Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Niki Mouzakiotis,

Plaintiff,

-against-

Styliani Mouzakiotis,

Defendant.

Motion Sequence No.: 005; MOTD
Motion Date: 2/1/17
Submitted: 4/26/17

Index No.: 11682/2013

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers numbered 1 to 29 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 18; Answering Affidavits and supporting papers, 21 - 25; Replying Affidavits and supporting papers, 28 - 29; Other, Memorandum of Law, 19 - 20, 26 - 27; it is

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and for an order severing and continuing her counterclaim is granted to the extent that the plaintiff's fourth and sixth causes of action are dismissed, and is otherwise denied.

This is an action seeking, among other things, damages and a judgment declaring that the transfer of certain real property from the plaintiff to the defendant is void. It is undisputed that the plaintiff purchased a single family dwelling located at 18 Longview Road, Southampton, New York (the premises) in 1995, and that the plaintiff executed a deed in 2004 attempting to transfer the premises, subject to the retention of a life estate, to a corporation purportedly owned by the defendant, her daughter. In addition, the plaintiff executed a deed in May 2007 which conveyed title in the premises to herself and the defendant as joint tenants with right of survivorship, and a third deed together with the defendant dated January 2, 2008 conveying title from herself and the defendant as joint tenants to the defendant, subject to the retention of a life estate. The plaintiff alleges, among other things, that she made these transfers during times of stress in her marriage to the defendant's father, that the transfers were made in reliance on certain promises made by the defendant, and that the defendant improperly retained the proceeds of a loan obtained by the plaintiff in 2007 which was secured by a mortgage on the premises.

In her complaint, the plaintiff sets forth six causes of action. In her first and second causes of action for fraud and constructive fraud, the plaintiff alleges, among other things, that the defendant promised the plaintiff that she would "protect [the plaintiff] and provide some financial stability," that the defendant incurred debts against the premises and refused to return the premises to the plaintiff when asked to do so, and that the defendant knew that she did not intend to keep her promises when they were made. In her third cause of action for unjust enrichment and restitution, the plaintiff alleges that the defendant was unjustly enriched when she took the proceeds of the aforesaid mortgage loan. In her fourth cause of action for conversion, the plaintiff alleges that the defendant improperly retained the proceeds of the mortgage loan. In her fifth cause of action, the plaintiff seeks to impose an equitable or legal lien upon the premises. In her sixth cause of action for specific performance, the plaintiff alleges that the "transfer" of the premises to the defendant in May 2007 "was made based upon fraudulent statements, promises, and assurances made to Plaintiff by Defendant."

This action was commenced by the filing of a summons and complaint on April 29, 2013. In her answer dated June 3, 2013, the defendant sets forth three affirmative defenses and a counterclaim in which she alleges, among other things, that the deed dated January 2008 was executed to reflect the original agreement between the parties that the defendant would be the title owner of the premises subject to the plaintiff's life estate, and that the plaintiff has failed to meet her obligations as a life tenant. The defendant's counterclaim seeks a judgment terminating the plaintiff's life estate. By reply dated June 17, 2013, the plaintiff entered a general denial of the allegations in the defendant's counterclaim.

The defendant now moves for summary judgment dismissing the complaint and an order "severing and continuing" her counterclaim. 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in

admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of the motion, the defendant submits, among other things, the pleadings, her affidavit, deeds reflecting the relevant conveyances herein, copies of the aforementioned note and mortgage dated May 17, 2007, and excerpts of the deposition transcripts of the plaintiff and three nonparty witnesses. The Court notes that the deposition transcripts of the three nonparty witnesses are unsigned and uncertified, and that the plaintiffs have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). Under the circumstances, the deposition testimony of the nonparty witnesses is not in admissible form (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Avenue. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). Although the transcript of the plaintiff's deposition suffers from the same disabilities, the Court may consider said transcript submitted in support of the motion as the parties have not raised any challenges to its accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]).

At her deposition, conducted with the aid of an interpreter, the plaintiff testified that she does not read or write English, that she currently resides at the premises with her husband and her son, George, and that she has no other children beside George and the defendant. She stated that she had previously jointly owned a residence in Bayside, Queens with her husband, that she received some money from her mother and placed that residence in her name only, and that she sold that residence and had "extra money" and purchased the premises. She indicated that she was laid off from work in 2004, that she asked the defendant for help in paying the real estate taxes on the premises at that time, and that the defendant said that "[i]f I do that, I need the deed." The plaintiff further testified that, "to save the house," she met with Frank Guarino, Esq. (Guarino), who had represented her in the sale of the Bayside house and the purchase of the premises, where she signed a deed dated February 10, 2004, that Guarino told her that "this paper is because [the defendant is] supposed to take the house and to be responsible for taxes and all of the things to happen after that," and that the defendant only paid the first $6,000 of taxes for the premises. She indicated that, sometime thereafter, the defendant asked her to help borrow money so that the defendant could purchase a residence, that she was hesitant in case she again lost her job, and that the defendant said she would pay the loan once she had time to "fix up" the new residence. She stated that she went to an office in Manhattan with the defendant, that a lawyer and another person "probably from the bank" was there, and that her signature appears on a deed dated May 17, 2007.

The plaintiff further testified that she believed that the defendant was the owner of the premises at the time she went to Manhattan, that no one explained the nature or purpose of the

document that she signed at that time, and that, although she understood that she was borrowing money from the bank, she was there because the defendant said the bank only needed her "good credit." She stated that thereafter, because her husband was threatening her and she did not believe that she had any "power" over the premises, she spoke with a lawyer named Kathleen who had been at the loan closing with her and the defendant in Manhattan, and that she signed some documents "the third time" in a car with Kathleen and the defendant. The plaintiff further testified that "from the beginning" she knew that the defendant owned the premises and she was "supposed to stay there," but that she was not supposed to be paying the taxes and the mortgage loan which she had been doing. She stated that her signature appears on the subject "mortgage document," and that she is aware that the bank has started a foreclosure action against the premises.

In her affidavit, the defendant swears that, in or about 2003, the plaintiff approached her "for financial assistance to pay certain debts," including "three years of real estate tax arrears for the Premises," and for money for other family expenses. She states that, in exchange for "substantial funds," the plaintiff agreed to transfer the premises to a "new business entity" that she was creating, but that her mother would retain a life estate. She indicates that she and the plaintiff "used" Guarino to prepare the documents for the transaction and to incorporate an entity called L'Etoile, Ltd., that she "would be the sole owner of this corporation," and that Guarino prepared a deed dated February 10, 2004 to L'Etoile, Ltd. (the 2004 deed). The defendant further swears that Guarino never filed the 2004 deed, that she paid the real estate taxes for the premises from 2003 to 2007, and that the plaintiff applied for a "mortgage loan against the Premises" in 2007 to pay some consumer debt and "to assist me in buying a house." She states that she contacted Kathleen Sciandra, Esq. (Sciandra) to come to the mortgage loan closing to explain the documents "to my mother and me," that there was no record of the 2004 deed when they arrived at the bank attorney's office in May 2007, and that "to effectuate the mortgage financing ... a deed was prepared whereby my mother transferred ownership of the Premises to me and her as joint tenants with a right of survivorship" (the 2007 deed). She declares that the plaintiff executed a mortgage note in the amount of $220,000 at said loan closing, that she received $200,000 of the loan proceeds which it was agreed would be used by her "to purchase a home in Brooklyn in my name," and that it was agreed that the plaintiff would pay the "carrying charges for the Premises in consideration for her life estate, including the mortgage payments, property taxes and all maintenance and repairs."

The defendant further swears that, in or about January 2008, "the issues with my father became worse," and the plaintiff asked Sciandra to prepare a deed transferring "any interest my mother had in the Premises to me," and that Sciandra suggested that the plaintiff retain a life estate. She states that a deed to that effect dated January 2, 2008 was signed by her and the plaintiff (the 2008 deed), that sometime thereafter her father learned of that the 2008 deed, and that the plaintiff "fled to Greece" in or about November 2009, only returning to stay at the premises "sporadically." She indicates that the plaintiff paid the mortgage for 22 months and ceased making the mortgage payments when she left the country, and that her father and brother continued to reside in the premises without her permission, and without paying any of the carrying charges. The defendant further swears that the bank holding the subject mortgage began a foreclosure action in 2012.

Here, the defendant has failed to establish her entitlement to summary judgment dismissing the plaintiff's first cause of action for fraud. Initially, the defendant contends that, because the plaintiff acknowledged that she "knowingly transferred" the premises to "a corporation owned by [the defendant]" in 2004, this claim is barred by the six-year statute of limitations (CPLR 213). However, the corporation is not a party to this action, and there are issues of fact including, but not limited to, whether the 2004 deed was delivered to the defendant or any representative of L'Etoile, Ltd., who were or are the principals of L'Etoile, Ltd., and which of the three subject deeds is the critical document in determining the rights of the parties.

An action alleging fraud must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it, whichever is later (*see* CPLR 213 (8); ***Carbon Capital Mgt., LLC v American Express Co.***, 88 AD3d 933, 932 NYS2d 488 [2d Dept 2011]). A plaintiff will be held to have discovered the fraud when it is established that he or she was possessed with knowledge of facts from which the fraud could be reasonably inferred (*see* ***Trepuk v Frank***, 44 NY2d 723, 405 NYS2d [1978]; ***Erbe v Lincoln Rochester Trust Co.***, 3 NY2d 321, 165 NYS2d 107 [1957]). Here, the defendant's testimony is that she paid the real estate taxes until 2007. This action was commenced in 2013. If the 2007 deed is operative herein, the defendant has failed to submit evidence as to the relevant dates in those years, and when the six-year period ran or when the defendant could reasonably infer that a fraud, if any, had taken place. If the 2008 deed is operative herein, it appears that this cause of action is not barred by the statute.

The elements of a cause of action for fraud are (1) a misrepresentation of fact, (2) which was false and known to be false by the defendant, (3) made for the purpose of deceiving the plaintiff, (4) upon which the plaintiff justifiably relied, (5) causing injury (*see* ***Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.***, 88 AD2d 461, 453 NYS2d 750 [2d Dept 1982]; *see also* ***Ozelkan v Tyree Bros. Envtl. Servs.***, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]). Here, there are issue of facts whether the 2004 deed, the 2007 deed, or the 2008 deed is the effective document herein, and whether the defendant misrepresented the nature of the loan to the plaintiff and otherwise committed a fraud thereby.

The defendant has also failed to establish her entitlement to summary judgment dismissing the plaintiff's second cause of action for constructive fraud. "Constructive fraud may be defined as the breach of a duty which, irrespective of moral guilt and intent, the law declares fraudulent because of its tendency to deceive, to violate a confidence, or to injure public or private interests that the law deems worthy of special protection" (***Brown v Lockwood***, 76 AD2d 721, 432 NYS2d 186 [2d Dept 1980]; *see also* ***Sears v First Pioneer Farm Credit, ACA***, 46 AD3d 1282, 850 NYS2d 219 [3d Dept 2007]; ***Williams v Lynch***, 245 AD2d 715, 666 NYS2d 749 [3d Dept 1997]). "The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial exception that the element of scienter upon the part of the defendant, his [or her] knowledge of the falsity of his representation, is dropped ... and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his [or her] confidence in the defendant and therefore to relax

the care and vigilance he [or she] would ordinarily exercise in the circumstances" (***Brown v Lockwood***, 76 AD2d at 731, 432 NYS2d 186; *see* ***Levin v Kitsis***, 82 A.D.3d 1051, 920 N.Y.S.2d 131 [2d Dept 2011]). Here, the defendant has failed to eliminate all issues regarding the existence of a fiduciary or confidential relationship with the plaintiff.

Similarly, the defendant has failed to establish her entitlement to summary judgment dismissing the plaintiff's third cause of action for unjust enrichment. To succeed on a claim for unjust enrichment, a plaintiff must establish that the defendant was enriched at the plaintiff's expense, and that "it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (***Paramount Film Distrib. Corp. v State of New York***, 30 NY2d 415, 421, 334 NYS2d 388 [1972]; *see* ***Whitman Realty Group v Galano***, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]; ***Cruz v McAneney***, 31 AD3d 54, 816 NYS2d 486 [2d Dept 2006]). Here, the defendant has failed to eliminate all issue of fact regarding her receipt and use of $200,000 of the mortgage loan proceeds, and whether, even if her claim that said funds were in consideration of the plaintiff's life estate is established at trial, there is any relationship between said amount and the value of the subject life estate.

However, the defendant has established her prima facie entitlement to summary judgment dismissing the plaintiff's fourth cause of action for conversion. Conversion is the unauthorized "exercise of dominion over or interference with" a specific identifiable piece of property in defiance of the owner's rights (***Petty v Barnes***, 70 AD3d 661, 894 NYS2d 85 [2d Dept 2010]; ***Hoffman v Unterberg***, 9 AD3d 386, 780 NYS2d 617 [2d Dept 2004]). The tort of conversion "can occur even though there is no wrongful intent to possess the property of another" (***Spodek v Liberty Mut. Insurance. Co.***, 155 AD2d 439, 441, 547 NYS2d 100, 103 [2d Dept 1989]; ***Ahles v Aztec Enters.***, 120 AD2d 903, 502 NYS2d 821 [3d Dept], *lv denied* 68 NY2d 611, 510 NYS2d 1025 [1986]). However, "[w]here one is rightfully in possession of property, one's continued custody and refusal to deliver it on demand of the owner until the owner proves his right to it does not constitute conversion" (***Mehlman Mgt. Corp. v Fong May Fan***, 121 AD2d 609, 610, 503 NYS2d 642 [2d Dept 1986]; *see also* ***Green Complex, Inc. v Smith***, 107 AD3d 846, 968 NYS2d 128 [2d Dept 2013]; ***Transportation World Trading, Ltd. v North Shore Univ. Hosp. at Plainview***, 64 AD3d 698, 882 NYS2d 685 [2d Dept 2009]).

Here, the plaintiff's testimony reveals that she voluntarily obtained a loan and granted the defendant access to a significant portion of the proceeds even if there may be another cause of action which would enable her to recover some or all of said monies. The mere right to payment cannot be the basis for a cause of action alleging conversion (***Zendler Constr. Co., Inc. v First Adj. Group, Inc.***, 59 AD3d 439, 873 NYS2d 134 [2d Dept 2009]).

The Court now turns to the branch of the defendant's motion for summary judgment seeking to dismiss the plaintiff's fifth cause of action for an equitable lien or a legal lien on the premises. "The existence of an equitable lien requires an express or implied contract concerning specific property wherein there is a clear intent between the parties that such property be held, given or transferred as security for an obligation" (***Ryan v Cover***, 75 AD3d 502, 502, 904 NYS2d 750 [2d

Dept 2010], quoting ***Datlof v Turetsky***, 111 AD2d 364, 365, 489 NYS2d 353 [2d Dept 1985]). The defendant's testimony raises issue of fact as to the express or implied agreement of the parties regarding the mortgage loan proceeds and the transfer of the premises in May 2007. There are also issues of fact regarding the defendant's testimony that she ceased paying the real estate taxes for the premises in 2007 at the time the plaintiff obtained a loan, mostly for the defendant's benefit, that the loan proceeds were given to her in payment of the plaintiff's life estate when the defendant contends that the plaintiff already possessed a life estate and the deed created at the loan closing did not contain a clause reserving a life estate to the plaintiff. Thus, the defendant has failed to established her prima facie entitlement to summary judgment dismissing the plaintiff's fifth cause of action.

However, the defendant has established her prima facie entitlement to summary judgment dismissing the plaintiff's sixth cause of action for specific performance. In this branch of her motion, the defendant contends that this cause of action is duplicative of the plaintiff's cause of action for fraud. In her sixth cause of action, the plaintiff alleges that "[t]he transfer of said real property to Defendant ... was made based upon fraudulent statements, promises, and assurances made to Plaintiff ... [and] was illegal and invalid." The plaintiff does not allege the existence of an agreement between the parties sufficient to support a cause of action for specific performance (*see* ***Brois v DeLuca***, 154 AD2d 417, 546 NYS2d 3 [2d Dept 1989]). More importantly, the plaintiff does not address the issue raised in this branch of the defendant's motion in her opposition. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc3d 1242A, 2009 NY Slip Op 51849U [Sup Ct, Bronx County 2009]).

Here, the defendant has failed to established her prima facie entitlement to summary judgment dismissing the plaintiff's first, second, third, and fifth causes of action. The failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Matinez v 123-16 Liberty Avenue. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). To the extent that the plaintiff's opposition to the defendant's motion is necessary, it fails to raise an issue of fact which would preclude the granting of summary judgment dismissing her fourth and sixth causes of action. In opposition, the plaintiff submits her affidavit, the transcript of her deposition testimony, a copy of the 2004 deed, an unauthenticated copy of a mortgage note dated February 10, 2004 purportedly executed by the defendant on behalf of L'Etoile, Ltd. and as guarantor, and two unauthenticated documents purportedly from the New York State Department of State, Division of Corporations regarding L'Etoile, Ltd.

It is a prerequisite to the admission of a private document offered in evidence by a party to an action that the authenticity and genuineness of the document be established (*see* ***Horowitz v Kevah Konner, Inc.***, 67 AD2d 38, 414 NYS2d 540 [1st Dept 1979]; ***Prestige Fabrics v Novik & Co.***, 60 AD2d 517, 399 NYS2d 680 [1st Dept 1977]). Similarly, it is a prerequisite to the admission of official records of a court or government office offered in evidence by a party to an action that the

document be authenticated as being what it purports to be in order to be admissible under exceptions to hearsay rule (CPLR 4540; ***People v Ricks***, 71 AD3d 1444, 899 NYS2d 756 [4th Dept 2010]). Thus, the submitted mortgage note and corporate records are inadmissible, and have not been considered by the Court in making this determination. Even if deemed admissible, said documents do not resolve the issues of fact herein.

Finally, the plaintiff's affidavit and her deposition testimony do not address the issues raised in the defendant's motion regarding conversion and specific performance, and neither raises an issue of fact regarding the causes of action relating to those claims. In addition, the plaintiff has not cross-moved for dismissal of the defendant's counterclaim. Under the circumstances, the defendant's request to sever and continue her counterclaim is academic. Accordingly, the defendant's motion for summary judgment is granted to the extent that the plaintiff's fourth and sixth causes of action are dismissed.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: August 29, 2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**