

Jacobs v Schulhof
2017 NY Slip Op 31768(U)
August 22, 2017
Supreme Court, New York County
Docket Number: 452336/2016
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LISA JACOBS,

Index No.: 452336/2016

Plaintiff,

DECISION/ORDER

-against-

MICHAEL P. SCHULHOF, Individually, As
Aider and Abettor, and as Manager of THE
SCHULHOF COLLECTION LLC and THE
SCHULHOF COLLECTION LLC,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Cross-Motion	
Affidavits/Affirmations/Memos of Law annexed	<u>1, 2</u>
Opposition Affidavits/Affirmations and Memos of Law annexed	<u>3, 4</u>
Reply Affidavits/Affirmations/Memos of Law annexed	<u>5</u>

ERIKA M. EDWARDS, J.S.C.:

Plaintiff Lisa Jacobs ("Jacobs") brought this action against Defendants Michael P. Schulhof, Individually, as Aider and Abettor, and as Manager of The Schulhof Collection LLC ("Schulhof"), and The Schulhof Collection LLC ("Collection") (collectively "Defendants") for monetary, equitable and injunctive relief. Defendants move to dismiss Jacobs' amended complaint pursuant to CPLR 3211(a)(1)(4)(5) and (7), based on documentary evidence, failure to state a cause of action, another pending action, statute of limitations, res judicata, collateral estoppel and release and for attorney's fees and costs. Jacobs opposes the motion and cross-moves to transfer the case to a non-commercial part and for permission to voluntarily discontinue without prejudice the previously severed third-party action involving the alleged breach of the oral contract under index number 157797/2013. This matter is currently assigned to Justice Charles E. Ramos. Defendants opposed Jacobs' cross-motion.

Upon a reading of the foregoing cited papers and for the reasons set forth herein, the court grants Defendants' motion to dismiss Jacobs' amended complaint to the extent that the amended complaint is dismissed as against Defendants with costs and disbursements and denies Jacobs' cross-motion to transfer this matter to a non-commercial part and for voluntarily discontinuance of the previously severed third-party action.

BACKGROUND

Jacobs was a part-time curator for Schulhof's mother, Hannelore Schulhof, and the Collection and Jacobs sold various works of art from Ms. Schulhof's art collection from 1998 to February 21, 2012. After Ms. Schulhof passed away, Schulhof became the executor of her estate and Jacobs continued working for Defendants until she was terminated on August 13, 2013.

Jacobs' amended complaint alleges ten causes of action with claims based on sexual harassment, hostile work environment, unlawful retaliation, sexual assault and battery, breach of contract, misappropriation and theft of confidential subpoenaed bank records and personal information, tortious interference with current and/or prospective business relations, unjust enrichment, quantum meruit, promissory estoppel and injunctive relief. Jacobs alleges in substance that Schulhof engaged in a pattern of sexual harassment and unlawful retaliation from 2004 until the filing of this law suit; he breached a 2012 agreement for the sale of \$25,000,000 in artwork where Jacobs was supposed to earn 4% in consignment fees and other claims regarding the sale of paintings; he aided and abetted Kings County Assistant District Attorney Lawrence Oh and Daniel Walsh to misappropriate, steal and convert Jacobs' confidential and personal bank account information to obtain the identity of the anonymous buyer of a Jean-Michel Basquiat painting; he tortuously interfered with Jacobs' current and prospective business relationships by disparaging her and defaming her honesty, integrity and good name; and she seeks an injunction directing Schulhof to cease and desist his improper conduct.

The parties have an extensive history of prior litigation and almost all of Jacobs' claims in the instant action were previously brought against Defendants as counterclaims or third-party claims in previous actions. Initially, Schulhof, as the executor of his mother's estate, sued Jacobs in this court on August 26, 2013, under index number 157797/2013 for fraud, breach of contract, breach of fiduciary duty and unjust enrichment involving Jacobs' failure to disclose the amount of a sale of Ms. Schulhof's Basquiat painting to an anonymous buyer in 2011 or that Jacobs received \$1,000,000 from the resale of that painting in addition to her \$50,000 fee. Jacobs alleged numerous affirmative defenses and counterclaims against Schulhof as an individual and as the executor of his mother's estate and the Collection. Justice Ramos struck all of Jacobs' affirmative defenses, except consent, waiver, estoppel and payment.

Jacobs' counterclaims involved the Kings County District Attorney's Office's investigation of Mrs. Schulhof's missing art work and disclosure of Jacobs' subpoenaed bank records and personal information, Jacobs' claims of sexual harassment, retaliation and hostile work environment, her claims that she was entitled to the \$1,000,000 payment for the resale of the Basquiat painting and tortious interference with prospective business relationships. Justice Ramos dismissed all of Jacobs' counterclaims because they were impermissibly brought against Schulhof as an individual and all, but the sexual harassment, hostile work environment and retaliation claims, were also dismissed on their merits.

Jacobs also brought similar claims in a third-party action against Schulhof, the Collection, the City of New York, A.D.A. Oh and Mr. Walsh. The claims against Schulhof and the Collection involved the alleged improper disclosure of Jacobs' subpoenaed bank records, sexual harassment, hostile work environment, retaliation, breach of contract regarding the oral

agreement to sell \$25,000,000 worth of artwork and interference with ongoing business opportunities. Justice Ramos dismissed all claims against the Collection as barred by a 2012 Release, where Jacobs agreed not to assert any claims against the property or assets of the Collection or Ms. Schulhof. Justice Ramos also severed the breach of contract claim against Schulhof, dismissed the sexual harassment, hostile work environment and retaliation claims against Schulhof without prejudice because they were improperly brought as third-party claims against him individually and dismissed the other claims on their merits. Pursuant to a “so-ordered” stipulation, the third-party action for the breach of contract claim was severed only as to A.D.A. Oh and the City of New York and it was reassigned to the City’s DCM Part. According to Defendants, no new counsel for Jacobs has appeared on the third-party action.

After the papers in the instant action were submitted, Justice Ramos granted Schulhof’s summary judgment motion in the first action and entered judgment against Jacobs in the amount of \$1,555,185.21, which includes the \$1,000,000 payment, \$50,000 commission, interest from 2011, costs and fees. Jacobs is appealing this ruling. The third-party action is still pending.

In yet another action, Jacobs, individually and doing business as Lisa Jacobs Fine Art sued A.D.A. Oh, Mr. Walsh, the Collection, Schulhof, individually and as manager of the Collection, and the City of New York under index number 451495/2016. The claims against Schulhof and the Collection in the amended complaint involved defamation and tortious interference with economic opportunity, which Jacobs’ argued should have been for tortious interference with prospective contract rights. Jacobs’ initial complaint also included claims against Schulhof and the Collection involving the alleged improper disclosure of Jacobs’ subpoenaed bank records and the identity of the anonymous buyer, sexual harassment, hostile work environment, retaliation, breach of the oral contract for the sale of \$25,000,000 in art work for the 4% commission and interference with ongoing business opportunities. Justice Manuel J. Mendez granted Schulhof’s motion to dismiss all claims against him in Jacobs’ amended complaint on their merits, plus costs and disbursements, but denied Schulhof’s request for sanctions against Jacobs’ and her counsel.

DISCUSSION

Defendants move to dismiss Jacobs’ amended complaint based on documentary evidence, failure to state a cause of action, another pending action, statute of limitations, res judicata, collateral estoppel and release. Jacobs cross-moves to transfer this case to a non-commercial part and for permission to voluntarily discontinue the severed breach of contract third-party action.

Dismissal based on documentary evidence is warranted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of a plaintiff’s claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

When considering Defendants’ motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible

inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) because it is time barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired and the court must take all allegations in the complaint as true and resolve all inferences in favor of the plaintiff (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011] [internal citations and quotation marks omitted]). Then, the burden shifts to the plaintiff to establish that the statute of limitations should have been tolled or that the defendant should have been estopped from asserting a statute of limitations defense (see *Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]; *Zumpano v Quinn*, 6 NY3d 666, 673 [2006]).

Collateral estoppel, or issue preclusion, “precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point” (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985] [internal citations and quotation marks omitted]). Collateral estoppel gives conclusive effect to a prior ruling when (1) the issue sought to be precluded is identical to a material issue necessarily decided in the prior action and is decisive of the present action and (2) the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the decision now said to be controlling (*Gilberg v Barbieri*, 53 NY2d 285, 291 [1981] [internal citations and quotation marks omitted]).

Principles of res judicata require that “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or seeking a different remedy” (*O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] [internal citations omitted]).

A. All Claims Against the Collection

Here, all of Jacobs’ claims are dismissed against the Collection because they are barred by the February, 2012 Release and collateral estoppel. In a Release, dated February 22, 2012, Jacobs agreed not to assert any claims against the property or assets of the Collection or Ms. Schulhof, whether promised as a gift, bequest or compensation, and she disclaimed any rights to any property or assets previously promised by the Collection or Ms. Schulhof. To the extent that any allegations occurred after the execution of the Release, Jacobs failed to set forth sufficient facts to support any of her claims against the Collection.

The court finds Jacobs' arguments regarding the invalidity of the Release to be without merit. Additionally, such arguments are barred by collateral estoppel as Justice Ramos previously upheld the validity of the Release when he relied on it to grant Defendants' motion to dismiss Jacobs' amended complaint against the Collection, under index number 157797/2013. Such decision was clearly on the merits after Jacobs had a full and fair opportunity to be heard.

Therefore, the court dismisses all claims against the Collection.

B. Sexual Harassment, Hostile Work Environment, Unlawful Retaliation and Sexual Assault and Battery

Jacobs' First, Second and Third Causes of Action in her amended complaint allege in substance that Schulhof engaged in a pattern of sexual harassment, which included sexual assault and battery, followed by a pervasive hostile work environment and unlawful retaliation against Jacobs for her repeated rejection of Schulhof's advances. Jacobs alleged in substance that it was an ongoing and continuous pattern and practice of sexual harassment and retaliation which resulted in Schulhof materially altering Jacobs' employment terms and conditions of employment, including her termination.

Defendants argue in substance that Justice Ramos previously dismissed the claims of sexual harassment, hostile work environment and unlawful retaliation on the merits against the Collection because they are barred by the 2012 Release and dismissed the claims against Schulhof because they were inappropriately brought against him in his individual capacity. Additionally, Defendants argue that such claims are barred by the applicable statute of limitations.

A valid claim for battery exists where a person intentionally touches another without that person's consent (*Wende C. v United Methodist Church*, 4 NY3d 293, 298 [2005]). Any unwanted touching that occurred more than one year prior to the commencement of the action is barred by the applicable one-year statute of limitations (CPLR 215[3]).

Jacobs relies solely on the New York State Human Resources Law ("NYSHRL") for her sexual harassment and retaliation claims and does not mention the more lenient standards of the New York City Human Right Law ("NYCHRL"). Pursuant to CPLR 214(2), there is a three-year statute of limitations on statutory claims (CPLR 214[2]). However, the court can go beyond the three-year period to determine liability in hostile environment claims if the conduct is of a continuous nature and at least one discriminatory act falls within the statute of limitations (*National Railroad Passenger Corporation v Morgan*, 536 US 101, 117 [2002]).

Under the NYSHRL, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in the terms, conditions and privileges of employment, because of an individual's sex or gender (*see* Executive Law § 296 [1][a]). The standard for recovery under either statute is analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green*, 411 U.S. 792 [1973]; *see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 270 [2006]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Under *McDonnell Douglas*, the plaintiff has the initial burden to

establish a prima facie case of discrimination. To meet that burden, plaintiff must show that he or she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Stephenson*, 6 NY3d at 270, citing *Ferrante v American Lung Ass'n*, 90 NY2d 623, 629 [1997]; *Forrest*, 3 NY3d at 305; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]).

As with Title VII of the Civil Rights Act of 1964, sexual harassment that results in a hostile or abusive work environment is prohibited as a type of employment discrimination. A hostile work environment exists when “the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment [internal citations and quotation marks omitted]” (*Forrest*, 3 NY3d at 310).

The NYSHRL also prohibits an employer from retaliating against an employee who has opposed or complained about unlawful discriminatory practices (*see* Executive Law § 296 [7]). To establish a retaliation claim under NYSHRL, Plaintiff must show that she was engaged in protected activity, that her employer was aware that she participated in such activity, that she suffered an adverse employment action based on her activity and that there is a causal connection between the protected activity and the adverse action (*Forrest*, 3 NY3d at 312-313).

The mere filing of a civil action cannot be the basis of an unlawful retaliation claim because it is barred by the *Noerr-Pennington* immunity doctrine, which gives civil litigants immunity for filing actions as long as the litigation is not a sham (*see I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 208 [1st Dept 2005]; *United Mine Workers of Am. v Pennington*, 381 US 657 [1965] and *Eastern R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127 [1961]).

Here, the court dismisses Jacobs claims for sexual harassment, hostile work environment, unlawful retaliation, sexual assault and battery against Schulhof because such claims are barred by the applicable statute of limitations and for failure to state a cause of action. Jacobs failed to set forth facts with sufficient details to demonstrate that Schulhof’s alleged actions were a continuous pattern of discrimination, that they occurred within the applicable statute of limitations, that the alleged actions were continuous to permit the court to go beyond the statute of limitations, or that the alleged retaliatory actions were linked to Jacobs’ denial of Schulhof’s unwanted sexual advances.

The initial complaint in this action was filed on August 5, 2016. Based on the allegations set forth in Jacobs’ amended complaint, Jacobs’ specific allegations of sexual harassment and hostile work environment dated back to 2004 until in or around 2011 or 2012. Jacobs failed to set forth sufficient facts to demonstrate that Schulhof’s alleged sexual harassment, hostile work environment and unlawful retaliation occurred after August 5, 2013, or that any allegations of sexual assault and battery occurred after August 5, 2015. Additionally, Jacobs failed to plead with the required specificity that such alleged acts were part of a continuing pattern of discrimination or a continued violation necessary to permit the court to reach beyond the three-year statute of limitations. Jacobs’ broad and conclusory allegations that such offending acts were ongoing on a

daily and weekly basis during her employment and continued until the filing of the law suit are insufficient to sustain these claims.

Jacobs argues that her claims of retaliation continued beyond 2011, however the court finds that such claims are without basis in fact or law and that Jacobs failed to adequately link such claims to her sexual harassment claims. For example, Jacobs alleged that Schulhof's retaliation included the Release and employment agreement in 2012; Schulhof's theft accusations against her and conspiracy with the Kings County District Attorney's Office in 2012 and 2013; her termination on August 13, 2013; Schulhof's filing of his initial law suit on August 26, 2013; and his defamatory acts from 2013 until the filing of the law suit. However, Jacobs failed to set forth any facts to link these acts to Schulhof's alleged retaliation for her denial of his unwanted sexual advances. Additionally, as mentioned above, the mere filing of a civil suit that is not a sham is protected by privilege. Furthermore, Jacobs' termination occurred after Schulhof's accusations that Jacobs committed fraud, breach of contract and other misconduct which was the basis of his successful lawsuit and judgment against her in his initial action.

Therefore, the court dismisses these claims because they are barred by the statute of limitations and they fail to state a cause of action.

C. Breach of Contract and Jacobs' Cross-Motion for Voluntary Discontinuance

Jacobs' Fourth Cause of Action for breach of contract alleges in substance that Defendants breached the terms of a 2012 agreement with Jacobs to sell \$25,000,000 worth of Agnes Martin paintings and other art work and to provide other services in exchange for 4% commission and Defendants breached other unspecified contracts over the next six years. Jacobs further alleges that she performed such services, the art work was sold by Christies and Defendants refused to pay Jacobs her commission.

The court grants dismissal of the breach of contract claim in the instant action because it is barred by the pending third-party action under index number 157797/2013 for essentially the same claim involving the same parties. This is the same cause of action that Jacobs brought against Defendants in her third-party complaint that was severed by Justice Ramos. However, the amended complaint in the instant matter does not specify whether the contract was written or oral and the complaint in the prior action specified that it was an oral contract. Jacobs now argues that the contract in the instant action was written and her amended complaint adds conclusory allegations that Defendants breached other contracts over a six-year period. Despite these differences, the factual allegations in both claims clearly involve an alleged agreement to sell the same art work for the same amount of money. Based on the prior pending action doctrine Jacobs should not be permitted to slightly alter the allegations to attempt to avoid dismissal.

Additionally, the court partially grants dismissal of the alleged additional contracts that Defendants violated over the six-year period on the merits for failure to state a cause of action. The elements of breach of contract are (1) the existence of a valid contract, (2) plaintiff's performance of its obligations under the contract, (3) defendant's breach, and (4) resulting

damages (*see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]).

With respect to these general allegations, Jacobs failed to allege any details about the additional contracts over a six-year period which were allegedly performed by Jacobs and breached by Defendants. As such, this breach of contract claim is partially dismissed against Defendants with prejudice.

Jacobs cross-moves to voluntarily discontinue without prejudice the previously severed breach of contract claim under index number 157797/2013, which is currently assigned to Justice Ramos. This prior action has been pending for three years and extensive discovery has already been completed, since discovery was consolidated with the main action. Jacobs cannot simply repeat the same allegations in various actions pending before the same court, and once all claims but one are dismissed, be permitted to voluntarily withdraw the remaining claim to avoid almost certain dismissal of the subsequent claims. The court tasked with adjudicating the first cause of action is normally assigned to adjudicate that claim and this court finds no reason to depart from this long-honored practice. To do otherwise would cause undue prejudice and hardship on Defendants. As such, this court denies Jacobs' cross-motion to voluntarily discontinue without prejudice the prior severed third-party complaint under index number 157797/2013.

As such, the court dismisses Jacobs' Fourth Cause of Action for breach of contract and denies this portion of Jacobs' cross-motion.

D. Misappropriation, Theft and/or Conversion

Jacobs' Fifth Cause of Action alleges that Defendants misappropriated, stole and/or converted confidential, proprietary business information, trade secrets and/or personal records and information. The underlying facts of this claim involve the repeated allegations that Defendants aided, abetted and conspired with A.D.A. Oh and Mr. Walsh to unlawfully obtain Jacobs' personal financial information and information of Jacobs' proprietary anonymous buyers and sellers in breach of Jacobs' confidentiality with her clients.

This claim is dismissed as barred by collateral estoppel because Jacobs' counterclaims and third-party claims involving the same underlying facts and issues pertaining to this cause of action were previously dismissed by Justice Ramos on their merits in the parties' first action under index number 157797/2013. Justice Ramos dismissed Jacobs' counterclaims and third-party claims procedurally because they were not properly filed as counterclaims and third-party claims and on their merits because Schulhof did not cause the grand jury subpoena to be issued, he did not abuse any process, it was reasonable for A.D.A. Oh to issue the subpoenas, Jacobs had no right to privacy for her bank records and for other reasons set forth in his decision. Therefore, the court found that Jacobs failed to state a cause of action based on Schulhof's role in obtaining the alleged confidential information and Jacobs' lack of privacy for her alleged confidential financial information.

These claims were dismissed after a final conclusion on the merits, so all other claims arising out of the same transaction or series of transactions are barred, even though they may be

based on different theories. Nothing changes in the allegations presented in the instant matter simply because Jacobs changed the title on her new cause of action. The underlying facts are the substantially the same and she could have brought this claim in a previous action against Schulhof as an individual.

Alternatively, based on the facts set forth in this latest cause of action, the court determines that Jacobs failed to state a cause of action. Therefore, the court dismisses Jacobs' Fifth Cause of Action.

E. Tortious Interference with Current and/or Prospective Business Relations

Jacobs' Sixth Cause of Action for tortious interference with current and/or prospective business relations alleges that Schulhof falsely and maliciously disparaged and defamed Jacobs' honesty, integrity, good name and reputation to others by contacting them and publishing false statements with the intent to retaliate, malign and destroy Jacobs' ability to continue her business as an art dealer, consultant and curator. Jacobs further alleges that because of Schulhof's actions, a client, Art Expressions LLC, its agent, Amy Wolf, and others stopped doing business with her.

The court dismisses this claim because it is barred by collateral estoppel, it fails to state a cause of action and it is barred by the applicable one-year statute of limitations for actions sounding in defamation.

Justice Ramos previously dismissed the same counterclaim and third-party claim against Schulhof based on substantially similar facts in the first action under index number 157797/2013. Jacobs' Seventh Counterclaim in the previous action was for Schulhof's interference with Jacobs' existing and ongoing business opportunities with the agent to the anonymous buyers and the anonymous buyers and her Thirteenth Cause of Action in the third-party complaint was for interference with ongoing business opportunities with these same individuals. Again, Justice Ramos dismissed these claims procedurally because they were improperly brought against Schulhof as an individual and substantively on their merits. Justice Ramos found that Jacobs' allegations were too broad and that she failed to sufficiently allege that Schulhof acted solely out of malice with wrongful means and not because of his economic interest.

Additionally, such claims are based on Jacobs' alleged claims of defamation, which requires a one-year statute of limitations, and were previously dismissed by Justice Mendez in Jacobs previous action under index number 451495/2016. Even though Jacobs' previous defamation claim may have been based on different facts, the same arguments warranting dismissal apply in this action. Here, Jacobs failed to allege any claims with specific particularity to demonstrate that they occurred within the one-year statute of limitations for defamation. As such, the court also dismisses these claims based on statute of limitations grounds and because of collateral estoppel based on Justice Mendez' decision.

Furthermore, the court also dismisses this cause of action for failure to state a cause of action. Tortious interference with prospective economic relations requires Jacobs to allege that she would have entered into an economic relationship but for the Defendants' wrongful conduct which resulted in damages (*Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266 [1st Dept

2002]). Here, Jacobs failed to demonstrate that Schulhof's alleged actions were the sort of egregious wrongdoing that might have supported this claim or that such actions were independently unlawful, that they constituted an independent tort, that they had an evil motive, or that Defendants' conduct was for the sole purpose of inflicting intentional harm on Plaintiffs (*Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]). Even if Jacobs had sufficiently pled that Schulhof's sole motive was to intentionally harm her, then she would still have to have alleged that such conduct was directed against a third-party and not Jacobs (*id.* at 192 [internal citations omitted]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193-194 [1980]).

Even though Jacobs slightly altered the factual allegations, including naming a business and the business' agent, the same deficiencies in her allegations remain based on the same underlying facts. Although the court is required to construe liberally the allegations in the pleadings on a motion to dismiss, Plaintiffs must support their claim with "more than mere speculation" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). Jacobs continues to fail to state a cause of action for this claim. Therefore, the court dismisses the Sixth Cause of Action.

F. Unjust Enrichment and Quantum Meruit

Jacobs' Seventh and Eighth Causes of Action for unjust enrichment and quantum meruit are based on the same allegations that Schulhof breached the contract to sell the Agnes Martin paintings and other art work worth \$25,000,000 and failed to pay Jacobs' 4% consignment fee, or compensate her for her services in Christies' sale of the art work.

The court dismisses both claims because they are duplicative of Jacobs' breach of contract claim which is pending in the previously severed third-party action and they fail to state a cause of action.

Unjust enrichment requires the receipt by one party of money or a benefit to which it is not entitled, at another's expense (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472 [1st Dept 2010] [citations omitted]). It is a "quasi-contract claim" that contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [internal citations and quotation marks omitted]). It requires a party to hold property "under such circumstances that in equity and good conscience he ought not to retain" (*Sharp v Kosmalski*, 40 NY2d 119, 123 [1976]). Such equitable consideration is "essentially a legal inference drawn from the circumstances surrounding a transfer of property and the relationship of the parties" (*id.*).

Defendants argue in substance that this claim is duplicative of Jacobs' unjust enrichment claim in the first action, however, this court disagrees. Jacobs' unjust enrichment counterclaim in the first action was for the \$1,000,000 fee regarding the sale of the Basquiat painting. The court dismissed that claim on the merits based on the particular factual allegations which do not apply to the claim in the instant matter. However, the underlying facts and issues involving this claim could have been brought in the previous law suit and they are based on the same factual allegations as those alleged in Jacobs' Fourth Cause of Action for breach of contract in the instant matter and her severed third-party claim which the court discussed above.

The equitable remedy of quantum meruit is an obligation independent of a contract which requires 1) the performance of services in good faith, 2) the acceptance of the services by the person to whom they are rendered, 3) an expectation of compensation therefor, and 4) the reasonable value of the services (*Soumayah v Minnelli*, 41 AD3d 390, 391 [1st Dept 2007] [internal citations and quotation marks omitted]). The existence of an express agreement, whether written or oral, governing a particular subject matter precludes recovery in a “quasi contract” cause of action like quantum meruit for events arising from that subject (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]).

Here, Jacobs failed to demonstrate that the relief of unjust enrichment and quantum meruit are appropriate in this case and she failed to state a cause of action for either claim. She failed to allege sufficient facts necessary to demonstrate that such conduct rose to the level of such an injustice as to require these equitable remedies and failed to set forth the elements of either claim. Additionally, since Jacobs alleges that an express contract existed between the parties, both claims are precluded by the existence of the alleged contract and such alleged conduct is duplicative of her breach of contract claim in the pending third-party action. Finally, Jacobs failed to sufficiently allege these causes of action as an alternative theory to her breach of contract claim. Therefore, both claims are dismissed.

G. Promissory Estoppel

The Ninth Cause of Action for promissory estoppel is based on allegations that at various times during the performance of Jacobs’ professional services for Defendants from 1998 to late August, 2013, she was promised that she would be compensated for her services, she reasonably and unjustifiably relied on such representations to her detriment and Defendants failed to pay her causing her to lose several million dollars.

The doctrine of promissory estoppel is an extraordinary remedy and a plaintiff must establish 1) an oral promise that is sufficiently clear and unambiguous, 2) reasonable reliance on the promise by the plaintiff, and 3) injury caused by the reliance (*N.Y. City Health and Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]). It does not apply in cases where there is a contract between the parties (*Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012]). In the absence of a duty independent of the agreement, a claim for promissory estoppel is duplicative of a claim for breach of contract (*Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303 [1st Dept 2008]).

Here, Jacobs failed to state a cause of action for promissory estoppel. She only provided general, conclusory allegations and failed to allege any specific details about the substance of the alleged promise or promises, that the promise was oral and not the same as the contracts alleged in her breach of contract claims, or that it was clear and unambiguous. For example, the allegations fail to specify when the promise was made, who made it, what service was performed in reliance on the promise, or how much compensation was promised.

Here, the allegations fall well short of demonstrating that an unconscionable injury or injustice would occur if the court did not grant this equitable remedy. Therefore, the court dismisses Jacobs’ Ninth Cause of Action.

H. Injunctive Relief

Jacobs' Tenth Cause of Action seeks a permanent injunction directing Schulhof to cease and desist his conduct of harassing, discriminating, retaliating, defaming, disparaging Jacobs, disclosing or using her personal and business confidential or proprietary information, or from engaging in additional conduct alleged in her amended complaint. Jacobs alleges in substance that there is a substantial likelihood of success on the merits of her claims and that she will be irreparably harmed unless the court grants this permanent injunction.

The court dismisses this cause of action and denies Jacobs' request for a permanent injunction because Jacobs failed to demonstrate that such relief is necessary to prohibit Schulhof from continuing his alleged misconduct or that she is entitled to such relief. Jacobs failed to sufficiently demonstrate that she has a substantial likelihood of success on the merits or irreparable harm. Particularly since her claims have repeatedly been dismissed.

Additionally, as Defendants argue, Jacobs was fired in August of 2013 and it appears that the parties have had no interaction with each other in four years. There have been no recent allegations of inappropriate behavior on the part of Schulhof. Also, to the extent that Jacobs has been damaged by Schulhof's improper conduct, she has an adequate remedy at law. Therefore, this cause of action is dismissed.

I. Jacobs' Cross-Motion for Transfer to a Non-Commercial Part

Finally, Jacobs' cross-motion to transfer this matter to a non-commercial part is denied as moot, since this case was already transferred to a non-commercial General IAS Part.

CONCLUSION

As set forth herein, the court grants Defendants' motion to dismiss to the extent that Jacobs' amended complaint is dismissed with prejudice against both Defendants with costs and disbursements and denies Jacobs' cross-motion in its entirety with prejudice.

Accordingly, it is hereby

ORDERED that the motion to dismiss by Defendants Michael P. Schulhof, Individually, as Aider and Abettor, and as Manager of The Schulhof Collection LLC, and The Schulhof Collection LLC is granted to the extent that Plaintiff Lisa Jacobs' amended complaint is dismissed in its entirety as against Defendants with prejudice and the Clerk is directed to enter judgment in favor of Defendants dismissing this action, together with costs and disbursements to Defendants, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that Plaintiff Lisa Jacobs' cross-motion to transfer this matter to a non-commercial part and to voluntarily discontinue her previously severed breach of contract third-party action is denied in its entirety.

Date: August 22, 2017



HON. ERIKA M. EDWARDS, JSC