

Gruber v Gruber

2021 NY Slip Op 32877(U)

December 16, 2021

Supreme Court, Putnam County

Docket Number: Index No. 500507/2019

Judge: Gina C. Capone

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X
JANICE GRUBER, as Administrator of the Estate of
BENJAMIN GRUBER a/k/a BEN GRUBER, Deceased,

Plaintiff,

-against-

ERIC GRUBER and "JOHN DOE" (said name being fictitious and intended to represent tenants, occupants, persons, or parties in possession of, having or claiming an interest in or lien on the premises),

Defendants.

-----X
CAPONE, J.S.C.

DECISION AND ORDER

Index No. 500507/2019
Motion Seq. Nos. 3,4,5,6

The following papers, numbered 1-168, were read and considered on (1) the Defendant's motion for summary judgment dismissing the Complaint; (2) the Plaintiff's cross-motion for summary judgment, to strike the Defendant's answer and dismiss his counterclaims, for leave to amend the complaint pursuant to CPLR § 3025(b), for leave to conform the complaint to the evidence pursuant to CPLR § 3025(c), for a declaratory judgment pursuant to CPLR § 3001, and for an order to compel documents pursuant to CPLR § 3124; (3) the Plaintiff's motion to vacate the Note of Issue pursuant to 22 NYCRR § 202.21; and (4) the Defendant's motion to cancel the notice of pendency pursuant to CPLR § 6514(a).

PAPERS

NUMBERED

Notice of Motion (#3)/ Attorney Affirmation in Support/
Exhibits A-G/Eric Gruber Affidavit in Support/Exhibits H-X/
Statement of Material Undisputed Facts/ Memorandum of Law
in Support

1-29

Notice of Cross-Motion (#6)/ Janice Gruber Affidavit in Opposition
to Motion and in support of Cross Motion/ Memorandum in
Opposition to Motion and in Support of Cross Motion/

30-106

Cross-Statement of Undisputed Material Facts/Exhibits A-ZZQ

Reply Affirmation in Further Support of Motion and in Opposition to Cross-Motion/ Exhibits A-L/ Reply Affidavit in Further Support of Motion and in Opposition to Cross-Motion/ Counter-Statement of Undisputed Material Facts/ Memorandum of Law in Reply	107 - 122
Reply Affirmation in Further Support of Cross-Motion/ Exhibit ZZR/ Memorandum of Law in Reply	123-125
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This action arises over an intra-family property dispute between Plaintiff Janice Gruber, acting in her capacity as the Administrator of the Estate of Benjamin Gruber, and Defendant Eric Gruber, the Plaintiff and the deceased’s son who is the owner of certain real property located at and known as 436 Route 6 in Mahopac, New York (hereinafter “the subject property”). The Defendant worked alongside Benjamin Gruber in the public adjuster business prior to Benjamin Gruber’s death. According to the Complaint, on May 12, 2004, Eric and Benjamin Gruber allegedly entered into the Operating Agreement for the formation and governance of Gruber Realty, LLC (hereinafter “Gruber Realty”). Thereafter, Eric Gruber purportedly agreed to transfer the subject property from himself alone to Gruber Realty in exchange for financial contribution from Benjamin Gruber. While a deed transferring the property has been produced, the deed was never recorded. The key issue overarching this dispute is whether there was a transfer of the subject property from Eric Gruber in his individual capacity to Gruber Realty.

Plaintiff commenced this action by filing a Summons and Verified Complaint on April 5, 2019, seeking to, inter alia, impose a constructive trust over the subject property, to partition the subject property according to respective rights and interests of the parties, and for a full accounting regarding monies related to the subject property. Defendant Eric Gruber submitted a Verified Answer with Counterclaims on October 25, 2019, in which he, inter alia, denied the allegations and asserted counterclaims seeking (1) a declaration that any alleged interest Benjamin Gruber and Gruber Realty claim to have in the subject property is void for lack of consideration and failure of contractual conditions precedent, and (2) alternatively, to recover damages for unjust enrichment in the event that the Court determines Benjamin Gruber does have an ownership interest in the subject property. Both sides have moved for summary judgment in their favor and ancillary relief.

Summary Judgment Standard

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form” (*Zuckerman v New York*, 49 NY2d 557, 562 [1980] [internal quotations omitted]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Summary Judgment with Respect to the First Cause of Action (Constructive Trust)

“In order for a constructive trust to be established, it is necessary to have (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment” (*Athanasatos v Scarpa*, 173 AD3d 817, 818-19 [2d Dept

2019)). “These factors, or elements, serve only as a guideline, and a constructive trust may still be imposed even if all four elements are not established, provided that those factors are substantially present” (*Delidimitropoulos v Karantinidis*, 186 AD3d 1489, 1490-91 [2d Dept 2020] [internal quotations omitted]). “A cause of action to impose a constructive trust is governed by a six-year statute of limitations and begins to accrue upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered” (*Aufferman v Distl*, 56 AD3d 502, 502 [2d Dept 2008] [internal quotations omitted]). “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 property acquired 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” (*Aufferman v Distl*, 56 AD3d at 502 [internal quotations omitted]).

A. *The Defendant’s Motion for Summary Judgment*

The Defendant’s primary argument for dismissal of the constructive trust cause of action is that it is barred by the statute of limitations. The Defendant contends that there are only three possible dates which could have triggered the running of the statute of limitations and each of these date are more than six-years before the action was actually commenced on April 5, 2019. Specifically, the first potential date was when Benjamin Gruber allegedly supplied or promised to supply funds to the Defendant for the purchase of the subject property [July 2, 2004] (NYSCEF Doc 44). The second potential accrual date is the date that Eric Gruber signed a “draft deed”to convey the property from himself individually to Gruber Realty [November 1, 2004] (NYSCEF Doc. 46). Finally, the Defendant contends that the only other possible accrual date is March 27, 2013, the date in which the Plaintiff and Benjamin Gruber represented for the first time on their

Federal Income Tax Returns that Benjamin Gruber was a partial owner of the subject premises (NYSCEF Doc. 48). Under each and every one of these potential accrual dates, the action, which was commenced on April 5, 2019, was untimely, as more than six years had passed.

The Defendant also contends that, even if the action was timely commenced, the Plaintiff cannot establish a key element of the cause of action to impose a constructive trust; a transfer made in reliance upon a promise. As argued by the Defendant, he is and has always been the sole owner of the subject property. As such, the Plaintiff has not alleged nor can she establish that Benjamin Gruber ever transferred the subject property to the Defendant in reliance upon any promise, express or implied, and, thus, the cause of action should be dismissed.

The Defendant, by his submissions however, has failed to eliminate all genuine triable issues of fact warranting an award of summary judgment dismissing the constructive trust cause of action. As noted above, the crux of this dispute between family members is whether it was the intention of the Defendant and deceased father to jointly own the subject property. By his own submissions, the Defendant has raised triable issues of fact around the ownership of the property. While the Defendant has asserted and supported his contention that he is and has always been the sole owner of the subject property, he has also submitted documents, specifically the notarized deed dated November 1, 2004, and letter by Jonathan Abraham, dated June 10, 2005, which seem to establish that it was the parties' intention to transfer the property from the Defendant individually to the LLC and that concrete steps were taken to advance those intentions (NYSCEF Doc. 47). The Defendant also submitted a copy of Janice Gruber's deposition testimony, wherein she testified that Benjamin Gruber supplied funds for the purchase of the subject property with the expectation that the property would be jointly owned. As was noted above, the imposition of a constructive trust does not require a finding that all of the elements are established. Given the numerous questions of fact around the ownership of the property and the parties' intentions, it cannot be said that the Defendant has, as a matter of law, eliminated all triable issues of fact as to

either the timeliness of the commencement of the constructive trust cause of action or the propriety of the action itself, as the burden on a summary judgment motion seeking dismissal on statute of limitation grounds is on the movant to conclusively establish the date at which the statute of limitations accrued and ran. In light of the Defendant's failure to meet his prima facie burden, summary judgment is not warranted at this juncture and the Court need not address the sufficiency of Plaintiff's opposition papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

B. The Plaintiff's Cross Motion for Summary Judgment

The Plaintiff has also cross-moved for summary judgment on her cause of action for the imposition of a constructive trust. The Plaintiff contends, inter alia, that the evidence establishes that Eric Gruber is just a constructive trustee of the subject property, that Eric Gruber and Benjamin Gruber had a fiduciary relationship as a result of their co-owned family business ventures, and that the parties' intent from the inception was to transfer the subject property so that ownership of the subject property was joint. As a result of the Defendant's failure to follow through on the parties' agreement and intentions, the Defendant became and remains unjustly enriched in that he is currently the sole owner of the property. Having stated all of the elements of the cause of action for the imposition of a constructive trust, the Plaintiff contends that she is entitled to summary judgment in her favor on this cause of action.

In support of her motion, Plaintiff submitted, inter alia, a copy of attorney Jonathan Abraham's deposition testimony, as well as the letter he wrote, dated June 10, 2005, a copy of attorney Johnathan Lerner's deposition testimony, a copy of attorney Jules Epstein's deposition testimony, Eric Gruber's deposition testimony taken in connection with a related Surrogate's Court action, and copies of two deeds (one notarized by attorney Jonathan Abraham and one notarized by attorney Johnathan Lerner), which purport to convey the subject property from Eric Gruber individually to Gruber Realty.

While much of the Plaintiff's submissions tend to establish that the parties' intention was to transfer the subject property to the LLC, the submission of the Defendant's testimony in the related Surrogate's Court action raises genuine issues of material fact as to whether or not the transfer was ever effectuated. Indeed, the Defendant testified that he had been and remains the sole title holder of the subject property since July 2, 2004, and that, while there was a "draft deed" prepared which purported to convey the subject property from himself to Gruber Realty, he directed his attorney, Jules Epstein, to hold the deed in escrow until Benjamin Gruber paid funds toward the subject property. According to the Defendant, Benjamin Gruber never made a payment and, therefore, the deed was never released from escrow for recording and the transfer was never completed. Given these material issues of fact around whether the transfer was supposed to occur or not, the Plaintiff cannot establish her entitlement to summary judgment as a matter of law on the cause of action to impose a constructive trust and the Court need not address the sufficiency of Defendant's opposition papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

Summary Judgment with Respect to the Second Cause of Action (Partition)

"A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners" (*Donlon v Diamico*, 33 AD3d 841, 842 [2d Dept 2006] [citing RPAPL § 901[1]). "In the event the estate of a decedent is the owner of an estate in common in real property, the executor or administrator may bring a partition action or intervene in a pending partition action on behalf of the estate if, upon application duly made, the surrogate approves" (RPAPL § 901[4]). Summary judgment dismissing the cause of action, which was for partition was proper, "as the plaintiff was not a person holding and in possession of real property as a joint tenant or tenant in common" (*Watson v Pascal*, 27 AD3d 459, 460 [2d Dept 2006] [internal

quotations omitted]).

A. *The Defendant's Motion for Summary Judgment*

The Defendant has moved for summary judgment dismissing this cause of action and contends that dismissal of the partition cause of action is appropriate because the estate of Benjamin Gruber is not and has never been a joint tenant or tenant in common with the Defendant in the ownership of the subject property. The Defendant argued that, at best, Gruber Realty, LLC could make an argument that it has an interest in the subject property. Nevertheless, the law is clear that where “the properties in question are owned by [an LLC], the plaintiff cannot maintain a cause of action for partition in his individual capacity” (*Sealy v Clifton, LLC*, 68 AD3d 846, 847 [2d Dept 2009]). As such, even if it could be established that the property was owned by Gruber Realty, LLC, the Plaintiff would lack standing to maintain an action for partition. Finally, the Defendant further contends that the Plaintiff may not maintain this action to partition because she, as the estate representative, did not obtain prior approval from Surrogate’s Court.

As noted above, there are significant questions of fact as to whether or not the estate of Benjamin Gruber, individually or as a member of the Gruber Realty, LLC, has any interest in the subject premises. The Defendant’s submissions do not eliminate all questions of fact as to the ownership of the subject property and, in fact, raise questions of fact themselves as to who or what entity has an interest in the subject property. While the Defendant has unequivocally stated that he is the sole title holder to the subject property and has been since July 2, 2004, other submissions on the motion support the Plaintiff’s contention that ownership of the subject property had passed and the interest of the Plaintiff’s estate has yet to be legally determined. As material issues of fact exist with respect to ownership of the subject property, the Defendant’s contention that he is entitled to dismissal of this cause of action as a matter of law is incorrect. Moreover, while the Plaintiff concedes that she has not obtained approval by the Surrogate’s

Court to maintain this action for partition, she has sought permission and her requests were denied on procedural grounds. Nothing in the Surrogate's Court determination implies that the Plaintiff is foreclosed or otherwise barred from seeking approval before a trial proceeds on the matter. Accordingly, upon the Court's finding that the Defendant has failed to meet his prima facie burden, summary judgment must be denied and the Court need not address the sufficiency of the Plaintiff's opposition papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

B. The Plaintiff's Cross Motion for Summary Judgment

The Plaintiff has also cross-moved for summary judgment on this cause of action and contends that, in her capacity as administrator of Benjamin Gruber's estate, she is entitled to seek dissolution of the LLC and a liquidation of the LLC's sole asset (the subject property).

The Plaintiff's submissions fail to meet her prima facie burden of establishing entitlement to judgment as a matter of law on her partition action. Indeed, for the reasons articulated by the Defendant in support of his motion for summary judgment, there are questions of fact as to whether or not the Plaintiff has standing to maintain the partition action. Until the questions around the ownership of the subject property are resolved, the issue of partition cannot be settled. Given the Plaintiff's failure to meet her prima facie burden, the cross motion must be denied, regardless of the sufficiency of Defendant's opposition papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

Summary Judgment with Respect to the Third Cause of Action (Accounting)

"An accounting is an equitable remedy, which a party may seek only where he or she can establish the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking an accounting has an interest" (*LMEG Wireless, LLC v Farro*, 190 AD3d 716, 720 [2d Dept 2021] [internal quotations omitted]). "To obtain an accounting, a plaintiff must show that there was some wrongdoing on the part of a defendant with respect to the fiduciary relationship concerning property in which the

plaintiff has an interest” (*LMEG Wireless, LLC v Farro*, 190 AD3d at 720 [internal quotations omitted]). “To state a viable cause of action for accounting, a plaintiff must also allege that he or she demanded an accounting, which the defendant refused to provide” (*LMEG Wireless, LLC v Farro*, 190 AD3d at 721).

A. *The Defendant’s Motion for Summary Judgment*

The Defendant contends that the Plaintiff’s cause of action for accounting should be dismissed because Janice Gruber never made a pre-suit demand for an accounting. The Defendant also contends that there is no fiduciary relationship between Benjamin Gruber and the Defendant with respect to the subject property. Finally, the Defendant argued that because “[c]laims for an accounting are subject to a six-year statute of limitations” (*Matter of Lee*, 153 AD3d 831, 833 [2d Dept 2017]), and the date of accrual for statute of limitations purposes was either July 2, 2004, when the Defendant purchased the property, or November 1, 2004, when the Defendant chose not to record the deed, the Plaintiff’s claim for an accounting is barred by the statute of limitations.

As has been the case in this Court’s review of the submission on the motion and cross motion, the Defendant’s submissions in support of this branch of his motion fail to eliminate all triable issues of fact as to whether the cause of action for an accounting should be dismissed on the merits or, alternatively, as barred by the statute of limitations. In support of his motion, the Defendant submitted documents that tend to show that the subject property was transferred or was intended to be transferred from the Defendant individually to the LLC. Moreover, the Plaintiff’s testimony was that the decedent financially contributed toward the purchase of the subject property in exchange for an ownership interest therein. Absent resolution of the issues of ownership, the Defendant cannot establish his entitlement to dismissal of the cause of action for an accounting. As such, the branch of the motion is denied, without regard to the sufficiency of the opposition papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

B. *The Plaintiff's Cross Motion for Summary Judgment*

The Plaintiff has also, purportedly, cross moved for summary judgment on her cause of action for an accounting. However, the Plaintiff has not included any legal analysis on this issue. As such, the Plaintiff is not entitled to summary judgment in her favor on this cause of action (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

Summary Judgment Dismissing the Defendant's Counterclaims

The Defendant asserted two counterclaims; (1) for a declaratory judgment declaring that any alleged interest Benjamin Gruber or Gruber Realty claim to have in the subject property be declared void for lack of consideration, failure to comply with contractual conditions precedent and (2) to recover under the theory of unjust enrichment in the event that the Court determines Benjamin Gruber to have an ownership interest in the subject property. To the extent that the Plaintiff has cross moved for dismissal of the Defendant's counterclaims because the Defendant submitted inadmissible evidence under the Dead Man Statute, that branch of her cross motion must be denied. Contrary to Plaintiff's assertion, the Dead Man's Statute cannot necessitate a finding of summary judgment because, at this time, it is not certain that "there would be no waiver of the [Dead Man] Statute and that all the proof would be excludable" (*Stathis v Estate of Donald Karas*, 193 AD3d 897, 900-01 [2d Dept 2021]). The Plaintiff has not asserted any additional legal analysis concerning the merits of the Defendant's counterclaims. Thus, the Plaintiff is not entitled to summary judgment dismissing the Defendant's counterclaims

Plaintiff's Cross-Motion for a Declaratory Judgment

In her Notice of Cross Motion, the Plaintiff seeks a judgment declaring that: (1) plaintiff has a (50%) membership interest in Gruber Realty or, alternatively (2) Gruber Realty is the sole fee owner of the subject property. The Plaintiff also seeks an order directing the County Clerk of the County of Putnam to accept for recording the copies of the deed dated as November 1, 2004, together with the TP-584 and the RP-5217 included as part of Exhibit N, or, alternatively,

compelling the Defendant Eric Gruber to execute and deliver to the Plaintiff a quit-claim deed, bearing a “wet” signature from Eric Gruber to Gruber Realty together with the appropriate TP-584 and the documents contained within exhibit N. However, despite requesting this relief, the Plaintiff has not supported this branch of her motion with any legal analysis and, therefore, has not established her entitlement to the relief she seeks.

Plaintiff’s Cross-motion for Leave to Amend the Complaint

“Pursuant to CPLR § 3025(b), leave to amend or supplement a pleading is to be freely given” (*McIntosh v Ronit Realty, LLC*, 181 AD3d 579, 579 [2d Dept 2020] [internal quotations omitted]). “A determination whether to grant such leave is within the Supreme Court’s broad discretion, and the exercise of that discretion will not be lightly disturbed” (*McIntosh v Ronit Realty, LLC*, 181 AD3d at 579 [internal quotations omitted]). “In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered” (*McIntosh v Ronit Realty, LLC*, 181 AD3d at 579 [internal quotations omitted]). “[W]here the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious” (*Morales v 1415, LLC*, 171 AD3d 913-915-16 [2d Dept 2019] [internal quotations omitted]). “Moreover, when...leave is sought on the eve of trial, judicial discretion should be exercised sparingly” (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 641 [2d Dept 2015] [internal quotations omitted]).

Plaintiff has not supported this branch of her cross motion with any legal analysis. Plaintiff, however, argued, inter alia, that because she had limited documents at the time the action commenced and Defendant resisted disclosure throughout discovery, she should be granted leave to amend her complaint to assert, inter alia, three causes of action (1) for a declaratory judgment that Benjamin and Eric Gruber are each 50% owners of Gruber Realty; (2)

to compel Eric to comply with article VII of the Operating Agreement to buy out Janice's 50% interest in Gruber Realty; and (3) to require the subject property to act as security for Eric Gruber's compliance with article VII of the Operating Agreement to buy out Janice Gruber's 50% interest in Gruber Realty. The Court finds that this motion to amend the Complaint was unreasonably delayed until after the Note of Issue had been filed. Further, the proposed additional causes of action substantially change the nature of the proceeding from one that arises in property law to one that arises in LLC and contract law. The Defendant was not put on notice to seek discovery related to the efficacy of specific provisions contained within the Operating Agreement. Thus, an amendment to the Complaint at this juncture would unduly prejudice the Defendant. Accordingly, the branch of the Plaintiff's cross motion which was for leave to serve and file an amended complaint is denied.

Plaintiff's Cross-motion for Document Disclosure

"The basic rule of discovery is set forth in CPLR § 3101(a), which states, broadly, [t]hat 'there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof'" (*Levine v City Med. Assoc., P.C.*, 108 AD3d 746, 746-47 [2d Dept 2013], citing CPLR § 3101[a]). "Although the discovery statutes are to be construed liberally so that there should be disclosure of any material that is even arguably relevant, unlimited disclosure is not required, and supervision of disclosure is generally left to the Supreme Court's broad discretion" (*Levine v City Med. Assoc., P.C.*, 108 AD3d at 747 [internal quotations omitted]). "Tax returns generally are not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources" (*Levine v City Med. Assoc., P.C.*, 108 AD3d at 747 [internal quotations omitted]). Moreover, where "the plaintiff's counsel failed to provide the required affirmation of a good faith effort to resolve the disclosure dispute, the [Second Department found that the Supreme Court] properly denied the plaintiff's motion insofar as it sought to compel the Defendant...to produce

certain documents” (*Romero v Korn*, 236 AD2d 598, 598 [2d Dept 1997] [citing 22 NYCRR § 202.7 [a][2]).

Here, the Plaintiff has not met her burden on her motion to compel disclosure of the Defendant’s income tax returns. Plaintiff has not made a showing that the information sought cannot be obtained by other sources. Plaintiff likewise has not shown that the Defendant’s income tax returns are indispensable to any of the causes of action asserted in the Complaint or that the production of Eric Gruber’s tax returns is necessary to determine respective ownership interests in Gruber Realty. Furthermore, Plaintiff has not submitted an affirmation of good faith effort to resolve the discovery dispute. Thus, the disclosure of Defendant’s tax returns is not warranted.

Plaintiff’s Motion to Vacate Note of Issue

“[T]o vacate [a] note of issue, discovery requests must be legitimate and pending, and not resolved or contrived” (*Jablonsky v Nerlich*, 189 AD3d 1561, 1563 [2d Dept 2020] [internal quotations omitted]). The Plaintiff sought to vacate the Note of Issue in order to obtain Eric Gruber’s tax returns and in order to take the non-party depositions of Johnathan Lerner, Esq., Jonathan Abraham, Esq., and Jules Epstein, Esq. As Plaintiff is not entitled to Eric Gruber’s tax returns and the depositions of the three non-party witnesses have already been conducted, no legitimate pending discovery requests remain, and this issue is moot, and the motion must be denied as such.

Defendant’s Motion to Cancel Notice of Pendency

“A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property” (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 317-18 [1984] [citing CPLR § 6501]). Cancellation of the Notices of Pendency is proper where “title to, possession of, and the use and enjoyment of the properties owned by the counterclaim defendants

are no longer at issue” (*Mew Equity, LLC v Sutton Land Servs., LLC*, 144 AD3d 872, 874 [citing § 6514(a)]).

Mandatory cancellation of the Notice of Pendency is not appropriate here due to the material issues of fact that exist with respect to ownership of the subject property. The Plaintiff is seeking, inter alia, causes of action for constructive trust and partition. Because the causes of action in Plaintiff’s Complaint are unresolved and pending before the Court, a judgment may affect title to, or the possession, use or enjoyment of the real property at issue and the Court therefore cannot cancel the Notice of Pendency pursuant to § 6514(a).

Accordingly, it is hereby

ORDERED that the Defendant’s motion for summary judgment dismissing the Complaint is denied in its entirety [Mot Seq 3]; and it is further

ORDERED that Plaintiff’s cross-motion which was for summary judgment, to strike the Defendant’s Answer, dismiss his counterclaims, and ancillary relief is denied in its entirety [Mot Seq 6]; and it further

ORDERED that Plaintiff’s motion to vacate the Note of Issue [Mot Seq 4] is denied as academic; and it is further

ORDERED that Defendant’s motion to cancel the Notice of Pendency [Mot Seq 5] is denied; and it is further

ORDERED that any other relief sought by Plaintiff or Defendant is denied; and it is further

ORDERED that all parties are directed to appear before the Court for a status conference on January 21, 2022 at 11:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 16, 2021

Carmel, New York



HON. GINA C. CAPONE, J.S.C.