

**Ferdinand v Fairmont Holding Corp.**

2008 NY Slip Op 33383(U)

December 15, 2008

Supreme Court, Suffolk County

Docket Number: 31254/2007

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

ORAL ARGUMENT SCHEDULED FOR OCTOBER 20, 2008 at 2:30 P.M.

**PRESENT:**

**Hon. Peter H. Mayer**

SHARON FERDINAND

Plaintiff(s),

-against-

FAIRMONT HOLDING CORP., DAVID  
FERDINAND, ARTHUR FERDINAND and  
HARRY C. DEMIRIS, JR., ESQ.

Defendant(s).

**ORIG. RETURN DATE:** December 19, 2007  
**FINAL RETURN DATE:** December 2, 2008  
**MTN. SEQ. #:** 001 CASEDISP;  
# 002 CASEDISP

**ORIG. RETURN DATE:** June 5, 2008  
**FINAL RETURN DATE:** December 2, 2008  
**MTN. SEQ. #:** 003 MG/CASEDISP  
# 004 MD/CASEDISP

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\*\*\*\*\*PROSE\*\*\*\*\*

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (001) by the defendant Harry C. Demiris, Jr., Esq. and supporting papers; (2) Affidavit in Opposition and supporting papers; (3) Reply Affidavit; (4) Notice of Cross Motion (002) by the defendant Arthur Ferdinand and supporting papers; (5) Affirmation in Opposition and supporting papers; (6) Reply Affidavit and supporting papers; (7) Order to Show Cause (003) by the defendant Fairmont Holding Corp. and supporting papers; (8) Notice of Cross Motion (004) by the plaintiff and supporting papers; and upon hearing oral argument; it is

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**ORDERED** the motion (001) by the defendant Harry C. Demiris, Esq. for dismissal of the complaint as to him is granted; and it is further

**ORDERED** that the cross motion (002) by the defendant Arthur Ferdinand for dismissal of the complaint as to him is granted; and it is further

**ORDERED** that the motion (003) by the defendant Fairmont Holding Corp. for an order cancelling the notice of pendency and for dismissal of the complaint as to it is granted; and it is further

**ORDERED** that the cross motion (004) by the plaintiff for an extension of time to serve the summons upon the corporate defendant Fairmont Holding Corp. is denied; and it is further

**ORDERED** that as a result of the dismissals herein of the complaint, this matter is dismissed in its entirety, the notice of pendency is cancelled and the action shall be marked, "Case Disposed."

This is an action for rescission, breach of contract, constructive trust, legal malpractice, breach of fiduciary duty, fraud and misrepresentation, and for a permanent injunction - all with regard to and arising out of the sale of the plaintiff's and her then husband's marital residence. This sale was done before a related matrimonial action (Suffolk County index No. 28987/06) was commenced between the plaintiff, Sharon Ferdinand, and her husband, Arthur Ferdinand (hereinafter Sharon and Arthur, respectively; and the Ferdinands, collectively).

The defendants in this action are Fairmont Holding Corp. (hereinafter FHC), the plaintiff's brother-in-law, David Ferdinand (hereinafter David), the plaintiff's husband, Arthur, and the attorney who handled the sale of the marital home on behalf of the Ferdinands, Harry C. Demiris, Jr. (hereinafter Demiris).

There are two pending motions and two pending cross motions, all of which are addressed in this one decision and order for the purpose of judicial economy. The motions and cross motions are as follows:

001 - a motion by Demiris to dismiss the legal malpractice cause of action pursuant to CPLR 3211;

002 - a cross motion by Arthur to dismiss the causes of action against him on the basis of "another action pending" (CPLR 3211[a][4]) (i.e., the matrimonial action);

003 - a motion by FHC to cancel a notice of pendency for failure to serve the summons and complaint in a timely fashion and to dismiss the complaint; and

004 - a cross motion by the plaintiff, Sharon, to extend the time to serve the summons and complaint.

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During the pendency of these motions, the matrimonial action was settled and included provisions with regard to the proceeds of the sale of the marital residence (*see* August 21, 2008 transcript of settlement in *Ferdinand v Ferdinand*, Sup Ct, Suffolk County, Cohen, J., index No. 28987/06). Since that sale and its proceeds were the factual underpinnings of the instant action, oral argument was held before the court to allow the parties to discuss whether the settlement of the matrimonial action lent itself to a resolution of the instant action.

Background:

In March of 2006, Sharon and Arthur sold their home to FHC. Demiris represented them in this transaction. FHC is a holding corporation in which some or all of the Ferdinand siblings have a principal interest. David acted as its agent with regard to the purchase. It is alleged that Sharon and Arthur were having financial difficulties and that this sale was arranged to provide funds for handling some of their financial obligations with the understanding, according to Sharon, that Sharon and Arthur would still be allowed to reside there and, subsequently, to reacquire ownership.

The purchase price was for \$600,000.00 which consisted of a \$250,000.00 "sellers' concession" and \$350,000.00 of which about \$170,000.00 went toward the forgiveness of a prior loan from David which was used to satisfy a home equity line of credit held by the Ferdinands and about \$180,000.00 which went to the Ferdinands.

The Ferdinands' \$180,000.00 first went into Demiris' escrow account and then, in a check made out solely to Arthur, into Arthur's business account (S.P.A.R. Products). Arthur was the only signatory on this account although he contends that Sharon was allowed to sign checks with Arthur's name. Of that \$180,000.00, some of it was used to pay off some of their financial obligations as well as for the purchase of a boat (\$10,000.00) and payment for a boat slip (\$3,000.00). A balance of about \$100,000.00 was then set aside for the benefit of their son, Eli.

Sharon contends that the sale of the marital residence was done without her full knowledge and consent and that the deposit of the proceeds from the sale into Arthur's business account was also without her knowledge and consent. In addition, she states that Demiris did not disclose to her that he had ties to FHC and David. Indeed, the record is devoid of any written indication that such a disclosure was made and waived and the check from the escrow account to Arthur contained no endorsement from Sharon acknowledging her consent to the payment being made only to Arthur.

On the other hand, according to Demiris, he asked the Ferdinands how to make out the check from his escrow account and they both said to Arthur only. Demiris states that Sharon actually said to him that it did not matter since the S.P.A.R. Products account, as a practical matter, was collectively used by them to pay all their bills.

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Sharon now complains, inter alia, that all the defendants in this action worked together to orchestrate the sale of the marital residence to deprive her of her ownership interest; that Demiris actually represented both sides to the transaction; that she had no conversations with Demiris other than his telling her where to sign the relevant documents; that the date of the transaction was altered on the deed; that relevant satisfactions (of the line of credit and a related mortgage) were never filed until after threats of litigation were made and, in any event, no proof of filing of the satisfactions has been produced; and, that she never received her share of the net proceeds from the sale. Sharon, thus, brought this action to obtain her rightful share from the sale or a rescission of the transaction and, in addition, to recover damages from Demiris due to his alleged legal malpractice in his handling of the transaction.

While these motions and cross motions were pending, it was learned that the matrimonial action was settled and that the terms of the settlement included the following: a divorce granted to Sharon, joint custody with residential custody to Arthur; each waived child support; Sharon waived maintenance; Arthur was to pay certain outstanding bills; Arthur was to be responsible for past tax liabilities; Sharon waived claims for counsel fees; and, the remaining monies from the sale of the matrimonial residence (approximately \$67,000.00 at that time) would be transferred to Sharon and said transfer would be a final settlement of all of her equitable distribution claims (*see* August 21, 2008 transcript of settlement in *Ferdinand v Ferdinand*, Sup Ct, Suffolk County, Cohen, J., index No. 28987/06).

By a decision of this court, dated October 8, 2008, oral argument was scheduled to allow the parties to present their views on whether the settlement of the matrimonial action was dispositive of the instant action to any extent.

#### Oral Argument:

At the oral argument, Demiris argued, inter alia, that there were never any damages to begin with and that, in any event, the settlement in the matrimonial action resolved any issues which might have otherwise been unresolved regarding the sale of the marital residence. According to Demiris, with Sharon's agreeing to the matrimonial settlement and her receiving about \$67,000.00 from the sale of their home as full settlement of any claim on her part for equitable distribution, she cannot now continue to attack the viability of the sale in the instant action, cannot claim she was damaged by that transaction and, more to the point, cannot satisfy all of the elements required to plead a cause of action for legal malpractice.

Arthur also argues along these lines. Arthur contends that since all monetary claims against him related to the sale were resolved in the matrimonial settlement, Sharon cannot now maintain her claims in this action based upon that sale.

The plaintiff contends that the instant action is still viable as an accounting is needed as to the funds received from the sale and, in any event, there was no general release resulting from the matrimonial settlement which expressly covered the claims in the instant action. Accordingly, she argues, there is an open issue as to damages and the amount of such damages.

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Other arguments were also made with regard to FHC's motion (003) seeking a cancellation of the notice of pendency pursuant to CPLR 6514(a) for Sharon's failure to timely serve FHC with the summons (*see* CPLR 6512) as well as for dismissal; and, as to Sharon's cross motion for an extension of time to serve FHC.

#### Conclusions of Law:

The claims in the instant action are all based upon the alleged improprieties regarding the sale of the marital residence. The settlement in the related matrimonial action, however, agreed to by the plaintiff in this action, is premised upon the viability of that sale and provides the basis for satisfying Sharon's equitable distribution claims. Sharon, therefore, is collaterally estopped from attacking the viability of that sale in this action.

Collateral estoppel is an issue preclusion doctrine which precludes a party from relitigating an issue in one action when the party had a full opportunity to litigate that particular issue in the other action (*see* Siegel, NY Prac §457, at 769 [4<sup>th</sup> ed]). This doctrine applies,

“not only to matters actually litigated, but also to all that are necessarily established by the other judgment, litigated or not. **Where a judgment of a particular kind can be accounted for legally only by the existence of a certain combination of findings, each of those findings will be deemed established by the judgment**” (*Id.* at §464, p. 779; emphasis added).

In this case, the settlement and judgment in the matrimonial action can only be accounted for legally by the existence of a valid sale of the marital residence. Without a valid sale, there would be no sale proceeds to satisfy the equitable distribution claims as agreed to in the settlement. Thus, the plaintiff in the instant action is precluded from attacking the viability of the sale since its legitimacy was “necessarily established” in the resolution of the matrimonial action (*id.*).

Since every cause of action in the plaintiff's complaint is premised upon the sale of the marital residence being improper, the doctrine of collateral estoppel compels the court to dismiss the complaint in its entirety.

Even without the applicability of the collateral estoppel doctrine, there are other grounds for dismissing certain causes of action. Specifically, the legal malpractice claim against Demiris is deficient since it is now clear that there are no damages from his actions and the plaintiff has also failed to show that but for Demiris' actions she would have suffered damages (*see Lamana v Pearson & Shapiro*, 43 AD3d 1111, 843 NYS2d 143 [2d Dept 2007]; *Kotzian v McCarthy*, 36 AD3d 863, 827 NYS2d 875 [2d Dept 2007]; *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572, 685 NYS2d 470 [2d Dept], *lv denied* 93 NY2d 809, 694 NYS2d 631 [1999]).

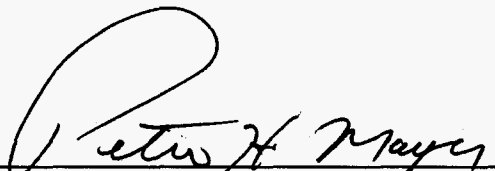
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As to FHC, the complaint would otherwise have to be dismissed pursuant to CPLR 6514(a) since the plaintiff failed to strictly comply with the requirements of service of the summons upon an owner of the property within 30 days of the filing of the notice of pendency pursuant to CPLR 6512 (*see Deans v Sorid*, 2008 NY Slip Op [2d Dept 2008]; *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 2989])

Accordingly, the complaint in this action is dismissed in its entirety and the plaintiff's cross motion (004) is denied as moot.

This constitutes the decision and order of the Court.

Dated: 12/15/08

  
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HON. PETER H. MAYER, J.S.C.