

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2  
Justice

ANGELIKA PAGOULATOU a/k/a  
ANGELIKA KOURKOU MELIS

Plaintiff

-against-

GEORGE KOURKOU MELIS,  
T & G KOURKOU MELIS-34, LLC and  
K & K BUILDING SERVICES CORP. a/k/a  
K & K BUILDING-33, LLC

Defendants

Index No: 3871/06

Motion Date: 1/10/07

Motion Cal. No.: 22

The following papers numbered 1 to 22 read on this motion and two cross motions by defendants for an Order dismissing the complaint pursuant to CPLR 3211(a) (1) and (7) and for an Order cancelling the notice of pendency filed in this action and cross-motion by plaintiff for leave to serve an amended complaint

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 5
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Upon the foregoing papers it is ordered that these motions are determined as follows.

The branch of the defendants' motion to dismiss the complaint is denied as moot in view of plaintiff's cross-motion for leave to amend the complaint. The plaintiff's cross-motion for leave to amend is granted. Plaintiff shall, within 30 days of the date of entry of this Order, file and thereafter serve the amended complaint in the form annexed to the moving papers.

The branch of the defendants' cross-motion for an Order cancelling the notice of pendency filed in this action is granted, and it is

**ORDERED**, that the County Clerk of Queens County is directed, upon payment of the proper fees by defendants, if any, to cancel and discharge a certain notice of pendency filed in this action on February 17, 2006 against property known as BLOCK 626, LOT 29, also known as 30-39 34th Street, Astoria, N.Y. 11103 and discharge a certain notice of pendency filed in this action on February 17, 2006 against property known as BLOCK 625, LOT 14, also known as 30-79 33rd Street, Astoria, N.Y. 11103 and said clerk is directed to enter upon the margin of the record of the same a Notice of Cancellation referring to this Order.

The defendants' motion for the imposition of sanctions is denied.

This is an action to set aside the alleged fraudulent transfer of two parcels of real property located in Queens County made on or about August 16, 2005 by the defendant, plaintiff's husband, GEORGE KOURKOUMELIS, to the defendants, K & K BUILDING SERVICES CORP. a/k/a K & K BUILDING-33, LLC and T & G KOURKOUMELIS-34, LLC.

The defendants now move for dismissal of the complaint pursuant to CPLR 3211(a)(1) and (7) and for the imposition of sanctions pursuant to 22 NYCRR 130-1.1. on the ground that the documentary evidence conclusively demonstrates that KOURKOUMELIS did not transfer either parcel of real property, fraudulently or otherwise, in 2005 inasmuch as the corporate defendants are and have been the deeded owners of the respective properties since 2001.

In response to the defendants' motions, plaintiff admits that the complaint erroneously alleges the fraudulent transfer of real property and cross-moves for leave to serve an amended complaint to assert the fraudulent conveyance of defendant's, GEORGE KOURKOUMELIS', interest in the corporate defendants which own the real property. In support of her motion, plaintiff submitted, inter alia, portions of the Statement of Net Worth GEORGE KOURKOUMELIS filed in the context of parties' pending matrimonial action in which he disclosed that on August 16, 2005 he sold his interest in the two corporations to the corporations. The plaintiff claims that the transfer was a fraudulent transfer of marital property made with the intent of depriving the plaintiff of the benefits of the property and for the purpose of unjustly enriching the defendant, KOURKOUMELIS.

Defendants oppose the plaintiff's cross-motion to amend on the ground that the amended complaint also fails to state a cause of action as GEORGE KOURKOUMELIS' interest in the real property and/or the corporate defendants is separate property not subject to equitable distribution. Defendants further argue that the plaintiff's application to amend should also be denied and the action dismissed, pursuant to CPLR 3211(a)(4), because the court, presiding over the matrimonial action, must necessarily determine all of the issues raised by the plaintiff's amended complaint. In addition, if the court grants plaintiff's motion to amend, defendants cross-move to cancel the notice of pendency filed in this action as the amended action is not one in which the judgment would affect the title, possession, use or enjoyment of real property.

Leave to amend a complaint to assert a new or different cause of action should be liberally granted in the absence of prejudice or surprise resulting from the delay, (see, CPLR 3025[b]; McCaskey, Davies & Assocs. v. New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]; Fahey v. County of Ontario, 44 NY2d 934, 935 [1978]). The party opposing the amendment must demonstrate that there will be actual prejudice in permitting the service of an amended pleading (see Edenwald Contracting Co., Inc. v. City of New York, 60 NY2d 957 [1983]; Holchender v. We Transport, Inc., 292 AD2d 568 [2002]; O'Neal v. Cohen, 186 AD2d 639 [1992]). The court will not consider the merits of the proposed amendment unless the proposed amendment is insufficient as a matter of law or totally devoid of merit (see Sunrise Plaza Associates, L.P. v. International Summit Equities Corp., 288 AD2d 300 [2001]; Norman v. Ferrara, 107 AD2d 739 [1985]). The proposed amendment is not palpably insufficient or patently devoid of merit (see, Klein v. Gutman, 12 AD3d 348 [2004]; Arany v. Arany, 282 AD2d 389 [2001]; Maharam v. Maharam, 245 AD2d 94 [1997]).

Nor have defendants established that denial of the amendment or dismissal of the action is warranted pursuant to CPLR 3211(a)(4). A motion to dismiss pursuant to CPLR 3211(a)(4) should be granted only when there is another action pending between the same parties for the same cause of and raises the danger of conflicting rulings relating to the same matter (see White Light Prods. v. On The Scene Prods., 231 AD2d 90, 93-94 [1997] ; Lopez v. Shaughnessy, 260 AD2d 551). "With respect to the subject of the actions, the relief sought must be 'the same or substantially the same' " ( White Light Prods. v. On The Scene Prods., 231 AD2d 90, 94 [1997] quoting Kent Dev. Co. v. Liccione, 37 NY2d 899, 901 [1975]; see, JC Mfg. v. NPI Elec., 178 AD2d 505, 506 [1991]). Neither criteria exists in this case. The corporate

defendants herein are necessary parties whose interest will be affected by the judgment obtained in this action and are not parties in the matrimonial action (see e.g. Hitchcock v. Boyack, 256 AD2d 842, 844 [1998]). Nor is the relief sought in the matrimonial action substantially the same as the relief sought herein (see Kent Dev. Co. v. Liccione, 37 NY2d 899, 901 [1975]). Contrary to the defendants' claim, whether KOURKOUMELIS' interest in the corporations is marital property need not be decided in this action. Under the circumstances, granting plaintiff's cross-motion for leave to amend is warranted.

However, inasmuch as the amended action affects the shares in a corporation that owns real property and not the real property itself, the defendants' cross-motion to vacate the notice of pendency is granted (see, 5303 Realty Corp. v. O & Y Equity Corp., 64 NY2d 313 [1984]). The extraordinary privilege and protection afforded by a notice of pendency is not available in this case despite the fact that the disposition of the real property owned by the corporations, the value of KOURKOUMELIS' interest in the corporations as well as whether such interest is marital property may significantly impact upon the plaintiff's right to equitable distribution and award of maintenance in the matrimonial action. Plaintiff's remedy to prevent any alleged dissipation of marital assets lies elsewhere.

Dated: January 16, 2007  
D# 29

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J.S.C.