

**Weinstein v Sklar**

2019 NY Slip Op 31603(U)

June 6, 2019

Supreme Court, New York County

Docket Number: 158613/2015

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

-----X

LOIS WEINSTEIN,

Plaintiff,

- v -

RITA SKLAR,

Defendant.

INDEX NO. 158613/2015

MOTION DATE 06/04/2019

MOTION SEQ. NO. 004

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105

were read on this motion to/for RENEW/REARGUE

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for leave to reargue her motion to amend the complaint to add additional defendants and causes of action (motion sequence number 003) and the cross motion of defendant for leave to reargue her motion for summary judgment dismissing the complaint (motion sequence number 002) are granted; and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated December 18, 2018 only to the extent that it hereby denies defendant's motion for summary judgment dismissing the first cause of action for an accounting against the individual defendant, and the first cause of action for an accounting is hereby reinstated, and it is further

ORDERED that as to the balance of the motion and cross-motion to reargue sequence number 002 and motion sequence number 003, the court otherwise adheres to its prior order; and it is further

ORDERED that counsel are directed to appear for a pre-trial conference in IAS Part 59, 60 Centre Street Room 331, on October 1, 2019, 12 noon.

#### DECISION

This court disagrees with plaintiff that the cross motion of defendant for reargument at bar was untimely brought. Both sides represented in open court that each timely served notices of appeal with respect to the prior order dated December 18, 2018, which prior order each side now seeks reconsideration. Thus, defendant's cross-motion is permitted. See Dugas v Bernstein, 5 Misc.3d 818 (Sup Ct, NY Co 2004).

Nevertheless, plaintiff is correct that in granting summary judgment dismissing her first cause of action for an accounting, the court overlooked controlling authority. In R.C. Gluck & Co., Inc. v Louis Tankel, 12 AD2d 339 (1961), the First Department held that a member of a partnership has a meritorious claim for an accounting based upon an alleged breach of fiduciary duty by the other partner. Therefore, in her original complaint, plaintiff stated a viable claim for an accounting against the individual defendant based on breach of the

fiduciary duty that defendant owed her under the power of attorney.

However, as argued by defense counsel, with respect to claims against or on behalf of the partnership, plaintiff would have to bring such claim(s) derivatively and name such entity, as an additional defendant. So too, plaintiff would have to name the partnership as a party in an action for dissolution. This court thus must adhere to its prior order denying plaintiff's motion for leave to amend her complaint to add such party defendant, on the ground that such motion, in this four-year old case, which plaintiff placed on the trial calendar and certified discovery as complete three months before making the such motion, is dilatory. As plaintiff waited to move to add an additional defendant (or defendants) and interpose claims against or on behalf of such defendant(s), until after certifying discovery was complete, such leave would result in substantial prejudicial to such defendant(s). See Clayton Webster Corp. v Bozell & Jacobs, Inc., 167 AD2d 145 (1<sup>st</sup> Dept. 1990).

As to plaintiff's motion seeking an order to add claims of constructive trust and conversion ("money had and received" [sic]) against the individual defendant, the court likewise adheres to its prior decision denying such relief, without prejudice to plaintiff's moving to conform the pleadings to the

proof pursuant to CPLR 3025(c) before she rests her case at trial. See Schwartzman v Weintraub, 100 AD2d 818 (1<sup>st</sup> Dept. 1984).

To the extent that defendant's cross motion seeks reargument of her motion for summary judgment dismissing the breach of fiduciary claim against the individual defendant, the court shall adhere to its finding that the affidavit of plaintiff raises an issue of fact with respect to whether defendant defrauded plaintiff and/or breached the duty she owed plaintiff under the power of attorney. This court, on that basis, must adhere to its original denial of defendant's motion for summary dismissal of that claim.

6/6/2019  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE