

<b>Miao Zhen Wei v Lee</b>
2021 NY Slip Op 30404(U)
January 15, 2021
Supreme Court, Kings County
Docket Number: 500089/20
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on 15<sup>th</sup> day of January 2021.

PRESENT:  
HON. CAROLYN E. WADE, J.S.C.

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MIAO ZHEN WEI,

Plaintiff,

Index No. 500089/20

-against-

DECISION and ORDER *leg 2*

BEN LEE A/K/A BIN LI,

Defendant.

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Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of plaintiff MIAO ZHEN WEI's motion for a preliminary injunction and other relief (seq. #1) and defendant BEN LEE a/k/a BIN LI's cross motion to vacate a TRO and for other relief (seq. #2):

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>3, 5-7, 26, 28-29</u>
Cross-Motion and Affidavits/Affirmations.....	<u>10, 12-17</u>
Answering Affidavits/Affirmations.....	<u>18-21</u>
Reply Affidavits/Affirmations.....	<u>23-25, 32-33</u>
Memorandum of Law.....	<u>27</u>

Upon the foregoing cited papers, and after oral argument, plaintiff MIAO ZHEN WEI ("Plaintiff") moves by order to show cause, dated February 13, 2020 (Edwards, J.) (the "TRO"), for an order, pursuant to CPLR §§ 325 (b), 326 (a), 602 (b), and 6313: (1) removing and consolidating with this action a pending summary holdover proceeding commenced by defendant Ben Lee, a/k/a Bin Li ("Defendant"), against her and her family in the Civil Court of the City of

New York, County of Kings, Housing Part (the “Civil Court”), captioned *Ben Lee, a/k/a Bin Li v Cai Liang Wei, Yu Ying Chen, Miao Zhen Wei, Jian Hui Wei, Jun Hui Wei, Dinsdale Lee and Stella Lee*, L&T Index No. 052805/20 (the “Summary Proceeding”); (2) enjoining Defendant, his employees, agents, and attorneys from taking any steps, directly or indirectly, to eject Plaintiff from her occupancy of the first floor, basement, and first-floor parking space at 1357 64th Street in Brooklyn, New York (the “Property”), or to otherwise interfere with her occupancy at the Property; (3) staying enforcement of any judgments or warrants of eviction or ejection issued as against her; and (4) enjoining Defendant from conveying, assigning, or encumbering the Property (“Plaintiff’s Motion”). Defendant cross-moves for an order, pursuant to CPLR §§ 6312 (b), 6313 (c), 6314, and 6315: (1) lifting the TRO, denying Plaintiff’s Motion, and awarding him the attorney’s fees which he incurred in opposing Plaintiff’s Motion; or, in the alternative, (2) requiring that Plaintiff post an undertaking while the TRO and any ensuing preliminary injunction are pending (“Defendant’s Cross Motion”).

#### Relevant Facts

It is undisputed that Plaintiff and Defendant met in 1991 and “cultivated [a] lover relationship” (Complaint, ¶ 5). “Since . . . the time [they] met, [they] lived together [as] husband and wife, although [they] did not register to get a certificate of marriage” (Plaintiff’s February 10, 2020 Affidavit, ¶ 4). Two children were born of the parties’ relationship: a son in 1994 and a daughter in 1997 (Complaint, ¶ 7). While Plaintiff was pregnant with the parties’ second child, the Property – a two-story, two-family house with two parking spaces (one parking space per family), and a furnished basement – was purchased in 1997 (Complaint, ¶ 8; Defendant’s April 21, 2020 Affidavit, ¶ 18). The Property, from the time of its purchase, has been titled solely in Defendant’s name (Complaint, ¶ 8).

The parties offer competing versions of the events regarding the purchase and subsequent occupancy of the Property by Plaintiff and her extended family. In Plaintiff's view, both parties purchased the Property, and she was promised a life estate therein (Complaint, ¶¶ 8-9, 14). According to Plaintiff, the purchase of the Property was financed, in part, by a loan obtained by Defendant on collateral of his taxicab medallion which, in turn, had been purchased with Plaintiff's financial assistance (Plaintiff's September 20, 2020 Affidavit, ¶ 7). Further, "[i]n reliance on [Defendant's] granting [Plaintiff] a life estate in the Property, before moving into the Property, [she] spent lots of money in renovating the Property," thereby increasing its value (*id.*, ¶¶ 9-10). In addition, "[i]n reliance on [Defendant's] granting [Plaintiff] a life estate in the Property, [she] acted as the Property manager . . . for about twenty-two years, without any compensation"; "act[ed], in effect, as the landlord in resolving the issues" with the second-floor tenant, "maintain[ed] the Property in good condition," and "cleaned the garbage and removed snow every year" (*id.*, ¶¶ 12-14). Plaintiff alleges that she contributed toward the mortgage and property taxes on the Property, initially at \$800 per month and currently at \$2,000 per month (*id.*, ¶ 11). Plaintiff used the Property to reside there with the parties' children, her "parents . . . and other relatives [including her two brothers]" (Plaintiff's February 10, 2020 Affidavit, ¶ 13; Plaintiff's September 20, 2020 Affidavit, ¶ 15). According to Plaintiff, after she found out in 2005 that Defendant had "an affair with another lady," she "voluntarily moved out [of the Property] for a couple of months to calm down and [that she] resumed living in the Property [later in 2005]" (Plaintiff's September 20, 2020 Affidavit, ¶¶ 14-16). She concludes, without objection from Defendant, that she and her family have occupied her portion of the Property without interruption since 2005 to date (*id.*, ¶ 17).

In contrast, Defendant denies ever promising Plaintiff a life estate in her portion of the Property (Defendant's April 21, 2020 Affidavit, ¶ 22). According to Defendant, Plaintiff has always been a tenant under a lease between him as the landlord and Plaintiff's father as the prime tenant on behalf of her extended family for the use and occupancy of the first floor and basement of the Property. Prior to January 1, 2006, the alleged lease had been oral in nature at the monthly rent of \$400 (*id.*, ¶ 24). After the break-up of the parties' relationship in 2005 which Defendant attributes to Plaintiff's cheating on him, he signed a written lease with Plaintiff's father for a two-year term from January 1, 2006 through December 31, 2008 at the monthly rent of \$1,500 for the demised portion of the Property (the "Lease") (*id.*, ¶ 53). Defendant's assertion that Plaintiff's father signed the Lease is at odds with the sworn statement of Plaintiff's father that the signature on the Lease is not his, and that he did not sign it (Affidavit of Cai Liang Wei, dated November 10, 2020, ¶ 2). Irrespective of the validity of the Lease, however, Plaintiff does not dispute that Defendant moved out of the Property by January 1, 2006, having married another woman in November 2005 (*id.*, ¶¶ 47, 49).<sup>1</sup> Following Defendant's departure from the Property, Plaintiff and her family continued to occupy the demised portion of the Property as month-to-month tenants at the progressively increasing rent.<sup>2</sup> By 2019, Plaintiff's father, on behalf of her family, was paying Defendant \$1,900 in monthly rent for the demised portion of the Property (*id.*, ¶ 58). When, in September 2019, Defendant announced to Plaintiff's father his plans to sell

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<sup>1</sup> Both the Lease and the redacted Certificate of Marriage Registration, dated November 14, 2005, constitute part of the record. Defendant's initial failure to include the Certificate and the Lease with his April 21, 2020 affidavit, and his subsequent inclusion of those documents with his September 23, 2020 Affidavit (as stated in ¶¶ 4-7 thereof), are non-prejudicial to Plaintiff. On the other hand, Defendant's additional statement (in ¶ 10 of his September 23, 2020 Affidavit) denying his "affair with another lady" is disregarded as an improper sur-reply.

<sup>2</sup> Real Property Law § 232-c provides, in relevant part, that where a landlord accepts rent for any period after the expiration of a lease, "then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term."

the Property, the latter stopped paying rent, and has paid no rent to date (*id.*, ¶ 60). On or about September 20, 2019, Defendant served Plaintiff's father, Plaintiff, and several other members of her family with a "Ninety (90) Days Notice of Termination" (the "Ninety Day Notice").<sup>3</sup> On or about January 10, 2020, Defendant commenced the Summary Proceeding in the Civil Court to recover possession of the demised portion of the Property, and for a money judgment in the principal sum of \$7,600, representing the unpaid rent for the months of September through December 2019. Shortly thereafter, Plaintiff commenced the instant action, essentially invoking the legal theory of constructive trust, to impose a life estate for her benefit on her portion of the Property (Complaint, ¶¶ 17-24, 26-33, and 35-40).<sup>4</sup> Defendant interposed an answer asserting, among other defenses, the affirmative defense of the Statute of Limitations.

On February 13, 2020, Plaintiff obtained the TRO which enjoined Defendant, his employees, agents, and attorneys, pending the hearing on Plaintiff's Motion, from taking any steps, directly or indirectly, to eject Plaintiff from her portion of the Property, or otherwise interfere with her tenancy at, or her rights to possession of, her portion of the Property. In opposition, Defendant cross-moved, principally, to vacate the TRO or, in the alternative, to require Plaintiff to post an undertaking.

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<sup>3</sup> Although Plaintiff's extended family is currently comprised of eight adults, only seven adults, including Plaintiff, were named in the Ninety-Day Notice. The eight adults are Plaintiff, her parents, the parties' two adult children (son, age 26, and daughter, age 23), her two brothers, and her sister-in-law (Defendant's April 21, 2020 Affidavit, ¶¶ 56-57).

<sup>4</sup> Plaintiff's additional legal theories of breach of contract and promissory estoppel are no more than a variation on her principal legal theory of constructive trust.

### Analysis

“Generally, a constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest” (*Creamer v DaCruz*, 185 AD3d 547, 547 [2d Dept 2020] [internal quotation marks omitted]). The requisite elements to sustain a claim for the imposition of a constructive trust are: “(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment” (*Salerno v Salerno*, 241 AD2d 488, 488-489 [2d Dept 1997] [internal quotation marks omitted]). The Statute of Frauds “is not a defense to the plaintiff’s properly pleaded cause of action to impose a constructive trust on real property” (*Hernandez v Florian*, 173 AD3d 1144, 1146 [2d Dept 2019]).

“A cause of action to impose a constructive trust is governed by a six-year [S]tatute of [L]imitations, which begins to run upon the occurrence of the wrongful act giving rise to a duty of restitution” (*Bodden v Kean*, 86 AD3d 524, 525 [2d Dept 2011]; CPLR 213 [1]).

“A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition, or whether the constructive trustee wrongfully withholds [the] property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date . . . the trustee breaches or repudiates the agreement to transfer the property” (*Sitkowski v Petzing*, 175 AD2d 801, 802 [2d Dept 1991] [internal quotation marks omitted]).

Here, the six-year Statute of Limitations did not begin to run until Defendant commenced the Summary Proceeding in January 2020 to evict Plaintiff and her family from her portion of the Property, which is the date it is alleged defendant dishonored his promise and took steps to wrongfully withhold from her the life estate in her portion of the Property (*see Cilibrasi v*

*Gagliardotto*, 297 AD2d 778, 779 [2d Dept 2002]; see also *Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688, 690-691 [2d Dept 2012]).

Defendant's contention that the Statute of Limitations began to run when Plaintiff departed from the Property in 2005 misapprehends the nature of a life estate. "The real substance of a life estate consists in the life tenant's right to exclude all others from the possession of the subject property for the duration of . . . her own life" (*Matter of Carey*, 249 AD2d 542, 544 [2d Dept 1998]). As such, "[a] life estate is more than a right to occupancy" because "a life tenant is tantamount to the owner of the property and is entitled to all of the benefits and burden of such ownership . . . so long as the remainder interest is not affected" (*Matter of Strohe*, 5 Misc 3d 1028[A], 2004 NY Slip Op 51592[U], \*2 [Sur Ct, Nassau County 2004] [internal quotation marks, citations, and alteration omitted]). Thus, Plaintiff's temporary departure from the Property could not terminate her life estate therein, particularly because her family continued to reside there in the interim.

The more pressing issue is whether Plaintiff is entitled to a preliminary injunction while the merits of her constructive trust claim are litigated in this action. "The purpose of any preliminary injunction is to maintain the status quo between the parties, not to determine their ultimate rights" (*Putter v Singer*, 73 AD3d 1147, 1149 [2d Dept 2010]). "The burden of proof is on the movant to demonstrate a likelihood of success on the merits, the prospect of irreparable injury if the relief is withheld, and a balancing of the equities in the movant's favor" (*Omakaze Sushi Restaurant, Inc. v Lee*, 57 AD3d 497, 497 [2d Dept 2008]). The decision to grant or deny a preliminary injunction requires a court to consider all three of the aforementioned elements, and is a matter ordinarily committed to its sound discretion (see *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]). "Where denial of injunctive relief would render



the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced” (*Deutsch v Grunwald*, 165 AD3d 1035, 1037 [2d Dept 2018] [internal quotation marks omitted]).

Here, Plaintiff has stated a cause of action for the imposition of a constructive trust on her portion of the Property and has demonstrated a likelihood of success on the merits, irreparable injury through the potential loss of her life estate in her portion of the Property should the Summary Proceeding continue and she and her family be evicted, for which money damages would be insufficient. Further, a balancing of the equities favors Plaintiff’s position in that an eviction (followed by a subsequent sale of the Property) would deprive her of the life estate in her portion of the Property. Accordingly, a preliminary injunction is appropriate to maintain the parties’ status quo pending a determination of this action (*see Deutsch v Grunwald*, 165 AD3d at 1037; *Spirt v Spirt*, 209 AD2d 688, 689 [2d Dept 1994]).

Although Defendant sharply disputes Plaintiff’s allegations, the presence of issues of fact does not warrant the denial of Plaintiff’s Motion, inasmuch as doing so would be inconsistent with the purposes of the equitable doctrine of constructive trust; namely, to prevent a breach of trust and to preserve in her possession the portion of the Property in which she alleges to have a life estate (*see Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605 [2d Dept 2004]; *Hightower v Reid*, 5 AD3d 440, 441 [2d Dept 2004]). Further, Defendant, in whom title to the Property is vested, will suffer no great hardship as a result of the issuance of the preliminary injunction, which is necessary to preserve the status quo, provided that the mandatory undertaking is given by Plaintiff (*see Hightower v Reid*, 5 AD3d at 441). Accordingly, the branch of Plaintiff’s Motion for a preliminary injunction is granted as more fully set forth in the decretal paragraphs below.

The remaining branch of Plaintiff's Motion which is for an order staying the Summary Proceeding pending in the Civil Court, removing it to this Court, and consolidating it with this action is granted as more fully set forth in the decretal paragraphs below. Pursuant to CPLR § 602 (b), "[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." "Where common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Kally v Mount Sinai Hosp.*, 44 AD3d 1010, 1010 [2d Dept 2007]). Both the Summary Proceeding and this action concern the same parties, and both involve common questions of law and fact regarding Plaintiff's use and occupancy of the portion of the Property which is the subject of the Summary Proceeding. Resolution of this action will necessarily decide the issues, as well as Plaintiff's defenses,<sup>5</sup> in the Summary Proceeding, and the two should be consolidated in the interest of judicial economy. Further, Defendant has made no showing that removal and consolidation would prejudice a substantial right (*see Hae Sheng Wang v Pao-Mei Wang*, 96 AD3d 1005, 1009 [2d Dept 2012]).

#### Conclusion

Accordingly, it is

**ORDERED** that Plaintiff MIAO ZHEN WEI's Motion is **GRANTED** as follows:

(1) Pending resolution of this action and subject to Plaintiff providing an appropriate undertaking: (a) Defendant, his employees, agents, and attorneys are enjoined from taking any steps, directly or indirectly, to eject Plaintiff from her occupancy of the first floor, basement, and

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<sup>5</sup> In the Summary Proceeding, the Civil Court would be required to entertain, as an equitable defense, Plaintiff's contention that she was entitled to a life estate based on a constructive trust, even though the Civil Court would be unable to grant her affirmative relief (*see Paladino v Sotille*, 15 Misc 3d 60, 63-64 [App Term, 9th & 10th Jud. Dists. 2007]).

first-floor parking space at 1357 64th Street in Brooklyn, New York, or to otherwise interfere with her occupancy of the Property; (b) the enforcement of any judgments or warrants of eviction or ejection issued as against Plaintiff in the Summary Proceeding is stayed; and (c) Defendant, his employees, agents, and attorneys are enjoined from conveying, assigning, or encumbering the Property;

(2) If the parties are unable to stipulate to an appropriate amount of Plaintiff's undertaking, they shall e-file and e-mail papers to the Court for its determination by no later than **February 19, 2021**; and

(3) Within 30 days after the date of entry of this Decision/Order, Plaintiff's counsel is directed to serve a copy thereof, with notice of entry, on the Clerk of the Civil Court, Kings County, and the Clerk of the Supreme Court, Kings County. Upon such service and payment of the appropriate fee, if any, the Clerk of the Civil Court, Kings County, is directed to transmit all papers in the Summary Proceeding filed under L&T Index No. 052805/20 to the Clerk of the Supreme Court, Kings County. The Clerk of the Supreme Court, Kings County, is directed to consolidate the files herein and mark his or her records to reflect such consolidation; and it is further

**ORDERED** that Defendant BEN LEE a/k/a BIN LI's Cross-Motion is **GRANTED TO THE EXTENT** that Plaintiff shall post an undertaking as set forth in this Decision/Order, and the remainder of his Cross-Motion is **DENIED**.

This constitutes the Decision/Order of the court.

HON. CAROLYN E. WADE  
SUPREME COURT JUSTICE  
Hon. Carolyn E. Wade  
Supreme Court Justice

2021 FEB -2 AM 11:24  
KINGS COUNTY CLERK  
FILED