

**Quirolo v Puri**

2008 NY Slip Op 33407(U)

December 12, 2008

Supreme Court, New York County

Docket Number: 118151/03

Judge: Herman Cahn

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

PRESENT: Cahn  
Justice

PART 49m

Victor Quirolo et al

INDEX NO. 118151/03

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 008

Sandeep P. Puri et al

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this 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

**FILED**  
DEC 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE.....**

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Dated: 12/12/08

Aca Cal  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

VICTOR QUIROLO and  
JOSEPHINE QUIROLO,

Plaintiffs,

-against-

SANDEEP PURI and  
ADRIENNE QUIROLO-PURI, and  
QUEEN ANNE APARTMENT CORP.

Defendants.

Index No. 118151/03

**FILED**  
DEC 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Herman Cahn, J.

Plaintiffs Victor and Josephine Quirolo move to withdraw their jury demand.

Defendant Sandeep Puri cross-moves to amend his answer and for summary judgment against Plaintiffs on the grounds of *res judicata* and collateral estoppel.

**BACKGROUND**

This is an action for partition or sale of a leasehold in a cooperative apartment. The cooperative apartment is Apt. 3E, 155 East 76th Street in Manhattan ("Apartment").<sup>1</sup>

Plaintiffs allege that in 1999, Defendants Sandeep Puri and Adrienne Quirolo-Puri (together "the individual defendants"), who were married at the time, sought to purchase a home in Manhattan with their assistance. Plaintiffs are the parents of Quirolo-Puri. They assert that the individual defendants requested that they be partners in the purchase of the Apartment and offered them an equity interest in the home. They also allege that, pursuant to the contract for the purchase of the Apartment, signed in August 1999, the parties agreed to the following: (1)

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<sup>1</sup> Defendant Queen Anne Apartment Corp., although a party to the action, submits no papers, in response to Plaintiffs' motion.

Plaintiffs contributed a \$270,000 cash payment and the use of their financial portfolio and (2) in consideration, they received a 50% ownership interest in the property – 40% representing the \$270,000 cash payment and 10% representing the value of using their portfolio. The individual defendants financed their ownership interest with a mortgage in the amount of \$401,000. A Stock Certificate and a Proprietary Lease were issued to Plaintiffs and the individual defendants as tenants in common.

Puri alleges that Plaintiffs' status as owners was intended to secure repayment of a \$270,000 loan to the individual defendants and, once the loan was repaid, they would be taken off the title. Plaintiffs allege that Puri prepared a document and asked them to sign it at the closing. The document stated that, based on their oral understanding, Plaintiffs would have a 40% ownership interest in the Apartment, and the individual defendants would have 60% equity. Plaintiffs assert that this was not their understanding at the time; however, they signed the document because they did not want the sale to fall through.

Upon its purchase, the Apartment was occupied by the individual defendants. Plaintiffs allege that, as part owners of the Apartment, they were compensated for their loss of its use, by payments made by the individual defendants. The measure of the payments was based upon an interest rate applied to a separate annuity held by Plaintiffs. They assert that the individual defendants made payments on a semi-annual basis; however, no payments were made for the year 2003 or beyond. The individual defendants acknowledge that they made a series of five payments between December 2000 and February 2003.

This action was commenced on October 17, 2003. Puri commenced a divorce action against his wife on November 20, 2003, entitled *Sandeep Puri v Adrienne Quirolo-Puri*. (NY County Index No. 315167-2003 Evans, J.). A decision and order, dated August 17, 2007 (the

“Matrimonial Decision”), and a Judgment of Divorce, incorporating the same, dated November 9, 2007, were issued, determining, *inter alia*, the issue of the ownership of the Apartment in the individual defendants’ favor.

## DISCUSSION

### Amending the Answer

In Puri’s cross-motion to amend his answer, he seeks an order permitting him to interpose additional affirmative defenses, based upon the Matrimonial Decision and Judgment of Divorce. He contends that the principles of collateral estoppel and *res judicata* govern and are conclusive of the issues in this case. Specifically, the Matrimonial Decision includes a finding that the Apartment was purchased by the individual defendants with the assistance of a \$270,000 loan, rather than an equity investment, from Plaintiffs. 8/17/2008 Matrimonial Decision, p. 7. The court also found that the Apartment was owned equally by the individual defendants. *Id.*, p. 31.

Plaintiffs argue that Puri’s cross-motion should be denied because his proposed affirmative defenses are “totally devoid of merit.” *Jacobowitz v Lack*, 19 AD3d 453, 455 (2d Dep’t 2005). They argue that they were not in privity with their daughter during her divorce action. They, therefore, argue that the proposed affirmative defenses of collateral estoppel and *res judicata* are inapplicable.

A court may grant leave to a defendant to amend its answer if it finds that the opposing party is not unduly prejudiced or unfairly disadvantaged. *See* CPLR 3025(b); *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 (1st Dep’t 2007). Here, the amendment of Puri’s answer would not unduly prejudice or unfairly disadvantage Plaintiffs because, immediately upon the issuance of the Matrimonial Decision in the divorce action, his counsel

apprised Plaintiffs of his contention that the principles of collateral estoppel and *res judicata* governed and were conclusive of the issues in the case. Plaintiff's counsel also acknowledged, in her affirmation in support, that she anticipated receiving a cross-motion to that effect. Iacono Aff, ¶ 8.

Additionally, there is merit to Puri's proposed affirmative defenses. The Matrimonial Decision directly addressed the issue at the center of this action, the ownership of the Apartment. In the case cited by Plaintiffs, the court denied the defendant's cross-motion to amend his answer because the amendment was found to be devoid of merit. *Jacobowitz*, 19 AD3d at 455. That is not the case in the action now before the Court. As such, Puri's request to amend his answer is granted.

#### Summary Judgment

A motion for summary judgment should be granted if the moving party has sufficiently made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *see also* CPLR 3212(b). However, the motion should be denied if the opposing party establishes that there is a triable issue of material fact. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

Puri argues that his cross-motion for summary judgment should be granted because there are no genuine triable issues of fact requiring a trial, in light of the Matrimonial Decision and Judgment of Divorce. He argues that his affirmative defenses of collateral estoppel and *res judicata* are sufficient to warrant dismissal of the complaint.

Plaintiffs argue that Puri's cross-motion should be denied because it was made 484 days after the filing of the Note of Issue and is, therefore, untimely. *See* CPLR 3212(a). They argue

that a summary judgment motion must be made no later than 120 days after such filing, “except with leave of court on good cause shown.” *Id.* However, on May 14, 2008, the Court granted Puri leave to make this motion because the Matrimonial Decision and Judgment of Divorce, upon which it is based, were entered more than 120 days after the filing of the Note of Issue. Therefore, the cross-motion is timely.

#### Collateral Estoppel and *Res Judicata*

Collateral Estoppel precludes a party from relitigating an issue that was raised in a prior action and decided against that party or those in privity.<sup>2</sup> *Buechel v Bain*, 97 NY2d 295, 303 (2001), *cert. denied* 535 US 1096 (2002). It requires “an identity of the issue which has necessarily been decided in a prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling.” *Id.* at 303-04.

*Res judicata* bars the litigation of a claim if it arises out of the same transaction or series of transactions of a claim that has been brought to a final conclusion, even if the current claim is based upon different theories or a different remedy is sought. *O’Brien v Syracuse*, 54 NY2d

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<sup>2</sup> The Court of Appeals has held that the term privity

includes those who are successors to a property interest, those who control an action although not formal parties to it [and] those whose interests are represented by a party to the action . . . . [A] person may so involve himself with litigation in which he is interested that the result is *Res judicata* against him . . . . [N]o single fact is determinative but all the circumstances must be considered from which one may infer whether or not there was participation amounting to a sharing in control of the litigation.

*Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 (1970)(internal citations omitted).

353, 357 (1981).

Puri argues that Plaintiffs are precluded from relitigating the issue of the Apartment's ownership because the issue was determined in the Matrimonial Decision. He further argues that, although Plaintiffs were not parties to the divorce action, they were in privity with their daughter, Quirolo-Puri, who was a party. Indeed, he contends that, through their daughter, Plaintiffs effectively controlled the matrimonial action.

Plaintiffs argue that they were not in privity with their daughter during the divorce action because they neither had the same rights to the Apartment as their daughter, nor were they treated as if they were parties to the action. *See Gramatan Home Investors v Lopez*, 46 NY2d 481, 486 (1979). Further, they argue that they did not have a full and fair opportunity to litigate the issue because the matrimonial court heard the evidence in the context of spousal rights and obligations. They argue that the Matrimonial Decision regarding the Apartment, exceeded the scope of the pleadings in that action. In this, Plaintiffs are incorrect.

Victor Quirolo admits that he "loaned large sums of money to [his] daughter to pay the exorbitant expenses of her divorce litigation." Quirolo Aff, ¶ 4. He testified at the divorce trial that he advanced his daughter a total of \$92,000 over the course of the divorce action. However, he produced no documentation that the monies were a loan, and "he stated that he had no discussion about repayment with [his daughter]." 8/17/2007 Matrimonial Decision, p. 23. Quirolo-Puri's parents also purchased an apartment in Bronxville, New York, and intended to allow their daughter and her son to move into and rent that apartment if they relocated from the Apartment, as planned. The matrimonial court found that Quirolo-Puri's "actions [were] supported by her family's limitless funding." 8/17/2007 Matrimonial Decision, p. 39. Whether or not the Plaintiffs were actually in privity with their daughter by reason of the sums they

loaned her or otherwise, can not be decided simply on papers. Although the Matrimonial decision may be persuasive, by itself it is not conclusive as a matter of law. The issues should be heard before the balance of the action is tried in a separate hearing.

Therefore, after service of a reply by the Plaintiffs to the amended complaint, the issue of whether Plaintiffs were in privity with their daughter in the Matrimonial Action, is respectfully referred to a Special Referee to hear and report. Pending the receipt of the Referee's report and a motion to confirm or vacate the same, that branch of the cross-motion seeking summary judgment and the motion seeking to withdraw the jury demand, are held in abeyance.

Accordingly, it is

ORDERED that the issue of whether or not Plaintiffs were in privity with their daughter in the Matrimonial Action, is respectfully referred to a Special Referee to hear and report; and it is further

ORDERED that Puri's cross-motion for an order to amend his original answer to the complaint is granted; and it is further

ORDERED that Puri's cross-motion for summary judgment and the motion to withdraw the jury demand, are held in abeyance pending receipt of the Special Referee's report and a motion to confirm or vacate the same; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: December 12, 2008

ENTER :

  
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J.S.C.

**FILED**  
DEC 19 2008  
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NEW YORK