At an IAS Term, Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of September, 2008.

P R E S E N T:

HON. LAURA LEE JACOBSON,
Justice.

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KOLEL DAMSEK ELIEZER, INC.
Plaintiff,

- against - Index No. 9261/06

VICTOR SCHLESINGER, AS REPRESENTATIVE/ ADMINISTRATOR OF THE GOODS AND CHATTELS OF MIKLOS SCHLESINGER A/K/A YITZCHAK SCHLESINGER A/K/A JACK SCHLESINGER ET AL.
Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Kolel Damsek Eliezer, Inc. (KDE) moves, pursuant to CPLR 3211 (a)(5), to dismiss the first, second and fourth counterclaims of defendants Victor and Eva Schlesinger (defendants) on the grounds that they are barred by the applicable statute of limitations and by the doctrines of res judicata and collateral

estoppel or, in the alternative, to dismiss the third counterclaim, pursuant to CPLR 3211(a)(7), on the ground that it fails to state a cause of action; to dismiss the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth affirmative defenses, pursuant to CPLR 3211(b), on the ground that the defenses have no merit; and for summary judgment, pursuant to CPLR 3212, dismissing the complaint.

Factual Overview

State Action

In this action, plaintiff KDE (plaintiff or KDE), a New York not-for-profit religious corporation, seeks a declaration, pursuant to Article 15 of the Real Property Actions and Proceedings Law (RPAPL), for a determination that it is the lawful owner of property known as 712 Wyeth Avenue, located in Brooklyn, New York, designated as Block 2197, Lot 29 (formerly a part of Lot 1), on the Kings County tax map (the Property). Defendant Victor Schlesinger (Victor) is the administrator of the goods and chattels of his father, Jack Schlesinger (Jack). Defendant Eva Schlesinger (Eva), Jack's widow, is the beneficiary and administratrix of Jack's estate. Victor, Eva and Jack's brother, Nathan Schlesinger (Nat), are all named defendants as they may claim some right to the Property adverse to KDE's alleged fee ownership.[1]

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[1]The remaining defendants are named for the same reason (Wallabout Properties, Inc., Keap Street Realty Corp., NJS Properties, Inc., NJR Properties, Congregation ZVI, and Congregation Shmiel V'Yakov [CSV]).

The complaint[2] alleges that in June, 1973, Jack, Nat and Regina (Jack and Nat's mother) (collectively the Schlesingers) as co-equal partners doing business as NJR, took title to the Property. In August, 1973, NJR obtained financing from the New York Job Development Authority (the JDA). In connection with this financing NJR, which owned Lot 1 of Block 2197, of which the Property then comprised approximately one-third, gave the JDA a mortgage on Lot 1. NJR defaulted on the JDA mortgage, and the JDA commenced an action against NJR and the Schlesingers in the Supreme Court, Kings County to foreclose the JDA mortgage. In order to cure its default, NJR agreed with the JDA to lease all of Lot 1 to various entities whose total rent would suffice to pay the entire JDA mortgage. As part of that agreement, NJR leased the Property to Yeshiva Beth Yehuda V'Chaim (Betlan), a New York religious corporation, which operated a synagogue and religious girls' school. Pursuant to the lease, Betlan was granted an option to purchase the Property for the full amount of the lease payments (if paid over twenty years), plus a nominal fee of $100.

NJR thereafter collected rents from the Lot 1 leases but failed to make its mortgage payments to the JDA, and defaulted on the JDA mortgage again. As a result, the JDA proceeded with its foreclosure action against NJR. In December 1979, the JDA took title to Lot 1 pursuant to the JDA foreclosure action and remained in title for approximately 20 years, while allowing the Lot 1 leases, including the Betlan lease, to remain in effect. After the expiration of the 20-year term of the Betlan lease, and in fulfillment of Betlan's option

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[2]The complaint is dated March 22, 2006.

to buy, in December, 1998, the JDA conveyed the Property to defendant CSV, as purported assignee of Betlan. Nat is alleged to have acted as president of CSV, which he purportedly formed in an effort to obtain the Property for himself through the Betlan lease option. In September, 1996, Nat and the Rabbi of Betlan agreed to incorporate CSV as a religious corporation, purportedly to further the goal of Nat to steal the Property from Betlan.

In January, 2000, officers/trustees of Betlan and CSV were elected (Mrs. Lichtenstein, Moshe Ehrenfeld and Zalman Klein) and Nat was voted out of office. In addition, a declaration was recorded against the Property in the Kings County City Registrar's Office, which stated that any instrument relating to the Property was invalid unless executed by Mrs. Lichtenstein (the CSV Declaration).

Upon learning that he had been voted out of office, Nat formed NJS Corp., and caused a deed to be executed which purportedly conveyed the Property to NJS. The transfer was made without consideration, and without approval from the Attorney General or the court. In June, 2000, Nat filed a petition in this court on behalf of CSV requesting that the transfer be approved by the Attorney General and the court. The Attorney General denied the application and the transfer was not approved by the court.

In July, 2000 Nat, individually and as president and trustee of CSV, filed an action in this court seeking to vacate the CSV declaration (*Nat Schlesinger v Zalman Klein*, Index No. 23641/00) (the Nat Schlesinger Action). CSV commenced a third-party action against NJS to declare the CSV-NJS transfer void. After extensive litigation, the parties entered into a

Stipulation of Settlement[3] dated June 21, 2001, which was so-ordered by Justice Robert J. Gigante (Supreme Court, Kings County). It provided that the Property would be sold to KDE, and that the proceeds of the sale would be divided among the rival claimants. The order further provided that CSV had good title to the Property and that Nat and NJS had no claim to the Property.[4]

In December, 2001, in the action entitled *Schlesinger v Schlesinger* (Index No. 27246/00, Supreme Court, Kings County) (the Schlesinger Action), Victor made a motion to add CSV and Betlan as defendants. The motion was denied by Justice Rivera and no appeal was taken from that order.

Thereafter, Nat made three failed attempts to set aside the CSV-KDE transfer. Justice Rivera denied two motions to do so in the Schlesinger Action and Justice Firetog denied the third motion, which was made in the previously settled Nat Schlesinger Action. No appeals were taken from these orders.

Subsequently, in April, 2003, a so-ordered arbitration agreement was entered into the Schlesinger action, which resulted in an award dated June 26, 2003.[5] The award indicated

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[3] Under Kings County Index Numbers 23641/00, 75866/00 and 20959/00.

[4] The Stipulation was approved by the Attorney General and by Justice Richard Rivera on April 26, 2002. The CSV-KDE transfer closed on April 29, 2002. According to the complaint, KDE has been the sole record owner and title-holder of the Property since that time.

[5] This action appears to have been one to impose a constructive trust on the Property (*see Schlesinger v Schlesinger*, 21 AD3d 942 [2005]).

on its face that it was addressed to Nat, Eva, and Victor and held, at least between the parties to that arbitration, that Jack was the owner of a 50% interest in the Property. Neither KDE nor any officer of or person affiliated with KDE was a party to the arbitration agreement, and Victor never attempted to demand arbitration against KDE despite knowing that KDE was the sole record owner of the Property.

In 2003, Victor moved to clarify a portion of the arbitration award with respect to the ownership of the Property. As a result, the arbitrator issued a clarification of the award ruling the Jack, Victor's father and predecessor in interest, was the owner of a fifty percent interest in the Property. Thereafter, Victor moved to confirm the arbitration award and to direct the Sheriff of the City of New York to execute a deed for a fifty percent interest in the Property to Victor pursuant to the arbitration award.

On or about October 1, 2003, Justice Spodek (Supreme Court, Kings County), modified the arbitration award *sua sponte* to provide that the estate of Jack had a 50% ownership interest in the proceeds of the Property rather than a 50% ownership interest in the title to that real property, and also denied Victor's request to direct a Sheriff's deed (the Spodek Order).

On appeal, the Appellate Division, Second Department reversed Justice Spodek's sua sponte modification of the arbitration award, but also held that the arbitration award could not affect the rights of KDE as owner of the Property because KDE had not been a party to the arbitration (unless it was in privity with a party to that arbitration). In this regard, the

Appellate Division stated that "[t]his is an issue that, as acknowledged by the parties at oral argument, must await subsequent litigation, and we express no opinion on it." The Appellate Division also held that while the rights of KDE might have been affected by the plaintiff's request for a sheriff's deed, Victor had not appealed the denial of his request for the Sheriff's deed (*Schlesinger v Schlesinger*, 21 AD3d 942 [2005]).

In November, 2005 Victor submitted an *ex parte* judgment in the Schlesinger Action, even though Justice Firetog had ordered all papers served on the attorneys for KDE and Betlan (the Victor Judgment).

The Victor Judgment confirms the arbitration award but also contains a decree that Victor has a fifty percent interest in the Property, which is described by block and lot and in sufficient detail to permit recordation of the Victor Judgment against the Property.

The complaint alleges that the recordation of the Victor Judgment against the Property could give the impression that Victor is a record 50% owner of the Property, when KDE is the 100% owner of the Property; that a judgment in this action should establish KDE's ownership in the Property; that any claims by Victor and others to the Property are unfounded; that any such claims are barred by the conveyances in the chain of title running from the JDA deed through and including the CSV-KDE transfer; and that by reason of the foregoing, KDE should be decreed the sole owner of the Property.

Federal Action

On October 27, 2005, Eva Schlesinger (Eva) commenced an action against Nat, KDE,

CSV, Betlan and others in the United States District Court for the Eastern District of New York. On March 21, 2006, Eva filed an amended complaint alleging that the defendants therein engaged in a conspiracy to deprive Jack of his interest in the Property, in violation of the Racketeer Influenced and Corrupt Organization Act (RICO) (18 USC § 1962). [As noted above, KDE commenced the instant state action on or about March 23, 2006].

Thereafter, by decision dated February 8, 2007, the Federal District Court granted defendants' motion to dismiss the federal amended complaint, finding that it failed to sufficiently plead any predicate acts of racketeering activity by any of the defendants. In this regard, the court found that the plaintiff (Eva) had failed to state a claim under any section of the RICO statute and, without sufficient allegations of any predicate acts, the plaintiff was also unable to state a claim for conspiracy to violate RICO. The court dismissed the amended complaint without prejudice and noted that the plaintiff could file a second amended complaint within thirty days.

On April 9, 2007, following the court's grant of an extension of time, plaintiff (Eva) (hereinafter plaintiff) filed a second amended complaint. As described by the federal court, plaintiff alleged that the defendants had engaged in a conspiracy to deprive Jack of his interest in the Property, in violation of RICO. Plaintiff alleged that the conspiracy was orchestrated by defendants Nat Schlesinger and Louis Kestenbaum, and that these defendants fraudulently transferred real property to and from nominee individuals and corporations, including religious and not-for-profit companies, in order to deprive plaintiff's family of any

right to the Property. Plaintiff claimed that defendants Joel Kestenbaum and Herman Niederman acted at the direction of Nat and Louis Kestenbaum and that defendants KDE, Congregation Shmiel and D'Betlan were owned or controlled by Nat and Louis Kestenbaum.

The complaint further alleges that the defendants engaged in activity constituting racketeering by committing mail fraud, wire fraud, and money laundering, in violation of 18 USC §§1962 (c) and (d). Plaintiff also claimed that pursuant to state law, she was entitled to a decree quieting title to the Property and for an accounting of the rents and profits received by KDE relating to the Property.

As to the history of the Property, the federal court explained:

> "The numerous transfers of the Property set forth in the second amended complaint are confusing, and at times, unclear. According to the Plaintiff's second amended complaint, in the early 1970's, Nat and Jack Schlesinger jointly owned the Property. In the late 1970's the Schlesingers had financial difficulties and were unable to repay loans made by the New York State Job Development Authority ("JDA").
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> Nat Schlesinger negotiated an agreement with the JDA whereby the Property was deeded to JDA and leased back to D'Betlan for a twenty year period. The second amended complaint further alleges that D'Betlan was controlled by Nat Schlesinger. The agreement with the JDA provided an option to purchase the Property for $100 at the expiration of the 20 year period. The agreement also provided that upon expiration of the lease the property would be deeded to Nat Schlesinger or any entity chosen by him. It is alleged that in 1998, Nat Schlesinger exercised the option to purchase the Property on behalf of D'Betlan.
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> It is further alleged that in late 1998, Jack Schlesinger was forced to retire due to an illness. The Plaintiff claims that Nat

> Schlesinger exercised control over the business ventures and also seized control over the properties owned by the two brothers.
>
> According to the second amended complaint, the essence of the fraudulent scheme dates back to the transfer of the Property from JDA to D'Betlan. The Plaintiff contends that D'Betlan assigned its rights to the Property to Congregation Shmiel, a company formed by Nat Schlesinger. The plaintiff alleges that Niederman was a member of the board of Congregation Shmiel and acted in concert with Nat Schlesinger. The Plaintiff contends that Congregation Shmiel held title to the Property in order to hide Nat Schlesinger's true interest in the Property. In January 2000, Nat Schlesinger formed NJS Properties and Congregation Shmiel deeded the Property to NJS Properties. However, a few months later, NJS Properties deeded the property back to Congregation Shmiel. In April, 2002, Congregation Shmiel deeded the Property to KDE. The Plaintiff contends that KDE was controlled by Louis Kestenbaum and that the sale to KDE was part of the conspiracy to defraud Plaintiff.

Summarizing the state court litigation of the parties' interests in the Property, the federal court further stated:

> "In 2000, Jack Schlesinger instituted an action in state court claiming a 50% interest in the Property. In addition, in 2000, the D'Betlan trustees initiated an action against Nat Schlesinger regarding control of D'Betlan and Congregation Shmiel. The Plaintiff contends that this action was contrived as part of the conspiracy to take control of the Property.
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> It is further alleged that the matters pending in state court were resolved by a stipulation in 2001 which was 'so ordered' by Justice Robert J. Gigante of the New York State Supreme Court (the "Stipulation"). The Stipulation approved the conveyance of the Property from Congregation Shmiel to KDE in exchange [for various consideration]. It is alleged that the Stipulation ignored Jack Schlesinger's claim to 50% of the Property. The

> Plaintiff also contends that the payments made to KDE and Congregation Shmiel were disguised as payments to Nat Schlesinger. In April, 2002, the Property transfer was approved by Justice Richard Rivera of the New York State Supreme Court.
>
> The Plaintiff alleges that KDE is a religious corporation operated by Louis and Joel Kestenbaum. It is further alleged that the Stipulation allowed Nat Schlesinger, Congregation Shmiel and D'Betlan to deed and transfer their ownership rights to KDE, enabling Nat Schlesinger to evade taxes and launder funds through a religious corporation."

The federal court concluded by noting that the Appellate Division, Second Department, upheld Jack's claim to a 50% ownership interest in the Property, but that its decision did not affect KDE's ownership interest in the Property, and that any dispute regarding KDE would have to be resolved in future litigation.

Thereafter, all of the defendants in the federal action moved to dismiss for failure to state a RICO claim. They also argued that the RICO claims were barred by the applicable statute of limitations. In opposition, plaintiff argued that her RICO claims were not barred by the statute of limitations because she suffered new and independent injuries within the limitations period. Plaintiff also asserted that she sufficiently pleaded predicate acts of racketeering and the existence of a RICO conspiracy.

By decision dated November 15, 2007, the Federal District Court found that the action was time-barred and that defendants' alleged actions within the limitations period did not result in new and independent injuries to plaintiff. Although the court found that plaintiff's claims were untimely, "to complete the record," the court addressed the merits of the RICO

claims. In this regard, the court found that plaintiff's wire fraud, mail fraud, and other allegations were insufficient to serve as predicate acts under the RICO statute. The court also held that plaintiff's money laundering claim was inadequately pleaded as a predicate racketeering activity with regard to her civil RICO claim.[6] Finally, as to plaintiff's state law claims, the court noted that it had jurisdiction over these claims solely on the basis of its supplemental jurisdiction pursuant to 28 USC § 1367. Stating that it had determined that all of the federal claims should be dismissed, the court held that there was no basis upon which to retain supplemental jurisdiction over the state law claims, and dismissed those claims as well.

Thereafter, in the instant state action, KDE was ordered by the court to accept the answer of the defendants upon payment of $100.00 to KDE. By letter dated January 22, 2008, KDE stated that it had received the check, but that no answer had been served with the check. However, in order to avoid further motion practice, KDE deemed the proposed answer accepted as if it had been properly served, and stated that it would be serving a reply to defendants' counterclaims. KDE, however, did not serve the reply to defendants' counterclaims.

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[6]In addition, although the court determined that plaintiff had failed to state a claim for a RICO violation, and that the second amended complaint would be dismissed for those reasons, it also stated that it had identified other deficiencies in the plaintiff's allegations that would independently support a dismissal of the RICO claims. In this regard, the court found that plaintiff's substantive RICO claim was not sufficiently pleaded with regard to the "pattern" element, and thus dismissed the substantive RICO claim. Further, the court found that plaintiff had failed to allege a distinct enterprise under § 1962(c) and had failed to state a claim under § 1962 (d).

In any event, in its answer in the pending action, the Schlesinger defendants generally denied the allegations of the complaint, and alleged in paragraphs 19, 34, and 48, respectively:

> "That an action has been filed in the United States District Court for the Eastern District of the United States under file number: 05-CIV-5016-ADS WDW 20. That the complaint in the aforesaid federal action is incorporated herein and annexed as exhibit a and made a part of this answer as if more fully set out herein (¶ 19);
>
> That the statement of the conduct of Plaintiff [KDE] and Defendant . . . NAT SCHLESINGER is set out in the complaint in the Federal action annexed hereto as exhibit a and incorporated herein by reference (¶ 34);
>
> That by reason of the conduct of Plaintiff [KDE] and Defendant . . . NAT SCHLESINGER as aforesaid, the answering defendant seeks judgment for the relief sought in exhibit a (¶48)."

In addition, the first counterclaim which KDE seeks to dismiss, alleges:

> "That the statement of the conduct of [KDE] and . . . Nat is set out in the complaint in the Federal Action annexed hereto as exhibit a and incorporated herein by reference.
>
> That the actions of [KDE] and . . . Nat were taken with intent to deprive answering defendant of its interest in the Property that is the subject of this action.
>
> That the Property that is the subject of this action . . . is unique.
>
> That by reason of the conduct of [KDE] and . . . Nat . . . the answering defendant has been deprived of its interest in the Property that is the subject of this action.
>
> That by reason of the above the answering [d]efendants seek judgment recording a deed placing title of the property . . . in the name of the answering defendant.

The second counterclaim KDE moves to dismiss seeks monetary damages based on the conduct of KDE and Nat.

The fourth counterclaim the KDE seeks to dismiss alleges that KDE and Nat failed to comply with the provisions of CPLR 1018; that as a result, defendant [sic] was deprived of its interest in the Property; and that as such, defendants [sic] seek a judgment recording a deed placing title in the Property in the name of defendant [sic].

KDE's motion to dismiss, among other things, the first, second and fourth counterclaims is presently before the court.

Analysis

KDE first moves to dismiss the first, second and fourth counterclaims pursuant to CPLR 3211(a)(5), on the grounds that they are barred by the applicable statute of limitations, and by the doctrines of res judicata and collateral estoppel. Specifically, KDE argues that the causes of action set forth in the counterclaims must be dismissed because the same issue was litigated in the federal action, and the first, second and fourth counterclaims are "based entirely on the allegations and causes of action alleged in the dismissed federal complaint."

KDE also asserts that the pendent state claim seeking a declaratory judgment for quiet title should be dismissed because the judgment awarded to the Schlesinger defendants in *Schlesinger v Schlesinger* (Index No. 27246/00)[7] (the Schlesinger Action) can not affect its title to the Property since the Appellate Division, Second Department, held that KDE was not a party to that action (*see Schlesinger v Schlesinger*, 46 AD3d 539 [2007] [court modified

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[7] In that action, Jack was declared the owner of a 50% interest in the Property.

the caption of *Schlesinger v Schlesinger* (21 AD3d 942) to delete KDE's name from caption]).

In the alternative, KDE contends that to the extent that the dismissal of the federal action and *Schlesinger* (46 AD3d 539) did not extinguish all of defendants' counterclaims, the counterclaims are barred by the six-year statute of limitations set forth in CPLR 213(1), (2), (7), or (8), measured by the accrual date for the RICO claims found by the federal court in the federal action.

In opposition, the Schlesinger defendants first argue that KDE's motion to dismiss is "late" because KDE's time to reply to their counterclaims "expired in January 2008[,] a date before it filed and served its motion to dismiss in February 2008." Thus, defendants argue that the court should enter a default judgment against KDE.

Substantively, defendants argue that their state law claims should not be dismissed on res judicata grounds because the federal court did not dismiss those claims on the merits. As to KDE's claim that the counterclaims are barred by the statute of limitations, defendants assert that this argument is without merit since it would mean that four years of the six-year statute of limitations period would have elapsed before KDE had taken title to the Property. In this regard, defendants assert that the first time the transfer of the Property became public record was in April 2002, when the deed transferring title from Nat's entity to KDE was filed, and that therefore this date was the first day they could have been made aware of the "*fraud being committed*" by KDE. Defendants further state that based upon CPLR 213, they have a six-year statute of limitations, which would start running no earlier than April 29,

2002 (when the deed was transferred) or November 2001 if the Gigante Stipulation is used to calculate the date, and that in either event, their claims are timely. Defendants also note that the underlying claim in this action is one to adjudicate a cloud on title, which has a six-year statute of limitations.

Finally on this issue, defendants reject KDE's argument that based upon the ruling in *Schlesinger* (46 AD3d 569), "nothing in the Schlesinger action could affect KDE's title to the Property in any way." Defendants note that while in *Schlesinger* (21 AD3d at 945), the Appellate Division, Second Department held that "[n]either the [arbitration] award (which awarded Jack a 50% interest in the Property) nor its confirmation will adversely affect KDE's rights since KDE has not been made a party," the court also held that such would not be the case if KDE was in privity with a party to the arbitration and that such issue, "as acknowledged by the parties at oral argument, must await subsequent litigation, and we express no opinion on it (*id.*)." Thus, defendants assert that the court did not rule on whether KDE had a claim to the Property interest which had been found to belong to them, leaving that issue open for future litigation.

As an initial matter, defendants' claim that KDE's motion to dismiss is untimely is rejected. CPLR 3211(e) requires that a motion to dismiss a cause of action under CPLR 3211(a) must be made before service of the responsive pleading is required. Pursuant to CPLR 3012, service of a reply must be made within twenty days after service of the pleading to which it responds. Here, the answer which contained counterclaims was deemed served on January 22, 2008. Thus, KDE had 20 days - until February 11th, 2008 - to serve its

response to the counterclaims or to serve its motion to dismiss. Since KDE served its motion to dismiss by overnight mail on February 11th, 2008 and inasmuch as service by mail is complete upon mailing (CPLR 2103[b][2]), the motion to dismiss was timely made.

On the merits, that branch of KDE's motion to dismiss defendants' first, second and fourth counterclaims on the grounds of res judicata and collateral estoppel is denied. In this regard,

> "[w]hile res judicata effect is given to judgments on the merits rendered by Federal courts, res judicata will not bar a State action where it is clear that the pretrial dismissal of the Federal cause of action did not include adjudication of a pendent State claim on its merits. [W]hether this is because the Federal court lacks jurisdiction over pendent State claims once it dismisses a Federal claim prior to trial, or because the Federal court is presumed to have declined to exercise its discretionary pendent jurisdiction over the State law claims, the result is the same as long as there is no clear indication by the Federal court that there was a dismissal of the State claim on the merits. The rule in New York is that a dismissal of a pendent State action by a Federal court is presumed to be not on the merits absent a clear indication to the contrary" (*Browning Ave. Realty Corp. v Rubin*, 207 AD2d 263, 265 [1994][internal citations and quotations omitted]).

Here, the instant action is not barred by res judicata since jurisdiction was never assumed by the Federal court over the state claims to quiet title and to an accounting (*id.*, citing *Creative Bath Prods. v Connecticut Gen. Life Ins. Co.*, 173 AD2d 400 [1991], *lv denied* 79 NY2d 751 [1991]; *Travelers Indem. Co. v Sarkisian*, 139 AD2d 27, 29 [1988]; *see also Van Hof v Town of Warwick*, 249 AD2d 382 [1998]). Thus, the doctrine will not bar the assertion of the pendant state law claims in the instant action (*id.*, citing *McLearn v Cowen & Co.*, 60 NY2d

686 [1983]; *Lamontagne v Board of Trustees*, 183 AD2d 424, 425 [1992], *lv denied* 80 NY2d 759 [1992]; *Evans v L.F. Rothschild, Unterberg, Towbin, Inc.*, 131 AD2d 278, 281[1987]). "The State claims were available in the Federal court only through pendent jurisdiction. Where the Federal court disposed of the case purely on Federal grounds, the Federal court necessarily 'declined to exercise jurisdiction over any accompanying claim based exclusively on State law, and ... dismissed that claim without prejudice to its prosecution in the State courts'" (*id.*, quoting *Capital Tel. Co. v New York Tel. Co.*, 146 AD2d 312, 316 [1989]).

Further, the doctrine of collateral estoppel is inapplicable here. "'Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same'" (*Bank v Brooklyn Law Sch.*, 297 AD2d 770 [2002], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). In this regard, "[t]here are two necessary requirements for the invocation of the doctrine of collateral estoppel. 'There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling'" (*id.*, quoting *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]). "Where . . . the parties in the State and Federal proceedings are identical and where the merits of the plaintiff's claims was afforded a full and fair opportunity to litigate, collateral estoppel precludes relitigation of the claim" (*Browning Ave. Realty Corp.*, 207 AD2d at 266).

In its reply, KDE, relying on *Browning* (207 AD2d 263), argues that while the failure of a federal court to exercise jurisdiction over a pendent state claim would not constitute res judicata, the pendent state claim could nevertheless be barred by the doctrine of collateral estoppel arising out of the dismissal of the federal claim over which the court *did* exercise jurisdiction. In *Browning* (207 AD2d 263), the plaintiff commenced an action in Federal court for mail and wire fraud under RICO. The federal court dismissed on the grounds that it failed to state a RICO claim and failed to satisfy the particularity requirements for pleading fraud. Plaintiff then commenced a state action alleging, among other things, common law fraud and breach of fiduciary duty. The *Browning* court found that plaintiff's complaint, containing causes of action for, among other things, common law fraud, was virtually identical to the plaintiff's federal complaint alleging mail and wire fraud under RICO, that a cause of action for the violation of Federal mail fraud statutes was broader than a common law fraud claim, and that therefore the federal court's dismissal of the federal complaint warranted dismissal of the state action. Thus, while in *Browning* a claim for common-law fraud was in effect held to be subsumed in a claim for mail and wire fraud under RICO, in contrast, the pendent claims in this action are a claim to quiet title and an accounting. Therefore, while review of the RICO claims in *Browning* encompassed, in effect, the common law fraud claims, which resulted in the determination that the common law fraud claims were barred by the doctrine of collateral estoppel, review of the RICO claims by the Federal District Court in this matter did not constitute a review of the state pendent claims since the state pendent claims were a claim to quiet title and an accounting, which were not,

in effect, subsumed by their dismissed RICO claims. As such, defendants' counterclaims are not barred by the doctrine of collateral estoppel.

KDE also asserts that the federal court's determination of the accrual date for the statute of limitations for Eva Schlesinger's RICO claims is binding as the accrual date for the injury in this action since the doctrine of collateral estoppel applies to facts determined by the federal court. In addition, KDE contends that defendants' state pendent claims are barred by the statute of limitations set forth in CPLR 213 (1), (2), (7) (six-year statute of limitations), and (8) (two-year statute of limitations). However, KDE has not sustained its burden of making this showing. While the federal court's finding that Eva Schlesinger, plaintiff in the federal action, discovered the wrong before 2000, is binding on defendants in this action (*see Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481 [1979]), this does not mean that defendants' quiet title counterclaims are barred by the statute of limitations, as KDE argues. In this regard, a RICO claim has a four-year statute of limitations, and a cause of action to recover damages based on a violation of 18 USC § 1962 accrues when the plaintiff discovered or should have discovered the injury (*Bankers Trust Co. v Rhoades*, 859 F.2d 1096, 1102 [2d Cir. 1988]). In contrast, a cause of action to quiet title where, as here, the plaintiff is not in possession of the property, must be brought within six years of the sale of the property *or* within two years afer discovery of the fraud, whichever is greater (*Piedra v Vanover*, 174 AD2d 191 [1992]). Here, although the federal court found that defendants in this action (plaintiff in the federal action) discovered the fraud before 2000, the sale of the Property occurred on April 29, 2002, when the deed was transferred from CSV to KDE.

Since defendants in this action had either six years from date of the sale of the Property or two years after discovery of the injury to interpose their counterclaims, whichever was greater, defendants had until April 29, 2008 to assert their counterclaims. Since the counterclaims were interposed no later than January 22, 2008, when KDE accepted defendants' answer, the counterclaims are not time-barred.

Lastly on this issue, the court rejects plaintiff's claim that *Schlesinger* (46 AD3d 539) extinguished defendants' claim to quiet title. In *Schlesinger* (21 AD3d 942), the Appellate Division, Second Department found that Justice Spodek's modification of the arbitration award (which gave Victor a 50% undivided ownership interest in the Property) was erroneous. The court found that in making the modification, Justice Spodek was prompted by his concern for KDE's due process rights. However, the Appellate Division held that this concern was misplaced since KDE was not a party to the arbitration or the action from which it arose, and that "neither the award nor its confirmation will adversely affect KDE's rights since KDE has not been made a party, "unless it is in privity with a party to the arbitration" (*id.*at 945). As defendants argue, the Appellate Division further held that such issue "must await subsequent litigation, and we express no opinion on it" (*id.* at 945). Subsequently, as noted above, in *Schlesinger* (46 AD3d 539), the Appellate Division, Second Department granted that branch of KDE's motion to modify the caption by deleting its name, holding that KDE's name did not appear in the action (*Schlesinger*, 21 AD3D 942), and that it was not a legal party to the appeal. Thus, contrary to KDE's claim, the Appellate Division did not make a ruling on whether KDE had a claim to the Property and left that question open for

future litigation. Accordingly, the two *Schlesinger* decisions rendered by the Appellate Division do not serve to bar defendants from asserting their counterclaims to quiet title.

In the alternative, plaintiff argues that the court should dismiss, pursuant to CPLR 3211(a)(7), defendants' third counterclaim, which alleges that KDE did not comply with CPLR 1018 and that as a result, defendant [sic] was deprived of her interest in the Property. CPLR 1018 provides that "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Thus, CPLR 1018 is invoked when a party transfers his or her interest in the subject matter of the action to another person while the action is pending. Further, the statute authorizes continuation of the action by or against the original party (the assignor or the transferor) without the need for substitution of the assignee or transferee (Alexander, McKinney's Cons Laws of NY, Book 7B, CPLR C1018, p 222). KDE argues that since no assignment occurred in this action, CPLR 1018 is not implicated; that even assuming there had been an assignment, CPLR 1018 permits the action to continue unabated; and that it did not fail to comply with any of the provisions of the statute.

In opposition, defendants argue, that "even if a party (presumably the transferee) is not substituted pursuant to CPLR 1018 for the transferor, such party (the transferee) will still be bound by the judgment and that non-party's interest will have been represented by the a [sic] party to the action." Defendants further assert that "[f]rom this, a Court can find that there was privity between KDE and a party to the prior action, in which case it will be bound

by the judgment as it took title subject to the pending action, and its interests were represented by [Nat] . . . [and] any admissions previously made by Nat will be imputed to KDE."

To the extent defendants are arguing that KDE could be substituted for CSV in this action, KDE is already a party, making CPLR 1018 inapplicable. Further, as KDE properly notes, no assignment occurred in this action and therefore CPLR 1018 is not implicated. Also, even assuming that there had been an assignment, CPLR 1018 permits the action to continue unabated. Inasmuch as defendants have failed to demonstrate how KDE did not comply with CPLR 1018, that branch of KDE's motion to dismiss this counterclaim is granted pursuant to CPLR 3211(a)(7).

KDE next moves to dismiss the first through ninth affirmative defenses, pursuant to CPLR 3211(b), on the ground that they have no merit. CPLR 3211(b) provides that "[a] party may move for judgment dismissing one or more defenses on the grounds that a defense is not stated or has not merit." That branch of the motion to dismiss the first through sixth affirmative defenses on the ground that the counterclaims are barred by res judicata, the statute of limitations, and *Schlesinger* (46 AD3d 539), is denied in light of the court's denial of that branch of KDE's motion to dismiss defendants' first, second and fourth counterclaims.

That branch of the motion to dismiss the seventh and eight affirmative defenses (both alleging that KDE has failed to name necessary parties to this action), is granted. In this regard, defendants have failed to name any of the purportedly unnamed necessary parties and

the complaint alleges various parties who could have some possible claim or interest to the Property. Finally, defendants do not oppose this branch of KDE's motion.

Lastly, KDE moves for summary judgment dismissing all counterclaims and affirmative defenses on the grounds that: 1) it has already demonstrated that all counterclaims and affirmative defenses must be dismissed, and that 2) the "denials" and "denials of knowledge and information sufficient to form a belief" are devoid of merit since defendants deny the existence of documents and their contents which are part of the public record, are either irrelevant, raise no issue of fact, and are negated by the various court rulings issued in the various Schlesinger actions noted above.

In light of the court's determination denying that branch of KDE's motion to dismiss the counterclaims, and in view of the fact that KDE has failed to make a prima facie showing entitling it summary judgment dismissing these counterclaims, as well as the remaining affirmative defenses, that branch of the motion for summary judgment is denied.

In sum, that branch of the motion to dismiss the counterclaims (1st, 2nd, 4th) on grounds of res judicata, collateral estoppel and the statute of limitations is denied; that branch of the motion to dismiss the third counterclaim for failure to state a cause of action is granted: that branch of the motion to dismiss the 7th and 8th affirmative defenses pursuant to CPLR 3211(b) is granted, that branch of the motion to dismiss the first thru sixth affirmative defenses is denied, and that branch of the motion for summary judgment is denied.

This constitutes the decision and order of the court.

E N T E R,

HON. LAURA JACOBSON

J. S. C.