STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MARYANNE MCKEOWN (FREDERICK), **DECISION**

Plaintiff,

v. Index #: 12/5505

DALE M. FREDERICK,

Defendant.

APPEARANCES: Rebecca Hatch, Esq.
Hatch Law Firm PLLC
Attorney for Maryanne McKeown , Plaintiff

Frank Beretta, Esq.
Attorney for Defendant

Dollinger, J.

Marriages are formed on a simple, but definite, promise: "I do." Innumerable statutory rights and responsibilities originate in that promise. In this case, the court explores whether other alleged promises made by a spouse, prior to marriage, create concomitant common law property rights and responsibilities under the equitable doctrine of a constructive trust.

The couple met in March 2010 and became engaged on New Year's Eve of that year. The husband contends that before marriage, the parties discussed buying a house together, but demurred. Instead, prior to the marriage, he moved into the wife's home.

The wife owned the home in her name. The husband states that the parties mutually agreed to "make this house our home." He further alleges that the wife, prior to the marriage, suggested that she would add the husband to the deed.

On or about the time these statements were allegedly made, the husband moved in with his soon-to-be wife. The wife's two children from a prior marriage were already residing in the house. To accommodate the expanding "family," the husband claims that he invested what he alleges to be $23,000, and then $900 for furnishings in the basement of the home. The husband further alleges that he "expended" in excess of $2,500 for hardwood floors, $5,900 in landscaping, $1,000 in furnace and plumbing repairs, and paid "all the routine expenses" on the house. The husband does not specify *when* these expenses were incurred, other than they were made after he moved in on August 29, 2011.

The husband asserts that there was a confidential relationship at the time of his work and expenditures, an actual and implied promise by the wife to him that he would "share in the benefits of improvements to the marital residence." He asserts that he expended significant sums in reliance on that promise and that the promise was breached by the wife's "actual and constructive conduct . . . in rendering cohabitation untenable."

The wife's version of the facts differs in some regards and has more specific details. She makes no reference to any promises to the husband prior to him relocating into her home. She admits that the couple surveyed other properties, but they eventually focused instead on the wife's home. The wife, in a statement uncontradicted by the husband, alleges that the husband moved into the house on August 29, 2011. The couple were then

married on October 14, 2011. Shortly thereafter, the married dissolved and the husband moved out permanently in March 2012. Importantly, the wife makes no statement regarding when the improvements were made.

After the husband moved out, the wife commenced an action for divorce. The husband answered, denying the substantive allegations and asserting, as a counterclaim, a claim for a constructive trust. The husband alleged that:

(A) he expended approximately $36,000 in "separate property funds" in improvements to the plaintiff's property both prior to and subsequent to the marriage;

(B) such expenditures were made upon "the expressed and implied promises by the wife that the parties would share the said residence, including, without limitation, substantial improvements thereto, as their principal residence, thereby inducing defendant to believe that he would share in the profits and/or use and enjoyment of said residence;"

(C) "the intent evidenced by both parties constitutes a mutual promise of a joint venture for the benefit of both parties" and, that a confidential relationship existed between the parties as the parties had, from the time they first commenced cohabitation in August 2011, anticipated marriage and were subsequently married; and,

(D) the wife had "been unjustly enriched thereby."

After negotiations, the parties agreed that the court would sever the constructive trust counterclaim and allow the divorce matter to proceed. The parties negotiated a settlement agreement. The court severed the counterclaim and a judgment of divorce was entered. The judgment provided that the husband's cause of action "for the imposition of a constructive trust be and the same is severed from the within action for divorce and preserved for further proceedings." The parties, after a conference, agreed that the counterclaim would be the subject of motion practice by the wife to determine if the husband could sustain a claim for constructive trust.[1]

The wife then moved for summary judgment to dismiss the constructive trust claim. CPLR 3212. As the movant for summary judgment, the wife has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Augur v. Augur, 90 AD3d 1111 (3rd Dept. 2011). CPLR 3212 (b) requires this court to determine if the movant's papers justify holding as a matter of law that "there is no defense to the cause of action or that the cause of action or defense has no merit." The evidence submitted in support of the wife must be viewed in the light most favorable to the husband. Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2nd Dept. 1990). Summary judgment

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[1] There is no evidence before this court that the wife served a reply in opposition to the counterclaim. Counterclaims are not "deemed" denied in the absence of a reply, regardless of whether a reply is specifically demanded by the party asserting a counterclaim. *See* CPLR 3011; Giglio v NTIMP, Inc., 86 AD3d 301(2nd Dept. 2011). However, because the parties stipulated to severe the claim and the wife has contested its validity throughout this proceeding, the court deems the essential allegations of the counterclaim as denied.

shall be granted only when there are no issues of material fact, and the evidence requires the court to direct judgment in favor of the wife as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 NY2d 1065 (1979). Here, the wife could meet this burden by establishing that the husband was unable to demonstrate one or more elements of a cause of action for a constructive trust. Christou v. Christou, 109 AD2d 1058 (4th Dept. 1985) *aff'd* Christou v. Christou, 65 NY2d 853 (1985). Because she challenges the husband's proof on these issues, the burden shifts to the husband who must "provide evidence in admissible form and show facts sufficient to require a trial of any issue of fact." Zuckerman v City of New York, 49 NY2d 557, 562, (1980). In reviewing wife's motion for summary judgment, this court must accept the husband's facts as true, and draw all reasonable inferences in the light most favorable to him. Asabor v Archdiocese of N.Y., 102 AD3d 524 (1st Dept. 2013); Keating v Town of Burke, 2013 NYAD LEXIS 2243 (3rd Dept. 2013). If there are any genuine and material disputed issues of fact, the motion is denied. Zuckerman v City of New York, 49 NY2d 557, 562, (1980). In reviewing a motion for summary judgment, the court does not assess either party's credibility. Ferrante v American Lung Assn., 90 NY2d 623, 631 (1997). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, when faced with a motion for summary judgment. Anderson v Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The wife's affidavit in support of summary judgment adds few facts for the court's consideration. The wife makes no comment about whether a confidential relationship

existed or, if it did, when it surfaced during their relationship. The wife makes no reference to any "promise" made to the husband. She makes no reference to the comment about "making the house our home," and makes no reference to the "suggestion" that the husband alleges she made regarding changing title to the property. She also does not contest the alleged improvements made by the husband. She makes no reference to any "unjust enrichment" and makes no comment about whether the value of the property was enhanced as a result of the husband's alleged improvements. Most of the wife's affidavit contests the husband assertion that she was at fault for the dissolution of the marriage. For purposes of this motion, the husband's version of the facts necessary to establish a constructive trust are presumed to be true and the husband is entitled to every favorable inference from them. Barr v. Wackman, 36 NY2d 371, 375 (1975); Besser v. Miller, 12 A.D.3d 1118, 1119 (4th Dept. 2004).

The Claim for a Constructive Trust

To impose a constructive trust upon real property,[2] a plaintiff must prove: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and

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[2] The husband must rely on a constructive trust theory because there is no writing by the wife sufficient to meet the Statute of Frauds. NY GEN OBLIG § 5-703. Diorio v Graziano, 2009 NY Slip Op 30689(U) (Sup. Ct. Nassau Cty 2009) ("[t] he Statute of Frauds will ordinarily prevent enforcement of an oral agreement to convey an interest in land). A constructive trust will be impressed, however, when an unfulfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment. McGrath v. Hilding, 41 NY2d 625, 628-29 (1977). The statute of frauds is not a defense to a properly pleaded cause of action to impose a constructive trust on real property. Ubriaco v. Martino, 36 AD3d 793, 794 (2nd Dept. 2007). The courts have noted where the plaintiff seeks to overcome the statute of frauds by claiming a gift or a constructive trust, the burden of proof is formidable, even though not insurmountable in an appropriate case. Carnivale v. Carnivale, 25 Misc3d 878, 882 (Sup. Ct. Queens Cty. 2009)

(4) unjust enrichment. *Sharp v. Kosmalski*, 40 NY2d 119, 121 (1976); *Maiorino v. Galindo*, 65 AD3d 525, 526 (2nd Dept. 2009); *Asinoff v Asinoff*, 2013 NY Slip Op 50515(U) (Sup. Ct. Kings Cty. 2013). These principles "are simply guidelines and are not to be applied rigidly in pursuing the goal of preventing unjust enrichment." Henness v Hunt, 272 AD2d 756, 757 (2000); Matter of Almasy v Ward, 53 AD3d 946, 947 (2008). Judge Benjamin Cardozo advised that courts considering such a trust should not rely heavily on formalisms and too little on basic equitable principles, especially when family transactions are involved. "The equity of the transaction must shape the measure of relief." Beatty v Guggenheim Exploration Co., 225 NY 380, 389 (1919) (Cardozo, J.). He added:

> [A] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

Beatty v Guggenheim Exploration Co., 225 NY at 386. The broad equitable precepts that anchor the constructive doctrine permit litigants a wide berth in constructing their claims. Even if the husband cannot plead, with specificity, the four elements of a constructive trust, a court may still entertain the claim. Robinson v. Day, 103 AD3d 584, 587 (1st Dept. 2013) (Although the [Sharp v. Komalski] factors are useful in many cases, constructive trust doctrine is not rigidly limited." *citing* Simonds v Simonds, 45 NY2d 233, 241 (1978)).

Despite Judge Cardozo's broad articulation of the concept of a constructive trust, later New York Court of Appeals decisions have added a caution: constructive trusts are "fraud-rectifying" remedies rather than "intent-enforcing remedies." Bankers Security Life Insurance Society v. Shakerdge, 49 NY2d 939 (1980); Estate of Grancaric, 91 AD3d 1104,

1107 (3rd Dept. 2012); Lefton v. Bedell, 160 AD2d 702, 704 (2nd Dept. 1990). This characterization is critical in unraveling the issues in this case because there is no evidence that the wife ever requested, demanded, or insisted that the husband undertake the improvements or repairs that he performed. There is no evidence in the husband's affidavit that the wife ever asked for any financial assistance, exerted any control over the repairs, or made any promise to pay for any portion of the repairs. There is no evidence that the wife concealed any factors or made any other statements to the husband - or anyone else - beyond those stated in the husband's affidavit. There is also no evidence that the wife said these statements at any time *after* the marriage and no evidence that the husband, prior to the commence of the divorce action, even inquired about whether he would be given an interest in the property or be repaid for his work.[3] In short, there is no allegation of any fraud by the wife in this case, and therefore, this court in analyzing the husband's proof must decide whether he seeks, albeit in equitable disguise, to rectify a form of fraud or enforce an inchoate intent.

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[3] The husband, in his response to the wife's motion, also asserts claims for other forms of equitable relief, including fraudulent inducement, fraudulent concealment, and unjust enrichment. The husband's claims do not establish a cause of action to recover damages for fraudulent concealment which requires, in addition to scienter, reliance, and damages, a showing that there was a fiduciary or confidential relationship between the parties which would impose a duty upon the defendant to disclose material information and that the defendant failed to do so. See Kevin Kerveng Tung, P.C. v JP Morgan Chase & Co., 2013 NY Slip Op 2223A (2nd Dept. 2013). Where there is no allegation – or proof – of an intent to defraud or a failure to disclose, this cause of action, to the extent the husband alleges it broadly in his papers, fails. The absence of such an allegation also dooms any fraudulent inducement claim. Massey v Byrne, 38 Misc3d 1215 (A) (Sup. Ct. New York Cty. 2013).

This court also notes that the New York courts have not specifically addressed the proof standard for the evidence of fraud in a constructive trust claim. Other states have required clear and convincing evidence of the exercise of fraud or undue influence to find a violation of a constructive trust. *See* Gitto v. Gitto, 239 Mont. 47 (Sup. Ct. Mon. 1989) (equity will not impose a constructive trust for the violation of a confidential relationship unless the party seeking to impose the trust shows by clear and convincing evidence the exercise of fraud or undue influence). This court cannot find any New York authority to impose a similar high standard of proof regarding fraud in a constructive trust claim but, the Court of Appeals has repeatedly held:

> The elements of fraud are narrowly defined, requiring proof by clear and convincing evidence. Not every misrepresentation or omission rises to the level of fraud. An omission or misrepresentation may be so trifling as to be legally inconsequential or so egregious as to be fraudulent, or even criminal. Or it may fall somewhere in between, as it does here.

Gaidon v. Guardian Life Ins. Co. of Am., 94 NY2d 330, 350 (1999). If a constructive trust is a fraud-rectifying remedy in New York, as the Court of Appeals directed in Bankers Security Life Insurance Society v. Shakerdge, then the standard of proof for all the elements of a constructive trust should be "clear and convincing evidence" and this court will apply that standard in analyzing the husband's proof on this motion for summary judgment.[4] As further evidence of the requirement of clear and convincing evidence to

[4] The husband makes no claim for a resulting trust, which research suggests is more popular in other states and differs from a constructive trust. See Goesch v. Hennagan, 2012 Cal. App. Unpub. LEXIS 8035(Cal. Ct. App. 6th AD 2012)(a resulting trust is an

establish the elements of a constructive trust, this court notes that the CPLR requires that a claim for "breach of trust" requires that the "wrong" be "stated in detail." CPLR 3016 (b); Mance v. Mance, 128 AD2d 448 (1st Dept. 1987) (a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement). The Court of Appeals direction, combined with the legislative intent in CPLR 3016 (b), mandates that the husband's proof, in this case, be tested under the "clear and convincing" standard.

The Confidential or Fiduciary Relationship

In reviewing the facts before this court, it is undisputed that at the time the wife made her alleged comments regarding the husband's role in the proeprty, the husband's was either dating or engaged to his soon-to-be wife. What is unclear is whether and to what extent the expenditures occurred while the couple were married or at some time before.

The New York courts recognize that husbands and wives stand in fiduciary relationships. Christian v Christian, 42 NY2d 63, 72 (1977) (agreements between spouses,

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"intention-enforcing" trust that carries out the inferred intent of the parties while the constructive trust defeats or prevents the wrongful act of one of them); Shiflet v. May, 49 Va. Cir. 542 (Cir. Ct. Va. 1998); In re Marriage of Heinzman, 198 Colo. 36 (Colo. 1979)(a constructive trust is a fraud-rectifying trust and a resulting trust is an intent-enforcing trust). New York recognizes resulting trusts, but in recent years, has seldom referenced them. *See* Bach v. Nagle, 294 NY 151, 156 (1945) (a resulting trust arises where a transfer of property is made under circumstances which raise an inference that the person making the transfer or causing it to be made did not intend the transferee to have the beneficial interest in the property transferred).

unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith); Petracca v Petracca, 101 AD3d 695, 698 (2nd Dept. 2012); Kabir v Kabir, 85 AD3d 1127 (2nd Dept. 2011) (in view of the fiduciary relationship existing between spouses, separation agreements are more closely scrutinized by the courts than ordinary contracts). The question of whether a fiduciary or confidential relationship exists for an engaged or pre-marital couple has been the subject of determinations made by the New York courts, albeit in a slightly different context than that extant here. In Rosenzweig v. Givens, 13 NY3d 774 (2009), the Court of Appeals held that an attorney-paramour exploited a "fiduciary relationship" with his then-girlfriend and soon-to-be wife, an apparent recognition that a couple, before marriage, can have a fiduciary relationship.[5] In Matter of Greiff, 92 NY2d 341, 346 (1998), the court, in resolving a dispute over the burden of proof for a party

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[5] What is unclear from the Court of Appeals in the Rosenzweig v. Givens opinion is whether the fiduciary relationship was created because of the personal relationship between the couple or that the fact that the putative boyfriend was an attorney. The court noted that "agreements between spouses or prospective spouses, unlike ordinary business contracts, involve a fiduciary relationship." The court held that even though the parties were not married on the date of the alleged unscrupulous transaction, "their relationship, as their eventual marriage demonstrates, was sufficiently analogous to at least raise a question as to whether or not a fiduciary relationship existed. . . ." Id. at 5. The court adds:

> The defendant has detailed circumstances that raise an issue of fact about whether a fiduciary relationship existed between the parties, including their romantic involvement that resulted in a marriage (albeit a sham one because plaintiff was a bigamist), their age difference, and that plaintiff was a lawyer.

Id.at 5.

defending an antenuptial agreement, noted "the unique character of the inchoate bond between prospective spouses - a relationship by its nature permeated with trust, confidence, honesty and reliance." The court added that there was "a special relationship between betrothed parties." Id. at 343. The Court of Appeals has found a confidential relationship in a close personal relationship, which persisted even if one of the parties turned down a marriage proposal. Sharp v. Kosmalski, 40 NY2d 119 (1976) (although no marital or other family relationship is present in this case, such is not essential for the existence of a confidential relation). Other courts have claimed that a fiduciary relationship can exist between fiancés. Robinson v Day, 103 AD3d 584 (1st Dept. 2013) (romantic companions for 14 years had a confidential relationship); Mei Yun Chen v. Mei Wan Keo, 97 AD3d 730 (2nd Dept. 2012) ("close relationship" for 20 years is enough for fiduciary relationship); Cannisi v. Walsh, 13 Misc3d 1231 (A) (Sup. Ct. Kings Cty. 2006) (while New York courts will not imply an agreement between unmarried domestic partners based on the nature of their relationship, they have imposed constructive trusts on assets of a relationship of unmarried partners in certain situations); Colello v. Colello, 9 AD3d 855, 859 (4th Dept. 2004) (the defendant had a fiduciary relationship with plaintiff both as her fiancé and as her spouse); Williams v. Lynch, 245 AD2d 715 (3rd Dept. 1997) (facts could support a finding that the parties who reached an agreement before living together for 14 years were in a relationship that "was, in many respects, analogous to that of a husband and wife"); Janke v. Janke, 47 AD2d 445, 448 (4th Dept. 1975) (the entire relationship and the

actions and contributions made by both parties were instinct with a mutual promise of a joint endeavor for the benefit of both, and hence, a confidential relationship existed); Muller v. Sobol, 277 AD 884 (2nd Dept. 1950) (couple, living in adultery, had confidential relationship); but see Matter of Almasy v. Ward, 53 AD3d 946 (3rd Dept. 2008) (boyfriend, who divorced owner's daughter, could provide no evidence that the work he did on the premises of his former father-in-law after the divorce resulted from any post-divorce promise by the owners and hence no constructive trust).

When examined closely, the fiduciary or confidential relationship demarcated in Christian and most of its progeny is not coextensive with the fiduciary relationship required in a constructive trust claim. The Court of Appeals in Christian confronted circumstances in which there was an allegation that someone in a fiduciary relationship was seeking to take advantage of their superior positioning to impose an unfair or untenable bargain on the other. In those cases, the courts held that the fiduciary relationship had the effect of protecting the more vulnerable participant. In essence, when the party with a superior role in a fiduciary relationship sought to enforce an agreement – in most cases some prenuptial agreement – the burden of proof shifted to the party asserting the agreement to show it was free from overreaching or other fraud. Matter of Greiff, 92 NY2d 341, 345 (1998); Stawski v. Stawski, 43 AD3d 776, 782 (1st Dept. 2007).

This assessment of when the fiduciary relationship exists between a romantically involved but-as-of-yet unmarried couple, when one of the parties seeks to impose a

constructive trust on the other, perplexes this court. Read broadly, the decisions of the New York courts acknowledge that the "confidential relationship" can arise between "family members," "betrothed couples" or those with lengthy "romantic relationships." Therefore, the relationship sufficient to support a constructive trust can exist prior to "engagement," or the exchange of a promise to marry. But, what if, as in this case, there is no extended "courtship" (less than two months)?[6] Does the "confidential relationship" suddenly blossom at the time of the posing of the age-old question: "Will you marry me?" When does the romantic relationship become transformed into a confidential or fiduciary relationship? The answer to this question is important in this case. It is unclear, based on the proof before this court, exactly *when* the husband claims that the wife made a promise to "make her house their home." It is unclear exactly *when* the husband actually performed the work and paid for the work for which he now seeks recovery under the constructive trust theory. Attempting to pinpoint the exact time when the "fiduciary relationship" emerged will plunge the court into the hearts of both parties and ask this court to determine the exact degree of emotional attachment between two persons.

This court is not convinced that the articulated "confidential or fiduciary relationship" found by the string of New York courts in the cases cited above should control in the constructive trust claim asserted between the romantic couple here. Parties have a

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[6] The husband alleges that the couple met in 2010 but did not begin a "serious relationship" until July 4, 2011. He moved into the wife's home on August 29, 2011.

fiduciary relationship "when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 19 (2005), *quoting* Restatement (Second) of Torts § 874, Comment A. A fiduciary relationship is not inherently present merely because plaintiff and defendant were engaged. The courts repeatedly advise that such relationship, as a touchstone for fiduciary liability, is fact-specific, and must be decided based on the factual circumstances alleged. Recant v. New York Presbyt. Hosp., 25 Misc3d 1219 (A) (Sup. Ct. New York Cty. 2009). There is no allegation before this court that the husband, prior to his marriage, placed any particular trust or confidence in the wife's integrity or fidelity. There is no allegation that the would-be husband relied on his would-be wife's superior expertise or knowledge. Chasanoff v. Perlberg, 19 AD3d 635 (2nd Dept. 2005). See Kallman v. Pinecrest Modular Homes, Inc., 81 AD3d 692 (2nd Dept. 2011) (mere allegation that someone knew the individual defendants for more than one year and trusted them was insufficient to raise a triable issue of fact as to the existence of a fiduciary relationship); Soley v. Wasserman, 2011 U.S. Dist. LEXIS 109470, p. 32 (SDNY 2011) (the mere fact that two parties are siblings does not necessarily mean that they have a fiduciary relationship).

Importantly, the fiduciary relationship is critical in analyzing the conduct in this case because it implies "a duty of fairness in financial matters." Simonds v. Simonds, 45 NY2d 233, 242 (1978). In this case, there is no evidence which suggests that the wife had the

financial upper-hand in her discussion with her future husband. There is no allegation of any fundamental unfairness or coercion in the wife's conduct or even a suggestion that she abused any fiduciary relationship. In this case, the husband argues for a "per se" fiduciary relationship, based on the couple's romantic relationship, without alleging that the wife had a superior bargaining position or the "upper hand" in their dealings.

If the couple in this case were unmarried at the time of the alleged promise, New York law militates against granting equitable relief for promises made prior to marriage and based on love and affection. New York courts since Morone v. Morone, 50 NY2d 481 (1980) have routinely declined to apply equitable relief in the form of quantum merit or constructive trust for the mere rendition and acceptance of services between unmarried couples. In language that is clearly pertinent in this case, the Court of Appeals noted:

> As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do (see Marvin v Marvin, 18 Cal 3d, 660, 675-676, n 11, (Cal. 1976). For courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error. Absent an express agreement, there is no frame of reference against which to compare the testimony presented and the character of the evidence that can be presented becomes more evanescent. There is, therefore, substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid.

Morone at 488. In another context, in Toth v. Spellman, 2011 Misc LEXIS 3417 (Sup. Ct. New York Cty. 2011), *aff'd* 96 AD3d 484 (1st Dept. 2012), the trial court dismissed any

claims for a constructive trust, premised on the unmarried partners allegation that the couple would be "equal economic partners." One partner in a 12-year romantic relationship argued that, as an experienced woodworker and construction expert, he had performed services in reliance on the other partner's promise. He sought what the husband in this case seeks: compensation for his efforts, even though there was never any promise to pay for those efforts, and even though he never requested compensation for those efforts during the relationship. The recipient partner in Toth v. Spellman noted that the plaintiff never kept a log of his hours and never presented contemporaneous receipts for purchases or work. The court rejected the plaintiff's plea that "I would have to be insane to do what I did without expecting to be compensated" as a basis for an equitable claim. The court went on to explain why it looks askance at claims by unmarried persons to recover goods or services transferred to their partner during a romantic relationship:

> [I]t is not reasonable for [an umarried partner] to infer or expect an agreement to receive payment for services rendered in the context of a romantic relationship between people who live together. 'As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do.' Morone, at 488. In fact, the Court of Appeals concluded that 'the notion of an implied contract between an unmarried couple living together is, thus, contrary to both New York decisional law and the implication arising from our legislature's abolition of common law marriage.' Id.

Toth v. Spellman, 2011 Misc LEXIS 3417, p.10.[7] See also Pizzo v. Goor, 50 AD3d 586 (1st Dept. 2008) (constructive trust claim dismissed even in face of "express promise to pay at the end of their cohabitation" because the main consideration was the provision of companionship, both sexual and platonic). Consistent with the logic of Morone v. Morone, other New York courts have frowned on a promise – implied or express – of "love and affection" in the future as the basis for any obligations. McRay v. Citrin, 270 AD2d 191 (1st Dept. 2000).

In his argument to the court, the husband cites Stewart v. Stewart, 26 Misc 3d 1062 (Sup. Ct. Delaware Cty. 2009) for the proposition that the husband in this instance has an equitable claim to the value of the improvements in the property under the theory of unjust enrichment. In Stewart v. Stewart, as here, the work performed by the husband - and any appreciation in value - occurred prior to the marriage, but unlike this case, the

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[7] In Toth v. Spellman, the trial court had dismissed the constructive trust claim and its opinion focused on a claim for quantum meruit. The elements of quantum meruit differ, in some respects, from the constructive trust claim, but the dismissals were based on the same underlying facts. Given the equitable nature of the two claims and the fact that both were designed to "prevent unjust enrichment," the logic and holding from the trial court opinion in Toth v. Spellman doom the constructive trust claims asserted here. The First Department affirmed dismissal of all the claims, noting:

> [C]ontrary to expecting compensation for performing renovations to certain properties owned by defendant during the parties' romantic relationship, plaintiff performed the renovations out of love and affection for defendant, and in an effort to make her happy.

Toth v. Spellman, 96 AD3d 484 (1st Dept. 2012).

improvements were made during a long 18 year-period of cohabitation. In addition, in Stewart v. Stewart, there was no evidence of any purported promise - express or implied - that the wife would grant the husband any interest in the house. This case is distinguishable from the holding in Stewart v. Stewart because the husband in that case did not assert a claim for a constructive trust. He asserted a cause of action for unjust enrichment from increased appreciation in the real property during his divorce proceeding and the court awarded him an interest in the property under equitable distribution. The court in Stewart v. Stewart, recognizing that it was granting a pre-marriage property right in the absence of an express agreement, questioned the continuing validity of the Court of Appeals decision in Morone:

> The Morone decision was in a different era. The number of persons living together before marriage may or may not have changed, but they do so more openly now. A number of cases have held that when the house is purchased shortly before marriage in the name of only one party, the appreciation will still be considered marital property if the nontitled spouse contributes to the appreciation.

Stewart v. Stewart, 26 Misc3d at 1065. This court, while acknowledging the social forces that drove the Stewart court's comment, is unwilling to skirt the Court of Appeals decision in Morone v. Morone and transform the husband's pre-marital investment, alleged on an implied rather than express promise, into the equivalent of a claim for equitable distribution.

Finally, this court, in considering whether a fiduciary relationship is sufficiently alleged in this case, also struggles with the public policy underlying the anti-heart balm

statute in New York. Section 80-b of the New York Civil Rights Law provides, in effect, that "a person, not under any impediment to marry, will no longer be denied the right to recover property given in contemplation of a marriage which has not occurred." NY CIV RTS LAW§ 80-b; Lipschutz v. Kiderman, 76 AD3d 178, 183 (2nd Dept. 2010), citing Gaden v Gaden, 29 NY2d 80, 85 (1971). In this case, after reading the husband's affidavit, it is undisputed that the property given by the husband - the repairs and improvements to the property - were given in contemplation and anticipation of marriage. Therefore, the repairs and improvements were a conditional gift, and when the marriage occurred, the "condition" was fulfilled and the gift complete - the husband had no further statutory claim to it. Section 80-b of the Civil Rights Law reflects the the legislature's intent to implement a policy to permit a transferor to recover property given prior to marriage, and similarly bar a married partner from recovering premarital gifts after the marriage has occurred. The recognition of a constructive trust based on the alleged confidential relationship in this case contradicts that legislative design.

However, the precedents above compel this court, despite its misgivings, to recognize that the husband has alleged facts sufficient to find that a fiduciary relationship existed between the husband and wife at some time prior to their wedding. The court cannot conclude, based on the evidence before it, when the confidential relationship existed, but the husband has alleged sufficient facts to evade summary judgment on this aspect of his constructive trust theory.

The Allegations of a Promise

On the second aspect of the constructive trust, the husband makes two assertions regarding the "promise" made by the wife:

(A) he asserts that the parties mutually agreed "that we would make this house our home;"

(B) the wife "suggested" that "she would amend the deed to include the deponent [husband] on the title to the home."[8]

Initially, in reading these statements, the court is struck by an omission: neither statement, attributed to the wife by the husband, mentions the word "promise." The husband, in presenting the proof most favorable to his claim, nowhere states that any "promise" was made to him by his wife.

1. The Law of Definite Promises

In this court's review of precedent, there is little guidance on the exact nature of a promise to support a constructive trust. As other courts have noted, the form of the promise in any legal claim is significant. Martin Roofing, Inc. v. Goldstein, 60 NY2d 262, 268 (1983). Where a doubt exists as to the meaning of words, resort may be had to the surrounding facts and circumstances to determine the meaning intended. Gillet v. Bank

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[8] In his answer to the divorce complaint, and in his counterclaim, the husband, under oath, asserts there was "an express and implied promise" by the wife that they "would share the residence." But there is no date associated with this promise, and the "share the residence" comment is not repeated in the husband's affidavit in opposition to the motion for summary judgment.

of American, 160 NY 549, 555 (1899). If the language of a promise may be understood in more senses than one, it is to be interpreted in the sense in which the promisor had reason to believe it was understood. Id. *citing* White v. Hoyt, 73 NY505 (1878). Under these rules, the wife's interpretation of the alleged promises – or at least the "sense in which she believed they were understood"– would govern the court's interpretation of these phrases.[9] As a further guide, the New York courts have required a certain "definiteness" to sustain any claims based on the promise. Bankers Life Security Life Insurance Soc. V. Shakerdge, 49 NY2d 939 (1980) (brother's statements that he would "do the right thing" and "take care of" a deceased family member were not a sufficient promise to enforce a constructive trust); Lefton v. Bedell, 160 AD2d 702, 703 (2nd Dept. 1980) (refusing to find a constructive trust even though a father told his son "this house is now yours"); Ogbunugafor v. St. Christopher's Union Free School Dist., 100 AD2d 580 (2nd Dept. 1984) (refusing to enforce the equivocal language -- "if all goes well" – of the purported promise); Charles H. Coppard, Inc. v. Chesbro, 34 AD2d 879 (4th Dept. 1970) (an illusory promise obliging defendants to nothing); Brown & Guenther v. North Queensview Homes, Inc., 18 AD2d 327 (1st Dept. 1963) ("a home of our desire" too equivocal to be enforced). The First Department in Brown & Guenther v. North Queensview Homes, Inc. recited a well-known rubric:

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[9] In her affidavit before the court, the wife does not deny making these statements and does not provide any interpretation for what she meant by these phrases.

> Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, may prevent the creation of an enforceable contract. * * * A promise that is too uncertain in terms for possible enforcement is an illusory promise; but to determine whether or not it is an 'illusion' one must consider the degree and effect of its uncertainty and indefiniteness. (1 Corbin, Contracts, § 95.)

Brown & Guenther v. North Queensview Homes, Inc., 18 AD at 330. The Court of Appeals in Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 NY2d 105 (1981) later reminded the trial courts:

> Before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken rather than confining itself to the implementation of a bargain to which they have mutually committed themselves. Thus, definiteness as to material matters is of the very essence of contract law. Impenetrable vagueness and uncertainty will not do.

Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 NY2d at 109. Lo Cascio v. James V. Aquavella, M.D., P. C., 206 AD2d 96 (4th Dept. 1994) (the very essence of a contract is "[d]efiniteness as to material matters"); Foster v. Kovner, 2012 NY Slip Op 30125 (U) (Sup. Ct. New York Cty. 2012) (under the doctrine of definiteness, "a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to"); Tompkins v. Jackson, 22 Misc3d 1128 (A) (Sup. Ct. New York Cty. 2009) (the promise to "give" plaintiff "the house," and place same in plaintiff's name, in and of itself, is insufficient on its face and lacks definiteness). This court also recognizes that the "definiteness" requirement is not absolute. Former Chief Judge Kaye advised that courts should not be

"pedantic or meticulous" in interpreting contract expressions:

> Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear (1 Williston, Contracts § 47, at 153-156 [3d ed 1957]). The conclusion that a party's promise should be ignored as meaningless "is at best a last resort."

Cobble Hill Nursing Home Inc. V. Henry & Warren Corp., 74 NY2d 475, 483 (1989). But, in this case, the alleged promises by the wife must meet some requirement for definiteness and certainty, and while this court is willing to look into the murky nature of the couple's relationship as a form of "extrinsic standard," the alleged promises must have a "reasonable certainty " to allow this court to conclude that they are a foundation for a constructive trust claim.

2. "Make This House our Home"

The husband alleges that "we mutually agreed that we would make this house our home. Even if this court accords this statement the weight required by the summary judgment standards, the statement is not a promise. First, the statement cannot be interpreted as an actual promise by the wife to convey any interest in her real property to the husband. There is no quoted statement from the wife indicating that she ever said she would ever give him an interest in the real property. The husband simply avers that "it was mutually agreed" that they would "make this house our home." The "make the house our home" statement cannot be interpreted as the wife promising the boyfriend-soon-to-be

husband that he was acquiring any interest in the real property.[10] Second, there is no date or time alleged when the statement was made. The court cannot determine whether the statement was made prior to the couple's engagement or after it. Even if this court concluded that a fiduciary relationship necessary to support a constructive trust existed at some point, the husband's evidence fails to indicate whether the statement was made in the context of that fiduciary relationship. Third, the statement lacks the definiteness necessary to withstand even a reasonable scrutiny. The statement could easily be interpreted to simply mean that the husband would reside in the home and does not, standing alone, contain any connotation that the wife intended to devise any portion of the real property to the husband. See Ullah v. Ullah, 100 AD3d 482 (1st Dept. 2012) (no contract existed because the supposed agreement "lacked reasonable certainty in its material terms"); Merritt Hill Vineyards Inc. V. Windy Heights Vineyard Inc., 94 AD2d 947 (4th Dept. 1983) ("lacking a promise, there is no duty to perform"). In a family context, the Second Department upheld a trial court decision that stated that in order to sustain a constructive trust involving real property, the promise had to be "clear and unequivocal." Rock v. Rock, 100 AD 3d 614, 616 (2nd Dept. 2012). Certainly, this statement cannot carry the weight that the husband seeks to assign it. It cannot, in any reasonable fashion, be interpreted that the wife intended to give the husband any interest in the real property or

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[10] In another context, a trial court noted that the handing over the keys by a father to a son and even a reference to "your new home" hardly evidences a gift of a co-op or a house and the court declined to find a constructive trust based on that alleged promise. *Carnivale v. Carnivale*, 25 Misc3d 878 (Sup. Ct. Queens Cty. 2009)

to pay the husband for any work that he performed or any materials that he provided to the house.

This court acknowledges that in seeking legal authority for analyzing the "definiteness" of the alleged "promise" in this case, it has turned to predominantly contract cases, in which the promise is supported by consideration. In a constructive trust context, this court acknowledges that equity requires a more flexible interpretation of the promissory language. But even under a more liberal interpretation, as equity commands, the alleged promissory language in this case – "make this house our home" – does not meet a reasonable standard for definiteness, sufficient to support a constructive trust. See Poupis v. Brown, 90 AD 3d 881 (2nd Dept. 2011) (dismissing constructive trust claim because of the absence of promissory language by the would-be wife).[11]

3. The "suggestion to amend the deed"

The husband also claims that the wife, "recognizing that the husband was about to undertake a major financial contribution to the home . . . went so far as to suggest that she would amend the deed to include the husband on the title to the home." The husband, in his affidavit, uses the word "suggest" to describe the wife's comment to him. Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 NY2d 38 (1985) (noting that language which "suggests" an intent to benefit a party cannot be viewed as a promise intended to benefit).

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[11] In *Poupis v. Brown*, the court denied summary judgment dismissing the would-be husband's claims under Civil Rights Law Section 80-b because he alleged that the gifts were given in contemplation of marriage. *Poupis v. Brown*, 90 AD3d at 882.

The word "suggest" does not imply obligation - the definition simply means "to mention or imply as a possibility" or "to propose as desirable or fitting." Merriam-Webster On-Line Dictionary, 2013. There is simply no interpretation of the word "suggest" that can be interpreted as a promise, sufficient to trigger any "promissory obligation" on the part of the wife. In his affidavits before this court, the husband can point to no other statement by the wife that would support the conclusion that she made a "promise" to the husband to put his name of the deed. There is no statement that the wife said she "would" put his name on the deed.

What is also crystal clear is that the husband never heard the wife make any statement about paying the husband for his repairs or maintenance of the house, which is what he seeks in this constructive trust claim. The husband does not allege that the wife made any promise to repay him for his work. The only "promise" that he asserts is that she "suggested" she might put him on the deed. It is also telling that the husband never suggests, in any fashion, that he ever mentioned anything to the wife after they were engaged or married about his desire to be included on the deed.[12] He also never suggests that he mentioned – or his wife discussed – his intention to someday seek repayment or that his work and expenses were somehow connected to having the wife put his name on

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[12] In another context, a court considering a constructive trust notes that the transferor's inaction belies his contention that a promise existed. In *Carnivale v. Carnivale*, the court noted that the party seeking a constructive trust should have taken "contemporaneous legal measures so that the proclaimed signs of affection were substantiated by enforceable action." There, as here, the supposed beneficiary never took an action – or even again mentioned the supposed promise to the promisor – to protect his interest. *Carnvivale v. Carnivale*, 25 Misc3d 878 (2009).

the deed. There is no evidence that the husband ever discussed that issue with the wife during the time he performed the repairs or any time thereafter during the marriage. The husband's evidence, viewed most favorably to him, simply states that the wife only made this "suggestion" once during the couple's 18 months together.

The court acknowledges that in matters involving a romantically linked couple, who are eventually engaged and married, the court should perhaps consider a broad reading of words like "suggest" and phrases like "make this house our home" into promises that would somehow support a constructive trust. However, this court is extraordinarily reluctant to do so. Under the "clear and convincing" standard for proof of the elements of a constructive trust, a broad reading would be inappropriate. The guidance of CLPR 3016 (b) further supports this conclusion. Even if the court allowed such a broad reading, the context – the status of the couple's romantic relationship – would suddenly become critical to interpreting the interchange between them. The court would have to determine the extent of love and affection at any given moment to determine whether to transform the "make this house a home" or "suggestion" comments into a promise to repay the husband for his investments into the house. This court is reluctant to delve into the couple's romantic life – how much romance is enough to reshape an equivocal comment into a definite promise? This court, even though imbued with the broad range of equitable powers, seems ill-equipped to decide which partner is more romantically inclined at any given time in their relationship.

This court also declines to find an implied promise. Other courts have accepted

proof of an "implicit promise" to sustain this aspect of a constructive trust. Marini v. Lombardo, 79 AD3d 932, 934 (2nd Dept. 2010) (the second aspect of a constructive trust involving real property could be based on an implicit promise to convey it). More than a century ago, the Court of Appeals commented on implied promises:

> They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where, by the relations of the parties and the subject-matter of the contract, a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. In this court we have thrown some safeguards about the doctrine to secure its prudent application and have said that a promise can be implied only where we may rightfully assume that it would have been made if attention had been drawn to it (citations omitted), and that it is to be raised only to enforce a manifest equity or to reach a result which the unequivocal acts of the parties indicate that they intended to effect.

Wilson v. Mechanical Orguinette Co., 170 NY542 (1902). Another New York court commented on the context surrounding an "implied promise:"

> Implied promises are recognized when either the promises are so clearly within the contemplation of the parties that it is unnecessary to express them, or when the promises are beyond the thought of the parties but necessary to effectuate the purpose of the contract . . . The intentions of the parties to the contract are instructive of whether an implied promise exists and they should be determined by the words the parties employed judged in light of [real estate industry] practices.

511 W. 232nd Owners Corp. v. Jennifer Realty Co., 285 AD2d 244, 247 (1st Dept. 2001) (citations omitted). In attempting to find an "implied promise" in this case, the court is struck by the lack of any allegations that the wife, in the course of their relationship, undertook any actions which would reveal an intention to grant the husband an interest in

the real property. There is no alleged conduct by the wife which could form the basis for an implied promise to repay the husband for his labors and expenses or any conduct remotely suggesting the wife was interested in adding him to the deed. There are no unequivocal acts alleged by the wife which indicate an intention to grant the husband any repayment. There is no evidence that anyone ever heard the promise or that the wife, in the presence of some other individual, repeated this statement. For these reasons, the husband does not allege sufficient facts to justify finding any implied promise by the wife to convey him any benefit before, during, or after he provided the alleged repairs and maintenance.

This court has also considered one other potential basis for finding a promise. One New York court suggested that "the required promise may be inferred where the totality of the transactions and the relations of the parties would render an express promise superfluous." Mele v. Okubo, 2010 NY Misc LEXIS 2626 (Sup. Ct. Suffolk Cty. 2010). The husband's claim for an inferred promise fares no better than his claim for an express promise. There is simply no evidence before this court that the totality of these transactions demonstrates a promise by the wife to either give the husband an interest in the real property or compensate him for his work and expenditures.

Under these circumstances, the husband has failed to allege any statement which, properly credited as it must be in response to this motion for summary judgment, that the wife made a definite or implied promise sufficient to meet the requirements of a constructive trust. Scivoletti v. Marsala, 61 NY2d 806, 808 (1984) (record does not contain

evidence to support a finding of any promise, express or implied, to convey the premises to plaintiff and, consequently, a constructive trust may not be imposed); Delzer v Rozbicki, 85 AD3d 1722 (4th Dept. 2011); Ewart v Ewart, 78 AD3d 992 (2nd Dept. 2010) (complaint fails to state a cause of action to impose a constructive trust upon the property because it does not contain factual allegations demonstrating an express or implied promise); Salatino v. Salatino, 64 AD3d 923 (3rd Dept. 2009); Crivaro v. Crivaro, 295 AD2d 304 (2nd Dept. 2002) (with regard to the alleged implied promise by the parents to the defendant, the defendant did not allege facts sufficient to support the imposition of a constructive trust as against the plaintiffs). The undisputed proof before this court does not establish any promise or implied promise: the husband's conduct in repairing or maintaining the property was based on his expectations rather than defendant's promises. Brazil v. Brazil, 235 AD2d 611, 614 (3rd Dept. 1997) see also Robinson v. Munn, 238 NY 40, 43 (1924) (the inference of an implied contract to pay the reasonable value of services rendered which may arise from the mere rendition and acceptance of the service cannot be drawn where because of the relationship of the parties, it is natural that such service should be rendered without expectation of pay).

Transfer in Reliance on the Promise

The third necessary ingredient is that the husband transferred some asset in reliance upon the promise. Henness v. Hunt, 272 AD2d 756 (3rd Dept. 2000) (element may be satisfied where the party seeking to impose the trust has no prior interest in the property, but does contribute funds, time or effort to the property in reliance on a promise

to share in some interest in it); Cannisi v. Walsh, 13 Misc 3d 1231 (A) (Sup. Ct. Kings Cty. 2006) (third element of a constructive trust, a transfer in reliance of a promise, can be shown by contributions of funds, time, and effort, by a domestic partner in reliance on a promise to share the results of their joint efforts); Shrifter v. Goldman, 23 Misc. 3d 1120 (A) (Sup. Ct. Kings Cty. 2009). The husband has asserted undisputed proof sufficient to establish a prima facie case that he transferred assets to the wife's home. He alleges that he expended in excess of $23,000 to remodel and finish the basement of the wife's house. While he provides no details to these expenditures: no invoices, no vouchers and no itemized receipts, nonetheless, at this stage, the wife does not seriously contest the husband's expenditures.[13]

But this conclusion does not end the inquiry. The husband must produce some evidence that he transferred these "resources" in reliance on the alleged promise to include him on the deed. In this regard, the husband's own proof, advanced to defeat the motion for summary judgment, does not even suggest that he remodeled and furnished the basement in reliance on his wife's promise. In his affidavit he states, "in order to accommodate the extended family, your deponent undertook to remodel and furnish the basement . ." The husband never asserts that he undertook these renovations in reliance on any promises made by the wife. Later in his affidavit, the husband describes paying for hardwood flooring, landscaping, furnace repairs and improvements and "routine expenses,"

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[13] The New York courts have denied equitable relief because the party seeking it did not submit any evidence, such as bills or receipts, demonstrating the extent of the work. *Depena v Shocker*, 83 A.D.3d 885 (2nd Dept. 2011).

but no where in the affidavit does he suggest that his paying these expenses was undertaken in specific reliance on any promise by the wife.[14]

The absence of such an allegation – the causal connection between the purported promise and rendering of services – mitigates against any finding of this third element of a constructive trust. One very recent case from Suffolk County emphasized the importance of the linkage between a promise and the conduct or contribution of a party seeking to impose a constructive trust. In Kelly v. Leone, 2013 NY Misc LEXIS 1128 (Suffolk County 2013), the court applied a "but for" analysis to determine whether the alleged beneficiary of a constructive trust had relied on a promise. In response to a summary judgment motion, the court noted that the alleged beneficiary "hasn't demonstrated that he would not have contributed . . . toward the purchase of the house but for the promise [to give him an interest in it]." Id. at p. 12.

Furthermore, as several courts have noted, if a contribution to real property is made by a party and benefits that party, as well as others, he cannot sustain a claim that the improvements were made in reliance on a promise. Marini v. Lombardo, 79 AD3d 932,

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[14] It is also noteworthy that the husband, despite expending large sums on the property, never pressed his claim to be included on the deed. There is no evidence that he ever mentioned it to his wife; he simply states that she "suggested" it. In another case in which the court analyzed a constructive trust in real property, a court noted that a repeated failure to press claims for conveyance of any interest in the property cast doubt on constructive trust theory. In *Carnivale v. Carnivale*, 25 Misc 3d 878 (Sup. Ct. Queens Cty. 2009), the court noted that the plaintiff's conduct belied any suggestion that his conduct was based on reliance on a supposed promise. The court commented that not only was there no evidence of "pressing" the claim with the father, there was "not even one writing to show that the son ever raised the subject with the father, his stepmother, or anyone else." Id. at 882.

934 (2nd Dept. 2010) (no constructive trust in favor of a husband when improvements to a property were undertaken for the husband and wife's benefit).[15] See also Rock v. Rock, 100 AD3d 614 (2nd Dept. 2012) (expenditures which improved the surroundings in which the claimant lived did not qualify as a "transfer in reliance" on a promise to convey property); Kunkel v. Kunkel, 32 Misc3d 1203 (A) (Sup. Ct. Nassau Cty. 2011) (improvements to a house the claimant occupied and which benefitted him were not proof of a transfer in reliance sufficient to sustain the constructive trust claim); DePaolis v. Cau, 2009 NY Slip Op 31716 (U) (Sup. Ct. New York Cty. 2009) (declining to find a constructive trust even though party claimed extensive major renovations to a property); Mele v. Okubo, 2010 NY Misc LEXIS 2626 (Sup. Ct. Suffolk Cty. 2010) (no constructive trust found, at best, "an implied agreement to share expenses and living arrangements"). In reading these precedents, this court can only conclude that the New York courts, in order to permit a constructive claim to be premised on the provision of services and repairs, require that the promise by the recipient of the benefit be the sole reason for the transferor's work.

The precedents cited above, combined with the logic of a constructive trust, compel this conclusion. The constructive trust is designed, as noted above, to rectify a fraud and redress an inequitable result. If the transferor has multiple motives for extending goods and services, then presumably equity would require that his efforts be apportioned among

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[15] In *Marini v. Lombardo*, the husband had installed a swimming pool, done tile work and interior painting but the court held that these works were not done in reliance on an express promise to convey title, and the improvements were not undertaken in reliance on any express promise.

the various justifications. In this case, for example, the husband specifically states that he provided the goods and services to "accommodate the family." He also asserts, as part of his claim, that he undertook these repairs because of the wife's alleged promise to place him on the title to the property. Faced with these independent motivations for his expenditures, a court in equity would only intervene to redress the injustice for the breached promise. The goods and services extended to accommodate the family were not motivated by any promise, but instead by a familial impulse to provide better surroundings for the family, including the husband who was about to or already had moved into the house.[16]

For these reasons, this court concludes that the husband has failed to produce any proof that he undertook the alleged repairs and improvement solely in reliance on the putative promises made by the wife.

Unjust Enrichment of the Wife by the Husband

On the final aspect of a constructive trust claims, the husband alleges that there is unjust enrichment flowing from the breach of the promise. The husband argues that in New York, if a party contributes funds to improve real property, the recipient has been

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[16] Furthermore, there is no basis to determine whether the improvements, undisputedly undertaken by the husband, occurred before or after any statement by the wife. According to the husband"s chronology, the wife allegedly made the two attributed statements at some point prior to the engagement, and certainly prior to marriage. But the husband's affidavit is unclear regarding when he started to invest his money and whether he continued to invest these sums through the engagement period and the short marriage. In order to sustain his claim, there would have to be proof that she made these promises prior to the husband expending his resources. There are insufficient facts in his affidavit to support that conclusion.

unjustly enriched. But, as the New York courts repeatedly intone:

> Enrichment alone will not suffice to invoke the remedial powers of a court of equity. Critical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust.

McGrath v. Hilding, 41 NY2d 625 (1977); Shrifter v. Goldman, 23 Misc3d 1120 (A) (Sup. Ct. Kings Cty. 2009). Initially, the husband makes no claim that his improvements increased the value of the property. In re Estate of Certo, 184 Misc2d 211 (Surr. Ct. Niagara Cty. 1998) (finding no unjust enrichment because absolutely no probative evidence was presented that established any gain to the decedent by virtue of the petitioner's actions). There is no proof or allegation regarding the enhanced value of the property as a result of the husband's efforts. Instead, the husband alleges that his wife breached her "promises" because she made continued residence in the marital home untenable. The court finds several flaws in this argument. The promise upon which the husband seeks to impose a constructive trust has nothing to do with his eventual marriage. The alleged promise which supports the constructive trust claim was that the wife would add him to the deed if he expended time and effort repairing the house. The constructive trust, if it exists at all, exists free and apart from the marriage promises exchanged at the time of their nuptials. In his affidavit, the husband recites a list of grievances which caused him to leave the home but these complaints are unrelated to the constructive trust.[17] The

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[17] The husband's list of grievances against his wife echoes the types of allegations seen by this court in claims for divorce under the "cruel and inhuman treatment" standards under DRL § 170 (1); *Brady v. Brady*, 64 NY2d 339 (1985). The husband argues, as did thousands of couples in the era before "no fault" divorce, that the wife's irritating and inconsistent conduct made cohabitation untenable. This court, having escaped trials over fault among unhappy couples seeking divorces with the advent of no-fault divorce under

"breach" under the trust occurred when the wife failed to put the husband on the deed, not when their marriage failed.

Nonetheless, the husband argues that wife was at fault for their marriage dissolving and he argues that the wife's conduct was comparable to a "constructive eviction" of the husband from the home. In his affidavit to the court, the husband alleges seven aspects of the wife's conduct that " rendered continuing cohabitation untenable." This court notes that the husband, in making a claim of a fault-related breach of the promise, misinterprets the requirements of unjust enrichment under a constructive trust. The husband does not need to prove fault:

> Unjust enrichment, however, does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched. What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it.'

Simonds v. Simonds, 45 NY2d 233 (1978) (citations omitted). While no fault is required to find unjust enrichment, the court is struck by the complexities that would be involved in deciding who was "at fault" for the breach of the alleged promise and the extent of any "unjust enrichment." The husband lived in the property from August 2011 until March 2012, when he moved out. The husband claims the extent of the unjust enrichment requires reimbursement to him of the improvements, the repairs and his contribution to on-going expenses. But, presumably, his claims would be offset by some imputed rent for his

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Section 170 (7) of the Domestic Relations Law, has little interest in revisiting decisions over property distribution based on fault in interpersonal relationships in the guise of a constructive trust proceeding.

living at the properly. In addition, presumably, the husband's only claim for "unjust enrichment" would be the value of the improvements and the amount that they increased the value of the property, which would require both pre-improvement and post-improvement real property valuations. The husband, to justify his unjust enrichment claim, would plunge this court back into the abyss of fault-based decision making to allocate assets between a couple. The court declines to convert a constructive trust claim or unjust enrichment allegation into a replica of a fault-based divorce claim. The husband's suggestion that the wife's "fault in the marriage" should be a factor in the constructive trust claim suggests this court should be wary before countenancing a mini-marital divorce fault trial under the guise of attempting to establish a constructive trust or unjust enrichment.

Finally, this court cannot, as this stage, concede that the wife was unjustly enriched at the husband's expense. The husband admits that he lived in the wife's home both prior to and after the marriage. There is no evidence that he and his wife had any unusual living arrangements. Under these circumstances, the husband had a place to live and enjoy daily living, even though he was not the owner of the house. To suggest that his investment in the house "unjustly enriched" the wife is to ignore all the aspects of a couple's married life, even if their marriage is a brief one, as it was here. To suggest that the wife did not provide anything of personal value to the relationship undercuts the reality of the marriage. The suggestion that a husband who spends his own separate money on his wife or her home – either before or after marriage – somehow "unjustly enriches" his wife is a callow view of courtship and marriage.

All of these factors dictate that the husband has not adduced clear and convincing evidence to support a claim that the wife, by accepting his repairs and improvements, was unjustly enriched in the process.

The Husband's remaining claims

In his affidavit, the husband and his counsel argue for additional equitable relief, including a claim for a unilateral mistake. First, the husband, in his counterclaim did not plead a claim for rescission because of a unilateral mistake. Second, there is no pleaded contract, and hence, rescission, an equitable remedy to reform or void a contract for a unilateral mistake, is not pertinent. Barclay Arms, Inc. v. Barclay Arms Assocs., 74 NY2d 644, 646 (1989); Gold v. New York State Bus. Group, 255 AD2d 628 (3rd Dept. 1999) (a person who has been induced to act, or to refrain from acting, because of such a misconception may, under certain circumstances, prevail upon the court to order the undoing of that action [typically, the execution of a contract, lease, or deed], on the ground that it was the product of a mutual – or in some cases, unilateral – mistake). Here, there is no contract to be reformed - the husband never alleges any contract claim. Third, he claims that his mistake was assuming marital compatibility and adds that he would not have made improvements if he knew marital discord was imminent. This court declines to consider the husband's inaccurate personal assessment of his future marital life as a unilateral mistake. For these reasons this court declines to find sufficient facts to justify relief under these other equitable claims.

Conclusion

In deciding this motion, this court is reluctant to step across a line drawn by the Court of Appeals in Morone v. Morone and permit an unmarried party to seek recovery of property given to their potential spouse during courtship based on an inexact representation about their future connubial bliss. At best, the husband attributes to the wife a completely amorphous statement was that the couple intended to "make their house a home." The constructive trust doctrine should not be stretched beyond its "fraud rectifying" limits to litigate marital property questions that should be resolved solely in the context of an equitable distribution action under the Domestic Relations Law. This court declines to rekindle the debate silenced by the Court of Appeals in Morone v. Morone over whether a party has a claim against their spouse for implied promises made prior to their marriage. In this court's view, those implied promises merge into the express marriage promise. Questions of "separate property," or who paid whom for what, should only be resolved inside a proceeding under the Domestic Relations Law. Expanding the constructive trust doctrine as a substitute for equitable distribution is without authority in this state, and from a public policy perspective, unwise. As the issues in this opinion indicate, judicial inquiry into the timing and context of premarital "promises" or "statements of present intention" will involve judges in matters of the heart that are intrusive on sensitive subjective feelings – when did we love each other enough to be considered in a fiduciary relationship – and lead to speculation and solipsistic moral judgments, which the courts are incapable of easily adjudicating and appellate courts will be challenged to review. As the Rhode Island

Supreme Court noted, following the trail of a constructive trust affords an "all too close look at the bride and groom, their in-laws and how this [marriage] . . . was reduced to being the decaying carrion of a moribund union." Dellagrotta v. Dellagrotta, 873 A2d 101 (Sup. Ct. R.I. 2005). This court repeats the sage comments of the court in Carnivale v. Carnivale:

> Use of the cause of action for constructive trust should not be distorted by courts as a device for enforcing an alleged intent to confer a benefit, gain, gift, or a material expression of love. A constructive trust cause of action should not be abused and misused as a means of redressing disappointed expectations, frustrated intentions, and failed hopes.

Carnivale v. Carnivale, 25 Misc 3d at 888.

As a final note, this Court is wary that recognition of a constructive trust in this case, would veer New York law too close to the interpersonal quagmire confronted by courts in determining the existence of common law marriages. New York State has long refused to recognize common-law marriages. *In re Jacob*, 86 N.Y.2d 651, 670 (1995)(common law marriage abolished in 1933 by enactment of Domestic Relations Law § 11). But, New York courts recognize common law marriages in other states. *Matter of Mott v Duncan Petroleum Trans*., 51 NY2d 289, 292 (1980). In determining whether common-law marriages exist under the laws of other states, the New York courts have confronted the nettlesome factual inquiries into a couple's personal lives that such a determination demands. *See In re Estate of Benjamin*, 34 N.Y.2d 27, 30 (1974) (direct or circumstantial evidence may suffice to establish a common law marriage and documentary evidence, cohabitation and reputation as husband and wife, acknowledgment, declarations, conduct

and the like are all probative of the existence of a common law marriage); *Baron v. Suissa,* 74 A.D.3d 1108 (2d Dep't 2010)(discussing the proof required for establishing a common law marriage). While such an inquiry may be necessary to accord comity to laws in our sister states in certain circumstances, New York courts, through consideration of a constructive trust doctrine, should not venture into similar factual investigations of couple's personal lives to determine their extra-marital rights to property outside the well-worn doctrines of marriage-based equitable distribution under the Domestic Relations Law.

While these policy rationales convince the court that its conclusion is justified, CPLR 3212 dictates the result on this motion. The husband has failed to allege sufficient material facts by clear and convincing evidence to justify a trial on his claims for a constructive trust. The motion for summary judgment is granted and the counterclaim for a constructive trust dismissed.

DATED: June 18, 2013

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Richard A. Dollinger A.J.S.C.

Kelly v. Leone, 2013 NY Slip Op 30572(U)

The necessary elements for the imposition of a constructive trust are: (1) a

confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on that promise; and (4) unjust enrichment. These elements, however, serve only as a guideline and a constructive trust may still be imposed even if all four elements are not established. See Marini v Lombardo, 79 AD3d at 933; Simonds v Simonds, 45 NY2d 233, 241, 380 N.E.2d 189, 408 N.Y.S.2d 359). Importantly, a constructive trust is an equitable remedy and its purpose is to prevent unjust enrichment. Henning v Henning, 103 A.D.3d 778

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "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 a motion for dismissal will fail" (Morris v Morris, 306 AD2d 449, 451, 763 N.Y.S.2d 622 [2003] quoting Guggenheimer v Ginzburg, 43 NY2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977]). When reviewing the pleadings, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]). Further, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus [*5] in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]).

(Marini v Lombardo, 79 AD3d 932, 933, 912 N.Y.S.2d 693 [*780] [citation omitted]).

The husband, in response to the argument on the nature of the promise, notes that the wife does not challenge the husband's characterization of the alleged promises. But, here, the husband misses the point: the question before this court is whether the husband's allegations regarding the specific words used by the wife, when believed, are sufficient to support a the legal conclusion that they comprise a promise as a matter of law.

Transfer in reliance opn the promise.

In his affidavit before this court, the husband does not specifically state that he advanced these funds in reliance on the alleged promise from his wife to put him on the deed. The husband alleges in his affidavit:

At the time your deponent moved in, the plaintiff's children, ages 17 and 19, were residing with her and in order to accommodate the extended family, you deponent undertook to remodel and furnish the basement for the benefit of these children.

The husband does not specifically allege that he performed these services in reliance on the promise to put him on the deed. Instead, he avers specifically that he undertook these repairs "to accommodate the extended family." The husband does not allege a specific correlation between the alleged promise – to put him on the deed and his undertaking the repairs or improvements in reliance thereon. In the second paragraph of his affidavit, the husband simply recites the additional repairs and makes statement that these additional repairs were motivated because of the alleged promise. Thus, even in reading the husband's sworn statements with the broad reading required for equitable relief, the statement do not, on their face, lead to the conclusion that the husband performed these repairs or took these actions in reliance on the wife's promise. As the court in Terrille v. Terrille, 171 AD 2d 906 (3rd Dept. 1991) said Terrille v. Terrille, 171 A.D.2d 906 The money, time and effort alleged to have been expended by plaintiff was only that which could be expected in a normal marital relationship and was not the direct result of the promise. Rock v. Rock, 100 A.D.3d 614 (2nd Dept. 2012) (including those for repairs and utilities, improved the surroundings in which he and his family lived. Accordingly, the Supreme Court properly held that the son's expenditures did not qualify as a "transfer" in [***7] reliance on the promise by the father to convey the property) re is

no correlation between

no expenditure of funds was made in reliance on the defendant's [*425] alleged promise that the house would be jointly owned. Sylvester v. Sbarra, 268 A.D.2d 424 (2d Dep't 2000)

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (See Alvarez v Prospect Hospital, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (Winegrad v New York University Medical Center, 64 NY2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985] Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc., 51 AD3d 651, 652, 857 N.Y.S.2d 234 [2d Dept 2008]; Greenberg v Manlon Realty, 43 AD2d 968, 969, 352 N.Y.S.2d 494 [2nd Dept 1974]).

Under these precedents, the husband's allegations regarding a "promise," which at this

stage must be credited by the court, lack the definiteness and exactitude necessary to qualify as a promise under the constructive trust theory. This court repeats: neither statement attributed to the wife mentions the word "promise