

*2006 NY Slip Op 1459, *; 26 A.D.3d 464, **;
811 N.Y.S.2d 413, ***; 2006 N.Y. App. Div. LEXIS 2416*

[*1] Aryeh Gutman, et al., respondents, v Zalman Klein, et al., appellants.

2005-07323, (Index No. 39834/04)

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2006 NY Slip Op 1459; 26 A.D.3d 464; 811 N.Y.S.2d 413; 2006 N.Y. App. Div. LEXIS
2416

February 28, 2006, Decided

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PRIOR HISTORY: [Klein v. Gutman, 12 A.D.3d 417, 784 N.Y.S.2d 581, 2004 N.Y. App. Div. LEXIS 13314 \(N.Y. App. Div. 2d Dep't, 2004\)](#)

CASE SUMMARY

PROCEDURAL POSTURE: In an action, inter alia, to impose a constructive trust, defendants appealed from so much of an order of the Supreme Court, Kings County (New York), as denied those branches of their motion which were to dismiss the complaint pursuant to [N.Y. C.P.L.R. 3211\(a\)\(4\)](#), (5), and (7), and to vacate a notice of pendency.

OVERVIEW: The appeals court found that the complaint was sufficient to state causes of action (1) to impose a constructive trust, (2) for attachment, (3) for an accounting, and (4) to recover damages for unjust enrichment. Further, as pleaded, these causes of action were not time-barred. Consequently, the court properly denied those branches of defendant's motion which were to dismiss the complaint pursuant to [N.Y. C.P.L.R. 3211\(a\)\(5\)](#) and (7) and to vacate the notice of pendency. In addition, the court properly denied that branch of defendant's motion which was to dismiss the complaint pursuant to [N.Y. C.P.L.R. 3211\(a\)\(4\)](#). However, pursuant to [N.Y. C.P.L.R. 3211\(a\)\(4\)](#), the court should have consolidated the action with another action entitled Klein v. Gutman, pending in the Supreme Court, Kings County. Both actions involved common questions of law and fact, and consolidation would avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts.

OUTCOME: The order was modified, on the law, by adding a provision thereto consolidating the action with an action pending in the Supreme Court, Kings County; as so modified, the order was affirmed insofar as appealed from, without costs or disbursements.

CORE TERMS: constructive trust, causes of action, properly denied, pendency, notice, vacate, modified

COUNSEL: Noel W. Hauser, New York, N.Y., for appellants.

Oved & Oved, LLP, New York, N.Y. (Darren **Oved** of counsel), for respondents.

JUDGES: ANITA R. FLORIO, J.P., DAVID S. RITTER, PETER B. SKELOS and ROBERT A. LIFSON, JJ., concur.

OPINION: [464] DECISION & ORDER**

[*413]** In an action, inter alia, to impose a constructive trust, the defendants appeal from so much of an order of the Supreme Court, Kings County (Schneier, J.), dated March 3, 2005, as denied those branches of their motion which were to dismiss the complaint pursuant to [CPLR 3211\(a\)\(4\)](#), [\(5\)](#), and [\(7\)](#), and to vacate a notice of pendency.

ORDERED that the order is modified, on the law, by adding a provision thereto consolidating the action with an action entitled *Klein v Gutman*, pending in the Supreme Court, Kings County, under Index No. 35890/01; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

Taking the facts alleged in the pleadings as true, and according the plaintiffs every favorable inference (see [Leon v Martinez](#), 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972; [Fay Estates v Toys "R" Us, Inc.](#), 22 A.D.3d 712, 803 N.Y.S.2d 135), the complaint was sufficient to state causes of action (1) to impose a constructive trust (see [Sharp v Kosmalski](#), 40 N.Y.2d 119, 351 N.E.2d 721, 386 N.Y.S.2d 72), (2) for attachment (see [Mineola Ford Sales v Rapp](#), 242 A.D.2d 371, 661 N.Y.S.2d 281), (3) for an accounting (see [Schantz v Oakman](#), 163 N.Y. 148, 57 N.E. 288), and (4) to recover damages for unjust enrichment (see [Carriafiello-Diehl & Assoc., Inc. v D&M Elec. Contr., Inc.](#), 12 A.D.3d 478, 784 N.Y.S.2d 617). Further, as pleaded, these causes of action are not time-barred (see **[***414]** [Eickler v Pecora](#), 12 A.D.3d 635, 785 N.Y.S.2d 126; [North Salem Cent. School Dist. v Mahopac Cent. School Dist.](#), 1 A.D.3d 418, 768 N.Y.S.2d 11; [Jakacic v Jakacic](#), 279 A.D.2d 551, 719 N.Y.S.2d 675; [L & L Plumbing & Heating v DePalo](#), 253 A.D.2d 517, 677 N.Y.S.2d 153; [Barash v Estate of Sperlin](#), 271 A.D.2d 558, 706 N.Y.S.2d 439). Consequently, the court properly denied those branches of the defendant's motion **[*2]** which were to dismiss the complaint pursuant to [CPLR 3211\(a\)\(5\)](#) and [\(7\)](#), and to vacate the notice of pendency (see [Klein v Gutman](#), 12 A.D.3d 348, 784 N.Y.S.2d 145).

[465]** In addition, the court properly denied that branch of the defendant's motion which was to dismiss the complaint pursuant to [CPLR 3211\(a\)\(4\)](#). However, pursuant to [CPLR 3211\(a\)\(4\)](#), the court should have consolidated this action with another action entitled *Klein v Gutman*, pending in the Supreme Court, Kings County, under Index No. 35890/01 (see [Whitney v Whitney](#), 57 N.Y.2d 731, 440 N.E.2d 1324, 454 N.Y.S.2d 977; [Benenson v SKEK Assoc.](#), 293 A.D.2d 694, 741 N.Y.S.2d 418; [Breiterman v Elmar Props.](#), 123 A.D.2d 735, 507 N.Y.S.2d 206). Both actions involve common questions of law and fact, and consolidation will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts (see [Fay Estates v Toys "R" Us, Inc.](#), *supra*; [Beerman v Morhaim](#), 17 A.D.3d 302,

[791 N.Y.S.2d 854](#)).

FLORIO, J. P., RITTER, SKELOS and LIFSON, JJ., concur.