

<b>Bernhardt v Schneider</b>
2018 NY Slip Op 31352(U)
March 22, 2018
Supreme Court, Queens County
Docket Number: 12519/16
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY  
Justice

PART 35

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INGRID BERNHARDT f/k/a INGRID SCHNEIDER,

Index No.: 12519/16  
Motion Date: 10/5/17  
Mot. Seq. : 1

Plaintiff,

-against-

EDWARD SCHNEIDER,

Defendant,

Mot. Seq. No.: 1

-----X  
The following papers were read on this motion by defendant pursuant to CPLR 3211 (a)(7) to dismiss plaintiff's complaint on the ground that the pleading fails to state a cause of action upon which relief may be granted, and on this cross-motion by plaintiff to amend the complaint to add a cause of action for constructive trust and waste.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion - Affidavits - Exhibits .....	1-5
Notice of Cross Motion - Affidavits - Exhibits .....	6-10
Answering Affidavits - Exhibits .....	11-14
Reply Affidavits .....	15-16

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

On September 23, 1986, plaintiff and defendant, became owners as tenants by the entirety of real property, located at 63-48 Dieterle Crescent, Rego Park, New York. On or about August 30, 2010, the plaintiff was granted an ex-parte judgment of divorce from defendant, in the State of Virginia. At present, the defendant is in sole possession of the subject real property, part of which, at times, has been rented. On October 28, 2016, the plaintiff commenced the instant action seeking a partition of the property or, alternatively, its sale, and a division of the proceeds (first cause of action), and an accounting of rents and profits (second cause of action).

In his motion, the defendant seeks an order dismissing both causes of action set forth in the complaint herein based on failure to state a cause of action, pursuant to CPLR 3211 (a) (7). Defendant asserts that the parties separated on December 10, 1995, and the plaintiff moved to Virginia, where she obtained an ex-parte judgment of divorce, that specifically states that all property and support rights are reserved unto the parties for adjudication in the appropriate jurisdiction. Neither party commenced an action for equitable distribution in New York after the granting of the ex-parte judgment of divorce,<sup>1</sup> and such a claim for equitable distribution would now be barred by the statute of limitations. (CPLR 213 [1].) According to the defendant, the parties continue to own the subject real property as tenants by the entirety and, consequently, a partition action may not be brought by the plaintiff, a party to an ex-parte foreign divorce. Defendant further asserts that the accounting cause of action should be dismissed as ancillary to the partition cause of action.

In her cross-motion, the plaintiff opposes the defendant's motion and seeks leave to amend her complaint to add two new causes of action for constructive trust and waste. In his reply and opposition to plaintiff's cross-motion, the defendant once again asserts that since he was neither personally served in Virginia, nor answered or appeared in that earlier action, the Virginia judgment did not convert the parties' tenancy by the entirety to a tenancy in common and, as such, the plaintiff's cause of action for partition must be dismissed. Defendant contends that the plaintiff's cause of action for an accounting should also be dismissed based on waiver. In addition, the defendant opposes that part of the plaintiff's cross-motion seeking leave to amend the complaint to add a cause of action for constructive trust. Defendant asserts that the plaintiff failed to plead a *prima facie* case for a constructive trust.

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008]; see *Leon v*

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<sup>1</sup>Plaintiff had commenced a prior action for divorce and equitable distribution in New York in 2007, but that action was dismissed by court order, dated October 27, 2009.

*Martinez*, 84 NY2d 83 [1994]; *see also Asgahar v Tringali Realty, Inc.*, 18 AD3d 408 [2005].)

In this case, the plaintiff has failed to state a cause of action for partition.

It is uncontroverted that the Virginia judgment terminated the parties' status as husband and wife and that judgment must be accorded full faith and credit in the courts of New York. (*See Young v Knight*, 236 AD2d 534 [1997]; *see also Peterson v Goldberg*, 180 AD2d 260 [1992]; *Elson v Elson*, 149 AD2d 141 [1989].) A valid ex-parte foreign divorce, however, terminates only the marital status of the parties. Such a divorce is divisible in that it has no effect upon the property held by the parties outside of the jurisdiction of the state issuing the judgment. (*See Peterson v Goldberg, supra*; *see also Lansford v Lansford*, 96 AD2d 832 [1983]; *Burford v Burford*, 24 AD2d 491 [1965].) Thus, contrary to the plaintiff's contention, the ex-parte foreign divorce secured by her did not convert the parties' tenancy by the entirety to a tenancy in common. An action for partition does not lie with respect to property held as tenants by the entirety. (*See RPAPL 901 [1]*; *see also Marshall v Bonica*, 86 AD3d 595 [2011]; *Russo Realty Corp. v Orlando*, 288 AD2d 289 [2001].) In a tenancy by the entirety, each party has a right to absolute ownership of the property upon the other's death, and this right of survivorship remains fixed and cannot be destroyed without the consent of both parties. (*See V.R.W., Inc. v Klein*, 68 NY2d 560 [1986].)

In light of the foregoing, that branch of defendant's motion seeking to dismiss plaintiff's first cause of action seeking partition or sale of the subject property for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is granted.

Inasmuch as a party to a tenancy by the entirety, out of possession, is entitled to an accounting by the other party of the rents and profits he or she has collected from the property (*see Neilitz v Neilitz*, 307 NY 882 [1954]; *see also Hiles v Fisher*, 144 NY 306 [1895]; *Kraus v Huelsman*, 52 Misc 2d 807 [1967]), the plaintiff, here, has stated a cause of action for an accounting.

Although the defendant, in his reply papers, adds a new ground for dismissal of the accounting cause of action, that is, waiver, the Court shall not consider such ground since it was not raised in the defendant's original motion papers.

Accordingly, that branch of defendant's motion seeking to dismiss plaintiff's second cause of action for an accounting for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is denied.

"Although leave to amend should be freely given in the absence of prejudice or surprise to the opposing party (*see* CPLR 3025[b]), the motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit." (*Strunk v Paterson*, 145 AD3d 700, 701 [2016]; *see Scofield v DeGroot*, 54 AD3d 1017 [2008]; *see also Lucido v Mancuso*, 49 AD3d 220 [2008].) "Whether to grant such leave is within the motion court's discretion, the exercise of which will not be lightly disturbed." (*Pergament v Roach*, 41 AD3d 569, 572 [2007].)

A constructive trust is an equitable remedy (*see Simonds v Simonds*, 45 NY2d 233 [1978]), which may be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." (*Poupis v Brown*, 90 AD3d 881, 882 [2011], quoting *Sharp v Kosmalski*, 40 NY2d 119, 121 [1976] [internal quotation marks omitted].) The elements of a cause of action to impose a constructive trust are (1) the existence of a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment. (*See Sharp v Kosmalski, supra*; *see also Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688 [2012]; *Poupis v Brown, supra*.) "However, as these elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established" (*Rowe v Kingston*, 94 AD3d 852, 853 [2012].)

In the plaintiff's proposed amended pleading, she does not allege "a transfer." Rather, the plaintiff voluntarily moved out of the subject property, and to Virginia, in 1995. As noted herein, the plaintiff still has an ownership interest in the subject property as a tenant by the entirety. Although it is not necessary to establish each of the elements of a constructive trust in order to obtain equitable relief (*see Rowe v Kingston, supra*), here, the allegations with respect to the proposed cause of action for constructive trust are insufficient to state a cause of action to impose a constructive trust. Thus, this proposed amendment is palpably insufficient as a matter of law.

Plaintiff also seeks to amend the complaint to add a cause of action for waste, alleging, among other things, that the defendant neglected the subject property and that its state of disrepair has diminished its value and her ownership interest therein.

This proposed amendment to add a cause of action for waste does not cause prejudice or surprise to the defendant and is neither palpably insufficient nor patently devoid of merit. Moreover, defendant did not submit any arguments in opposition thereto.

Thus, the plaintiff's cross-motion seeking leave to amend the complaint is granted solely to the extent that the plaintiff is granted leave to serve an amended complaint adding only the new cause of action for waste.

Accordingly, it is

**ORDERED**, that the branch of the defendant's motion seeking to dismiss plaintiff's first cause of action, seeking partition or sale of the subject property for failure to state a cause of action, pursuant to CPLR 3211 (a)(7), is granted; and it is further

**ORDERED**, that the branch of the defendant's motion, seeking to dismiss plaintiff's second cause of action for an accounting for failure to state a cause of action, pursuant to CPLR 3211 (a)(7), is denied; and it is further


**ORDERED**, that the plaintiff's cross motion seeking leave to amend the complaint is granted solely to the extent that the plaintiff is granted leave to serve an amended complaint adding ONLY the new cause of action for waste; and it is further

**ORDERED**, that the plaintiff shall file and serve the amended complaint, along with a copy of this Order with Notice of Entry, upon the defendant and the defendant shall serve his answer to the amended complaint, within twenty (20) days from the date of such service.

The foregoing constitutes the order and decision of this Court.

**Dated: March 22, 2018**

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TIMOTHY J. DUFFICY, J.S.C.