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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON JOAN A. MADDEN

PART 11

Index Number : 117452/2005

STANLEY LISTOKIN

VS.

LENORE KREITMAN

SEQUENCE NUMBER : 001

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE 8-2-07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

FILED
JAN 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: December 17, 2007

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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STANLEY LISTOKIN, INDEX NO. 117452/05

Plaintiff

-against-

LENORE KREITMAN,

Defendant.

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JOAN A. MADDEN, J.:

Defendant, Lenore Kreitman ("Kreitman") moves for summary judgment dismissing the complaint, and plaintiff, Stanley Listokin ("Listokin") opposes the motion. For the reasons set forth below, the motion for summary judgment is granted in part and denied in part.

Background

Listokin, who is a businessman, commenced this action to recover a diamond engagement ring he gave to Kreitman with an alleged value of $200,000, as well as other items of property valued by him at $100,000.00 ("disputed property")[1], which he allegedly purchased between 1999 and 2001, while the couple resided together in Kreitman's apartment.

Both parties agree that in or around 1998, Listokin and Kreitman became engaged to be married and in March of 1999, Listokin purchased a diamond engagement ring for $76,200[2],

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[1]In his complaint, Listokin claims that he purchased "numerous objects of furniture, crystal, china, objects of art, paintings and household goods...including objects by Lalique and Baccarat and art by Picasso totaling approximately fifty thousand dollars...", and currently valued at $100,000. (Complaint ¶ 40)

[2]While the complaint alleges that the ring was purchased for $85,000 (Complaint ¶ 13), an invoice for the rings indicates a price of $76,200.

which he gave to Kreitman in contemplation of marriage. During the entire course of the couple's relationship, Kreitman knew that Listokin was married and undergoing divorce proceedings. Kreitman, who is a corporate attorney, gave Listokin certain legal advice regarding his pending divorce, as well as other business matters. However, Listokin always maintained independent legal counsel in both his personal and business affairs. It is undisputed that Listokin moved into Kreitman's apartment in October 1998, and that between 1999 and 2001 Listokin purchased various items for the apartment.

Listokin and Kreitman eventually terminated their engagement. According to Kreitman, the engagement ended when Listokin moved out of her apartment in September of 2001. Although Listokin concedes he moved out in September 2001, he maintains that the engagement did not end until December of 2004. In July or August 2004, Listokin's marriage to his wife was terminated by a Judgment of Divorce. In December 2004, Listokin remarried his former wife.

On December 15, 2005 Listokin commenced this action in which he asserts thirteen causes of action.

The first cause of action seeks the return of the engagement ring under Civil Rights Law § 80-b ("§ 80-b"), which permits a plaintiff to recover property given in contemplation of a marriage that has failed to occur. The second cause of action alternatively seeks damages in the amount of $200,000, which is alleged to be the ring's current value.

The third, fourth and fifth causes of action allege that a contract implied in law existed between the parties that Kreitman would return the ring in the event the marriage did not occur, and that Kreitman's refusal to return the ring is a breach of that contract and has resulted in Kreitman being unjustly enriched.

The sixth and seventh causes of action allege that Kreitman has illegally retained and converted the disputed property to her own use, and that unless she is compelled to return the property, or to pay damages in the amount of $100,000, she will have been unjustly enriched.

The eight and ninth causes of action allege that Kreitman wrongfully and unlawfully retained the engagement ring and disputed property, despite Listokin's demands for their return, and seeks damages in the amount of $300,000 with interest. The tenth and eleventh causes of action purport to assert claims of fraud, and allege that Kreitman, as an experienced lawyer with superior knowledge of the law, fraudulently induced Listokin to purchase an expensive engagement ring, when she knew that he might not be able to recover it from her in the event the parties' marriage never occurred.

The twelfth and thirteenth causes of action, for breach of fiduciary duty, allege Kreitman owed a fiduciary duty to Listokin based on a purported attorney-client relationship, and that she breached this duty when she failed to disclose that he might not be able to recover the ring in the event the marriage did not occur.

After Kreitman answered the complaint, she moved for summary judgment, arguing that Listokin's claims for recovery of the engagement ring and disputed property are all subsumed under Civil Rights Law § 80-b, as they were given to her contemplation of marriage, and that Listokin is barred from asserting a § 80-b claim to recover these items since he was married, and acting under an impediment to marriage at the time the gifts were conferred. See Lowe v. Quinn, 27 N.Y.2d 397, 402 (1971). Alternatively, Kreitman argues that even if there were independent legal bases for Listokin's varied claims, they are either time barred or fail to state a cause of action.

In support of her motion for summary judgment, Kreitman submits her affidavit in which she avers that the engagement terminated in September of 2001, when Listokin moved out of her apartment. Kreitman states that following the separation, there was never any question that she would retain the engagement ring and property, which were given to her as either unconditional gifts or in contemplation of marriage. She also states that this belief was reinforced by Listokin's failure to demand the return of the ring or the disputed property, until she received a letter dated December 8, 2005, from Listokin's counsel threatening her with legal action should she fail to return the items.

With respect to plaintiff's allegations of fraud, Kreitman admits to assisting Listokin in selecting the ring. However, she states that her involvement never rose to the calculating level that Listokin implies, and further maintains that she never insisted, or even requested, that Listokin buy her a ring. Moreover, Kreitman states that there was no contractual agreement or understanding that the ring would be returned in the event the marriage did not occur, and that contrary to Listokin's allegation of superior knowledge, she was never aware, prior to the commencement of this action, that Listokin was acting under an impediment that would preclude his recovery of the engagement ring, and that although she is an attorney, her expertise is in corporate law, and not the law governing the exchange of gifts given in contemplation of marriage.

With respect to the existence of fiduciary duty, Kreitman admits that she advised Listokin from time to time on various legal issues, but that those discussions never rose to the level of attorney-client relationship, and that Listokin maintained independent counsel to represent at all times in his personal and business relations.

In opposition, Listokin contends that a dispute remains over the approximate date the engagement was terminated. According to his opposition affidavit, the parties terminated the engagement in December of 2004, not in September of 2001 as stated by Kreitman. Listokin also contends that none of the evidence submitted at this time is dispositive of the issue, and that the date is critical to the determination of the application of various statutes of limitation.

Listokin also challenges Kreitman's contention that his claims relating to the disputed property are subsumed under § 80-b. In his affidavit, Listokin states that the property was purchased by him for the couple's mutual use, and was never conferred to Kreitman in contemplation of marriage nor as unconditional gifts, and thus the disputed property does not fall within the framework of § 80-b. See Leemon v. Wicke, 216 A.D.2d 272 (2d Dept. 1995) (denying summary judgment with respect to property not given in contemplation of marriage). Listokin also argues that Kreitman should be equitably estopped from raising a defense against his § 80-b statutory claim, based on the application of the so-called doctrine of "special facts,"

In reply, Kreitman submits an additional affidavit in which she states that Listokin's contention that the engagement ended in December of 2004 is incredible given that he admitted to remarrying his current wife at that time. Kreitman admits that she and Listokin remained friends following the end of their engagement, but their relationship was no longer intimate, and although they may have attended the same gatherings, it was never together, let alone as an affianced couple. Kreitman avers that although she admitted to being aware of a "potential impediment" to the marriage, this was in reference to her knowledge of Listokin's ongoing divorce proceedings, not in relation to his ability to recover the ring should the marriage not occur. Moreover, Kreitman contends that plaintiff's allegations of misconduct are without basis,

where there is no proof that she had superior knowledge or that she owed him a fiduciary duty.

With regard to the disputed property, Kreitman admits that Listokin purchased some items, which he conferred to her as gifts or in contemplation of marriage. However, she maintains that the gifts were not the extravagant list which plaintiff claims. Specifically, Kreitman denies any knowledge of specific paintings, objects of art, or Lalique. In response to plaintiff's allegations concerning "certain art by Picasso," Kreitman submits an invoice for a Picasso plate which is made out in her name and indicates that she is the purchaser.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegard v New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof, in admissible form, to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Civil Rights Law § 80-b states that "nothing in this article [contained] shall be construed to bar a right of action for the recovery of chattel...or the value thereof... when the sole consideration for the transfer of the chattel...was a contemplated marriage which has not occurred..." Section 80-b is intended "to return the parties to the position they were in prior to becoming engaged, without rewarding or punishing either party for the fact that the marriage failed to materialize." Gaden v. Gaden, 29 N.Y.2d 80, 88 (1971). However, when, as here, one of the parties is married, the courts have held that an engagement ring or other property given in

contemplation of marriage may not be recovered on the grounds that "[a]n agreement to marry under such circumstances is void as against public policy... and it is not saved or rendered valid by the fact that the married individual contemplated divorce and that the agreement was conditioned on procurement of the divorce." Lowe v. Quinn, 27 N.Y.2d 397, 400 (1971)(internal citations omitted); see also, Raji v. Nejad, 256 A.D.2d 12 (1st Dept. 1998).

In this case, it is undisputed that Listokin was married at the time he gave the engagement ring to Kreitman in contemplation of marriage. Therefore, under the controlling New York precedent, Listokin is barred from recovering the ring under § 80-b.

Furthermore, contrary to Listokin's argument, the doctrine of special facts does not apply to equitably estop Kreitman from asserting an impediment to marriage as a defense. Under the doctrine of "special facts" a duty to disclose arises where "'one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair.'" Swersky v. Dreyer & Traub, 219 A.D.2d 321, 327 (1st Dept. 1997) appeal withdrawn 89 N.Y.2d 983 (1997). In the present case, Listokin asserts that the doctrine of special facts applies as Kreitman urged him to purchase an expensive ring and, as a corporate lawyer, she knew Listokin was acting under a potential impediment to recovery of the ring should marriage between the parties not occur. This argument is without merit, however, since as a business man who had retained counsel in connection with his divorce proceedings and otherwise had access to lawyers, it cannot be said that Kreitman had any superior knowledge of any alleged facts regarding Listokin's inability to recover the ring in the event the parties did not marry. In any event, the doctrine does not apply since the alleged undisclosed facts are not facts at all but, at best, undisclosed legal advice that Listokin did not seek from Kreitman.

Listokin's alternative basis for recovery of the engagement ring is that there is an implied in fact contract between the parties that the transfer of the engagement ring was subject to the condition, implied in law, that Kreitman would return the ring to Listokin. A contract implied in law "is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it..." Grombach Productions, Inc. v. Waring, 293 N.Y. 609, 615 (1944) mot to reargue den. 294 N.Y. 697 (1945), citing,Miller v. Schloss, 218 N.Y. 400, 407 (1916). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Paramount Film Distribution Corp. v. State of New York, 30 N.Y.2d 415, 421 (1972), cert denied, 414 U.S. 829 (1973).

Here, there is no such basis for finding a contract implied in law, where such a claim would essentially circumvent the prevailing New York law barring the recovery of gifts given in contemplation of marriage, where one party is acting under an impediment to that marriage. Lowe v. Quinn, 27 N.Y.2d 397. Moreover, New York's adoption of Civil Rights Law §§ 80-a-84 "'abolished all causes of action to recover sums of money as damages for breach of contract to marry'... and provided that 'no contract to marry...shall operate to give rise...to any cause or right of action for the breach thereof.'" Gaden v. Gaden, 29 N.Y.2d at 84 (1971) citing Civil Practice Act §§ 61-b, 61-d.

In the tenth and eleventh causes of action, plaintiff alleges that defendant fraudulently induced him to purchase an expensive engagement ring, knowing that he may not be able to

recover the ring if the marriage failed to occur. To state a claim for fraud in the inducement, a plaintiff "must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the material misrepresentation or omission, and injury." Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 (1996).

Here, the gravamen of the fraud claim is that Kreitman failed to inform Listokin that he would not be able to recover the ring if the marriage did not occur. However, as indicated above, the allegedly omitted information does not consist of undisclosed or omitted facts, but rather legal advice regarding Listokin's right to recover the ring, which Listokin does not claim that he sought from Kreitman, and which he could have obtained from any attorney, including the attorney Listokin had retained in connection with his divorce proceeding. In addition, it cannot be said that Kreitman had special knowledge of any facts the would give rise to a cognizable claim for fraud based on a failure to disclose. See Mandarin Trading, Ltd. v. Wildenstein, 17 Misc.3d 1118(A), 2007 WL 3101235, *5 (Sup Ct NY Co. 2007). Accordingly, the fraud claims must be dismissed, and the court need not reach whether the claims are time barred.

Listokin's claims against Kreitman for breach of fiduciary duty are also without merit. To state a cause of action for beach of fiduciary duty claim, a plaintiff must establish the existence of fiduciary relationship, and a breach of the fiduciary relationship. Chasanoff v Perlberg, 19 A.D.3d 635 (2d Dept 2005); Wilhelmina Artist Mgt., LLC v. Knowles, 8 Misc. 3d 1012(A) (Sup. Ct. N.Y. County 2005). Here, Listokin maintains that Kreitman owed him a fiduciary duty to inform him that he would not be able to recover the ring if the marriage did not occur based on a purported attorney-client relationship between them. In this instance, although

there is evidence that Kreitman gave Listokin legal advice regarding his divorce proceedings and with respect to certain business transactions, Listokin admits that he never formally retained Kreitman with respect to these matters, but instead retained other counsel. Under these circumstances, where Listokin sought Kreitman's legal advice in the course of their personal relationship, it cannot be said that an attorney-client relationship existed between them. See People v. O'Connor, 85 A.D.2d 92, 96 (4th Dept 1982)(holding that for there to be an attorney-client relationship, "[t]he client must consult the attorney as an attorney, not as a friend or to engage him in non-legal matters"). In any event, Listokin does not claim that he sought Kreitman's legal advice with respect to the engagement ring at issue.

Furthermore, since this action was not commenced until December 2005, which is more than three years after the purchase of the engagement ring in March 1999, any claim for breach of fiduciary duty would be time-barred. See Bouley v. Bouley, 19 AD3d 1049 (4th Dept 2005)(breach of fiduciary duty claim which seeks monetary relief is subject to a three-year statute of limitations and there is no discovery accrual rule in the absence of viable allegations of fraud).

Accordingly, the breach of fiduciary duty claims must be dismissed.

While Kreitman is entitled to summary judgment as to Listokin's claims relating to the engagement ring, with one exception, material issues of fact remain which preclude dismissal of the claims regarding the disputed property. Although Kreitman contends that the claims pertaining to the disputed property are subsumed under § 80-b, the record contains conflicting evidence as to whether such property was given to Kreitman in contemplation of marriage or purchased by Listokin for the couple's mutual use during the course of their relationship. Leemon v. Wicke, 216 A.D.2d at 273.

In addition, the timeliness of these claims cannot be resolved as there is conflicting evidence as to when the parties' engagement was terminated and when demand was made for return of the disputed property. On the other hand, as Kreitman submits undisputed evidence that she purchased the Picasso plate, she is entitled to partial summary judgment dismissing the claims to the extent they seek to relief with respect to this item of disputed property.

Accordingly, defendant's motion for summary judgment is granted to the extent of dismissing (i) all claims and portions of claims relating to the engagement ring, and (ii) any claims seeking damages for, or recover of, the Picasso plate.

Finally, given that the court has found that Listokin cannot recover on his claims relating the engagement ring, and the Picasso plate, and it appearing that the Civil Court of the City of New York has jurisdiction over the parties to this action and pursuant to CPLR 325(d) and Rule 202.13 of the Uniform Civil Rules for the Supreme Court and the County Court, as directed below, the remaining claims are appropriately transferred to the Civil Court of the City of New York .

Conclusion

In view of the above, it is

ORDERED that defendant's motion for summary judgment is granted to the extent of dismissing the first, second, third, fourth, fifth, tenth, eleventh, twelfth, and thirteenth causes of action, as well as those parts of the eighth and ninth causes of action relating to the engagement ring; and it is further

ORDERED that defendant's motion for summary judgment is also granted to the extent of dismissing the those portions of the sixth, seventh, eighth and ninth causes of action seeking

damages for, or recover of, the Picasso plate; and is further

ORDERED that the remainder of the action shall continue upon transfer to the Civil Court of the City of New York, County of New York\York, County of New York; and it is further

ORDERED that this action, bearing Index No. 117452/05 be, and it hereby is, removed pursuant to CPLR 325(d) from this Court and transferred to the Civil Court of the City of New York, County of New York; and it is further

ORDERED that the Clerk of the Supreme Court, New York County shall transfer to the Clerk of the Civil Court of the City of New York all papers in this action now in his possession, upon payment of his proper fees, if any, and the Clerk of the Civil Court of the City of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the Clerk of the County of New York, shall issue to this action a Civil Court Index Number without payment of any additional fees; and it is further

ORDERED that the above-entitled action be, and it hereby, transferred to said Court, to be heard, tried, and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

Dated: December 19,2007

J.S.C.