SHORT FORM ORDER

INDEX No. 06-14583

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/3/06
ADJ. DATES 11/17/06
Mot. Seq. # 003 - Mot D
Mot. Seq. # 004 - MD

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| BARBARA ANNE CARNEY,<br><br>Plaintiff,<br><br>-against-<br><br>MARK EDWARD CARNEY and 53 MOMARK PROPERTY, INC., a New York Corporation,<br><br>Defendants. | DAVID STONE & ASSOC.<br>Attys. For Plaintiff<br>72 E. Main St.<br>New Rochelle, NY 10801<br><br>MAJID & ASSOC., PC<br>Attys. For Defendant Carney<br>300 Rabro Dr.<br>Hauppauge, NY 11788<br><br>RONALD C. SCHULE, PC<br>Atty. For Defendant 53 Momark Prop.<br>398 Route 111<br>Smithtown, NY 11787 |

Upon the following papers numbered 1 to 15 read on this motion for dismissal and cross motion denying motion; Notice of Motion/Order to Show Cause and supporting papers 1-3; 4-7; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 8-9; 10-13; Replying Affidavits and supporting papers 14-15; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion (#003) by plaintiff for an Order pursuant to CPLR 3211(a)(7) and (b) (1) dismissing the counterclaim of the corporate defendant, 53 Momark Property, as well as, its second, third and sixth affirmative defenses and (2) dismissing the counterclaim of defendant, Mark Edward Carney, as well as, his sixth and seventh affirmatives defenses, is granted to the extent that the counterclaim and the second,

third and sixth affirmative defenses of defendant, 53 Momark Property, and the sixth and seventh affirmative defenses of defendant, Mark Edward Carney, are dismissed and in all other respects, is denied; and it is further

***ORDERED*** that the motion (#004) by defendant, Mark Edward Carney, for an Order (1) pursuant to CPLR3211(d)(1) denying plaintiff's motion; (2) directing a continuance to permit further information and affidavits to be obtained; and (3) permitting disclosure to be had in order for all facts essential to the opposition of this motion may be then stated, is denied; and it is further

***ORDERED*** that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for defendants within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1), (2), or (3) and thereafter file the affidavit of service with the Clerk of the Court; and it is further

***ORDERED*** that a preliminary conference is scheduled for **March 6, 2007**, at 9:30 a.m., in the DCM Part at the courthouse located at 1 Court Street, Riverhead, New York.

Plaintiff and defendant were divorced by a decree from the Dominican Republic in 2000. The parties entered into a Stipulation of Settlement. Thereafter, plaintiff commenced a plenary action to set aside the Stipulation based upon defendant's, Mark Edward Carney (hereinafter "Carney") alleged fraud and misrepresentation by failing to disclose certain assets, including the corporate defendant, 53 Momark Property, Inc. (hereinafter "Momark"). For the record, the Court notes that the corporate defendant Momark is represented by an attorney and the individual defendant Carney has retained separate counsel.

Plaintiff now moves to dismiss Momark's counterclaim, as well as, its second, third and sixth affirmative defenses and to dismiss Carney's counterclaim, as well as, his sixth and seventh affirmative defenses. In opposition to the motion, Momark submits its counsel's affirmation, Carney's affidavit, dated November 7, 2006, and the affidavit of Carney's wife, Oksana B. Carney (hereinafter "Oksana"), dated November 6, 2006. Carney states in his affidavit that he is a 50% shareholder, director and officer of Momark. The affidavits of both Oksana and Carney state that the affidavit of service of plaintiff's process server, regarding service of process upon Carney individually pursuant to CPLR 308(2) and the mailing of same was improper as it was mailed to the wrong address. Carney also denies that Oksana is a person authorized to accept service of process under CPLR 311(1). Plaintiff offers no proof to counter Carney's contention in this regard.

Carney also contests service of the summons with notice upon the Secretary of State pursuant to BCL § 306 on the grounds that he has not resided at the address listed with the Secretary of State for over six years. It is noted that the affidavits do not raise any issue in opposition to plaintiff's motion to dismiss (*see e.g.* ***Wohlgemuth v Lang Constr. LLC,*** 18 AD3d 650, 795 NYS2d 634 [2d Dept 2005 ]).

Momark's counterclaim alleges:

> As a result of the frivolous conduct of Plaintiff in maintaining this action, defendant MOMARK has and will continue to sustain unnecessary legal expenses and seeks, pursuant to CPLR 8303(a) and Part 130 of the Uniform Rules of the Trial Courts, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees plus financial sanctions against Plaintiff and plaintiff's counsel for the frivolous conduct alleged.

"A counterclaim is a cause of action asserted by a defendant against a plaintiff" (Siegal, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3019:1; *see also* Seigal, N.Y. Prac. § 370 4th ed.). A counterclaim must contain facts which set forth a separate and distinct cause of action wherein it can be maintained as a separate and independent claim (*see* ***Bendat v Premier Broadcast Group, Inc.,*** 175 AD2d 536, 572 NYS2d 796 [3d Dept 1991]; ***Grafer v Marko Beer & Beverages, Inc.,*** 36 AD2d 295, 320 NYS2d 143 [2d Dept 1971]; ***Mehlsak v Mehlsak,*** 81 NYS2d 690 [Sup. Ct. Kings County 1948]) and "whether the counterclaim is itself sufficient to support an independent cause of action against plaintiff in the same capacity in which plaintiff sues" (***Geddes v Rosen,*** 22 AD2d 394, 397, 255 NYS2d 585 [1st Dept 1965] *citations omitted*); *affd* 16 NY2d 816, 263 NYS2d 10 [1965]).

The Appellate Division, Second Department has restated the rules governing a motion to dismiss in ***State of New York v Grecco,*** 13 AD3d 350, 786 NYS2d 197 [2d Dept 2004]). The Court's inquiry is limited to determining whether, taking the allegations of the complaint as true and affording plaintiff the benefit of every reasonable inference, plaintiff has stated a cause of action against one or more defendants (*see* ***Sirlin v Town of New Castle,*** ____ AD3d ____, ____ NYS2d ____ [2d Dept 2006]; ***Dunleavy v Hilton Hall Apts. Co., LLC***, 14 AD3d 479, 789 NYS2d 164 [2d Dept 2005]). In applying the standard, the Court expresses no opinion as to the truth or falsity of the allegations of the complaint or, consequently, as to the conclusions plaintiff argues should be drawn therefrom. On the procedural posture of the action, these issues are not properly before the Court. On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see* ***Fast Track Funding Corp. v Perrone,*** 19 AD3d 362, 796 NYS2d 164 [2d Dept 2005]; ***Paterno v CYC, LLC,*** 8 AD3d 544, 778 NYS2d 700 [2d Dept 2004]; ***McGee v City of Rensselaer,*** 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]; ***Leon v Martinez,*** 84 NY2d 83, 614 NYS2d 972 [1994]; ***Morone v Morone,*** 50 NY2d 481, 429 NYS2d 592 [1980]; *see also* ***511 West 232nd Owners Corp. v Jennifer Realty Co.,*** 98 NY2d 144, 746 NYS2d 131 [2002]; ***Sokoloff v Harriman Estates Dev. Corp.,*** 96 NY2d 409, 729 NYS2d 425 [2000]).

A matrimonial stipulation of settlement, which is incorporated but not merged into the judgment of divorce, is an independent contract subject to the principles of contract law (*see* ***Stevens v Stevens,*** 11 AD3d 791, 783 NYS2d 683 [3d Dept 2004]; ***Brennan v Brennan,*** 300 AD2d 524, 752 NYS2d 557 [2d Dept 2002]; ***Dreiss v Dreiss***, 258 AD2D 499, 684 NYS2d 627 [2d Dept 1999]; ***McWade v McWade,*** 253 AD2d 798, 677 NYS2d 596 [2d Dept 1998]). Plaintiff commenced a plenary action seeking to challenge and reform the

stipulation (*see* ***Caldwell v Caldwell,*** 209 AD2d 1022, 619 NYS2d 908 [4th Dept 1999]; ***Dombroski v Dombroski.*** 239 AD2d 460, 657 NYS2d 208 [2d Dept 1997]; ***Lambert v Lambert,*** 142 AD2d 557, 530 NYS2d 223 [2d Dept 1988]).

CPLR 8303(a) is applicable only to claims or counterclaims in actions seeking to recover damages for personal injury, injury to property or wrongful death (*see* McKinney's Cons Laws of NY, Book 7B, 2007 Supp Pamph at 89) and, therefore, inapplicable in this breach of contract action. Conduct deemed to be subject to sanctions under 22 NYCRR § 130.1.1, is conduct "which is completely without merit in law and fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, it is undertaken to harass or maliciously injure another or it asserts material factual statements that are false (*see* ***Wecker v D'Ambrosio,*** 6 AD3d 452, 773 NYS2d 891 [2d Dept 2004]; ***Wagner v Goldberg,*** 293 AD2d 527, 739 NYS2d 850 [2d Dept 2002]).

Momark's counterclaim fails to set forth any facts concerning alleged, frivolous conduct by plaintiff to harass or maliciously injure Carney (*see* ***Hamilton v Cordero,*** 10 AD3d 702, 781 NYS2d 907 [2d Dept 2004]; ***Intercontinental Credit Corp. Div. of Pan American Trade Dev. Corp. v Roth***, 78 NY2d 306, 574 NYS2d 528 [1990]***; Minsters, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York v Modell,*** 76 NY2d 411, 559 NYS2d 866 [1990]), which would be the basis of a separate and distinct cause of action and could be maintained as a separate and independent claim (*see* ***Bendat v Premier Broadcast Group, Inc.,*** 175 AD2d 536, *supra*; ***Grafer v Marko Beer & Beverages, Inc.,*** 36 AD2d 295, *supra*; ***Mehlsak v Mehlsak,*** 81 NYS2d 690, *supra*).

The Court's role on the motion is to discern if, from the four corners of the counterclaim, there are factual allegations when taken together would manifest any cause of action which would be cognizable at law (*see* ***Jackel Holdings v JSS Holdings,*** 23 AD3d 435, 803 NYS2d 917 [2d Dept 2005]). Further, the motion must be denied if, from the pleading's four corners, factual allegations are discerned, when taken together, manifest any cause of action cognizable at law (*see* ***Sheila v Povich,*** 11 AD3d 120, 781 NYS2d 342 [1st Dept 2004]). Under this liberal approach and upon review of the four corners of the counterclaim, the Court finds that Momark's counterclaim fails to set forth any cognizable legal theory and/or applicable facts relative to the matter before the Court. Thus, the counterclaim is dismissed.

Plaintiff also seeks to dismiss Momark's second, third and sixth affirmative defenses. Momark's second and third affirmative defenses state as follows:

> As and for a Second Affirmative Defense, defendant MOMARK alleges that this honorable Court has not [sic] jurisdiction of the person of this defendant. Accordingly, the said complaint should be dismissed pursuant to CPLR 3211(a)(8).
>
> As and for a Third Affirmative Defense, defendant MOMARK alleges that

> personal service upon this corporate Defendant was not accomplished in a manner prescribed by the provisions of CPLR 306, CPLR 311(a)(1) and/or CPLR 312(a). Accordingly, the complaint should be dismissed as to this Defendant.

There is no dispute between the parties that Momark is a domestic corporation incorporated in the State of New York and its principal place of business is within the State of New York. Counsel for plaintiff has submitted with his moving papers a copy of the affidavit of service upon the Secretary of State pursuant to BCL § 306, which clearly states that a copy of the summons and complaint was served upon Momark. In the reply papers, plaintiff corrected this inadvertent oversight to note that a summons with notice was served. In any event, service was effected on the subject corporation and the Court has jurisdiction over Momark. Counsel's protestations regarding lack of effective service under CPLR 311 and CPLR 312 is unpersuasive, academic and moot as the Court's jurisdiction has been established pursuant to the provisions of BCL § 306.

Additionally, Momark and its principals have been aware for a number of years that they have not changed their address designation with the Secretary of State since it was first filed. Consequently, defendants did not do anything to insure receipt of service of process (*see* ***Cristo Bros., Inc. v M. Cristo, Inc.***, 91 AD2d 807, 458 NYS2d 50 [3d Dept 1982]; *app. dism* 59 NY2d 760 [1983]; *lv app dism* 60 NY2d 701 [1983]; ***Eugene DiLorenzo, Inc. v Dutton Lbr. Co.,*** 67 NY2d 138, 501 NYS2d 8 [1980]). Momark was under an obligation to advise the Secretary of State of its current and correct address (*see* ***Widgren v 313 East 9th Assocs., Ltd,*** 295 AD2d 146, 742 NYS2d 837 [1st Dept 2002]) and did not do so.

Regarding Momark's third affirmative defense which states the corporate defendant was improperly served. There is no record that Momark has or had moved by notice of motion for judgement on their objection within 60 days after service of their responsive answer, dated on or about September 12, 2006 (*see* CPLR 3211[e]; ***Woleben v Sutaria,*** 34 AD3d 1295, 825 NYS2d 860 [4th Dept 2005]; ***State Farm Fire and Cas. Co. v Firmstone,*** 18 AD3d 900, 795 NYS2d 118 [3d Dept 2005]; ***Worldcom v Dialing Loving Care, Inc.,*** 269 AD2d 159, 702 NYS2d 76 [1st Dept 2000]; ***Amerasia Bank v Saiko Enter., Inc.,*** 253 AD2d 519, 693 NYS2d 628 [2d Dept 1999]). Therefore, under the facts and circumstances of this matter, the Court dismisses Momark's second and third affirmative defenses.

The Court of Appeals held in ***Textile Tech. Exch., Inc. v Davis,*** 81 NY2d 56, 595 NYS2d 729 [1993] that interposing a counterclaim related to plaintiff's complaint would not waive the defense of personal jurisdiction, but that asserting an unrelated counterclaim would waive said defense because the defendant is taking an affirmative advantage of the court's jurisdiction. The court noted in its decision "that a counterclaim will only be 'related' for those purposes when such counterclaim could potentially be barred under principles of collateral estoppel; where the parties or their privies are the same and where the issues in the plaintiff's claim are potentially identical and decisive of issues raised in the counterclaims" (*id* at 59; *citations omitted*).

However, the Court has found that Momark's counterclaim to not be related as the counterclaim seeks

money damages based solely on plaintiff's plenary action which seeks to set aside the stipulation of settlement based upon Carneys' fraud and misrepresentation. The counterclaim seeks damages under an inapplicable provision of the CPLR and sanctions under 22 NYCRR § 130-1.1, which concerns frivolous conduct which occurred during the course of litigation. These are not issues potentially related to, or even identical to, the claims set forth in plaintiff's complaint. Further the counterclaim would not be decisive as to the issues in the instant matter before the Court (*see* ***Textile Tech. Exch., Inc. v Davis,*** 81 NY2d 56, *supra*). Thus, as Momark's counterclaim is unrelated to the claims set forth in the complaint, Momark has placed itself in the position of a plaintiff who has initially invoked the jurisdiction of the court and has effectively waived any jurisdictional objection (*see* ***Bell v Little a/k/a Rick Little,*** 250 AD2d 485, 673 NYS2d 402 [1st Dept 1998]; ***GE Capital Mtg. Serv., Inc. v Mittelman,*** 238 AD2d 471, 656 NYS2d 645 [2d Dept 1997]; ***Prezioso v Demchuk,*** 27 AD2d 576, 511 NYS2d 375 [2d Dept 1987]; *lv app dism* 70 NY2d 1002, 526 NYS2d 438 [1988]; ***Liebling v Yankwitt,*** 109 AD2d 780, 486 NYS2d 292 [2d Dept 1980]; Siegal, Practice Commentaries, McKinney's Con Laws of NY Book 7B, C3211:60).

Plaintiff also moves to dismiss Momark's sixth affirmative defense, which states:

> As and for a sixth affirmative defense, defendant MOMARK alleges that the complaint by the Plaintiff against this corporation Defendant are frivolous, without any factual or legal basis, contain material misstatements of act, fail to disclose material facts and was interposed solely to achieve an impermissible and unjust result.

Although couched in semantical language, Momark's sixth affirmative defense can be reduced to the its plain meaning which states plaintiff's complaint fails to state a cause of action. This affirmative defense is totally conclusory in character and sets forth no supporting facts. Therefore, it is insufficient (*see* ***MacIver v George Braziller***, 32 Misc2d 477, 224 NYS2d 364 [Sup. Ct. New York County 1961]; CPLR 3018; *cf* ***Morgestern v Cohon,*** 2 NY2d 302 [1957]). Affirmative defenses plead as conclusions of law that are not supported by any facts are insufficient and should be stricken (*see* ***Petracca v Petracca,*** 305 AD2d 566, 760 NYS2d 513 [2d Dept 2003]; ***Bentivegna v Meenan Oil Co.,*** 126 AD2d 506, 510 NYS2d 626 [2d Dept 1987]). In the Second Department, failure to state a claim upon which relief can be granted cannot be raised as an affirmative defense in an answer (*see* ***Bentivegna v Meenan Oil Co.,*** 126 AD2d 506, *supra*; *see also* ***Falk v MacMasters,*** 197 AD 357,188 NYS 795 [2d Dept 1921]) and must be brought by motion. Accordingly, Momark's sixth affirmative defense is dismissed.

In its opposition papers, Momark seeks to raise issues regarding plaintiff's impleading of Momark as a party defendant. These issues were not placed before the Court on plaintiff's motion and Momark's attempt in counsel's affirmation and Carney's affidavit to place these issues in contention, is procedurally incorrect pursuant to CPLR 2215 (*see* ***Blam v Netcher,*** 17 AD2d 495, 793 NYS2d 464 [2d Dept 2005]; ***Chun v North American Mtg. Co.***, 285 AD2d 42, 729 NYS2d 716 [2st Dept 2001]; ***Hergerton v Hegerton,*** 235 AD2d 395, 652 NYS2d 77 [2d Dept 1997]; ***Thomas v The Drifters, Inc.,*** 219 AD2d 639, 631 NYS2d 419 [2d Dept

1995]). A notice is required to prevent surprise to the original moving party (*see* ***Guggenheim v Guggenheim,*** 109 AD2d 1012, 468 NYS2d 489 [4th Dept 1985]). Consequently, the issues were not before the Court and were not considered.

Plaintiff also moves to dismiss Carney's counterclaim and his sixth and seventh affirmative defenses. Carney opposes that portion of plaintiff's motion and moves pursuant to CPLR 3211(d), for a continuance of the action on the grounds that he is unable to marshal sufficient facts and documentary evidence to contest plaintiff's claims because of certain circumstances beyond his control.

CPLR 3211(d) is inapplicable to Carney's application regarding plaintiff's motion to dismiss his affirmative defenses. However, while CPLR 3211(d) has application to Carney's counterclaim, a preliminary conference has not yet been held which would direct a discovery schedule. Therefore, the Court in its discretion, declines to grant Carney's application for a continuance.

Carney's counterclaim states as follows:

> As a direct and proximate result of plaintiff's culpable and negligent conduct and intentional misrepresentation, defendant MARK EDWARD CARNEY alleges that he has been forced to expend and/or pay to plaintiff a sum in excess of $394,981.00 (Three Hundred Ninety Four Thousand Nine Hundred Eighty One Dollars). . .

The Court, having reviewed Carney's counterclaim under the rules governing a motion to dismiss and the liberal standards enumerated in the caselaw cited herein, finds that although inartfully drafted, it sets forth a separate and distinct cause of action wherein which can be maintained as a separate and independent claim (*see* ***Bendat v Premier Broadcast Group, Inc.,*** 175 AD2d 536, *supra*; ***Grafer v Marko Beer & Beverages, Inc.,*** 36 AD2d 295, *supra*; ***Mehlsak v Mehlsak,*** 81 NYS2d 690, *supra*). The counterclaim is sufficient to support an independent cause of action against plaintiff in the same capacity in which plaintiff has brought her causes of action (*see* ***Geddes v Rosen,*** 22 AD2d 394, 397, 255 NYS2d 585 [1st Dept 1965] *citations omitted*); *aff'd* 16 NY2d 816, 263 NYS2d 10 [1965). Therefore, plaintiff's application to dismiss Carney's counterclaim, is denied.

Carney's sixth affirmative defense, state as follows:

> As and for a sixth affirmative defense, defendant MARK EDWARD CARNEY alleges that the complaint as stated by the plaintiff against MARK EDWARD CARNEY, is frivolous and without basis, contains material misstatements of fact, fails to discloses material facts and was interposed solely to achieve an impermissible and unjust result.

> As a result of the frivolous conduct of Plaintiff in maintaining this action, defendant MARK EDWARD CARNEY sustained unnecessary legal expenses and seeks pursuant to CPLR 8303(a) and Part 130 of the Uniform Rules of Trial Courts, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees plus financial sanctions against plaintiff and plaintiff's counsel for the frivolous conduct alleged.

Carney's seventh affirmative defense, states as follows:

> As and for a seventh affirmative defense, defendant MARK EDWARD CARNEY respectfully alleges that this honorable Court lacks jurisdiction over the person of defendant MARK EDWARD CARNEY. Therefore, the complaint should be dismissed as against defendant MARK EDWARD CARNEY.

Based upon the fact that CPLR 8303(a) is totally inapplicable to this action, as noted herein in the Court's dismissal of Momark's counterclaim, Carney's sixth affirmative defense is dismissed. Also, for the same reasons stated herein in denying Momark's application for sanctions in its counterclaim, Carney's application seeking sanctions for plaintiff's alleged frivolous conduct is also denied.

In his affidavit submitted in support of his motion, Carney questions the Court's jurisdiction of his person in his seventh affirmative defense and submits a separate affidavit as an officer of Momark with Momark's opposition, which also contested the Court's jurisdiction. The Court having already determined that plaintiff has obtained jurisdiction over Carney for the reasons stated above, denies Carney's application. As CPLR 3211(d) is inapplicable to Carney's application regarding plaintiff's motion to dismiss his affirmative defenses, Carney's sixth and seventh affirmatives defenses are dismissed.

Accordingly, plaintiff's motion is decided as herein indicated and defendants' motion is denied. This constitutes the Order and decision of the Court.

DATED: 1/3/07

THOMAS F. WHELAN, J.S.C.