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

PRESENT: HON. PAUL WOOTEN Justice — PART 7

PATRICIA BAKWIN SELCH,

Plaintiff,

- against-

GREGORY STEPHEN SELCH and MELISSA JO FLEMING,

Defendants.

INDEX NO. 106072/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 6, were read on this motion to dismiss by defendant Melissa Jo Fleming, pursuant to CPLR 3211(a)(1) and (7).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits (Memo)	3,4
Replying Affidavits (Reply Memo)	5,6

Cross-Motion: ☐ Yes ■ No

This is an action in equity by plaintiff Patricia Bakwin Selch ("plaintiff") against her son and daughter-in-law, defendants Gregory Stephen Selch ("Mr. Selch") and Melissa Jo Fleming ("Fleming") (collectively "defendants"), to impose a constructive trust over any surplus monies realized from a sale of defendants' cooperative apartment, or alternatively, for unjust enrichment. Plaintiff alleges that she has paid $737,348.95 to satisfy a guaranty that she executed in connection with a line of credit that was extended to Mr. Selch in 2008. The proceeds of the line of credit were purportedly used for the exclusive benefit of both defendants, including for the purposes of paying expenses related to the cooperative apartment. Plaintiff claims that defendants will be unjustly enriched if the property is sold and defendants are allowed to retain any surplus monies without first reimbursing plaintiff for her expenditures pursuant to the guaranty. Discovery has not commenced and the Note of Issue

has not been filed. Before the Court is Fleming's pre-answer motion to dismiss, pursuant to CPLR 3211(a)(1) and (7), seeking to dismiss the complaint as against her on the grounds that: (1) the complaint fails to state a cause of action for a constructive trust or unjust enrichment because it does not allege all of the essential elements of such claims; and (2) there is a defense founded upon documentary evidence conclusively establishing that the line of credit that plaintiff guaranteed was solely in Mr. Selch's name, and not in Fleming's name. Plaintiff has responded in opposition to the motion, and Fleming has filed a reply.

BACKGROUND

A. The Underlying Facts

The relevant facts as alleged in the complaint are as follows. Mr. Selch and Fleming were married on September 23, 2000. They live apart and have been involved in highly contested divorce proceedings since 2007. Plaintiff is Mr. Selch's mother, and Fleming's mother-in-law.

In February 2006, defendants purchased, as husband and wife, a cooperative apartment located at 1160 Park Avenue, New York, New York ("the co-op"), for the price of $2,225,000.[1] They financed a portion of the purchase price with a loan from MB Financial Bank, N.A. ("the Bank"). They allegedly still needed additional financing to pay the balance of the purchase price, as well as to undertake extensive renovations, pay the debt service on the co-op loan, pay monthly maintenance payments due to the co-op corporation, and pay various other household and living expenses. To cover these expenses, defendants purportedly obtained a line of credit from the Bank in the principal sum of $2,750,000, which they drew down upon from time to time.

In January 2008, after the renovations were complete, Fleming moved into the co-op

[1]Defendants purchased shares of the co-op's corporation stock and the tenant's interest in the proprietary lease pertaining to the co-op.

with defendants' children. Defendants were separated at the time and Mr. Selch had commenced divorce proceedings. Fleming continued to live in the co-op with the children and Mr. Selch resided at another location.

In April 2008, the maturity date for the line of credit was extended. As further security for the indebtedness, the Bank required plaintiff to execute a guaranty. Accordingly, on April 2, 2008, plaintiff executed and delivered to the Bank a Consumer Guaranty ("the Guaranty"), pursuant to which plaintiff guaranteed the indebtedness under the line of credit up to the principal amount of $800,000, together with unpaid interest, collection costs, and attorney's fees.

The line of credit was subsequently defaulted upon. The Bank then brought an action for breach of contract against Mr. Selch in the Circuit Court of Cook County, Illinois, and on April 15, 2009, the court issued a Final Judgment Order On Consent ("the Consent Judgment") in favor of the Bank and against Mr. Selch in the amount of $992,000. Defendants failed to pay any portion of the outstanding indebtedness under the Consent Judgment. The Bank thereafter demanded payment from plaintiff in the principal amount of $800,000 under the Guaranty.

On December 23, 2009, plaintiff entered into a settlement agreement with the Bank in avoidance of a lawsuit ("the Settlement Agreement"). Under the Settlement Agreement, plaintiff paid the Bank the principal amount of $700,000, together with the Bank's attorney's fees of $11,361.87, in full satisfaction of plaintiff's obligations under the Guaranty. Plaintiff also paid an additional $25,987.08 for legal fees in connection with services rendered by her own counsel. Plaintiff alleges that she has thus expended a total of $737,348.95 in connection with the Guaranty and Settlement Agreement, and that she may incur additional expenditures for further legal fees.

On May 7, 2010, plaintiff commenced the present lawsuit against defendants. In the first cause of action for a constructive trust, she claims that the Bank intends to commence

foreclosure proceedings and that the co-op will be sold, either by foreclosure or by defendants in connection with their pending divorce, and that defendants will be unjustly enriched if they are allowed to retain any surplus monies realized from such a sale without first reimbursing plaintiff for her expenditures under the Guaranty. Plaintiff seeks to impose a constructive trust, in her favor, over any surplus monies realized from a sale of the co-op up to the aggregate amount of the monies she has expended and will expend in connection with the Guaranty and Settlement Agreement. In the second cause of action for unjust enrichment, plaintiff alternatively seeks money damages in the aggregate amount of the monies expended and to be expended in connection with the Guaranty and Settlement Agreement. Defendants have not yet answered the complaint.

B. Fleming's Motion To Dismiss

In support of her dismissal motion, Fleming submits, *inter alia*, a Consumer Pledge Agreement ("the Pledge Agreement"); a Promissory Note; correspondence between the Bank and Mr. Selch; loan billing statements; and the Consent Judgment.[2] Fleming alleges that her documentary evidence conclusively establishes that the line of credit underlying the Guaranty was solely in Mr. Selch's name, and not her name.

The Pledge Agreement indicates that it was executed on April 2, 2008 (the same date as the Guaranty), between Mr. Selch and the Bank in the principal sum of $2,750,000, with a maturity date of September 21, 2008. It was signed only by Mr. Selch, and was secured by an investment account that Mr. Selch maintained and not by any interest in the co-op.

The Promissory Note was executed by Mr. Selch in favor of the Bank on September 21, 2008, for the same line of credit of $2,750,000, with a new maturity date of March 21, 2009.

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[2]Fleming submits additional documents with her reply affidavit, consisting of two memorandum from the Bank to Mr. Selch; monthly statements issued by the Bank to Mr. Selch; and documentation pertaining to the underlying divorce proceedings. Since this evidence is presented for the first time in reply papers, the Court will not consider it (*see Moshin v Port Authority of New York*, 83 AD3d 536, 536 [1st Dept 2011]).

The Promissory Note identifies the sole "Borrower" as Mr. Selch, and is signed solely by Mr. Selch.

The Bank's loan billing statements were sent only to Mr. Selch. In addition, on March 2, 2009, the Bank wrote to Mr. Selch and advised him that the collateral on his loan had been liquidated and that his loan balance remained due. The Bank thereafter commenced the Illinois action and obtained the Consent Judgment against Mr. Selch in the principal sum of $992,000, which represented the amount then remaining due under the Pledge Agreement and Promissory Note. Notably, the Consent Judgment was against Mr. Selch only, and not against Fleming.

In opposition to Fleming's motion, plaintiff submits her own affidavit and a Forbearance Agreement Adjourning UCC Co-op Foreclosure Sale ("Forbearance Agreement") that was executed by the Bank, Mr. Selch, and Fleming on July 14, 2010. Under the Forbearance Agreement, defendants were afforded additional time to locate a purchaser for the co-op in order to avoid a foreclosure sale. The Forbearance Agreement provided at paragraph 5(E) that if the property was sold within the allowed adjourned time, the proceeds from the sale would be disbursed as follows:

> "first, to the payment of any outstanding maintenance, assessment, etc. due to Third Commonwealth Corp. (the Co-op Corp.); second, to Lender, in the amount of $50,000 as a forbearance fee; third, to Lender in an amount to fully satisfy the amount due under the Co-op loan to the Borrowers, including, attorneys' fees and costs and expenses incurred in connection with the scheduled sale, etc.; *fourth, to Lender, in the amount of $292,000 plus applicable interest thereon and all other charges, to fully satisfy the Consent Judgment in favor of the Lender as against Greg Selch*; fifth, to the Borrowers as they direct, or otherwise required by law" (Aff. in Opp., Ex. 1 [emphasis supplied]).

Plaintiff asserts in her affidavit that, notwithstanding that the Promissory Note was signed only by Mr. Selch and that the Consent Judgment was against Mr. Selch only, Fleming

agreed under paragraph 5(E) that the $292,000 balance is to come out of Fleming's share of the co-op sale proceeds as well.[3] Plaintiff therefore claims that Fleming has effectively acknowledged her co-equal liability for the line of credit indebtedness that plaintiff guaranteed. Plaintiff also asserts that the Guaranty was never intended to be a gratuitous gift for the benefit of defendants, and that she fully expected that defendants would reimburse her for any payments she had to make to the Bank under the Guaranty.

DISCUSSION

A. Motion to Dismiss Standards

CPLR 3211(a)(1) permits a defendant to seek dismissal of a cause of action on the ground that the defendant has a defense founded upon documentary evidence. The Court may grant dismissal when the documentary evidence submitted by the defendant "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see also Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Kram Knarf, LLC v Djonovic*, 74 AD3d 628, 628 [1st Dept 2010]; *IMO Indus. Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 10 [1st Dept 1999]).

CPLR 3211(a)(7) permits a defendant to seek dismissal of a cause of action for failure to state a claim. In evaluating a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Harris v IG Greenpoint Corp.*, 72 AD3d 608, 608-09 [1st Dept 2010]; *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 [1st Dept 2005]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, dismissal will be denied (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1997]; *Harris*, 72

[3]Plaintiff claims that $292,000 is the balance remaining after plaintiff's $700,000 payment to the Bank under the Guaranty.

AD3d at 609; *Amaro ex rel Almazan v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009] ["a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, the criterion being not whether the proponent of the pleading has simply stated a cause of action, but whether he or she actually has one"]).

B. Constructive Trust

Fleming first seeks to dismiss plaintiff's cause of action for a constructive trust for failure to state a claim. She argues that the complaint fails to allege any of the elements necessary to establish such a claim as against her. Plaintiff argues that the complaint does set forth the requisite elements for imposition of a constructive trust against Fleming.

A constructive trust is an equitable remedy employed to prevent unjust enrichment (*see Simonds v Simonds*, 45 NY2d 233, 242 [1978]; *Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). In general, "four elements must be established before a court may grant this remedy: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Panetta v Kelly*, 17 AD3d 163, 165 [1st Dept 2005]; *see also Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980]; *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). As an equitable remedy, a constructive trust may be imposed to satisfy the demands of justice.

Taking plaintiff's allegations as true and affording her the benefit of all favorable inferences, the Court finds that plaintiff has sufficiently pled the first element. Although Fleming argues that the complaint does not allege a confidential or fiduciary relationship between Fleming and plaintiff since defendants were engaged in bitter divorce proceedings when plaintiff executed and satisfied the Guaranty, it is well established that a confidential or fiduciary relationship "can grow out of marital or other family relationship[s]" (*Minieri v Knittel*, 188 Misc 2d 298, 300 [Sup Ct NY County 2001]; *see also Zuch v Zuch*, 117 AD2d 397, 404 [1st Dept 1986]; *Reiner v Reiner*, 100 AD2d 872, 874 [2d Dept 1984]). Here, plaintiff sufficiently alleges

that a confidential, family relationship existed, as plaintiff was Fleming's mother-in-law. The fact that defendants were engaged in adversarial divorce proceedings, even if plaintiff sided with her son, does not require a contrary finding (*see Cinquemani v Lazio*, 37 AD3d 882, 883 [3d Dept 2007] [a confidential, family relationship existed among the parties despite the fact that the parties subsequently found themselves litigating against each other]).

The Court further finds, however, that plaintiff has not sufficiently alleged the remaining three elements so as to establish a cognizable claim for a constructive trust as against Fleming (see *Matter of Alpert*, 37 AD3d 187, 189 [1st Dept 2007]; *Ewart v Ewart*, 78 AD3d 992, 993 [2d Dept 2010]; *Delzer v Rozbicki*, 85 AD3d 1722 [4th Dept 2011]).

With respect to the second element, Fleming argues that the complaint fails to allege any promise on her part. Plaintiff responds that she has pled sufficient facts to establish that there was an implied promise that she would be reimbursed by both defendants for her expenditures under the Guaranty, since it was her execution of the Guaranty that allowed the Bank to renew the line of credit that both defendants purportedly benefitted from. Plaintiff also claims that Fleming has acknowledged her co-liability for the indebtedness under the line of credit in paragraph 5(E) of the Forbearance Agreement.

The Court finds that plaintiff has pled no allegations sufficient to support a finding of any promise, express or implied, made by Fleming to plaintiff in connection with the Guaranty (*see Scivoletti v Marsala*, 61 NY2d 806, 808 [1984]; *Khoury v Khoury*, 60 AD3d 539, 540 [1st Dept 2009]; *Samantha Enters. v Elizabeth St.*, 5 AD3d 280, 280 [1st Dept 2004]; *Ewart*, 78 AD3d at 993). Plaintiff has essentially conceded, and indeed the documentary evidence establishes, that the Pledge Agreement and Promissory Note underlying the line of credit that plaintiff guaranteed were signed only by Mr. Selch, and not by Fleming. Indeed, even if there was an implied promise of reimbursement made to plaintiff by Mr. Selch, no facts are alleged from which a similar promise may be inferred on the part of Fleming. Nor does the Forbearance Agreement, standing alone, provide a sufficient basis upon which to find an implied promise

made by Fleming to plaintiff regarding the Guaranty.

As to the third element, Fleming contends that plaintiff's actions with respect to the Guaranty were entirely voluntary and that plaintiff has not alleged a transfer made in reliance upon a promise by Fleming. Plaintiff argues that her execution and delivery of the Guaranty was not a gratuitous act, and was done in reliance on an implied promise that she would be reimbursed by both defendants for her expenditures under the Guaranty.

Plaintiff has not pled sufficient facts to establish the transfer element (*see Frydman & Co. v Credit Suisse First Boston Corp.*, 272 AD2d 236, 238 [1st Dept 2000]; *Alpert*, 37 AD3d at 189; *Ewart,* 78 AD3d at 993). Although plaintiff argues that she executed and delivered the Guaranty in reliance on an implied promise by both defendants, she does not dispute that the Pledge Agreement and Promissory Note were signed solely by Mr. Selch. Her mere allegation that both defendants benefitted from the Guaranty is insufficient to establish that plaintiff made a transfer in reliance on a promise by Fleming (*see Doria v Masucci*, 230 AD2d 764, 765-66 [2d Dept 1996] [bare, conclusory assertion regarding circumstances for a constructive trust, which was contradicted by the documentary evidence and expressly denied by the defendants, was insufficient to establish promise or transfer elements]; *Matter of Noble*, 31 AD3d 643, 645 [2d Dept 2006]).

With regard to the fourth element, Fleming argues that the complaint fails to allege unjust enrichment because there are no allegations that Fleming acquired plaintiff's property and was enriched at plaintiff's expense. In opposition, plaintiff argues that it would be extremely unfair to permit defendants to retain the benefits of plaintiff's payments under the Guaranty without reimbursement since the proceeds of the line of credit were used for both defendants' exclusive benefit for purposes related to the co-op.

The underlying purpose of a constructive trust is to prevent unjust enrichment (*see Sharp*, 40 NY2d at 123). "A person may be deemed to be unjustly enriched if he (or she) has received a benefit, the retention of which would be unjust. 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.* [citation omitted]; *see also Cinquemani*, 37 AD3d at 883 ["As to the element of unjust enrichment, a person is unjustly enriched when retention of the benefit received would be unjust considering the circumstances of the transfer and the relationship of the parties"] [internal quotations omitted]; *Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]).

Here, the complaint fails to allege facts sufficient to establish this element because plaintiff has not adequately alleged that a benefit was bestowed upon Fleming as a result of plaintiff's execution of the Guaranty, the retention of which would be unjust (*see M&B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 258 [1st Dept 2008]; *Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332, 333 [1st Dept 2006]; *Prospect Plaza Tenant Assn., Inc. v New York City Hous. Auth.*, 11 AD3d 400, 401 [1st Dept 2004]). The documentary evidence establishes that the line of credit that plaintiff guaranteed was extended in 2008 based on a Pledge Agreement and Promissory Note that were executed only by Mr. Selch, and the Consent Judgment pertained only to Mr. Selch. Thus, any benefit that may have resulted from plaintiff's execution of the Guaranty, if any, pertained to Mr. Selch's obligations to the Bank, not Fleming's. Nor has plaintiff alleged any conduct that Fleming engaged in that may have unfairly induced plaintiff to execute the Guaranty. Plaintiff's mere allegation that Fleming benefitted from the Guaranty simply because she lived in the co-op and presumably used the proceeds from the line of credit to pay for expenses related to the co-op are insufficient to establish the element of unjust enrichment (*see Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract*, 14 AD3d 678, 680 [2d Dept 2005] ["plaintiff's allegation that the appellants received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment"]; *Erlitz v Segal, Liling & Erlitz*, 142 AD2d 710, 712-13 [2d Dept 1988]).

Therefore, the complaint fails to state a cause of action for a constructive trust as against Fleming. Accordingly, Fleming's motion to dismiss the first cause of action seeking a

constructive trust as against her is granted.

C. Unjust Enrichment

Fleming next argues that plaintiff's second cause of action for unjust enrichment should be dismissed based upon documentary evidence and for failure to state a claim. Fleming argues that the documentary evidence conclusively establishes that the Guaranty did not benefit her at plaintiff's expense, and that plaintiff merely acted as a volunteer in guaranteeing the line of credit for her son. Plaintiff argues that the documentary evidence fails to refute the facts alleged in the complaint which she claims establish the elements of her claim for unjust enrichment, or at the very least, raises factual disputes that preclude dismissal of the complaint.

Unjust enrichment is a quasi-contract theory of recovery, and "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). "The essential inquiry in any claim for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be returned" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]). To successfully plead unjust enrichment, a plaintiff must show that: (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *Georgia Malone & Co., Inc. v Ralph Rieder*, 926 NYS2d 494 [1st Dept 2011]).

The facts as pled by plaintiff are insufficient to support an inference of unjust enrichment warranting the interference of equity as against Fleming. As found above in the Court's discussion of the constructive trust elements, the documentary evidence undisputedly establishes that the Pledge Agreement and Promissory Note underlying the line of credit that plaintiff guaranteed were signed only by Mr. Selch. The complaint fails to establish a cognizable claim that Fleming received a benefit from plaintiff for which she was unjustly enriched at plaintiff's expense (*see North Salem Psychiatric Servs. v Medco Health Solutions,*

Inc., 50 AD3d 986, 987 [2d Dept 2008]["Although the plaintiffs seek to recover on a theory of unjust enrichment, their cause of action does not contain the necessary allegation that the defendant unjustly received something of value at the expense of the plaintiffs"]; *CDR Creances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421, 422 [1st Dept 2007]; *M&B*, 49 AD3d at 258).

The Court therefore finds that the complaint does not allege facts sufficient to support plaintiff's claim for unjust enrichment as against Fleming. Accordingly, Fleming's motion to dismiss the second cause of action for unjust enrichment as against her is granted.

For these reasons and upon the foregoing papers, it is,

ORDERED that Fleming's motion to dismiss plaintiff's first cause of action for a constructive trust and second cause of action for unjust enrichment is granted; and it is further,

ORDERED that the Clerk is directed to enter judgment dismissing all claims in the complaint as against Fleming; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that the remaining parties are directed to appear at a preliminary conference on September 7, 2011, at 2:30 p.m., in Part 7, at 60 Centre Street; and it is further,

ORDERED that Fleming shall serve a copy of this Order, with notice of entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: August 3, 2011

Paul Wooten J.S.C.

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