

18 Misc.3d 1114(A), 856 N.Y.S.2d 503, 2007 WL 4687255 (N.Y.Sur.), 2007 N.Y. Slip Op. 52510(U)
(Table, Text in WESTLAW), Unreported Disposition
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(The decision of the Court is referenced in a table in the New York Supplement.)

Surrogate's Court, Nassau County, New York.
 In the Matter of the Petition of Richard TSCHERNIA, for a judgment declaring, Petitioner to be the owner of certain real property, located at 1728–1732 West Sunrise Highway, Merrick, New York, and imposing a constructive trust, in the Estate of Bernard Tschernia, Deceased.

No. 348650.
 Dec. 19, 2007.

Bahn Herzfeld & Multer, LLP, New York, for Petitioner.

Greenberg Freeman LLP, Goldfarb Abrandt Salzman & Kutzin LLP, New York, for Respondent.

JOHN B. RIORDAN, J.

*1 This is an application for a preliminary injunction. The proceeding was commenced by Richard Tschernia by order to show cause and petition seeking a judgment declaring him to be the owner of real property located at 1728–1732 West Sunrise Highway, Merrick, New York (the Property), or imposing a constructive trust. The order to show cause, which was issued on November 9, 2007, contained a temporary restraining order restraining respondent, Beverly Polasko, and/or her agents from transferring, selling or otherwise encumbering the Property and from terminating the tenancy of First West Mortgage Brokers, Ltd. (First West) pending the return date of the order to show cause. Jurisdiction is complete.

On December 5, 2007, the court held a hearing on whether a preliminary injunction should issue. The hearing continued on December 6, 2007 and concluded the following day. Six witnesses, includ-

ing Richard, testified on Richard's behalf. Beverly did not call any witnesses.

At the close of the hearing, the court vacated from the bench that portion of the temporary restraining order that restrained Beverly and/or her agents from terminating the tenancy of First West. The court issued a written order to that effect on December 11, 2007.

In addition to the pleadings, both sides have submitted several affidavits, as well as memoranda of law, in support of their respective positions. In lieu of oral closing arguments, counsel for each party has submitted a written closing statement with the court's permission. In his closing statement, Richard's attorney states that Richard also seeks a stay of any distributions to the beneficiaries from the trust pending a determination of this proceeding.

The decedent, Bernard Tschernia, died on August 15, 2007 a resident of Florida, leaving his spouse, Roberta, and four children from a prior marriage, Richard, Beverly, Jacqueline and Paul. Bernard and Roberta had a prenuptial agreement under which Roberta waived her rights to inherit or elect against Bernard's estate or the assets held in the Bernard and Pamela Tschernia Family Trust. Pamela was Bernard's first wife and the mother of Richard, Beverly, Jacqueline and Paul. Pamela died on December 18, 2001.

On October 16, 2007, Beverly filed a petition seeking letters testamentary as the nominated executor of Bernard's last will and testament dated June 11, 2007 and to probate the will. Paragraph 9(a) of the probate petition lists the value of Bernard's improved real property located in New York State as \$3,000,000. Paragraph 9(b) states that Bernard does not have any mother testamentary assets in New York State, except for a possible recovery from litigation against Richard regarding the transfer of stock in the mortgage brokerage busi-

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ness. On October 16, 2007, the court issued an order granting preliminary letters testamentary to Beverly.

Article II of Bernard's will states, in part, that Bernard "intentionally and with full knowledge failed to provide for Richard S. Tschernia and his issue in this Will and in the Survivor's Trust of Bernard Tschernia and Pamela Tschernia Family Trust." Article IV of the will reiterates that "[e]xcept as otherwise provided herein," Bernard "intentionally and with full knowledge omitted to provide for" Richard. In the will, Bernard left his residuary estate to the trustee of the Survivor's Trust of the Bernard Tschernia and Pamela Tschernia Family Trust or, if that disposition was to be inoperative in whole or in part, to the persons named, and in the manner provided, in the Survivor's Trust of the Bernard Tschernia and Pamela Tschernia Family Trust.

*2 The Bernard Tschernia and Pamela Tschernia Family Trust was executed on June 21, 1994 ^{FN1} and was amended and restated on April 3, 2001 as the Total Amendment and Restatement of the Bernard Tschernia and Pamela Tschernia Family Trust. Section 4.3 states that after the death of the first to die of Bernard or Pamela, the surviving trustee was to divide the trust estate into three separate trusts, a survivor's trust (governed by section 4.4), an exemption trust and a marital trust. Section 6.1(a) states, in pertinent part, that, upon the deaths of Bernard and Pamela, the Property would be distributed outright to Richard. It is the disposition of the Property that is the subject of the proceeding. It is uncontroverted that title to the Property was never transferred to the trust (EPTL 7-1.18). The Total Amendment and Restatement of the Bernard Tschernia and Pamela Tschernia Family Trust was later amended a total of five times, on December 10, 2004, July 14, 2005, August 1, 2005, November 28, 2006 and June 11, 2007. In the petition, Richard advances five causes of action: (1) that a constructive trust be impressed on the Property based on his allegation that Bernard and Pamela committed to

each other to transfer the Property to the trust; (2) that a constructive trust be impressed on the Property based on his allegations that Bernard promised Richard that the Property would be his upon Bernard's death and that Richard forewent certain opportunities in reliance upon that promise; (3) under certain terms of the trust, which Richard alleges became irrevocable after Pamela's death, the Property belongs to Richard; (4) the trust, Bernard's estate and the beneficiaries are unjustly enriched by reason of the failure to transfer the Property to the trust; and (5) the decisions to eliminate Richard's interest and circumvent the commitment to transfer the Property to the trust resulted from Beverly's campaign of fraud and undue influence on Bernard.

^{FN1}. Neither Richard nor Beverly supplied the court with a copy of the trust as it existed in 1994 or as it existed at any time prior to the 2001 amendment and restatement. In his closing statement, Richard claims that he does not have a copy of any versions prior to when it was amended and restated in 2001, but that Beverly does.

In her answer, Beverly denies these allegations and asserts as affirmative defenses the following: (1) failure to state a claim upon which relief can be granted; (2) Richard's claims are barred by the "Dead Man's Statute" (CPLR 4519); and (3) Richard's claims are barred by the doctrine of unclean hands. The court notes that CPLR 4519 is not an affirmative defense, but, rather, a statute that in substance provides that a person interested in the outcome of the litigation is, upon proper objection, incompetent to testify to a personal transaction or communication with a deceased or mentally ill person, when the testimony is offered against the decedent's estate or the mentally ill person (Prince, Richardson on Evidence x6-121, 11th ed.).

The testimony and other evidence revealed the following. In the mid-1980s, while Bernard was married to Pamela, Bernard and Richard began First West, a New York mortgage lender. Bernard was the guarantor of the mortgage lines. He also was the

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president of First West, and initially owned all the stock. Richard testified that the business was started using money loaned to it by him. Later, in 1992, Richard received one percent of the stock and, in the late 1990s, owned eighteen percent of the stock.

*3 First West purchased the Property in October 1996 and maintained its principal office at that location. The cost of the renovations to the Property was paid from First West's funds. On July 12, 1999, title to the Property was transferred from First West to Bernard. No explanation for this transfer was offered by either side.

In or about 1988, long before First West purchased the property, Bernard moved to Nevada. In 1991 or 1992, he became inactive in running the business, although he continued to be the guarantor of the mortgage lines. According to testimony, Bernard's sole involvement with First West was a daily call to the office to see how the business was doing. Nevertheless, until at or near his death, Bernard continued to receive compensation, including the payment of the mortgage and taxes on the Property and the payment of various personal expenses totaling several hundred-thousand dollars per year.

Testimony also showed that Richard, who was the executive vice-president of First West, was actively involved in its day-to-day operation and was responsible for generating approximately \$80,000,000 in mortgage loans per year, which represented more than half of First West's yearly business. Richard received a yearly salary of approximately \$400,000. Richard and two other witnesses testified that Richard would have earned more money per year if he worked on commission rather than salary. Richard also testified that he gave up other business opportunities, but remained at First West out of loyalty to Bernard.

Witnesses, including Jacqueline, testified that, at various times and sometimes in Richard's presence, Bernard stated that Richard would receive the Property on Bernard's death because of Richard's

dedication to and success in running First West. The testimony was unclear as to whether any of Bernard's statements in this regard post-dated Pamela's death in 2001, although at least one witness testified that she might have heard Bernard state this after Pamela's death. Jacqueline also testified that she often heard Beverly denigrate Richard's business acumen in Bernard's presence.

According to Beverly, the estate has received an offer to purchase the Property for \$2,900,000. On or about November 8, 2007, Richard filed a Notice of Pendency against the property. In his closing statement, Beverly's attorney asks the court to issue an order directing the Clerk of Nassau County to cancel the lis pendens on the alleged ground that Richard brought this proceeding in bad faith with the goal of harming Bernard's estate.

ANALYSIS

The parties agree that title to the Property never passed to the trust and that the Property is therefore not an asset of the trust (EPTL 7-1.18). The parties also agree that New York State law governs since the situs of the Property is New York State (EPTL 3-5.1[b][1]). "The validity of an *inter vivos* trust of real property is determined by the law of the situs.... The law of situs also regulates the descent, alienation and transfer of the property, the construction and effect of the instrument, and the effect of transfers and conveyances of interests therein" (*Matter of Piazza's Estate*, 130 N.Y.S.2d 244, 247 [Sur Ct, New York County 1954], citing *Matter of Good's Will*, 304 N.Y. 110, 115 [1952] [additional citation omitted]).

*4 During the hearing, the court sustained Beverly's objections to Richard testifying as to personal transactions between him and Bernard on the ground that Richard was disqualified under the Dead Man's Statute (CPLR 4519). Although normally the statute is applicable only "[u]pon the trial of an action or the hearing upon the merits of a special proceeding," here the court is asked to determine, as part of Richard's application for a preliminary injunction, Richard's likelihood of success on

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the merits. Unlike in the inquisitorial stage of a proceeding, the protection of the Dead Man's Statute may be raised "when the testimony is offered in evidence at the trial on the merits as to the issue of title, or is used as a basis for the determination of title" (*Lalor v. Duff*, 28 A.D.2d 66, 67 [3d Dept 1967], citing *Matter of Van Volkenburgh*, 254 N.Y. 139, 143 [1930] [additional citations omitted]). Unlike a pretrial deposition or the inquisitorial stage of an SCPA 2103 proceeding, the preliminary injunction hearing is not inquisitorial in nature. Presumably, the testimony Richard's attorney attempted to elicit from Richard was to help demonstrate that he is likely to succeed at trial. It would be incongruous for the court to allow Richard to testify at the preliminary injunction hearing on matters about which he would be disqualified, upon a proper objection, from testifying at trial.

To be entitled to a preliminary injunction, Richard must establish by clear and convincing evidence: (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in his favor (*Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 [1990]; *EdCia Corp. v. McCormack*, 44 AD3d 991, 993 [2d Dept 2007]; *Ying Fung Moy v. Hoho Umeki*, 10 AD3d 604, 604 [2d Dept 2004]); *Pearlgreen Corp. v. Yau Chi Chu*, 8 AD3d 460, 461 [2d Dept 2004]). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Ying Fung Moy v. Hoho Umeki*, 10 AD3d 604, 604 [2d Dept 2004]). Whether to grant a preliminary injunction lies in the court's discretion (*id.*). A preliminary injunction is a drastic remedy that will not be granted unless the petitioner meets the heavy burden of establishing a clear right thereto under the law and the undisputed facts ..." (*Abinanti v. Pascale*, 41 AD3d 395, 396 [2d Dept 2007], quoting *Peterson v. Corbin*, 275 A.D.2d 35, 37 [2d Dept 2000], quoting *Nalitt v. City of New York*, 138 A.D.2d 580, 581 [2d Dept 1988]). Additionally, it is a remedy that should be used sparingly, "with caution, and only

when required by urgent situations or grave necessity, and then upon the clearest evidence" (*Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc.*, 62 A.D.2d 1053, 1053 [2d Dept 1978]). Although as indicated above, Richard advances several causes of action, the only evidence adduced at the hearing was relative to the constructive trust claim.

*5 The usual elements required 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 (*Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 [1976]; *Losner v. Cashline, L.P.*, 41 AD3d 789, 790 [2d Dept 2007]), but these criteria are not rigidly applied (*Simonds v. Simonds*, 45 N.Y.2d 233, 241 [1978]) and "a constructive trust may be erected whenever necessary to satisfy the demands of justice" (*Latham v. Father Divine*, 299 N.Y. 22, 27 [1949]).

While Richard may ultimately succeed in establishing the elements of a constructive trust at trial, he has not convinced the court that that is the most likely outcome of this litigation, at least not on the record as it now stands. He has also failed to establish irreparable injury if the injunction is not granted, because even "[w]here a plaintiff succeeds in proving his entitlement to equitable relief, and the granting of such relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy" (*Lusker v. Tannen*, 90 A.D.2d 118, 125 [1st Dept 1982], quoting *Doyle v. Allstate Ins. Co.*, 1 N.Y.2d 439, 443 [1956]). Finally, even if Richard had established by clear and convincing evidence, as he must, that a balancing of the equities leans in his favor, his failure to satisfy either of the other two criteria requires denial of his application for a preliminary injunction, as all three elements must be established (*Garden City Irrigation, Inc. v. Salamanca*, 7 Misc.3d 1014A [Sup Ct, Nassau County 2005]. Finally, the court notes that since there is a lis pendens filed which will effectively preclude a sale of the property during the pendency of the litigation,

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the preliminary injunction is unnecessary to maintain the status quo (*Rundquist v. Rundquist*, 33 Misc.2d 107, 108 [Sup Ct, Nassau County 1962]).

CONCLUSION

Accordingly, Richard's application for a preliminary injunction restraining Beverly and/or her agents from transferring, selling or otherwise encumbering the Property and his application to stay distributions to beneficiaries from the trust pending a determination of this proceeding are denied. Beverly's request that the court issue an order directing the Clerk of Nassau County to cancel the lis pendens is denied without prejudice as the request was not properly raised. Even if the request were properly made, however, there does not appear a basis for cancelling it (CPLR 6513, 6514[b]).

The temporary restraining order restraining Beverly, and/or her agents from transferring, selling or otherwise encumbering the Property is hereby vacated.

The court issued a preliminary conference order after the conclusion of the hearing on December 7, 2007. The parties are directed to adhere to the dates contained in that order.

Settle order.

N.Y.Sur.,2007.

In re Tschernia

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