

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRYAN RUSSELL

Plaintiff - Appellant

-VS-

GARY RUSSELL

Defendant - Appellee

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 2014CA00166

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court
of Common Pleas, Case No.
2013CV02479

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

July 27, 2015

APPEARANCES:

For Plaintiff-Appellant

SEAN BUCHANAN

Slater & Zurz

One Cascade Plaza, Suite 2210

Akron, OH 44308

For Defendant-Appellee

IVAN L. REDINGER, JR.

Redinger & Morris, L.L.P

Courtyard Centre, Suite 418

116 Cleveland Ave. NW

Canton, OH 44702

Baldwin, J.

{¶1} Appellant Bryan Russell appeals a judgment of the Stark County Common Pleas Court imposing a resulting or constructive trust over real property owned by appellant, and ordering him to convey title of the property to appellee Gary Russell.

STATEMENT OF FACTS AND CASE

{¶2} Appellee is appellant's father. Diane Midcap is appellee's sister and appellant's aunt.

{¶3} In 1996, appellee injured his right hand in an industrial accident, and as a result he received a settlement in the amount of \$300,000.00, payable in three installments. Appellee's second wife used the proceeds of the first installment to pay off her credit card debt. At the time appellee received the second installment, a divorce was pending from his second wife. He placed the second installment into separate bank account.

{¶4} Appellee purchased a home in Perry Township with these funds. He decided to put the home in Diane's name in order to avoid having the new home mixed up in the divorce settlement. Appellee purchased the home for \$68,000.00 on October 5, 2001, and the property was transferred directly from the seller to Diane. Diane and appellee agreed that she would hold title, but it would be appellee's home, and he would pay the utilities, taxes and upkeep. Diane expected that if appellee died while the home remained in her name, she would divide the proceeds between appellee's three children, including appellant.

{¶5} Appellee moved into the home and began paying for the upkeep from the proceeds of his third installment payment on the settlement. In 2003 appellee was

incarcerated, and Diane used appellee's funds to pay expenses related to the home. Upon his release, appellee returned to the home and assumed responsibility for paying expenses.

{¶6} Appellee was incarcerated again in 2004, and had exhausted his funds from the settlement. Diane began paying the expenses with her own money. Appellee returned to the home in 2005, and Diane continued to help him with expenses. Appellee also filed for bankruptcy in 2005, and did not identify any interest in real property in the bankruptcy proceeding.

{¶7} Appellee was once again incarcerated in 2006. Diane was burned out with all of the responsibilities on her plate, and began to look for another family member to step in and look after the home for appellee. Although she had an offer of \$30,000.00 to sell the home to someone outside the family, she wanted to transfer ownership to a family member who would accept the responsibilities to appellee.

{¶8} Appellant was at Bible college in Chicago during this time. He called Diane in September of 2006, asking if she was trying to get rid of appellee's home. She told appellant that she was interested in getting the home out of her name. She told him that she expected any family member who was interested in accepting title in his or her name to pay the property taxes and insurance of about \$150.00 per month, and to continue to allow appellee to live in the home for the rest of his life. She also told appellant that she would like to be reimbursed \$4,000.00 to cover the expenses she had paid for the home from her own pocket.

{¶9} Appellant agreed to the terms as set forth by Diane. Diane then arranged to have a deed prepared placing the home in appellant's name. The deed was recorded

on September 1, 2006. In 2007, appellant reimbursed appellee the agreed upon \$4,000.00.

{¶10} Appellant was asked to leave Bible college at the end of 2006, and he moved into the home just after Christmas. In July of 2008, appellant arranged to borrow \$34,000.00 from a bank, mortgaging the home to do so. Late in July of 2008, appellee was released from prison and returned to the home.

{¶11} The parties lived together in the home until December of 2008, when appellant moved out. During the period in which they lived together in the home, appellee did not pay anything to appellant other than contributing toward utilities.

{¶12} After appellant moved out, appellee did not pay any rent to appellant. Appellant continued to pay the taxes and insurance, and appellee paid the gas and electric bills. This arrangement continued between the parties through 2009, 2010, 2011, 2012, and into 2013.

{¶13} On June 3, 2013, appellant served statutory notice on appellee to leave the premises pursuant to R.C. 1923.04, with "nonpayment of rent" listed as the grounds, although there was no obligation on the part of appellee to pay rent. Appellant filed a forcible entry and detainer action against appellee on June 18, 2013, again asserting that appellee was in default on payment of rent. This action was dismissed by appellant after a hearing in the Massillon Municipal Court.

{¶14} Appellant filed a new eviction action in Massillon Municipal Court in August of 2013. Appellee counterclaimed, asserting that the property was the subject of a constructive trust for appellee. The case was transferred to the Stark County Common Pleas Court. The Common Pleas Court sent the eviction action back to the

Massillon Municipal Court, and proceeded to bench trial on the counterclaim. The court found that the property was subject to a resulting and/or constructive trust in favor of appellee, and ordered appellant to transfer title, free of the mortgage, to appellee.

{¶15} Appellant assigns three errors to this Court:

{¶16} "I. THE COURT ERRED BY FINDING AN ORAL CONTRACT IN DIRECT CONTRAVENTION OF OHIO REVISED CODE 1335.04 AND 1334.05.

{¶17} "II. THE COURT ERRED BY ADMITTING TESTIMONY REGARDING AN ALLEGED ORAL TRUST INVOLVING REAL PROPERTY.

{¶18} "III. THE COURT ERRED BY CREATING AN EQUITABLE TRUST ON BEHALF OF GARY RUSSELL WHOSE OWN FRAUD CREATED THE ALLEGED 'NECESSITY' FOR THE TRUST AND THE PERSON WHO THE TRUST WAS CREATED AGAINST COMMITTED NO FRAUD OR ANY OTHER CONDUCT THAT WOULD GIVE RISE TO EQUITABLE INTERESTS."

I.

{¶19} Appellant argues that the court erred in finding a constructive trust in violation of the Statute of Frauds, codified in R.C. 1335.04 and 1334.05. He also argues that appellee did not properly plead unjust enrichment or fraud in his counterclaim.

{¶20} R.C. 1335.04 provides:

{¶21} "No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law."

{¶22} R.C. 1335.05 requires certain agreements to be in writing, and states in pertinent part:

{¶23} "No action shall be brought whereby to charge the defendant, * * * upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, * * * unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶24} Constructive trusts are not generally subject to the Statute of Frauds. *Teeter v. Teeter*, 7th Dist. Carroll No. 13 CA 887, 2014–Ohio–1471, ¶ 16, citing *Hunter v. Green*, 5th Dist. Coshocton No. 12-CA-2, 2012-Ohio-5801, ¶40. Therefore, the trial court did not err in deciding the issue of whether the property was subject to a constructive trust based on an oral agreement and the conduct of the parties, despite the fact that there was no written agreement.

{¶25} Appellant also argues that appellee did not sufficiently plead unjust enrichment or fraud in his counterclaim. Appellee's counterclaim was not one sounding in fraud and unjust enrichment, but rather sought the imposition of a constructive trust over the property. Appellant's counterclaim asserted in pertinent part:

15. By reason of the above, Plaintiff is a voluntary constructive trustee, holding title to the described premises in constructive trust for Defendant, with the duty to hold said title to allow Defendant to remain as a residence [sic] in said premises for the remainder of Defendant's life.

WHEREFORE, Defendant prays [sic] that this case be transferred to the Stark County Common Pleas Court, General Division, as the Municipal Court lacks subject-matter jurisdiction, and after said transfer is complete, Defendant demands judgment against Plaintiff requiring that: (1) Plaintiff be decreed to be a trustee of the property and to hold title for the benefit of Defendant; and, (2) Plaintiff be ordered to convey fee simple title to said premises to Defendant or his designated agent[.]

{¶26} Appellee clearly pled the issue of the imposition of a constructive trust. A constructive trust is an appropriate remedy against unjust enrichment, and, although usually invoked when property has been acquired by fraud, a constructive trust may also be imposed where it is against the principles of equity that the property be retained by a person even though the property was acquired without fraud. *Ferguson v. Owens*, 9 Ohio St.3d 223, 226, 459 N.E.2d 1293 (1984), citing 53 Ohio Jurisprudence 2d (1962) 578–579, Trusts, Section 88, and V Scott on Trusts (3d Ed.1967), 3412, Section 462. Therefore, the issues of unjust enrichment and fraud which arose at trial were a part of appellee's claim of a constructive trust rather than separate causes of action, and appellee was not required to plead unjust enrichment or fraud.

{¶27} The first assignment of error is overruled.

II.

{¶28} In his second assignment of error, appellant argues that the court erred by admitting testimony of an oral trust. Appellant restates his arguments in the first

assignment of error concerning the Statute of Frauds and the state of the pleadings. As noted above, appellee's counterclaim clearly raised the issue of whether appellant held the property as a constructive trustee for appellee, and evidence of the existence of a constructive trust by oral agreement is not barred by the Statute of Frauds. The court therefore did not err in admitting testimony concerning an oral agreement involving the real property at issue.

{¶29} The second assignment of error is overruled.

III.

{¶30} In his third assignment of error, appellant argues that the court erred in creating an equitable trust because appellant was not alleged to nor found to have committed any fraud, and appellee refused to take title to the property in order to defraud his creditors, his wife, and the bankruptcy court.

{¶31} Although a constructive trust is usually invoked when property has been acquired by fraud, a constructive trust may also be imposed where it is against the principles of equity that the property be retained by a person even though the property was acquired without fraud. *Id.* Where a person holds title to property against equity and good conscience and will be unjustly enriched by retaining title, Ohio courts have not required, as a prerequisite for a constructive trust, that the holder obtained title by fraudulent or questionable means. *Groza–Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, 834 N.E.2d 15, ¶ 27 (10th Dist.). Therefore, the fact that appellant was not alleged nor found to have committed fraud does not bar the imposition of a constructive trust.

{¶32} There is no evidence to support appellant's claim that appellee refused to take title to the property to defraud creditors and the bankruptcy court. Although appellee did not disclose any interest in the property to the bankruptcy court, he did not declare bankruptcy until 2005, while he placed the property in his sister's name in 2001. Further, although his stated reason for placing the property in his sister's name was to keep the property from his ex-wife in his divorce proceeding, the evidence does not demonstrate that he committed fraud in so doing. As found by the trial court:

Plaintiff asserted at trial that Defendant's actions in completing the 2001 purchase were illegal or fraudulent, and as such, served to nullify the creation of an implied trust. The evidence did not support this conclusion. Defendant freely acknowledges that he acted in large part to prevent his then wife, who was divorcing him, from taking his settlement funds, and that he did not want to complicate the divorce with a real property transfer issue. There was no evidence that these settlement funds were marital property, which would have been counter to the normal classification of personal injury settlements as separate property. A home purchased with those traceable funds would retain the separate property designation. The uncontroverted testimony was that Ms. Russell was fully aware of the litigation and of the settlement, having spent the first installment. She also had legal counsel. There was no

evidence presented that any specific creditors existed at the time of the transactions, who could have been the subjects of an effort to hinder, delay, or defraud them. Judgment Entry, August 6, 2014.

{¶33} The third assignment of error is overruled. The judgment of the Stark County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Gwin, P.J. and

Delaney, J. concur.