

**Fassler v Fassler**

2011 NY Slip Op 33556(U)

December 23, 2011

Supreme Court, Suffolk County

Docket Number: 11-4670

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 6-1-11 (#001)  
MOTION DATE 6-7-11 (#002)  
MOTION DATE 7-5-11 (#003, #004 & #005)  
MOTION DATE 1-09-11 (#006)  
MOTION DATE 1-30-11 (#007)  
ADJ. DATE 7-5-11 (#001 - # 005)  
ADJ. DATE 12-6-11 (#006 & #007)  
Mot. Seq. # 001 - MD # 004 - MotD  
# 002 - XMD # 005 - MD  
# 003 - MD # 006 - MD  
# 007 - MD

-----X  
ANDRE FASSLER,  
  
Plaintiff,  
  
- against -  
  
STEPHANIE FASSLER, a/k/a STEPHANIE  
ROSS and LYNN POSTER-ZIMMERMAN,  
  
Defendants.  
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Lynn Poster-Zimmerman, dated April 14, 2011, and supporting papers 1-7 (including Memorandum of Law dated April 14, 2011); (2) Notice of Cross Motion by the plaintiff, dated May 24, 2011, supporting papers 8-15; (3) Notice of Motion/Order to Show Cause by the defendant Lynn Poster-Zimmerman, dated May 24, 2011, and supporting papers 16-23; (4) Notice of Motion/Order to Show Cause by the plaintiff, dated June 2, 2011, and supporting papers 24-43 (including Memorandum of Law dated June 1, 2011); (5) Notice of Motion/Order to Show Cause by plaintiff, dated June 17, 2011, and supporting papers 44-48; (6) Notice of Motion/Order to Show Cause by plaintiff, dated October 27, 2011 and supporting papers 82-94; (7) Notice of Cross Motion by the defendant Ross, dated November 8, 2011, and supporting papers 95-108; (8) Affirmation in Opposition by the defendant Lynn Poster-Zimmerman, dated June 23, 2011, and supporting papers 49-52; (9) Affidavit in Opposition by plaintiff, dated June 27, 2011, and supporting papers 53-55; (10) Affirmation in Opposition by defendant Stephanie Ross, dated June 28, 2011, and supporting papers 56-63; (11) Reply Affirmation by the defendant Lynn Poster-Zimmerman, dated June 29, 2011, and supporting papers 64-67; (12) Reply Affirmation by defendant Lynn Poster-Zimmerman, dated July 1, 2011, and supporting papers 68-69; (13) Affidavit in Opposition by plaintiff, dated July 1, 2011, and supporting papers 70-79; (14) Other Second Notice of Default by plaintiff, dated July 18, 2011, and supporting papers 80-81; (15) Affidavit in Opposition by plaintiff,

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dated November 12, 2011 and supporting papers 109-120; (16) Affidavit in Reply by defendant Ross, dated November 28, 2011 and supporting papers 121-141 (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the parties' motions herein enumerated (001) through (007) are consolidated for the purposes of this determination; and it is further

**ORDERED** that the motion (001) by defendant Lynn Poster-Zimmerman for an order dismissing the complaint insofar as it is asserted against her for failure to state a cause of action is granted; and it is further

**ORDERED** that the cross motion (002) by plaintiff Andre Fassler for an order *inter alia* granting leave to amend his complaint and compelling Poster-Zimmerman to comply with his discovery demands is denied in its entirety; and it is further

**ORDERED** that the motion (003) by Poster-Zimmerman pursuant to CPLR 3103 for a protective order striking plaintiff's notice to admit, dated May 5, 2011 is denied as moot; and it is further

**ORDERED** that the branch of motion (004) by plaintiff Andre Fassler for an order pursuant to the Judiciary Law adjudicating the defendant Stephanie Ross in criminal and civil contempt of a March 15, 2010 So-Ordered stipulation and punishing her therefore is denied; and it is further

**ORDERED** that the branch of the motion (004) which seeks post judgment enforcement relief with respect to the marital residence, the transfer of retirement assets and investment accounts, and visitation is respectfully referred to the Honorable Marion T. McNulty, the Supervising Justice of the dedicated matrimonial parts. The remaining branches of the motion are otherwise denied as being unrelated to the within action; and it is further

**ORDERED** that the motion (005) by plaintiff for an order compelling the defendant Stephanie Ross to comply with discovery requests or in the alternative for an order of preclusion is denied, and it is further

**ORDERED** that the motion (006) by plaintiff for an order granting omnibus post divorce judgment enforcement relief is denied without prejudice to a further application for appropriate post judgment relief in the divorce action under Index Number 38637-2007; and it is further

**ORDERED** that defendant Ross's cross motion (007) for an order granting omnibus post divorce judgment enforcement relief is denied without prejudice to a further application for the same relief under Index Number 38637-2007 in the divorce action.

The following facts are not in dispute. Plaintiff Andre Fassler and defendant Stephanie Ross were married on December 11, 1988. There are three children of the marriage, Danielle, born July 29, 1990,

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Dylan, born November 3, 1995 and Sam, born November 3, 1995. The parties judgment of divorce (Martin, AJSC), dated August 17, 2010 and entered on August 24, 2010 under Index Number 38637-2007 incorporated but did not merge the stipulation of settlement executed by the parties on March 15, 2010. The stipulation of settlement states that plaintiff Andrew Fassler was represented by the Law Offices of Anthony A. Capetola and that defendant Stephanie Ross was represented by Lynn Poster-Zimmerman, Esq.

On or about February 16, 2011, Andrew Fassler commenced this action by filing a summons and complaint against his former wife, Stephanie Ross and her attorney in the divorce action, Lynn Poster-Zimmerman. He alleges causes of action sounding in breach of contract against defendant Ross and interposes claims against defendant Poster-Zimmerman for fraud, tortious interference with a contract and breach of fiduciary duty.

In the complaint, plaintiff alleges that defendant Ross failed to comply with the terms of the parties' stipulation of settlement that required her to pay him a net amount of \$132,911 for his equitable interest in the former marital residence; to list the marital residence for sale upon such default in payment; to effectuate the removal of his name from the mortgage on the marital residence; to pay the mortgage and equity loan on the marital residence; to pay him \$200 per month for each month she failed to pay the mortgage on the marital residence; to transfer \$108,220 in retirement assets to him; to pay him \$112,000 representing his interest in other investment accounts; to provide documentation as to the cost of the health insurance premium of which he is obligated to pay 50%; to transfer ownership of an antique bedroom dresser; and to otherwise comply with the custody and visitation provisions of the stipulation of settlement. As against defendant Poster-Zimmerman, plaintiff alleges that during the pendency of the divorce action, she accepted a \$20,000 fee from Ross, the source of which was IRA funds, in violation of a pendente lite order restraining withdrawals of such funds; allowed Ross to submit a false statement of net worth to the court; failed to provide items of discovery in the matrimonial action including Ross's cash income; had a process server serve him with legal papers in front of the parties' children; and fraudulently induced him to enter into the stipulation of settlement.

Poster-Zimmerman now moves for an order pursuant to CPLR 3211 (a) (1) and (7) dismissing the sixteenth through twentieth causes of action interposed against her in the verified complaint for failure to state a cause of action. In support thereof, she submits a copy of the summons and verified complaint and the parties' stipulation of settlement.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v. Martinez, supra*; *International Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed

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when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (*Leon v Martinez, supra; Vitarelle v Vitarelle*, 65 AD3d 1034, 885 NYS2d 320 [2d Dept 2009]; *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401, 873 NYS2d 326 [2d Dept 2009]).

#### Sixteenth Cause of Action Sounding in Fraud

The elements of a cause of action for fraud are (1) a misrepresentation of fact, (2) which was false and known to be false by the defendant, (3) made for the purpose of deceiving the plaintiff, (4) upon which the plaintiff justifiably relied, (5) causing injury (*Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461, 453 NYS2d 750 [2d Dept 1982]; see also *Ozelkan v Tyree Bros. Envtl. Servs.*, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]; *Eades v Tadao Ogura, M.D., P. C.*, 185 AD2d 266, 587 NYS2d 209 [2d Dept 1992]; *Ruse v Inta-Boro Two-Way Radio Taxi Assocs.*, 166 AD2d 641, 561 NYS2d 70 [2d Dept 1990]). Further, CPLR 3016 (b) requires that where a cause of action is based on fraud, the circumstances constituting the wrong shall be stated in detail.

The gravamen of plaintiff's claim against Poster-Zimmerman is that in the underlying matrimonial action, she failed to disclose items of discovery and submitted a false sworn statement of net worth on behalf of her client. Insofar as the complaint alleges that Poster-Zimmerman knew or should have known that such submissions were false, it fails to set forth with sufficient particularity her actual knowledge of such alleged falsity. Neither does the complaint allege the substance of such material misrepresentation or material omission on the part of defendant Poster-Zimmerman. Moreover, the complaint is devoid of any allegation that Poster-Zimmerman acted with intent to induce plaintiff to rely on such alleged false statements or that he actually relied thereon. Rather, plaintiff details in the complaint that in the context of the ongoing matrimonial action, he was aware that Poster-Zimmerman's client had allegedly failed to report income on her 2008 and 2009 tax returns. Nevertheless, he signed the stipulation of settlement in March 2010.

In view of the foregoing, the sixteenth cause of action sounding in fraud is dismissed.

#### Seventeenth, Eighteenth and Nineteenth Causes of Action Sounding in Tortious Interference with a Contract

In order to prevail on a claim of tortious interference with a contract, a plaintiff must prove the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 646 N.Y.S.2d 76 [1996]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 595 NYS2d 931 [1993]; *Avant Graphics Ltd. v United Reprographics, Inc.*, 252 AD2d 462, 676 NYS2d 160 [1st 1998]; *M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 631 NYS2d 938 [2d Dept 1995]). In addition, the plaintiff must specifically allege that the contract would not have been breached "but for" the defendants' conduct (see *Burrowes v Combs*, 25 AD3d 370, 808 NYS2d 50 [1st Dept 2006]; *Washington Ave. Assoc., Inc. v Euclid Equip., Inc.*, 229 AD2d 486, 645 NYS2d 511 [2d Dept 1996]). Here, each allegation interposed against defendant Poster-Zimmerman predates the March 15, 2010 stipulation of settlement and,

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therefore, it cannot be said that the complaint alleges that she procured any breach by defendant Ross. Moreover the complaint is devoid of allegations as to how and in what manner Poster-Zimmerman interfered with the performance of the stipulation of settlement.

Accordingly, the seventeen, eighteenth and nineteenth causes of action sounding in tortious interference with a contract are dismissed for failure to state a cause of action.

#### Twentieth Cause of Action Sounding in Breach of Fiduciary Duty

The essential elements of a cause of action sounding in breach of fiduciary duty are the existence of a fiduciary relationship; misconduct by the fiduciary; and damages that were directly caused by the fiduciary's misconduct (*see Palmetto Partners, L.P., v AJW Qualified Partners, L.L.C.*, 83AD3d 804, 921 NYS2d 260 [2d Dept. 2011]). The complaint fails to allege that a fiduciary or confidential relationship existed between the plaintiff and Poster-Zimmerman, as she did not represent the plaintiff in the drafting and execution of the stipulation of settlement. Rather, the parties' stipulation of settlement sets forth that plaintiff was represented by counsel of his choosing, the Law Offices of Anthony A. Capetola.

Accordingly, plaintiff's twentieth cause of action sounding in breach of fiduciary duty is dismissed.

It is noted that in the ad damnum clause of the complaint, plaintiff seeks judgment in the exact amount of \$108, 226.81 on each cause of action interposed against Poster-Zimmerman. Said amount correlates with defendant Ross's agreement in the stipulation of settlement to transfer the same amount, \$108, 226.81 to the plaintiff from her retirement accounts. However, nowhere is it alleged in the four corners of the complaint that Poster-Zimmerman caused such alleged breach.

In view of the foregoing, the motion (001) by defendant Poster-Zimmerman for an order dismissing the complaint insofar as it is asserted against her is granted.

Turning to the plaintiff's cross motion (002) for an order *inter alia* granting leave to amend the complaint, it is well settled that motions for leave to amend pleadings are to be liberally granted absent prejudice or surprise resulting from the delay (*see Glaser v County of Orange*, 20 AD3d 506, 799 NYS2d 120 [2005]). The movant, however, must make some evidentiary showing that the proposed amendment has merit or it will not be permitted (*see, Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 832 NYS2d 255 [2007]; *Curran v Auto Lab Serv. Ctr.*, 280 AD2d 636, 721 NYS2d 662 [2001]). The failure to submit an affidavit of merit and evidentiary proof to allow the Court to determine the merits of the proposed amendment warrants denial of the motion (*see Zaid Theatre Corp. v Soan Realty Corp.*, 18 AD3d 352, 797 NYS2d 434 [2005]; *Morgan v Prospect Park Assoc. Holdings, L.P.*, 251 AD2d 306, 674 NYS2d 62 [1998]). Here, the motion does not contain a proposed second amended complaint. Moreover, plaintiff's sworn statement in support of his motion and the exhibits annexed thereto have not established that the proposed amendment has merit. Absent the submission of a proposed amended complaint or an evidentiary showing of merit, the motion is denied (*Pollak v Moore*, 85 AD3d 578, 926 NYS2d 434 [1st Dept 2011]; *Kilkenny v Law Office of Cushner & Garvey, LLP*, 76 AD3d 512, 905 NYS2d 661 [2d Dept 2010]; *Chang*

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*v. First Am. Tit. Ins. Co. of N.Y.*, 20 AD3d 502, 799 NYS2d 121[2d Dept 2005]).

In view of the foregoing, the cross motion (002) by plaintiff for an order *inter alia* granting leave to amend the complaint is denied. The application for an order compelling Poster-Zimmerman to comply with plaintiff's discovery demands is denied as moot in view of the dismissal herein of the claims asserted against her, and the motion is otherwise denied.

Defendant Poster-Zimmerman's further motion (003) pursuant to CPLR 3103 for a protective order striking plaintiff's notice to admit, dated May 5, 2011 is denied as moot in view of the within dismissal of the complaint as against her.

Plaintiff's motion (004) for an order adjudicating the defendant Stephanie Ross in contempt of a March 15, 2010 So Ordered stipulation and for other omnibus post judgment enforcement relief is determined as follows.

The branch of plaintiff's motion which seeks an order pursuant to the Judiciary Law adjudicating defendant Ross in civil and criminal contempt of a March 15, 2010 So Ordered stipulation is denied. The moving papers are devoid of proof that a court order was entered on March 15, 2010, so ordering the provisions of the parties' stipulation of settlement.

Moreover, Domestic Relations Law § 245 provides that in order to prevail on a motion to punish a spouse for defaulting in payment of any money required by a judgment, it must be demonstrated that payment cannot be enforced pursuant to Domestic Relations Law §§ 243 and 245 and CPLR 5241 and 5242 or that resort to such remedies would be ineffectual (*see Wolfe v Wolfe*, 71AD3d 878, 895 NYS2d 855 [2d Dept 2010]; *Snow v Snow*, 209 AD2d 399, 618 NYS2d 442 [2d Dept 1994]). Here, even if plaintiff had sought an order adjudicating Ross in contempt for failure to pay sums due under the parties' August 17, 2010 judgment of divorce, he would not prevail, as he has not alleged that the enforcement devices set forth in Domestic Relations Law § 245 have been exhausted or that pursuit of same would be futile.

The branch of the motion (004) which seeks certain post judgment enforcement with respect to the marital residence, the transfer of retirement assets and investment accounts, and visitation is respectfully referred to the Honorable Marion T. McNulty, the Supervising Justice of the dedicated matrimonial parts. The remaining branches of the motion are otherwise denied as being unrelated to the causes of action interposed in the within action.

Plaintiff's motion (005) pursuant to CPLR 3126 for an order *inter alia* compelling Ross to comply with his discovery requests or in the alternative for an order of preclusion is denied. In support thereof, plaintiff submits a notice of discovery and inspection and a 19 page rider and alleges that Ross failed to respond thereto. In opposition, counsel for Ross asserts that plaintiff was served with a reply to his notice to admit and argues further that all discovery in the action was stayed in view of the pending motion to dismiss.

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CPLR 3124 (b) provides that service of a 3211 motion to dismiss stays disclosure until determination of the motion. Here, in view of the fact that Poster-Zimmerman's motion to dismiss was pending when plaintiff served discovery demands, the within motion to compel discovery is denied. Moreover, even if the discovery demand was timely, the 19 page rider to the notice of discovery and inspection is overly broad, burdensome and vague and subject to vacature, as the burden was on the plaintiff to serve a proper demand (*see Cramp v Cramp*, 114 AD2d 835 494 NYS2d 748 [2d Dept 1985]).

Plaintiff's motion (006) for an order granting omnibus post divorce judgment enforcement relief is denied. Plaintiff seeks an order vacating the child support provisions of the judgment of divorce; directing the Child Support Enforcement Bureau to clear his record and reinstate his driving privileges; imposing a constructive trust on the marital residence; awarding sanctions and costs; imposing punitive damages and ordering nonparty AXA Equitable Life Insurance Company to transfers funds to plaintiff. The relief requested in the motion is unrelated to the causes of action interposed against defendant Ross in the within action. Accordingly, the motion is denied without prejudice to a further application for appropriate post judgment relief in the divorce action under Index Number 38637-2007.

Defendant Ross's cross motion (007) for an order granting omnibus post divorce judgment enforcement relief is determined as follows. Ross's motion which seeks an order granting a money judgment in the amount of \$20,615 for arrears in child support and medical arrears; awarding college expenses for the parties' daughter; awarding counsel fees; and directing plaintiff to provide proof of life insurance naming the parties' children as beneficiaries is denied as unrelated to the within action and without prejudice to a further application for the same relief under Index Number 38637-2007 in the divorce action. To the extent that Ross seeks an order directing the sale of the marital residence, said application is denied without prejudice to raising in the proceedings to be heard before the dedicated matrimonial parts in conjunction with the plaintiff's application regarding the marital residence.

The foregoing motions (001) through (007) have been determined herein with the exception of the branches of motion (004) which seek post judgment enforcement relief and which have been respectfully referred to the Honorable Marion T. McNulty, the Supervising Justice of the dedicated matrimonial parts.

Dated: \_\_\_\_\_

12/23/11

  
\_\_\_\_\_  
PETER H. MAYER, J.S.C.