

At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12<sup>th</sup> day of May, 2020.

P R E S E N T:

HON. KATHY J. KING,

Justice.

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MARCO CHAVEZ,

Plaintiff,

**DECISION/ORDER**

Index No. 512923/19

- against -

FREDDIE MORALES, NELSON MORALES,  
JEREMY MORALES, 3<sup>RD</sup> GENERATION  
MADISON ST LLC, AND 923 LAFAYETTE  
DEVELOPMENT

Defendants.

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The following papers number 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____ 1-2 _____
Opposing Affidavits (Affirmations)_____	_____ 3,4 _____
Reply Affidavits (Affirmations)_____	_____ 5,6 _____

Plaintiff, Marco Chavez, moves by order to show cause, for an order seeking, a permanent injunction enjoining defendants from all proceedings to: 1) remove plaintiff and plaintiff's possessions, transfer, sell, encumber, or alienate the properties located at 923 Lafayette Avenue, Brooklyn, NY (Block 1606 Lot 61) and 921A Lafayette Avenue, Brooklyn, NY (Block 1606 Lot

62), and 2) interfering with plaintiff's access to the premises known as 923 Lafayette Avenue, Brooklyn, NY (Block 1606 Lot 61) and 921A Lafayette Avenue, Brooklyn, NY (Block 1606 Lot 62). Upon the signing of the order to show cause, a temporary restraining order was granted for the requested relief pending the determination of the within motion. Defendants, Freddie Morales, Nelson Morales, Jeremy Morales and 3rd Generation Madison St. LLC, submitted opposition on the return date of the order to show cause.

It is well settled that the courts consider the granting of an injunction to be a drastic remedy only to be used in the rarest of circumstances (*see Uniformed Firefighters Ass'n of Greater N.Y. v. City of N.Y.*, 79 NY2d 236, 241 [1992]). A preliminary injunction may be granted where the following criteria is met; 1) probability of success on the merits of the underlying action; 2) danger of irreparable injury in the absence of an injunction; and 3) a balancing of the equities (*see Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 [1990]). Further, plaintiff has the burden of establishing these three elements by clear and convincing evidence (*see Network Financial Planning, Inc. v. Prudential-Bache Sec., Inc.*, 194 AD2d 651, 652 [2d Dept 1993]).

Here, defendant contends that the gravamen of plaintiff's complaint is based on a constructive trust, notwithstanding that the complaint enumerates causes of action of fraudulent conveyance/quiet title, declaratory judgment, rescission and permanent injunction. The Court agrees. A review of the moving papers indicates that plaintiff cannot demonstrate a likelihood of success on the merits on plaintiff's underlying constructive trust action. In order "[t]o state a cause of action for the imposition of a constructive trust, the plaintiffs must plead and prove four essential elements: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." (*Doxey v. Glen Cove Community Dev. Agency*, 28 AD3d 511, 512 [2d Dept 2006]). Here, plaintiff's claim of a familial relationship is disputed and

plaintiff fails to set forth facts to demonstrate a confidential or fiduciary relationship between the parties, there is no documentary evidence to establish a promise of payment of the outstanding mortgage and plaintiff's ownership of the property, and that plaintiff relied on said alleged promise. Finally, there is no showing of unjust enrichment since plaintiff's claim of ownership and exclusive possession of the subject premises is controverted. While plaintiff may allege that the lease is fraudulent, such assertion is an issue of fact.

Additionally, while plaintiff contends that he will be irreparably harmed because "money cannot replace the special place in his heart for the subject properties," (Plaintiff's Affidavit, Paragraph 27) it is well settled that "as long as the injuries are "compensable in money and capable of calculation, albeit with some difficulty," they are not irreparable (*Scoffo v. Mei*, 219 AD2d 181, 184 [1st Dep't 1996]; see also *Price Paper & Twine Co. v. Miller*, 182 AD2d 748, 750 [2d Dept 1992]).

Similarly, since plaintiff has a monetary remedy and defendants have a demonstrable property right, the balance of the equities does not favor granting of a preliminary injunction.

Based on the foregoing, plaintiff's motion is denied in its entirety, and all stays are vacated.

ENTER,

  
HON. KATHY J. KING  
J.S.C  
HON. KATHY J. KING  
JSC

2020 JUN 15 AM 7:13  
KINGS COUNTY CLERK  
FILED

