

<b>Wen Mei Lu v Yuen Hsiang Lu</b>
2020 NY Slip Op 35324(U)
December 8, 2020
Supreme Court, Saratoga County
Docket Number: Index No. 20162946
Judge: Thomas D. Nolan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

WEN MEI LU, CHIN CHUNG LU, LI HUA LU and  
LU HOLDING, LLC,

Plaintiffs,

**DECISION AND ORDER**

**RJI No. 45-1-2016-1480**

**Index No. 20162946**

-against-

YUEN HSIANG LU, WEN YING GAMBA and  
WEN FU LU,

Defendants.

**PRESENT: HON. THOMAS D. NOLAN, JR.**  
**Supreme Court Justice**

**APPEARANCES: WHITEMAN OSTERMAN & HANNA LLP**  
**Attorneys for Plaintiffs**  
**One Commerce Plaza**  
**Albany, New York 12260**

**PHELAN, PHELAN & DANEK, LLP**  
**Attorneys for Defendants**  
**300 Great Oaks Boulevard, Suite 315**  
**Albany, New York 12203**

In this litigation among members of the Lu Family over the ownership of three real properties, three motions are before the court.<sup>1</sup> The first by defendants seeks an order granting summary judgment dismissing the plaintiffs' complaint and discharging the court-appointed receiver. The second by plaintiffs seeks an order granting partial summary judgment dismissing

---

<sup>1</sup> An earlier action was litigated to conclusion. Gamba Lu v Lu, Sup Ct. Saratoga County, Index No. 2015-3068 (Nolan J.) Dismissal Affd, 157 AD3d 1101 (3d Dept. 2018). A third action pending in Schenectady County Supreme Court, Gamba v Lu, Index No. 2016-0170, was reported settled in April 2020. However, the claims raised by the plaintiffs in that action have been interposed as counterclaims in the Amended Answer of the defendants in this action.

the defendants' counterclaims. The third by defendants seeks an order both striking the plaintiffs' complaint for non-compliance with discovery demands and striking the trial note of issue filed by plaintiffs and allowing further discovery.

To set the stage for deciding these motions, a recitation of the background follows. The Lu Family consists of the parents – defendant Yuen Hsiang Lu (Mr. Lu), now 97 years old and plaintiff Chin Chung Lin Lu (Mrs. Lu) and seven children four of whom are parties to this litigation – plaintiff daughters Wen Mei Lu (Iris) and Li Hua Lu (Patty) and defendant daughter Wen Ying Gamba (Gamba) and defendant son Wen Fu Lu (Fu).

In 1973, Mr. Lu and Mrs. Lu emigrated from Taiwan to Argentina. Between 1973 and 1978, the Lus purchased three properties in Argentina and opened and operated two restaurants. The title to those properties was not taken in the name of Mr. Lu, but rather in the names of Mrs. Lu and daughter Gamba. In 1978, the Lu Family emigrated to the United States. Between 1978 and 1980, they purchased, operated, and then sold two restaurants, one in New Jersey and one in Pennsylvania. Legal title to those two restaurant properties was placed in Gamba's name. In 1980, the Family relocated to New York State and purchased a restaurant/motel in the Town of Mayfield, Fulton County, and legal title was placed in Gamba. In 1982, two properties were purchased in Argentina with title placed in the names of three daughters, Patty, Iris and Gamba. The Mayfield motel/restaurant business operation was sold in 1983. In 1984, title to a motel and to what had been a furniture store later renovated into a restaurant in Saratoga County was placed in Gamba. Once the restaurant was operating, the business only was sold as a "turnkey" operation with the Lu Family remaining as landlord(s). A second restaurant property in Saratoga Springs was purchased in 1985 and renovated and operated at times by the members of the Lu Family and at times leased to third parties. Again, title was taken in Gamba's name. These two

commercial properties, now referenced as the “Hibachi” and the “Duo” properties, are subjects of this litigation.

In 1987, Gamba married, moved to Florida, and then to Long Island. At Mr. Lu’s directive, Gamba conveyed the three Saratoga properties in her name to her sister “Patty”. In 1987, Mr. Lu and Mrs. Lu divorced. Mr. Lu, who had retired in 1983, returned to Taiwan in 1987, where he resided until 2015.

In 1988, a single-family residence in the Town of Guilderland, Albany County, was purchased with title taken in “Patty’s” name.

In 1992, an ocean front motel property (Hither House) in Montauk, Suffolk County, which had been owned by Gamba’s husband’s family, was purchased with title divided away Gamba and her husband (27%); Patty (36.5%) and Iris (36.5%).<sup>2</sup>

In 1993 and 1994, the three Saratoga properties, “Hibachi”, “Duo”, and the Saratoga motel, were deeded by “Patty” to Mr. Lu, again who was residing in Taiwan at the time. In 1998, the Guilderland residence also was deeded by “Patty” to Mr. Lu and the now former Mrs. Lu as joint tenants with right of survivorship. In 1996, the Saratoga motel was sold to a third-party.

During the years 1998 to 2015, defendant “Iris” managed the two Saratoga commercial properties, which for most of the period were rented to third parties, and \$4,000.00 a month was sent by Iris to Mr. Lu in Taiwan. The Guilderland residence was apparently occupied by Iris, Patty, and Mrs. Lu. In 2006, Mr. Lu signed a power of attorney in favor of Iris.

---

<sup>2</sup> Subsequently there was litigation among these Lu Family members and Mr. Lu who had made the down payment over the Hither House property. The litigation was a settled in 1997 resulting in Gamba and her husband acquiring full ownership.

Fast forward to April 2015 when Mr. Lu, then 93 years old, returned to the United States to live with Gamba in Montauk, New York. On April 8, 2015, the day after he returned to the United States, Mr. Lu signed a power of attorney appointing Gamba<sup>3</sup> as his attorney-in-fact, and on that day, Mr. Lu executed deeds conveying the two Saratoga properties (Hibachi and Duo) to Gamba. Also, on April 8, 2015, Mr. Lu and Gamba met with Iris and informed her of the transfers and Gamba's appointment as attorney-in-fact. On April 13, 2015, Mr. Lu and Gamba met with Iris's then attorney. Also on April 13, 2015, the Saratoga County Clerk received for recording the two deeds Mr. Lu had signed on April 8, 2015 but because the filing fees submitted were insufficient, the Clerk rejected them and returned the deeds by mail to the attorney who had forwarded them. On April 16, 2015, Iris, acting under the 2006 power of attorney as Mr. Lu's attorney-in-fact, executed deeds purporting to convey the two properties to Lu Holding, LLC, a company she had formed, and on that day those two deeds and the 2006 power of attorney in favor of Iris were recorded in the Saratoga County Clerk's Office. On April 21, 2015, Mr. Lu in writing revoked the power of attorney Iris held and the revocation was recorded on May 1, 2015 in the Saratoga County Clerk's Office.<sup>4</sup> On April 22, 2015, the previously rejected deeds conveying the two properties from Mr. Lu to Gamba were recorded in the Saratoga County Clerk's Office, and on May 1, 2015 the power of attorney from Mr. Lu to Gamba was recorded.

The above property transfers were the subjects of the earlier lawsuit before this court (Gamba Lu v Lu, Sup Ct, Saratoga County, Index No. 2015-306 [Nolan, J.] which resulted in a judgment vacating the two deeds purporting to transfer the properties to Lu Holding LLC and

---

<sup>3</sup> Wen Ying Gamba is also known as Wen Ying Gamba Lu.

<sup>4</sup> On April 15, 2015, corrective deeds, also signed by Iris as attorney-in-fact conveying the two properties to Lu Holding, LLC were recorded in the Saratoga County Clerk's Office.

determining them as invalid and ineffective and confirming that the two deeds from Mr. Lu to Gamba were valid and effective. That determination was affirmed on appeal (157 AD 3d 1101 (3d Dept. 2018)). A receiver has been collecting the rents of the Duo property. The Hibachi property is vacant.

This action was then commenced. In their amended complaint, plaintiffs allege causes of action to impose a constructive trust in their favor on the Duo and Hibachi commercial properties and one-half of the Guilderland residence, or alternatively for money damages based on unjust enrichment and for judgment declaring the 2015 deeds transferring title from Mr. Lu to Gamba void because of Mr. Lu's lack of mental competency and confirming that the 2015 deeds from Iris to Lu Holding, LLC are valid and enforceable. Additionally, plaintiffs allege causes of action for conversion based on Gamba's alleged misappropriation of \$95,565.03 held in joint bank accounts in Iris's name and Mr. Lu's name by allegedly impersonating Iris and wrongfully acquiring the proceeds of five bank accounts.

In their amended answer, defendants assert six counterclaims<sup>5</sup> alleging conversion by plaintiff Wen Mei Lu (Iris) of \$83,167.96 belonging to Mr. Lu and by Iris and Lu Holding, LLC of \$292,235.00 in rent allegedly illegally collected by Iris and not delivered to Mr. Lu. Additional counterclaims sounding in fraud, breach of fiduciary duty, and unjust enrichment seek compensatory and punitive damages.

There has been extensive discovery. All parties have been deposed, some more than once. A trial note of issue has been filed. A trial date has not been set.

First, the summary judgment motion and cross-motion.

---

<sup>5</sup> There are two counterclaims labeled "third".

In support of their summary judgment motion, defendants submit the pleadings and the depositions of all parties, discovery demands and responses, various documents, affidavits, and decisions generated in the Hither House litigation and the concluded litigation and their attorney's affirmation.

In opposition and in support of their cross-motion for partial summary judgment, plaintiffs submit affidavits of the three plaintiffs with numerous exhibits, the parties' depositions, and the affirmation of their attorney.

In opposition to the cross-motion, defendants submit an affirmation of their attorney and the affidavit of Mr. Lu.

And lastly, plaintiffs submit in reply to the defendants' opposition to their summary judgment cross-motion, an affirmation of their attorney and affidavit of plaintiff Iris.

The third motion by defendants seeks an order striking the plaintiff's complaint for willful failure to comply with their discovery demands or alternatively for an order striking the trial note of issue. This motion is supported by an attorney's affidavit asserting that concurrently with the filing of its trial note of issue, plaintiff produced 9,258 pages of documents which were uncategorized and disorganized in what counsel labels as a document "dump". In addition, defendants contend that plaintiffs have failed to comply with defendants' demands to produce the tax returns of L.W. Management, identified by plaintiff Iris in her deposition as an entity formed by her to manage the Duo and Hibachi properties and to which defendants contend fees were presumably paid.

In opposition to this motion, plaintiffs assert that the LW Management entity was created solely to facilitate the procurement of health insurance at a favorable group rate for Patty and Iris and that as Iris testified in her deposition, no management fee had ever been paid to L.W.

Management. Moreover, plaintiffs contend that there has been extensive, exhaustive discovery and that defendants are simply attempting to further delay the proceedings and frustrate plaintiffs' efforts to bring the action to conclusion.

Both sides have submitted extensive memoranda of law briefing the salient legal issues.

First, the general principles governing summary judgment. Since summary judgment is a drastic remedy, it may be granted only when the moving parties, here all parties on their respective motions, "tender(s) sufficient evidence to demonstrate the absence of any material issues of fact". Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012), quoting Alvarez v Prospect Hosp., 68 NY 320, 234 (1986). And, the facts must be viewed "in the light most favorable to the non-moving party", here the defendants on the plaintiffs' cross motion and the plaintiffs on the defendants' motion. Ortiz v Varsity Holdings LLC, 18 NY3d 335 (2011). "The court's role on a motion for summary judgment is to determine whether there is a material issue to be tried, not to resolve it." Sommer v Federal Signal Corp., 79 NY2d 540, 554 (1992). And, a movant's failure to meet its prima facie showing requires denial regardless of the sufficiency of the opposing party's submissions. Vega v Restani Constr. Corp., supra. "Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts (citations omitted)." Friends of Thayer Lake, LLC v Brown, 27 NY3d 1039 (2016). And, on such a motion, the court does not make credibility determinations when conflicting evidence is presented. Hall v Queensbury Union Free School Dist., 147 AD3d 1249 (3<sup>rd</sup> Dept 2017).

Since there is a prior judicial determination (157 AD3d 1101) to the effect that the record title to the Duo and Hibachi properties lies in defendant Gamba, the plaintiffs are limited to their claim that a constructive trust should be established in their favor (first cause of action) or



alternately, a finding that defendant Gamba will be unjustly enriched were no equitable interest awarded to plaintiffs (second cause of action).

A constructive trust cause of action has four elements: 1) a confidential and fiduciary relationship; 2) a promise; 3) a transfer made in reliance on the promise; and 4) unjust enrichment if the trust were not imposed. Krol v Yager-Krol, 145 AD3d 1249 (3rd Dept. 2016); Leire v Anderson-Leire, 22 AD3d 944 (3<sup>rd</sup> Dept 2005). These elements are flexible with the ultimate purpose of applying the remedy “whenever justice so demands”. Cinquemani v Lazio, 37 AD3d 882 (3<sup>rd</sup> Dept 2007); Moak v Raynor, 28 AD3d 900 (3<sup>rd</sup> Dept 2006). Stated by Judge Cardozo, “[a] court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief”. Beatty v Guggenheim Exploration Co., 225 NY 380, 386 (1919). A constructive trust may be imposed “[w]hen property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest”. Beatty, supra, at 389.

Recently, the Appellate Division, Third Department, considered the doctrine and offered that a flexible rather than a rigid application of the elements be applied in situations “where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer actually occurred” (citation omitted) provided a confidential relationship between the parties existed. Baker v Harrison, 180 AD3d 1210 (3d Dept. 2020). In Baker, the court, in reversing the trial court’s grant of summary judgment dismissing the plaintiff’s complaint, found triable issues existed whether plaintiff, the former long-term paramour of defendant, was entitled to a constructive trust over a parcel of real property where all the funds to purchase the property were provided by plaintiff but the deed was directly placed in defendant’s name “in an effort to thwart potential creditors”. The court stated as follows:

An express promise is not required to impose a constructive trust. The parties' relationship and circumstances may be construed to suggest an implied promise (see Moak v Raynor, 28 AD3d at 902). Additionally, the promise may be implied or inferred from the very transaction itself (see Johnson v Lih, 216 AD2d 821, 823, 628 N.Y.S.3d 458 [1995]).

This recent case seems to distinguish and broaden the holding of an earlier case, Matter of Marine Midland Trust Co of Rochester [Wells], 36 AD2d 471 (4<sup>th</sup> Dept. 1971)), which defendants rely on to support their motion. In Marine Midland, the court rejected a claim that a constructive trust be imposed absent a prior transfer of property. In that case, three sons operated three farms for years. Their father owned the farms, and on his death, the properties became estate assets which, under the father's will, were to be divided among the father's eight children. The sons contended that their father had promised that on his death and based on their long years of work, the farms would belong to them. The court wrote that "[N]o constructive trust will be imposed by one who has no interest in the property prior to obtaining a promise that such interest will be given to him", (36 AD2d at 474).

Here the claim is that for almost 50 years the Lu Family operated as a "collective unit" (Verified Complaint par 11)<sup>6</sup> and that while the properties were bought and titled in various family members, the properties "belonged" to those who participated in the family operation. Defendants' now assert that irrespective of title, that the properties were always owned by Mr. Lu and that title had been placed in the names of other family members only because Mr. Lu did not speak, write, or understand English and only spoke, wrote, and understood Mandarin Chinese.

---

<sup>6</sup> The word "collective" is defined as "individuals acting together" or "an enterprise in which people work collectively or together" (Webster's New World College Dictionary, 5<sup>th</sup> ed. 2019).

Suffice it to say that the deposition testimony and affidavits of the litigants reflect a dysfunctional, fractured family, particularly since 2015 when Mr. Lu returned to the United States. The record is replete with inconsistencies and contradictions particularly concerning the key issues of why the real estate was titled as it was and which family members were to be considered as having a beneficial interest in the properties now in dispute. The record is clear that the two commercial properties in dispute were initially titled to defendant Gamba, then titled to plaintiff Patty, and then to Mr. Lu before being conveyed back to defendant Gamba in 2015. The Guilderland property was initially titled in plaintiff Patty before being transferred to Mrs. Lu and Mr. Lu and then Mr. Lu's interest was conveyed to defendant Gamba. Moreover, there is evidence that these particular properties and other properties earlier acquired and sold had been intended for the "collective" benefit of those family members who worked or participated in the family business over the years. And there is evidence that when a Lu family member decided to leave the "collective" and live an independent life, that person received what could be classified as a "buy out" of his or her interest. And there is no dispute that between 1998 and April 2015, plaintiff Iris was entrusted by Mr. Lu to manage the two commercial properties.

This record demonstrates the existence of issues of fact whether the elements of a constructive trust in favor of the plaintiffs over the three properties in question have been established. Moreover, there is a triable issue, in the event that a constructive trust is not impressed in favor of the plaintiffs, over whether Gamba would be unjustly enriched without providing fair compensation to the plaintiffs for the role they played in the Family "collective" prior to April 2015.

Defendants' motion for summary judgment dismissing the complaint's first and second causes of action is denied, without costs.

Next, the defendants' motion directed against the complaint's third and fourth causes of action in which plaintiffs seek judgment declaring void the 2015 deeds from Mr. Lu to Gamba and the power of attorney granted by Mr. Lu to Gamba in 2015 on the ground that Mr. Lu was mentally and legally incompetent. Defendants meet their threshold burden of proof based on the affidavit of Mr. Lu and his deposition testimony wherein he unequivocally testified that he knowingly and voluntarily executed the power of attorney and deeds for the reasons that he believed that Iris had "robbed and cheated" him and that his wife was "dishonest".

In opposition, plaintiffs offer no factual evidence to show any incompetency of Mr. Lu or undue influence exercised by Gamba. Again, there has been extensive discovery. Plaintiffs offer no medical evidence which reflects any mental incapacity of Mr. Lu at the time he executed the power of attorney and deeds. Nor has any competent evidence of undue influence been provided. Speculation and surmise are not enough to demonstrate an issue of fact sufficient to defeat defendants' motion.

Defendants' motion is granted to the extent that the complaint's third and fourth causes of action are dismissed, without costs.

Now, the defendants' motion seeking dismissal of plaintiffs' fifth cause of action is considered together with plaintiffs' motion seeking summary judgment dismissing the defendants' first and second counterclaims. These causes of action involve the alleged conversion of funds generated presumably from the rental of the Hibachi and Duo properties. Plaintiffs also contend that defendant Gamba wrongfully impersonated Iris and wrongfully withdrew funds from five bank accounts (four in Citizens Bank and one in Bank of America) totaling \$95,565.03 which plaintiffs contend belonged, not to Mr. Lu, but to the Lu Family cooperative enterprise. In their first and second counterclaims, defendants allege that plaintiff

Iris wrongfully withdrew at least \$83,167.96 of funds allegedly belonging to Mr. Lu from three bank accounts in April 2015 after being notified that the power of attorney she held for Mr. Lu had been revoked and further that plaintiff Iris and Lu Holding LLC converted rental income of at least \$292,325.00 after legal title to the properties was transferred to defendant Gamba in April 2015 and before the court's appointment of a temporary receiver in July 2017.

Notwithstanding the parties' positions, the ownership and entitlement to these funds cannot be determined until the plaintiffs' primary causes of action to impress a constructive trust and for unjust enrichment are adjudicated. Thus, the parties' respective motions seeking summary judgment on the conversion claims are denied, without costs.

Next, the plaintiffs' motion seeking summary judgment dismissing the third, fourth, fifth, and sixth counterclaims is based on res judicata, specifically this court's decision, affirmed by the Appellate Division, in Gamba Lu v Lu, (Index No. 2015-3068) (157 AD3d 1101 (3d Dept. 2018)). Plaintiffs are correct. Their motion is granted and the defendants' third, fourth, fifth, and sixth counterclaims are dismissed, without costs.

Lastly, the defendants' motion for an order striking the complaint and/or for preclusion for alleged discovery non-compliance or alternatively for an order striking the note of issue and allowing additional discovery. As the motion papers now before the court demonstrate, there has been extensive discovery to the point that both sides deemed it appropriate to seek summary judgment. It appears that "no stone has been left unturned". Yet, defendants contend that because the plaintiffs recently produced some 8200 pages of documents, additional discovery is justified but point out that defendant Mr. Lu is now 97 years old and that a trial should be held to bring the matter to resolution.


Based on the record, the court finds that there is no need for further discovery.

Defendants' motion is denied, without costs.

This constitutes the decision of the court. The original decision and order is being uploaded into the NYSCEF system for filing and entry by the Saratoga County Clerk. The signing of this decision and the uploading of the decision and order for filing and entry by the Saratoga County Clerk shall not constitute notice of entry under CPLR Section 2220 and 22 NYCRR §202.5-b(h), and counsel for the plaintiffs are not relieved from the applicable provisions of those rules regarding service of notice of entry.

So Ordered.

DATED: December 8, 2020  
Saratoga Springs, New York



---

HON. THOMAS D. NOLAN, JR.  
Supreme Court Justice



Entered Saratoga County Clerk

12/08/2020