

**Moore v Hill**

2014 NY Slip Op 32293(U)

August 28, 2014

Supreme Court, New York County

Docket Number: 150082/13

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

WILLIAM PERRY MOORE, III, as Administrator  
of the Estate of WILLIAM PERRY MOORE, IV,  
Plaintiff,

Index No.: 150082/13

Motion Date: \_\_\_\_\_

- v -

Motion Seq. No.: 01

HUNTER HILL,

Motion Cal. No.: \_\_\_\_\_

Defendant,

and

HOUSTON STREET OWNERS CORP.,  
Defendant Cooperative Apartment  
Corporation.

The following papers, numbered 1 to 4 were read on this motion to dismiss and for summary judgment.

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3
Replying Affidavits - Exhibits	4

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall grant the motion of plaintiff-Administrator to dismiss defendant Hunter Hill's first and second affirmative defenses as the defendant raises no opposition thereto and shall otherwise deny the motion to the extent it seeks dismissal of defendant's counterclaims. The court shall also deny that branch of the motion which seeks summary judgment on the claim for

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

partition as there are issues of contested fact precluding such relief.

With respect to the first counterclaim wherein defendant seeks to recover from plaintiff-estate one-half of the liability that has been allegedly solely borne by the defendant upon the apartment since the decedent's passing, the court shall deny dismissal as the movant does not dispute the validity of the claim and instead only disputes the amount and manner in which the claim may adjudicated. It is well settled that pursuant to General Obligations Law §15-106 "[o]n the death of a joint obligor in contract, his estate shall be bound as such jointly and severally with the surviving obligor or obligors." Such a claim may be raised as a separate cause of action on the obligation alleged. See Sisto v Bambara, 228 AD 456, 458 (2d Dept 1930).

With respect to defendant's second counterclaim, it has been held that "[t]he elements which are looked to for the imposition of the equitable remedy of a constructive trust are as follows: a confidential relationship, a promise, a transfer in reliance thereon and unjust enrichment. These elements are not rigid, but are flexible considerations for the court to apply in determining whether to impose a constructive trust." Hornett v Leather, 145 AD2d 814, 815 (3d Dept 1988). Contrary to plaintiff's arguments,

defendant alleges all four of these elements in the second counterclaim asserted in the answer.

At this stage of the litigation plaintiff does not contest the nature of the relationship between the decedent and the defendant. Rather plaintiff claims there is no basis for defendant's assertion that there was a mutual promise by the decedent and the defendant that each intended the other to inherit the contested intellectual and real property interests upon their passing and that the defendant's alleged greater contribution to the purchase price of the real property was based upon that mutual promise. Plaintiff's claims are based upon the alleged lack of any writing evidencing the parties' understanding as asserted by the defendant. However, "it is not essential that the promise relied upon in making the transfer be express. A promise may be implied where the property was transferred in reliance upon the confidential relationship." Hornett, 45 AD2d at 815 [3d Dept 1988]; see Sharp v Kosmalski, 40 NY2d 119, 121 (1976) ("Although no marital or other family relationship is present in this case, such is not essential for the existence of a confidential relation"). The Court in Sharp cited the case of Muller v Sobol (277 AD 884, 885 [2d Dept 1950]) wherein a constructive trust was imposed upon a joint property purchase based upon the parties' conduct of living as "man and wife . . . albeit in adultery."

Therefore, defendant's answer adequately pleads a counterclaim for constructive trust and contrary to plaintiff's argument the documentary evidence is insufficient to sustain dismissal at this stage of the litigation. Similarly, because the claim for constructive trust is not subject to dismissal at this stage, plaintiff's motion for summary judgment seeking partition must be denied without prejudice as that remedy cannot be granted until the determination of the counterclaim seeking to impose a constructive trust as unjust enrichment may result. See e.g. Coco v Coco, 107 AD2d 21, 26 (2d Dept 1985).

Accordingly, it is

ORDERED that plaintiff's motion is GRANTED only to the extent of dismissing defendant HUNTER HILL's first and second affirmative defenses; and it is further

ORDERED that plaintiff's motion is otherwise DENIED; and it is further

ORDERED that the parties shall appear for a preliminary conference on September 23, 2014 at IAS Part 59, Room 103, 71 Thomas Street, New York, NY, 10013 at 9:30 am.

This is the decision and order of the court.

Dated: August 28, 2014

ENTER:

~~Debra A. James~~  
**DEBRA A. JAMES** J.S.C.