

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

740

CA 08-01490

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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NEAL TOOLEY AND KENDRA TOOLEY,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

FERN R. CORP, DEFENDANT-RESPONDENT.

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ALDERMAN AND ALDERMAN, SYRACUSE (RALPH G. DEMASI OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Jefferson County (Joseph D. McGuire, J.), entered June 27, 2008. The order, insofar as appealed from, granted those parts of defendant's motion for summary judgment dismissing the second and third causes of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, those parts of the motion for summary judgment dismissing the second and third causes of action are denied and those causes of action are reinstated.

Memorandum: Plaintiffs commenced this action seeking, inter alia, to impose a constructive trust on the proceeds of the lease and subsequent sale of a gravel quarry on a portion of property owned by defendant and on defendant's remaining interest in that property. As limited by their brief on appeal, plaintiffs contend that Supreme Court erred in granting those parts of defendant's motion for summary judgment dismissing the second and third causes of action based on the doctrine of unclean hands. Those causes of action were asserted by Neal Tooley (plaintiff). We agree with plaintiffs that the court erred in granting those parts of defendant's motion. Although plaintiff's admitted purpose for the transfer of the land to defendant was to avoid the potential creditors of either plaintiff Hazel Tooley, the original owner of the land, or plaintiff himself, defendant failed to meet her burden on those parts of the motion inasmuch as she failed to establish that either Hazel Tooley or plaintiff had any actual creditor at the time of the transfer (*see Trager v Vigliotti*, 42 AD2d 912, *affd* 35 NY2d 865; *Guggenheim v Lieber*, 42 AD2d 778; *cf. Muscarella v Muscarella*, 93 AD2d 993, 994; *see also* Debtor and Creditor Law § 270). We therefore reverse the order insofar as appealed from, deny those parts of the motion for summary judgment dismissing the second and third causes of action and reinstate those

causes of action.

Entered: June 5, 2009

Patricia L. Morgan  
Clerk of the Court