage payment. (Def.'s Aff. ¶ 7.) In the early years, before the Tiernans divorced, they had been making this payment to the Feeneys, although not every month. (Def.'s Aff. ¶ 8.) Tiernan confirms that such payments were made for a time; he has not made any payments for approximately six years. (Def.'s Aff. ¶ 9; *see also* Pl.'s Aff. ¶ 18.)

In 2010 there was a fire in the house on the property. The Feeneys submitted an insurance claim and received proceeds, which they used to pay down the mortgage. (Def.'s Aff. ¶ 10.) They did not share the proceeds with Tiernan (but he may have received other insurance proceeds from a claim on his damaged personalty). (Pl.'s Aff. ¶ 19; Def.'s Aff. ¶ 10.) Tiernan claims he repaired the fire damage to the house, using his own funds. (Pl.'s Aff. 19.) Tiernan still resides there, although the parties dispute the extent to which Tiernan has maintained the property and whether the house itself is even currently habitable or insurable. (*See* Def.'s Aff. ¶¶ 14-15; Pl.'s Aff. ¶¶ 19, 21.)

In 2014 the Feeneys sold part of land to Central Maine Power Company (CMP), which had preexisting easement rights therein; he (Tiernan) did not receive a share of the proceeds. (Pl.'s Aff. ¶22.) The Feeneys concede that they did not share any of the proceeds with Tiernan but rather considered this to be a partial offset against the

monthly mortgage payments plaintiff has refused to make in the last six years. (Def. Aff. ¶ 10.)

The current assessed value of the property is \$220,000. (Pl.'s Aff. ¶ 23.) Defendants contend that this value reflects an increase due to the investment they made in securing town approval to subdivide and develop the property. (Def.'s Aff. ¶ 16.) They also contend that Tiernan has been harvesting timber on the property for sale without their permission. (Def.'s Aff. ¶ 13.)

At this point, the Feeneys are not in a position either to continue carrying the mortgage or to develop the property. They have had to refinance the mortgage on their own home again in order to keep up with payments on the Lebanon property. (Def.'s Aff. ¶ 13.) There have been efforts over the last several years to resolve their differences. Thus far those efforts have been unsuccessful. Through counsel at the hearing, the parties expressed continued interest in attempting to work this matter out. The Feeneys are merely looking to sell the property and unburden themselves of the debt. Tiernan, at the very least, wants to keep and remain living in the house on the property.

In August 2015 the Feeneys apparently received an offer from a third party to buy the property; the status of that offer is unclear. (Pl.'s Aff. ¶ 24.)

In February 2016 defendants served plaintiff with a 30-day notice to quit and filed a forcible entry and detainer (FED) action in Springvale District Court (SPR-SA-2016-0086). On April 29, 2016 the District Court (*Janelle, J.*) stayed the FED action pending ruling in this court on plaintiff's request for injunctive relief, which was filed in March 2016. (See Pl.'s Aff. ¶ 25.)

## II. Analysis

A preliminary injunction is a remedy in equity that serves to preserve the *status quo* pending trial. As with any equitable remedy, the court applies principles that require consideration of all surrounding facts and circumstances in order to determine what outcome is right and just as between the parties. See *Walsh v. Johnson*, 608 A.2d 776, 778 (Me. 1992).

In order to obtain a preliminary injunction, an applicant must establish that (A) there is a likelihood of success on the merits; (B) irreparable injury will ensue if the injunction is denied; (C) the threatened injury to the applicant outweighs potential harm to the other party if the injunction is granted; and, if relevant,<sup>3</sup> (D) an injunction will not adversely affect the public interest. *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 9, 837 A.2d 129; *Ingraham v. Univ. of Me. at Orono*, 441 A.2d 691, 693 (Me. 1982). The court must balance these factors, which are somewhat intertwined, in order to determine whether injunctive relief is warranted in the unique circumstances of each case. *Windham Land Trust v. Jeffords*, 2009 ME 29, ¶ 41, 967 A.2d 690; see Horton & McGehee, *Maine Civil Remedies*, § 5-3(d) at 107 (4th ed. 2004). The extent of the showing required to demonstrate a likelihood of success on the merits, for example, may vary from case to case depending upon strength or weakness of the other factors. If there is a strong showing of irreparable injury and a relatively low impact on the other party, an injunction may be justified even if the showing on likelihood of success on the merits is not particularly strong. See *id.*

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<sup>3</sup> The fourth factor—whether an injunction will adversely affect the public interest—does not appear to be a relevant or significant consideration in this case, and thus the court does not address it.

### A. Likelihood of Success on the Merits

The complaint in this case sets out four causes of action: constructive trust (and equitable partition based thereon); unjust enrichment; breach of contract; and promissory estoppel. The limited factual record supporting this motion makes the determination of likelihood of success on any of these counts a close call, even as to the constructive trust claim, upon which plaintiff seems to most rely.

“[A] constructive trust may be imposed to do equity and to prevent unjust enrichment when title to property is acquired by fraud, duress, or undue influence, or is acquired or retained in violation of a fiduciary duty.” *Gaulin v. Jones*, 481 A.2d 166, 168 (Me. 1984); see also *Baizley v. Baizley*, 1999 ME 115, ¶ 6, 734 A.2d 1117. Plaintiff has not demonstrated that the Feeneys acquired the property by fraud, duress, or undue influence. Cf. M.R. Civ. P. 9(b) (averments of fraud or mistake “shall be stated with particularity”) Rather, he appears to base his constructive trust claim on the assertion that the Feeneys stood in a fiduciary relationship to him stemming from a confidential relationship with Mr. Feeney.

A confidential relationship exists when “(1) ‘an individual place[s] trust and confidence in’ another and (2) there is ‘a great disparity of position and influence in the relationship.’” *Albert v. Albert*, 2015 ME 5, ¶ 8, 108 A.3d 388 (quoting *Theriacault v. Burnham*, 2010 ME 82, ¶ 6, 2 A.3d 324); see also *Morris v. Resolution Tr. Corp.*, 622 A.2d 708, 712 (Me. 1993); *Ruebsamen v. Maddocks*, 340 A.2d 31, 35 (Me. 1975). The existence of a confidential relationship is a question of fact. *Estate of Campbell*, 704 A.2d 329, 331 (Me. 1997); *Ruebsamen*, 340 A.2d at 35.

Plaintiff contends that he was in poor health, disabled and destitute at the time he entered into this arrangement. He turned to wife’s parents, whom he trusted to help him avoid foreclosure and the resulting disruption to his family that would have

ensued. Further, he contends that the Feeneys stood in a disproportionately advantageous bargaining relationship to him because he was in dire straits and they had the resources and experience to undertake this venture.

As noted, this is a close question. The mere fact that the parties were family members does not necessarily demonstrate the level of trust and confidence required to establish a confidential relationship. *Albert*, 2015 ME 5, ¶6, 108 A.3d 388. Nor does the fact that they were entering into a business venture together, *Bryan R. v. Watchtower Bible & Tract Soc'y, Inc.*, 1999 ME 144, ¶ 20, 738 A.2d 839, or the fact that this undertaking was intended to protect against creditors or avoid foreclosure, *see Albert*, 2015 ME ¶ 13; *Moulton v Moulton*, 1998 ME 31, 707 A.2d 74. Just because the Feeneys were in a position to assist their daughter and plaintiff, and had the means and experience to do so, does not necessarily transform their relationship with plaintiff into a fiduciary one. At the same time, Tiernan did convey outright 60 acres of land to the Feeneys, and, based on the assertions before the court at this juncture, there may have been an expectation of gain beyond simply avoiding foreclosure, and if so, those expectations have been thwarted.

Even if plaintiff can establish a confidential relationship sufficient to support the imposition of a fiduciary duty, there still remains the question of unjust enrichment. The showing of unjust enrichment is a component of a constructive trust claim (and also has been plead as an independent ground for relief). The relevant facts appear to be as follows. The property is currently assessed at \$220,000; however, its value at the time of the agreement is less clear, and the only record evidence of its value in 2007 is anecdotal. The extent of moneys defendants have expended or invested in the property appears to have been substantial, but this, too, is not fully clear from the record. It is undisputed that defendants retained the insurance proceeds from the fire

as well as the proceeds from the sale to CMP. Thus, there is a plausible basis for finding unjust enrichment, although it is unclear whether plaintiff will be able to sustain that finding on a more fully developed record.

The court, therefore, concludes that plaintiff has marginally demonstrated a likelihood of success on the constructive trust claim for purposes of this motion.<sup>4</sup>

### **B. Irreparable Injury**

Generally speaking, an injury is considered irreparable if it is one for which there is no adequate legal remedy. This typically means that recovery of damages alone would not be a sufficient or complete remedy for the wrongs asserted by the plaintiff. In the context of a motion for preliminary injunction, however, the potential for irreparable injury may be viewed not just in terms of whether there is an adequate, alternate legal remedy but rather whether the potential injury would be unrectifiable without an injunction were the plaintiff to prevail at trial. *See Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275 (7th Cir. 1992) (Posner, J.)

Plaintiff satisfies this requirement in one limited respect. If defendants are allowed to sell the property while this action is pending and plaintiff were to prevail at final hearing, he would be unable to recover this particular property and the specific relief available via a constructive trust would be thwarted. The “concept of the uniqueness of a piece of real estate” is one that may support a showing of irreparable harm, depending upon the circumstances. *Horton and McGehee, Maine Civil Remedies*, § 5-5(b) at 104 (4th ed. 2004). Plaintiff is seeking through this action to reclaim his interest in this particular property. Conveyance of the property to a third party during the pendency of this action could render that relief unavailable, and would be

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<sup>4</sup> In light of this conclusion, it is unnecessary to consider the likelihood of success with regard to the remaining claims.



unrectifiable. Available legal remedies would not be able to restore the property to him.

That is not the case with respect to plaintiff's attempt to maintain his current possession of the property and essentially use this action as a shield in the FED action. Plaintiff asserts that he would be irreparably harmed if forced to vacate the home in which he has resided for nearly 20 years. Eviction may be disruptive and difficult, but it does not amount to irreparable or unrectifiable injury. Possession can be restored if he ultimately prevails. Moreover, it is unclear whether defendants will be successful in their FED action.

Other than enjoining sale of the property pending the final outcome in this matter, plaintiff has adequate remedies at law for any other potential injuries claimed.

### **C. Balance of Harms**

In considering the impact of the requested injunction on the defendants, the court concludes that the full measure of relief sought by plaintiff would have an unjustifiably adverse impact on them. While plaintiff continues in possession, defendants remain financially and legally responsible for the property. They continue to bear the sole burden of paying the mortgage and taxes on the property, without assistance from plaintiff. It is alleged that plaintiff may be cutting and selling timber from the land, thus profiting himself while potentially depreciating the property's value. This action aside, if defendants have possessory rights to the property superior to plaintiff they ought to be able to assert those rights; and vice versa.

On the other hand, temporarily enjoining sale of the property impacts defendants less over the short run and preserves the potential for relief that plaintiff is seeking should he prevail. As a practical matter, it is unclear whether defendants

would be able to conclude a sale of the property while this action is pending due to the uncertainty created by this lawsuit to clear title.

### III. Conclusions and Order

For the foregoing reasons, the court concludes that plaintiff is entitled at this point to limited injunctive relief. This order enjoins defendants from selling the property during the pendency of this action. This order does not enjoin defendants from proceeding ahead with the FED action pending in the Springvale District Court, and if awarded possession of the property in said action from taking possession and exercising any and all possessory rights thereto, including without limitation the right to lease the property to a third party.

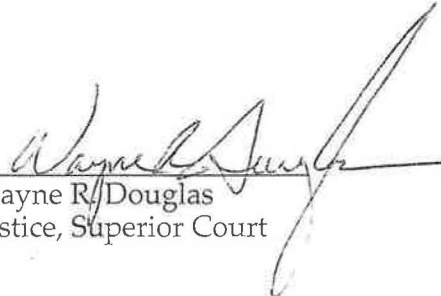
Accordingly, it is hereby ORDERED as follows:

1. Plaintiff's motion for preliminary injunction is granted in part and denied in part, as set forth herein.
2. Pending further order of the court, defendants are enjoined from selling any interest in or to the property located at 30 Merchants Row in Lebanon, Maine.
3. As required by Rule 65(c) of the Maine Rules of Civil Procedure, plaintiff shall post security in the amount of \$50,000 (or in any other amount agreed upon by the parties) for the payment of such costs and damages as may be incurred by defendants.
4. In all other respects, the motion for preliminary injunction is denied.

The clerk may incorporate this order upon the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

**SO ORDERED**

DATE: August 30, 2016

  
Wayne R. Douglas  
Justice, Superior Court