

Russo v Russo

2018 NY Slip Op 32373(U)

August 20, 2018

Supreme Court, Richmond County

Docket Number: 150668/2018

Judge: Jr., Orlando Marrazzo

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

JOSEPHINE RUSSO,

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 150668/2018

Motion No. 1

Plaintiff,

-against-

LUIGI RUSSO and LUISA RUSSO,

Defendants.

The following numbered 1 through 4 were submitted on July 10, 2018

	Papers Numbered
Notice of Motion.....	1
Affirmation in Support of Motion, with Supporting Papers.....	2
Affirmation in Opposition, with Supporting Papers.....	3
Reply Affirmation.....	4

Defendants seek to dismiss plaintiff’s action in which she seeks to impose a constructive trust on a piece of property that is owned by the Defendants. Plaintiff is seeking a divorce from the Defendant Luigi Russo (“Luigi”) in a separate action and now requests that this court impose a constructive trust on the Property based on Defendant’s oral promise to put her name on the deed. Plaintiff claims Defendant Luigi made this promise to her approximately 35 years ago. Defendants claim that Plaintiff has not proved the elements required to impose a constructive trust and that Defendant’s alleged oral promise is not enforceable under the Statute of Frauds.

A plaintiff seeking to impose a constructive trust is typically required to prove four elements: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment. *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121, 386 N.Y.S.2d 72, 351 N.E.2d 721 (1976); *A.G. Homes, LLC v. Gerstein*, 52 A.D.3d 546, 547, 860 N.Y.S.2d 582, 583 (App. Div. 2d Dept., 2008). In this case, Plaintiff did not prove all four elements. Plaintiff has not shown there was a transfer made in reliance upon Defendants' promise to put the deed at issue in her name and therefore has not proven the third element. Previous cases have examined whether a plaintiff made transfers using her own separate property in reliance on a defendant's promise and whether a plaintiff made such transfer before the defendant purchased or acquired the property. *See Somoza v. Somoza*, 88 A.D.2d 931, 931–32, 450 N.Y.S.2d 879, 880–81 (App. Div. 2d Dept., 1982); *Terrille v. Terrille*, 171 A.D.2d 906, 907–08, 566 N.Y.S.2d 780, 781–82 (App. Div. 3d Dept., 1991); *Tidball v. Tidball*, 93 A.D.2d 954, 463 N.Y.S.2d 287 (App. Div. 3d Dept., 1983); *Tomaino v. Tomaino*, 68 A.D.2d 267, 268–69, 416 N.Y.S.2d 925, 926 (App. Div. 4th Dept., 1979). While transfers of time and money can be considered under this element, Plaintiff in this case has not demonstrated that she made such transfers solely because of her reliance on Defendant's promise.

Plaintiff has not shown that she transferred marital funds to improve the home during her decades-long marriage because of her reliance on Defendant's promise. Instead, Plaintiff continued to make such transfers during her decades-long marriage while Defendants never made any significant showings of fulfilling Luigi's alleged promise. Furthermore, Plaintiff has not demonstrated that she used her personal funds or separate property to improve the property, which has been a significant factor in similar cases. Plaintiff also claims that Luigi made his

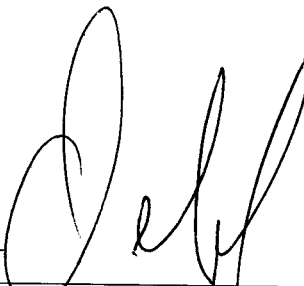
promise to her after they met, which was three years after he and the Co-Defendant purchased the property. Therefore, Plaintiff has not shown that she made a transfer on reliance.

Plaintiff has also failed to prove the fourth element of unjust enrichment, which requires the showing that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 944 N.E.2d 1104, 1110 (2011); *Marini v. Lombardo*, 79 A.D.3d 932, 934, 912 N.Y.S.2d 693, 697 (App. Div. 2d Dept., 2010). The real property at issue was purchased at least three years before Plaintiff claims the promise was made and she has not shown that the Defendants were unjustly enriched. *See Davidman v. Davidman*, 175 A.D.2d 232, 233, 572 N.Y.S.2d 363, 364 (App. Div. 2d Dept., 1991). While Defendant might have been enriched through improvements made to the property, the Defendant have not been enriched at the Plaintiff's expense. Plaintiff did not lose any separate property as a result of this supposed enrichment and Plaintiff enjoyed the property during her marriage to Defendant, including any improvements made to such. Therefore, while Defendants may have been enriched by the use of marital funds to improve the property, Plaintiff has not shown that Defendants were enriched at her expense.

The court recognizes that the constructive trust doctrine is not rigidly limited and that a constructive trust may be imposed without the presence of all four elements. *See Simonds v. Simonds*, 45 N.Y.2d 233, 241, 408 N.Y.S.2d 359, 380 (1978); *Coco v. Coco*, 107 A.D.2d 21, 24, 485 N.Y.S.2d 286, 289 (App. Div. 2d Dept., 1985). However, this is not a case in which the doctrine should be applied despite Plaintiff's failure to prove the four elements discussed.

Therefore, the motion to dismiss Plaintiff's complaint pursuant to CPLR §3211(a)(7) is granted. The parties have also acknowledged that there is a matrimonial action currently in which this matter may be resolved and therefore this complaint should be properly decided within the matrimonial proceeding.

Dated: August 20, 2018
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court