

**Evans v Perl**

2007 NY Slip Op 34482(U)

July 7, 2007

Sup Ct, New York County

Docket Number: 602898/05

Judge: Judith J. Gische

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Index Number : 602898/2005  
**PERL, SHARI**  
vs.  
**ANDREA PERL**  
SEQUENCE NUMBER : 066  
DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 066

Motion to/for \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

# FILED

JUL 11 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/7/11

HON. JUDITH J. GISCHE, J.S.C.  
*JSC*

1. CHECK ONE: .....  CASE DISPOSED
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York  
County of New York: IAS Part 10

-----X

Martin Evans, as guardian of the property  
of Shari Perl, individually and on behalf of  
Shari Perl as trustee of the Shari Perl Family  
Trust and derivatively on behalf of Perl Properties, Inc.

Plaintiff,

Decision/Order

-against-

Index # 602898/05

Andrea Perl, individually and as a trustee of the  
Shari Perl Family Trust, Gerald Shallo, 145-147 Mulberry

Motion Seq. #s 066,  
67

Realty Co. LLC, Perl Properties Inc.. 495 Broadway  
Realty Co., LLC, 256-258 West 36<sup>th</sup> Street Realty Co., LLC,  
Perlrose Realty Co., Mulberry Realty Co., LLC  
and Conrad Roncati,

Defendants,

**FILED**

Bridget Hannah Herman, a minor, and Rebecca Perl,

**JUL 11 2011**

Nominal Defendants.

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-----X

Hon. Gische, J:

Pursuant to CPLR 2219(A) the following numbered papers were considered on this  
motion:

PAPERS	NUMBERED
Motion Seq.: # 66	
Notice of Motion, GS affd., exhibits.....	1
ME affd., exhibits.....	2
KMM affirm., exhibit.....	3
Motion Seq.: # 67	
Notice of Motion, DP affd., exhibits.....	1
DLW affd., exhibits.....	2
ME affd. In opp, exhibits.....	3

Upon the foregoing papers the decision and order of the court is as follows:

Defendant Gerald Shallo ("Shallo") moves to dismiss the Fourth Verified Amended and Supplemental Complaint ("4<sup>th</sup> Complaint") as against him. He claims that the 4<sup>th</sup> Complaint fails to state a cause of action for constructive trust and that it is otherwise fails based upon documentary evidence. Dean Palin and 32 West 22<sup>nd</sup> Street, LLC (collectively "Palin defendants") have separately moved to dismiss the 4<sup>th</sup> Complaint. The motions are interrelated and are, therefore, considered in this single decision and order. The court has written approximately 60 prior decisions in this case, many of which substantively address the parties' relative claims. The reader is presumed familiar with such decisions and their content which are incorporated by reference herein. Consequently, the facts are only repeated here as may be necessary.

Any motion made pursuant to CPLR 3211, requires the court to give the pleadings a liberal construction and accept the facts alleged as true. The court will determine whether, affording plaintiff the benefit of every possible favorable inference, the facts as alleged in the 4<sup>th</sup> complaint against Shallo and Palin fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83 (1994). Whether plaintiff can ultimately establish his allegations is not part of the calculus. EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2005). While extrinsic evidence may be freely relied upon to preserve in-artfully pleaded but potentially meritorious claims, it may not be considered to defeat a complaint, unless it is documentary evidence that definitively disposes of plaintiff's claims. Zanett Lombardier v. Ltd v Maslow, 29 AD3d 495 (1<sup>st</sup> Dept. 2006); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1<sup>st</sup> dept. 1995). To the extent the motion to dismiss is based upon documentary evidence, the

documents relied upon must definitively establish a basis for dismissal. Bronxville Knolls Inc. v. Webster Town Center Partnership, supra. In this regard both Shallo and Palin have submitted factual affidavits to the court in support of their respective motions. These affidavits are not properly considered on a motion addressed to the sufficiency of the pleadings. Likewise, the court will not consider transcripts of sworn testimony submitted in support of these motions. Affidavits are not the kind of documentary evidence that is addressed to the sufficiency of a pleading.

Insofar as Shallo is concerned, the court has on at least two prior occasions found that the allegations against Shallo are sufficient. Briefly stated, the claims against Shallo are that he was hired as a real estate sales broker at a time when the Perl family interests owned the property located at 32 West 22<sup>nd</sup> Street in New York City ("property") and that in violation of his fiduciary duty, he bought the property himself for less than fair market value, without full disclosure of all of the relevant facts. Although Shallo denies the claim, the dispute has not yet been adjudicated. By decision and order dated April 9, 2008, the court denied a prior motion by Shallo to dismiss the third amended complaint with respect to the claims arising from these allegations. By decision and order dated October 21, 2010, the court permitted the 4<sup>th</sup> complaint over Shallo's objection to include the remedy of constructive trust on account of the allegations of breach of fiduciary duties.

Nothing has substantively changed since the court made its earlier rulings. The court's earlier rulings with respect to the claims against Shallo warrant the denial of his most recent motion to dismiss.

The claims against the Palin defendants, however, require a different analysis.

When Shallo purchased the property, he purchased it in the name of 32 West 22<sup>nd</sup> Street, LLC, in which he and Dean Palin have a financial interest. Although the claims asserted against the Plain defendants are for a constructive trust and aiding and abetting a fiduciary duty, the Palin defendants argue that there are no facts alleged concerning them which support such causes of action. The Palin defendants argue that whatever may have occurred between Shallo and Shari Perl, neither of them stood in a confidential relationship with Shari Perl, and the allegations in the complaint do not support such a conclusion. The Palin defendants argue that the complaint does not allege that they knew about any breach of a fiduciary relationship between Shallo and Shari Perl. They argue that the claim should be dismissed because plaintiff has an adequate remedy at law. Finally the Palin defendants argue that the documentary evidence shows that the property was sold after only an arm's length negotiation. In making this claim they rely primarily on the contract of sale and other closing documents.

The court rejects the argument that the sale documents are sufficient in themselves to dispose of any of the claims against the Palin defendants. The gravamen of plaintiff's claims is that the property was sold for less than what it was worth to and without full disclosure by Shallo, who was a fiduciary to the sellers. The sale documents, however, do not resolve these factual issues, as a matter of law. The court, therefore, rejects the arguments that documentary evidence mandates dismissal against the Palin defendants at this time. The court also rejects the argument that you cannot plead a claim that seeks both a legal and equitable remedy. While a party may not be entitled to both remedies at the end of the case, alternate pleading of claims is

permitted.

The court otherwise finds that the facts as plead do not state a cause of action against the Palin defendants, warranting a dismissal of the claims against them. To state a cause of action for the imposition of a constructive trust, a plaintiff must plead and prove four essential elements: [1] a confidential or fiduciary relationship; [2] a promise; [3] a transfer in reliance thereon; and [4] unjust enrichment. These elements, however, are not to be rigidly applied. Simonds v. Simonds, 45 NY2d 233, 240 (1978). Because there are no facts alleged about either Palin or 32 West 22<sup>nd</sup> Street LLC that would support a legal conclusion that either of them stood in a fiduciary relationship with Shari Perl, any direct cause of action against the Palin defendants for a constructive trust cannot stand.

In order to support a claim that the Palin defendants are responsible for aiding and abetting a breach of Shallo's fiduciary duties to Shari Perl, there must be allegations that such defendants knowingly participated or induced a breach of a fiduciary duty. Kaufman v. Cohen, 307 AD2d 113 (1<sup>st</sup> dept. 2003). Here, at most, the allegations are that Dean Palin negotiated the purchase with the Perls, that he knew that Shallo was an investor on the buyer side and that he also knew that Shallo was a broker for the seller. There are no allegations that he knew what if any disclosures were made by Shallo to the Perls and/or that he actively engaged with Shallo to acquire the property for less than fair market value. Thus, there are insufficient allegations for the court to conclude that the Palin defendants would have known that there was any breach of fiduciary duty occurring, much less that they actively aided and abetted it. Dubbs v. Stribling & Assoc., 10 NY3d 344 (2008). ; Dube-forman v. D'Agostino, 61

AD3d 1255 (3<sup>rd</sup> dept. 2009); Brown Harris Stevens Residential Sales, LLC v. Oxford Capital, 306 AD2d 112 (1<sup>st</sup> dept. 2003).

Accordingly, the motion to dismiss the claims against the Palin defendants is granted.

Since no party has addressed whether the remedy of constructive trust is available when the claim exists only against a party having a partial financial interest in the subject property, the court, likewise, does not address the issue in this decision.

**Conclusion**

In accordance with this decision it is hereby:

ORDERED that Gerald Shallo's motion (seq # 66) to dismiss the Fourth Amended and Supplemental Complaint is denied , and it is further

ORDERED that Dean Palin and 32 West 22<sup>nd</sup> Street, LLC's motion (seq # 67) to dismiss the Fourth Amended and Supplemental Complaint is granted and the claims against them are hereby severed and dismissed, and it is further

ORDERED that any requested relief not expressly granted herein is denied and it is further

ORDERED that this constitutes the decision and order of the court.

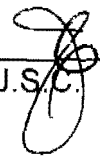
Dated: New York, NY  
July 7, 2007

**FILED**

**JUL 11 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.C.