

Coplan v Kaufman

2018 NY Slip Op 30164(U)

January 29, 2018

Supreme Court, New York County

Docket Number: 152865/2017

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

BETH COPLAN

INDEX NO. 152865/2017

Plaintiff,

MOTION DATE

- v -

THOMAS KAUFMAN,

MOTION SEQ. NO. 001 002

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 26, 27, 28, 29, 30, 31, 32, 33, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 57

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 35, 36, 37, 38, 52

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motions are decided as follows.

Motion sequence Nos. 001 and 002 are consolidated for disposition. In motion sequence No. 001, defendant Thomas Zahn Kaufman moves; pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing plaintiff Beth Coplan's complaint. In motion sequence No. 002, defendant moves, pursuant to CPLR 3126 (3), for an order dismissing the complaint, or alternatively, staying the instant action.

The parties were married on June 14, 1992 and had two children. In 2012, plaintiff Beth Coplan commenced a matrimonial action against defendant entitled Kaufman v Kaufman (Sup Ct, Westchester County, Index No. 4815/12). On February 18, 2015, the parties, represented by

counsel, entered into a stipulation on the record resolving all issues regarding custody of their children and financial issues (“the Stipulation”). Pursuant to the Stipulation, the parties agreed, inter alia, that, in addition to a pre-equitable distribution of \$2,000,000, plaintiff would receive from defendant \$4,750,000,¹ consisting of approximately \$900,000 from a Hightower account; approximately \$350,000, with interest, payable in three equal installments; \$400,000 cash and proceeds from the sale of the marital residence. The parties also agreed that: (1) the jewelry would be sold, with the proceeds being distributed 1/3 to plaintiff and 2/3 to defendant; (2) defendant would receive the parties’ art collection, with the exception of plaintiff’s entitlement to select art worth between \$50,000 and \$100,000; (3) the parties’ furniture in the marital residence would be selected alternatively by the parties upon the sale of the house; and (4) each party was responsible for his or her own counsel fees. The parties each waived spousal maintenance; plaintiff waived all right, title and interest to the marital portion of bonuses, incentives, stock option, bank accounts, and security accounts, with the exception of those addressed in the Stipulation; and defendant waived all right, title and interest to whatever accounts plaintiff had in her separate and sole name. After the terms of the Stipulation were read into the record, the court allocated the parties in the presence of their attorneys. The Stipulation was incorporated, but not merged, into the judgment of divorce dated May 6, 2015.

In March 2017, plaintiff commenced the instant action alleging three causes of action: breach of fiduciary duty (first); unjust enrichment (second) and rescission of the Stipulation (third).

Defendant now moves for an order dismissing the complaint, pursuant to CPLR 3211 (a) (1) and (7), based on documentary evidence and for failure to state a cause of action. “On a motion

¹ The total amount would be affected in the event that the marital home sold for less than 3.1 million dollars.

to dismiss pursuant to CPLR 3211, the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory” (*Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]). Affidavits and other evidence submitted by plaintiff may be considered for the limited purpose of remedying any defects in the complaint, thus preserving inartfully pleaded, but potentially meritorious, claims (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). “[D]ismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted ‘utterly refutes plaintiff’s factual allegations’” (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015] [citation omitted]); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Defendant seeks dismissal of the first cause of action for breach of fiduciary duty, arguing that it lacks the specificity required in certain pleadings by CPLR 3016 (b). Specifically, he maintains that the complaint contains broad, undetailed allegations of transfers of assets during the pendency of the underlying matrimonial action, misrepresentations as to the value of assets in his net worth statement, and claims of his purported commingling of separate property with marital property.

“To state a claim for breach of fiduciary duty, plaintiff[] must allege that (1) defendant owed [her] a fiduciary duty, (2) defendant committed misconduct, and (3) [she] suffered damages caused by that misconduct” (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). “A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*EBC I. Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]) [internal quotation marks and citation omitted]). A fiduciary relationship exists between a husband and his wife (*see Logiudice v*

Logiudice, 67 AD3d 544, 544 [1st Dept 2009]). Further, as noted by defendant, a cause of action must be pleaded with particularity as required by CPLR 3016 (b) (*see Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570, 571 [1st Dept 2016]).

In her first cause of action, plaintiff alleges that defendant, as her husband, owed her a fiduciary duty to act in good faith, which he breached, subsequent to the commencement of the underlying divorce action, by converting proceeds from the sale of marital assets without judicial authorization, and for failing to provide truthful and complete disclosures (complaint, ¶¶ 72, 73). She further asserts that he hid assets, misrepresented assets in his net worth statements, commingled marital and separate property for his own use, hid non-disputed marital assets, and decreased the value of the marital residence (*id.*, ¶74). The complaint also identifies specific alleged marital assets and investments, subject to the automatic orders, that defendant allegedly sold during the divorce proceedings (*id.* at ¶59). She seeks damages of at least \$15,000,000 for lost rental payments that she would have received, pending the sale of the marital residence, and proceeds from the passive income stream from marital assets. Thus, in light of the liberal construction accorded the pleadings on a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]), the first cause of action sufficiently alleges a breach of fiduciary duty claim. Therefore, that branch of defendant's motion seeking to dismiss the first cause of action is denied.

Defendant argues that the second cause of action for unjust enrichment should be dismissed because the Stipulation covers the subject matter raised by plaintiff in this claim.

"To successfully plead unjust enrichment, a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Norcast S.ar.l. v Castle Harlan*,

Inc., 147 AD3d 666, 668 [1st Dept 2017] [internal quotation marks and citation omitted]). “The theory of unjust enrichment is one created in law in the absence of any agreement” (*Loreley Fin. (Jersey) No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d 463, 468 [1st Dept 2014] [internal quotation marks and citation omitted]).

Here, plaintiff’s unjust enrichment claim is based upon defendant’s conversion of plaintiff’s alleged share of income from the sale of marital assets and separate corporate inventory during the underlying matrimonial action (complaint, ¶¶60, 77). As defendant argues, and as plaintiff fails to dispute in her opposing papers, the subject matter of this claim, i.e., plaintiff’s equitable share in the marital assets, is governed by the Stipulation, and, accordingly, is dismissed (*Loreley Fin. (Jersey) No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d at 468; *see also Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 141 [1st Dept 2014]).

Defendant also argues that the third cause of action, for rescission, must be dismissed, because, inter alia, the Stipulation, made on the record in open court, is enforceable; the Stipulation refutes plaintiff’s allegations that she was unable to fully comprehend the terms of that document; and the complaint fails to allege any mutual mistake of the parties. He further maintains that plaintiff ratified the Stipulation by accepting its benefits and retaining nearly \$3,500,000 she received as a result thereof.

In the third cause of action, plaintiff purports to state a claim for rescission of the Stipulation based on mutual mistake, indefiniteness and vagueness. In support of her claim, she asserts various reasons why she claims the Stipulation should be vacated. She alleges that the oral settlement agreement is not enforceable (complaint, ¶ 2). She further contends that she suffers from Attention Deficit Disorder (ADD), which made it difficult for her to fully understand the

terms of the Stipulation that were placed on the record (*id.* at ¶¶ 32, 33; plaintiff aff dated 5/26/17 at 1). She submits an affidavit from Lowell D. Kern, Esq., who avers, inter alia, that: (1) at plaintiff's request, in March 2016, he attended a meeting with her and Dina Kaplan, Esq. (Kaplan), one of her former attorneys in the underlying matrimonial action; (2) that, during the meeting, plaintiff indicated to Kaplan that there were many things in the Stipulation that she still did not understand; and (3) that Kaplan stated that she knew that plaintiff did not understand the terms of the settlement on the day it was entered into (Kern's affirmation dated 5/31/17). Plaintiff also claims that one of the other attorneys who represented her in the underlying matrimonial action, Theodore Uno, was unlicensed, and that she should not be blamed for his mistakes or incompetency (complaint, ¶¶ 4-5, plaintiff aff at 7).

Additionally, she alleges that the Stipulation could not be enforced due to its incompleteness, ambiguity and mutual mistakes. She claims that mutual mistakes were made regarding, inter alia, the aggregate value of the marital estate at the time of the Stipulation; how the mortgage on the former marital residence was to be satisfied; and the marital artwork and jewelry (complaint, ¶¶ 78-79). She maintains that defendant submitted multiple inaccurate net worth statements, which failed to include significant marital assets or income, and purportedly instructed the parties' accountant to file a forged power of attorney form on her behalf with the IRS (*id.*, ¶¶ 14-19). She contends that, as a result, the aggregate value of the marital estate could not be accurately calculated at the time of the Stipulation (*id.*, ¶ 19). Additionally, she maintains that the parties have not been able to agree on what art and jewelry is identified in the Stipulation, since the language is not sufficiently clear and no lists are appended to that document (*id.*, ¶ 22).

Marital settlement agreements are judicially favored and are not to be easily set aside (*Simkin v Blank*, 19 NY3d 46, 52 [2012]). Contrary to plaintiff's contention, an oral settlement

agreement entered on the record in open court during a divorce action in the presence of, and with the participation of, the parties and their respective counsel, is binding on the parties (*see Rubinfeld v Rubinfeld*, 279 AD2d 153, 159 [1st Dept 2001]). “A stipulation of settlement which is made in open court by parties who are represented by counsel and who unequivocally agree to its terms will not be set aside absent a showing that the stipulation was tainted by mistake, fraud, duress, overreaching or unconscionability” (*Libert v Libert*, 78 AD3d 790, 791 [2d Dept 2010] [internal quotation marks and citation omitted]).

Here, as defendant argues, plaintiff’s allegation that she did not understand the Stipulation is refuted by her own testimony during her allocution, inasmuch as plaintiff, prior to consenting to the Stipulation, was given an opportunity by the court to speak with her counsel to ask any questions that she had (Stipulation tr dated 2/18/15 at 28-29); and that, after she availed herself of this opportunity, she acknowledged, under oath, in the presence of her counsel, that all of her questions had been answered to her satisfaction (*id.* at 29). Further, when asked by the court if her “mind was clear enough to enter into a business agreement,” she responded that she was of “sound mind to make a decision” (*id.* at 29). Additionally, when asked if she understood that the Stipulation was a full and final settlement of all disputes between the parties, she responded “yes” (*id.* at 33).

The court subsequently found that “each of the parties knowingly, voluntarily and intelligently entered into this stipulation of settlement . . .” (*id.* at 34), which the parties’ respective counsel confirmed on the record (*id.*). Thus, the minutes of the court’s careful allocution of the plaintiff demonstrate her understanding of the Stipulation. In view of the foregoing, plaintiff’s claim that she did not comprehend the terms of the Stipulation is refuted by the record, and, therefore, fails to provide any basis for setting aside the Stipulation (*see Kinberg v Kinberg*, 50

AD3d 512, 513 [1st Dept 2008]). Further, the court's thorough allocution, which was confirmed by Kaplan, her prior counsel, belies the plaintiff claims Kaplan made, i.e., that she (Kaplan) was aware that plaintiff did not understand the Stipulation. Additionally, plaintiff fails to allege a basis for any claim against defendant based on the purported incompetence of an alleged unlicensed employee of her prior counsel's firm.

Further, although a mutual mistake by the parties may form the basis for rescission of a marital settlement agreement, "the mistake must be so material that . . . it goes to the foundation of the agreement" (*Simkin v Blank*, 19 NY3d at 52 [internal quotation marks and citation omitted]). "To vacate a stipulation of settlement on the ground of mutual mistake, [a party must] demonstrate that the mistake existed at the time the stipulation was entered into and that it was so substantial that the stipulation failed to represent a true meeting of the parties' minds" (*Hannigan v Hannigan*, 50 AD3d 957, 958 [2d Dept 2008] [internal quotation marks and citation omitted]). "[M]utual mistake requires that both parties to an agreement have the same belief" (*Warberg Opportunistic Trading Fund L.P. v GeoResources, Inc.*, 151 AD3d 465, 471 [1st Dept 2017]). Further, a claim predicated on mutual mistake must be pleaded with the specificity required by CPLR 3016 (b) (*Simkin v Blank*, 19 NY3d at 52).

Here, the complaint adequately states a claim for rescission of the Stipulation based on mutual mistake with respect to whether the mortgage of the former marital residence was intended to be part of the closing costs that defendant agreed to assume, and what the marital jewelry consisted of. The Stipulation provided that the jewelry located at Darcy Hammerman's office and in a box present in the court was to be sold, "unless of course there is other jewelry somewhere else" (Stipulation tr at 12). However, plaintiff does not allege any mutual mistake regarding the art, inasmuch as the Stipulation clearly identifies this asset as art that was appraised by Sam

Rosenfeld (tr at 13), and provides that defendant would receive the art, subject to the plaintiff selecting art of her choosing in an amount between \$50,000 and \$100,000 (*id.*).

Plaintiff also fails to allege a mutual mistake with respect to the aggregate value of the marital estate at the time of the Stipulation. She alleges that this value was not known because defendant, *inter alia*, failed to include significant marital assets and income in the multiple net worth statements submitted in the underlying matrimonial action. Plaintiff's claim is more in the nature of one in fraud, which may provide a basis for setting aside a marital agreement (*see Libert v Libert*, 78 AD3d at 791)). To state a claim for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Liberally construing the complaint, plaintiff sufficiently states a fraud claim, insofar as she alleges that defendant misrepresented the extent of the marital assets and income in the underlying matrimonial action, that she relied on the misrepresentation in the distribution of the marital assets, and that this misrepresentation prevented her from receiving an equitable share of marital property.

As contended by defendant, a party who accepts substantial benefits under an agreement for any considerable period of time is deemed to have ratified the agreement and, thus, is estopped from having it set aside (*se, Kuznetsov v Kuznetsov*, 127 AD3d 1031, 1032 [2d Dept 2015]; *Hoffer-Adou v Adou*, 121 AD3d 618, 619 [1st Dept 2014]). While defendant alleges that plaintiff received certain benefits arising from the Stipulation, the record is devoid of any proof substantiating same. Further, this court rejects those portions of defendant's reply affirmation, including attached new documentation, in which he attempts to "introduce new arguments in support of, or new grounds

[or evidence]” in support of his application (*All State Flooring Distribs. L.P. v MD Floors, LLC*, 131 AD3d 834, 836 [1st Dept 2015] [internal quotation marks and citation omitted]). In view of the following, that branch of the defendant’s motion for dismissal of the third cause of action is denied.

Accordingly, in motion sequence No. 001, defendant’s motion for an order dismissing the complaint pursuant to CPLR 3211 (a) (1) and (7) is granted only to the extent of dismissing the second cause of action for unjust enrichment.

In motion sequence No. 002, defendant’s motion, pursuant to CPLR 3126 (3), for an order dismissing the complaint or, alternatively, staying plaintiff’s action for her failure to provide her address in compliance with defendant’s demand dated May 5, 2017, is denied as moot, insofar as plaintiff, subsequent to the submission of the defendant’s application, provided him with the address at which she resided when the instant action was filed and resides at present.

In light of the foregoing, it is hereby:


ORDERED that, in motion sequence No. 001, defendant’s motion for dismissal of the complaint, pursuant to CPLR 3211 (a) (1) and (7), is granted only to the extent of dismissing the second cause of action for unjust enrichment, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in motion sequence No. 002, defendant's motion for dismissal of the complaint, pursuant to CPLR 3126 (3), or alternatively, to stay the action, is denied as moot; and it is further

ORDERED that this constitutes the decision and order of the court.

1/29/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	DO NOT POST			<input type="checkbox"/>	FIDUCIARY APPOINTMENT		<input type="checkbox"/>
								REFERENCE