

<p><b>Kupfer v Kupfer</b></p>
<p>2012 NY Slip Op 30141(U)</p>
<p>January 13, 2012</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 100075/2010</p>
<p>Judge: Emily Jane Goodman</p>
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: \_\_\_\_\_

EMILY JANE GOODMAN

Justice

PART 17

Index Number : 100075/2010

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

KUPFER, MITCHELL

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

vs.

MOTION SEQ. NO. \_\_\_\_\_

KUPFER, SAMUEL

SEQUENCE NUMBER : 003

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

SUMMARY JUDGMENT

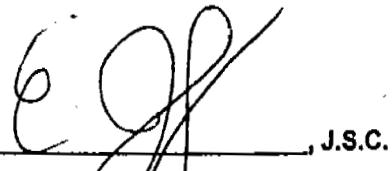
No(s). 1-3No(s). 4-6No(s). 7-8, 9, 10

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

decided by the annexed  
Memorandum Decision and Order.MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

FILED

JAN 23 2012

NEW YORK  
COUNTY CLERK'S OFFICEDated: Jan 13, 2012  
J.S.C.

EMILY JANE GOODMAN

NON-FINAL DISPOSITION

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

-----X

MITCHELL KUPFER,

Plaintiff,  
-against-

Index No. 100075/10

SAMUEL KUPFER, SEWARD PARK HOUSING  
CORPORATION,

**FILED**

Defendants.

**JAN 23 2012**

-----X  
Emily Jane Goodman, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this unseemly tussle over the ownership of a cooperative apartment, defendant Samuel Kupfer (defendant) moves for summary judgment dismissing the complaint as against him. Defendant Seward Park Housing Corporation (Seward Park) cross-moves for summary judgment on an unpled claim for the payment of monies allegedly owed to it by both plaintiff Mitchell Kupfer and defendant, in the form of "maintenance and additional maintenance." Notice of Cross Motion.

#### **I. Background**

Seward Park is a residential cooperative corporation which owns a complex of four buildings located in Manhattan. It is alleged that in 1992, Seward Park was a Mitchell-Lama housing corporation, and, at the time, there was a long waiting list for apartments.

Plaintiff and defendant are brothers. In 1992, the parties'

mother owned an apartment unit in the building, numbered unit 801, a four-bedroom apartment. Plaintiff was named as a joint holder of some of the shares to unit 801 with his mother, with a right of survivorship, although he never resided there.

In 1992, defendant claims that he became the proprietary lessee and shareholder in unit 803 in the building, which purchase was financed by his mother. According to defendant, he then sublet unit 803, which was a one-bedroom apartment, to plaintiff. Defendant, who was married, never resided in unit 803. Plaintiff was, and is, single, and has continued to reside in unit 803 since 1992.

Plaintiff, on the other hand, claims that he is the beneficial owner of unit 803, if not owner in name. He claims that the apartment was purchased with funds provided for his benefit by his mother, but was purchased in defendant's name, in an effort to defeat Seward Park's rules that single persons were not allowed to lease one-bedroom apartments (which were restricted to married couples). Without defendant's representation that the apartment was his, plaintiff had no right to a one-bedroom apartment. Thus, plaintiff claims that the apartment is being held in a constructive trust for him as beneficiary, by defendant, as trustee, despite defendant's name on the shares and proprietary lease. In this action, plaintiff seeks a judicial determination that he is the owner of the

apartment. He denies that he is a subleasee.

Plaintiff also admits that he purchased the apartment through defendant to defeat Seward Park's rule that no tenant could have an interest in two apartments in the complex at the same time. Plaintiff's interest in unit 801 would not allow him to purchase unit 803 in his own name. The parties' mother passed away in 2007, and unit 803's ownership has reverted to plaintiff.

Plaintiff claims that he has paid the maintenance for the unit since 1992, often through his mother, and has made substantial renovations to the unit referable to his belief that he was the beneficial owner of the unit.

## II. Arguments

Defendant, in this motion, claims that plaintiff cannot prevail in this equitable action because he has "unclean hands," a reference to plaintiff's admitted deceit in circumventing Seward Park's rules in order to get a one-bedroom apartment instead of a studio. Defendant also claims that an action for a constructive trust is barred by the statute of limitations, and that plaintiff's action, which is based on an oral contract, is further barred by the statute of frauds. Lastly, defendant argues that plaintiff cannot state a claim for a constructive trust on the facts alleged.

Seward Park claims no interest in the outcome of the dispute between plaintiff and defendant, but insists that it is owed

substantial maintenance fees from both plaintiff and defendant, along with sublet fees, and a financial recovery for the legal costs it has sustained in appearing in this action.

### III. Discussion

#### A. Defendant's Motion

A constructive trust may be recognized where there are allegations of a confidential or fiduciary relationship, a promise made, a transfer in reliance on the promise, and resulting unjust enrichment. *See Zane v Minion*, 63 AD3d 1151 (2d Dept 2009). A constructive trust is an equitable remedy (*Sierra v Garcia*, 168 AD2d 277 [1st Dept 1990]), and can be defeated by the doctrine of "unclean hands." *National Distillers & Chemical Corp. v Seyopp Corp.*, 17 NY2d 12, 15 (1966) ("he who comes into equity must come with clean hands [internal quotation omitted]).

Reliance upon the doctrine of unclean hands is applicable only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct. To charge a party with unclean hands, it must be shown that said party was guilty of immoral or unconscionable conduct directly related to the subject matter [internal quotation marks and citations omitted]).

*Citibank, N.A. v American Banana Co., Inc.*, 50 AD3d 593, 594 (1st Dept 2008).

In the present case, plaintiff readily admits his own wrongdoing in finding a way to circumvent Seward Park's rules, in that he allowed defendant to put his name on the proprietary

lease and stock knowing that plaintiff could not do so. See e.g. *Festinger v Edrich*, 32 AD3d 412 (2d Dept 2006) (plaintiff who purchased property in name of sister, in order to evade creditors, has acted with unclean hands); see also *Dolny v Borck*, 61 AD3d 817 (2d Dept 2009). Plaintiff's hands are not clean.

However, defendant has not shown how he has been damaged by plaintiff's actions. Defendant has apparently not paid any maintenance fees or other charges on unit 801 since the unit was purchased in 1992. Defendant knew, from the beginning, that he would never live in the unit, and, as a nonresident, had no right to a purchase a unit in Seward Park at all. As a result, defendant assisted in the deceit on Seward Park; defendant's hands are not clean.<sup>1</sup>

As defendant has not been damaged by plaintiff's blatantly unconscionable behavior (as he shares in it), the doctrine of unclean hands does not apply.<sup>2</sup>

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<sup>1</sup> Seward Park appears indifferent to whether plaintiff, as a single man, retains a right in the unit, or that defendant, as a nonresident, might have the better interest in the unit, although both situations were against its rules, circa 1992. Seward Park, which might have argued that it has been damaged by the parties' actions, expresses its indifference to the dispute.

<sup>2</sup> Had defendant shown that he sustained any damages, defendant's own wrongdoing could not have saved plaintiff.

Where both parties are equally offenders against the positive laws of the country, or the general principles of public policy, or the laws of decency or morality, *potior est conditio defendantis*; not because the defendant is more favored where both are equally

Regardless, the action for a constructive trust is barred by the application of the statute of limitations. A cause of action for a constructive trust is governed by a six-year statute of limitations. *Goco v Ramnani*, 65 AD3d 664 (2d Dept 2009). The statute of limitations for the imposition of a constructive trust "begins to run at the time of the wrongful conduct or event giving rise to a duty of restitution." *Id.* at 665; *see also Dybowski v Dybowska*, 146 AD2d 604 (2d Dept 1989). In the present case, that event was the purchase of the unit. *See e.g. Satler v Merlis*, 252 AD2d 551, 552 (2d Dept 1998) (claim for constructive trust arose "from the time of the purchase" of the unit); *see also Pisciotto v Dries*, 306 AD2d 262 (2d Dept 2003) (claim for constructive trust arose at time of wrongful acquisition of property). As the unit was purchased in 1992, the statute has long passed, and defendant's motion to dismiss the complaint as to him is granted.

#### **B. Seward Park's Cross Motion**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute,

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criminal, but because the plaintiff is not permitted to approach the altar of justice with unclean hands [internal quotation marks omitted].

*Flegenheimer v Brogan*, 259 App Div 347, 349-350 (2d Dept), *affd* 284 NY 268 (1940), citing *Nellis v Clark*, 4 Hill 424, 426 (1842).

and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a *prima facie* case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

In its cross motion, Seward Park seeks back maintenance payments it claims both plaintiff and defendant owe to it, along with sublet fees, and legal costs for defending itself in this action. In its answer, Seward Park seeks neither maintenance fees nor sublet fees. Aff. of Samuel Kupfer, Ex. 3.

While the general rule is that a party may not obtain summary judgment on an unpled cause of action, it is also true that summary judgment may be awarded on an unpled cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice.

*Weinstock v Handler*, 254 AD2d 165, 166 (1st Dept 1998). Here, there is no prejudice to allowing Seward to move on its previously unpled claims.

Seward Park's right to maintenance fees, and the amounts due from which party if fees are applicable, are questions of fact which cannot be determined on this motion.

Seward Park has not shown any right to sublet fees (assuming sublet fees are recoverable under the proprietary lease), as the situation herein between plaintiff and defendant is not one of sublessor and sublessee. This court agrees with defendant that the situation presented by plaintiff's tenancy is more akin to a license than a sublet. *See 445/86 Owners Corp. v Haydon*, 300 AD2d 87 (1st Dept 2002). As a result of the foregoing, plaintiff's tenancy is subject to defendant's will, and is not a "right that cannot be revoked for a fixed period of time" (*id.* at 88), such as a sublet.

Nor can Seward Park recover attorneys' fees and other legal costs related to the defense of this action. Ordinarily, "a prevailing party may not recover attorney's fees from the losing party except where authorized by statute, agreement or court rule." *U.S. Underwriters Insurance Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 (2004). While the proprietary lease allows for attorney's fees in an action brought pursuant to the lease, the current action is not brought pursuant to the lease by the lessor, defendant; it is brought by the defendant's licensee, plaintiff, and attorney's fees are therefore not applicable. Therefore, Seward Park can only collect damages in the form of

maintenance fees, should it show its right to them.

Accordingly, it is

ORDERED that the motion brought by defendant Samuel Kupfer for summary judgment dismissing the complaint as to him is granted, and the complaint is dismissed in its entirety as against Samuel Kupfer, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

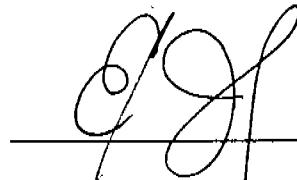
ORDERED that the cross motion brought by defendant Seward Park Housing Corporation for summary judgment is denied.

**FILED**

Dated: 1/13/12

**JAN 23 2012**

ENTER: **NEW YORK  
COUNTY CLERK'S OFFICE**

  
J.S.C.

**EMILY JANE GOODMAN**