

<b>Mendler v Jane-Horatio LLC</b>
2020 NY Slip Op 30471(U)
February 18, 2020
Supreme Court, New York County
Docket Number: 157007/2018
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**JUDITH MARION MENDLER,**

**DECISION AND ORDER  
Index No.: 157007/2018**

**Plaintiff,**

**Mot. Seq. Nos.: 001-002**

**-against-**

**JANE-HORATIO LLC, SUZANNE LAWTON, individually  
and as Personal Representative of the ESTATE OF HENRY  
MENDLER, and DIME COMMUNITY BANK f/k/a THE  
DIME SAVINGS BANK OF WILLIAMSBURGH,**

**Defendants.**

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**O. PETER SHERWOOD, J.:**

In this case, plaintiff, Judith Marion Mendler (Judith), the former wife of the now deceased Henry Mendler (Henry), seeks a constructive trust and title of certain real property, or compensation reflecting the value of the property, pursuant to Henry and Judith's 1973 separation agreement (the Agreement). Judith also sues for certain apartment maintenance costs. In these motions, defendants seek to dismiss the entire complaint. For the reasons discussed below, the motion shall be granted except as to the fifth cause of action.

**BACKGROUND**

**I. The Complaint**

Defendant Jane-Horatio LLC (the LLC) is a company that holds real property including a multiple dwelling located in Manhattan on Jane and Horatio Streets (the Property). Defendant Suzanne Lawton (Lawton), the personal representative of Henry's estate (the Estate), is Henry's second wife and widow.<sup>1</sup>

Plaintiff alleges that, in the Agreement, which divided the couple's jointly owned property, Henry, who received the Property, agreed to bequeath the Property to Judith, unless he sold and conveyed it to a third party during his lifetime. Had Henry sold the Property in his lifetime, Judith

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<sup>1</sup> No wrongdoing is alleged on the part of Dime Community Bank f/k/a The Dime Savings Bank of Williamsburgh, which is alleged to hold a mortgage lien on the Property.

alleges that he was obligated to pay her one-half of the net sales proceeds. Henry died in June 2018, survived by Judith, without having sold the Property, or devised it to her. Plaintiff contends that public records show that in or around September 1998, Henry, the sole member of the LLC, filed a deed transferring the Property to the LLC. Judith alleges that Henry entered into a scheme with Lawton to wrongfully deprive Judith of the Property and defeat her future estate therein. In 2000, without Judith's knowledge, Henry made Lawton a 50% member of the LLC, and in January 2006, he assigned his remaining 50% interest therein to Lawton, making her the sole owner.

In the first cause of action against the Estate, Judith alleges that Henry breached the Agreement by failing to devise the Property to her in his will. The second cause of action alleges that, as a result of Henry's failure to devise the Property to Judith, upon his death there arose a prior charge and lien against Henry's estate in favor of Judith. In the third cause of action against all defendants, Judith claims that, pursuant to New York Real Property Actions and Proceedings Law (RPAPL), Article 15, she is entitled to a declaration that she is the owner of, or has a constructive trust or equitable lien upon, the Property.

In fifth cause of action<sup>2</sup> against the Estate, Judith alleges Henry breached the Agreement by ceasing to pay maintenance costs for Judith's occupancy of a cooperative apartment since April, 2016. In the sixth cause of action alleged against all of the defendants, Judith complains that Henry's transfer of his interest in the LLC to Lawton before his death, without consideration, was a fraudulent conveyance, violating Debtor and Creditor Law §§ 276 and 276-a. In the seventh cause of action against all defendants, Judith claims that the LLC and Lawton were unjustly enriched by the transfer of the Property to the LLC and the transfer of the LLC's membership interests to Lawton, and seeks a constructive trust.

The eighth cause of action against the Lawton and the LLC (together, the LLC Defendants), alleges that Lawton tortiously interfered with Henry's contractual obligation to devise the Property to Judith. The ninth cause of action is against the LLC Defendants for unjust enrichment. Judith claims that it would be against equity and good conscience for the LLC to retain the Property, or for Lawton to retain her membership interests in the LLC.

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<sup>2</sup> Plaintiff has withdrawn the fourth cause of action.

## II. The Agreement

The 1973 Agreement states that it was intended to make support provisions for Judith, and to divide personal and real property jointly owned by Henry and Judith during their marriage. The real property consisted of parcels, including two homes, in Dutchess County, New York (the Dutchess County Properties), and three multiple dwellings, or apartment buildings, in Manhattan, one of which is the Property. Henry and Judith's marital home was an apartment (the Apartment) in one of the apartment buildings, located at West 11th Street (the West 11th Street Property). The third Manhattan property was located on Perry Street.

The fourth article of the Agreement concerned the division of properties and Henry's non-alimony, cash payments.<sup>3</sup> Judith received the Dutchess County Properties and Henry received the three Manhattan properties.

For all of the properties, the parties' stated intentions were that the title pass to the intended transferee immediately upon the Agreement's execution. Judith agreed, upon execution of the Agreement, to execute and deliver to Henry the deed conveying the Property, but subject to a second mortgage on the Property in her favor (the Second Mortgage) (Agreement at 10, fourth article, ¶ B [2]). The Second Mortgage secured non-alimony cash payments that Henry was obligated to make to Judith. Specifically, Henry agreed to pay the sum of \$181,000, with \$25,000 paid upon execution of the Agreement, and \$156,000 payable in weekly installments over a period of 30 years, with interest paid in two \$47,617 installments, at 30 years and 40 years from the date of the Agreement (*id.* at 12-13, fourth article, ¶ B [5], [5] [a], [b]). The parties agreed that the Second Mortgage was subordinate only to a then-existing bank mortgage on the Property, with a balance of \$697,000, which the Agreement stated was an existing first lien against the Property (*id.* at 13, fourth article, ¶ B [5] [c]).

Also concerning the Property, the Agreement, provides that:

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<sup>3</sup> The Agreement contains a separate article concerning the alimony payments.

"Upon a sale of these premises by [Henry], [Henry] shall pay to [Judith] the amount remaining unpaid pursuant to this Article FOURTH B, Subparagraph 5(b),<sup>4</sup> plus the difference, if any, between that sum and one half of the net proceeds of such sale. Upon such payment, the mortgage and the debt it secures shall be deemed satisfied"

(*id.*, fourth article, ¶ B [5] [c]). The parties further agreed that, upon notification by Henry that a contract of sale for the Property had been executed, Judith would execute and deliver to Henry's attorney a satisfaction of the mortgage, to be held in escrow, until that attorney's receipt of all amounts due to Judith from the sale (*id.*).

Paragraph B (6) of the fourth article of the Agreement concerns the mutual agreements of Judith and Henry to make wills. Concerning the Property the Agreement provides that:

"In the event [Henry] at the time of his death is the owner of [the Property], [Henry] shall, by appropriate provision contained in his Last Will and Testament, devise and bequeath the [Property] to [Judith], subject to the then existing encumbrances [sic], and, in default of such provision in the Husband's Last Will and Testament, or, should he die intestate, this obligation on the part of [Henry] shall be a prior lien against [Henry's] estate. Upon [Henry's] death, the mortgage and the debt it secures, shall be deemed satisfied, [Judith] then becoming the owner of the property. Nothing contained herein shall be construed to prevent or restrain [Henry] from selling and conveying the said premises, or encumbering them, during his lifetime, subject to the provisions of this agreement. Upon the death of [Judith], the mortgage and the debt it secures shall be assigned to [Henry] and an appropriate certificate cancelling the same shall be delivered to [Henry] by [Judith's] executor or administrator"

(*id.* at 15A, fourth article, ¶ B [6] [C]) (the Bequeathal Paragraph). The Agreement also has a bequeathal provision, in favor of Judith, concerning the West 11th Street Property, and one in favor of Henry for the Dutchess County Properties. Those bequeathal paragraphs contain language similar to the Bequeathal Paragraph, but do not contain the language "subject to the provisions of this agreement."<sup>5</sup>

In the provision of the Agreement transferring the Dutchess County Property to Judith, Henry agreed to pay off an existing mortgage on one of the parcels. A paragraph concerning Henry's

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<sup>4</sup> "Subparagraph 5(b)," of paragraph B of the fourth article, addresses the \$156,000 non-alimony cash payments and the two interest payments.

<sup>5</sup> There is no provision for the bequeathal of the Perry Street property.

liability for that mortgage reads:

“[n]othing herein shall be construed to deny [Judith] the power to sell or otherwise convey any or all of said parcels, but it is understood that to the extent of such conveyance or divestiture, [Henry’s] obligations hereinabove set forth shall cease as to such parcel”

(*id.* at 8, fourth article, ¶ B [1]).

The first article of the Agreement provided for a home for Judith. Thus, the transfer of the West 11th Street Property to Henry was made subject to Judith’s right to occupy the Apartment for her lifetime, free of rent and certain utility and appliance upkeep payments, referred to in the Agreement’s first article as a “life estate.” Judith and Henry agreed that the provisions concerning Judith’s occupancy of the Apartment would be binding upon any present and future owner of the West 11th Street Property, and that Henry would not convey the premises except subject to Judith’s occupancy rights.

### **III. The Prior Litigations**

In 1976, Judith commenced an action against Henry for half of the proceeds of a \$125,645.51 mortgage taken on the Property, prior to the divorce. Judith claimed that Henry obtained the mortgage money by conveying the Property to another entity he owned, taking out the mortgage, and then transferring ownership of the Property back to himself and Judith. The court held that: (1) Judith had knowledge of the mortgage and its amount; (2) Henry’s concealment of the fact that the Property was encumbered by the proceeds of a refinancing was not a substantial factor in causing Judith to enter into the Agreement; (3) the mutual release of claims in the Agreement barred claims concerning pre-Agreement conduct regarding the mortgage; and (4) Judith had not demonstrated that she sustained damages as a result of the allegedly fraudulent transaction, as she freely divested herself of ownership interests in the Property upon entering into the Agreement, and incurred no liability on a note executed as consideration for the \$125,645.51 mortgage.

In 1994, Henry commenced a proceeding, pursuant to RPAPL § 1921 (2), seeking to prepay the Second Mortgage and obtain a satisfaction of mortgage (SOM) from Judith. Judith asserted affirmative defenses/counterclaims, for breach and reformation of the Agreement, and for declaratory relief. She claimed a continuing interest in the Property that was protected during Henry’s lifetime or the period when he continued to own the Property, by the Second Mortgage. Judith claimed that her bequeathal rights in the Agreement were protected by the Second Mortgage

because it insured that Henry could not refinance the Property's first mortgage, or dispose of the Property, without Judith's consent. She argued that Henry's request to prepay the mortgage would threaten her rights to a payment upon sale of the Property and to bequeathal of the Property. Within this context, Judith requested that the court "determine the interpretation and operative effect of the Separation Agreement and Second Mortgage to determine the rights and obligations of the parties" (Furman moving affirmation, exhibit 5, ¶ 53).

In moving for judgment, Henry challenged as incorrect Judith's contention that interest payments were not due until thirty and forty years after the Agreement was executed, and that Judith had a recordable interest based upon the Second Mortgage, thereby encumbering the property until 2013. While the court granted Henry's petition, it did so because of a provision in a separate mortgage agreement, which was executed as part of the separation agreement transaction, that expressly permitted prepayment of the Second Mortgage, whereas the Agreement did not expressly prohibit prepayment (*see Mendler v Mendler*, 245 AD2d 199, 199 [1st Dept 1997]). The trial court order stated that the relief granted was without prejudice to Judith seeking relief within the context of the parties' prior matrimonial action concerning sums due and owing by Henry to Judith under the Agreement. The Appellate Division affirmed and opined that the Second Mortgage secured only the outstanding mortgage principal and interest, with the other Agreement obligations unsecured (*id.*).

In December 1996, Judith commenced an action against Henry involving the Property, the Agreement, and the Second Mortgage. Judith claimed that until the Property's sale, or the death of Judith or Henry, it was intended that she retain a mortgage interest in the Property, because only with those events did the Agreement discuss satisfaction of the debt owed. Judith stated that the Agreement was structured to give her a continuing mortgage interest in the Property, terminable only if absolutely necessary through its sale, and likely resulting in her absolute ownership. She alleged that, although the court had earlier decided that Henry was entitled to a SOM, Henry had not complied with the Agreement's terms that Judith receive the full number of weekly \$100 payments and the two \$47,617 interest payments discussed in the Agreement.

Judith complained that Henry reaped the benefits of having the first interest payment deferred for 30 years, and, despite a fiduciary duty to her, had not fully disclosed the value, or potential value, of the Property before the Agreement was executed. Judith also made allegations about her health during the time when she entered into the Agreement.

The causes of action involved the \$100 per week payment and deferred interest payments, her claim that her was inadequate, and what Judith claimed was an improperly drafted Second Mortgage agreement. Judith requested declarations that: (1) an SOM would only be obtained by Henry upon the sale of the Property or at his death; (2) absent extraordinary circumstances necessitating its sale, Judith had a right to the Property unless she predeceased Henry; (3) the prepayment clause in the mortgage agreement did not terminate Judith's right to one-half of the proceeds upon sale, or, should no sale occur during Henry's lifetime, bequeathal of the Property at Henry's death; (4) Henry would be in breach of the Agreement if he attempted to gift, mortgage or otherwise diminish Judith's interest in the Property, as this would violate or avoid the terms of the Agreement relating to the Property's sale and bequeathal; and (5) if the court determined that early payment of the Second Mortgage was permissible, Henry had to pay a certain, higher amount of interest than he had paid. Judith alleged that Henry was unjustly enriched by her transfer to him of her interest in the Property, made in reliance on his promises in the Agreement. As part of the action, Judith deposited a SOM for the Property with the court (Furman moving affirmation, exhibit 9 [memorandum of law at 3]).

Henry counterclaimed for conversion and unjust enrichment. He alleged that he had tended a check to Judith for over \$46,000 in 1996, and that the court had previously ordered Judith to deliver a SOM to him, but she had not done so. In a decision dated December 18, 1997 and filed on December 23, 1997, the court dismissed Judith's 1996 complaint as barred by res judicata, characterizing the gravamen of Judith's complaint as alleging that the prior court order had, without interpreting the contravening Agreement, required that Judith provide to Henry a SOM upon his tender of the mortgage (see Doc No. 23). No appeal was taken of this decision. On December 23, 1997, the First Department affirmed the 1994 trial court decision granting Henry discharge of the Second Mortgage (*Mendler*, 245 AD2d at 199).

## DISCUSSION

Defendants move to dismiss pursuant to CPLR 3211 (a) (1), (5) and (7).

### A. Standards

#### 1. CPLR 3211 (a) (1) Standard

To succeed on a motion to dismiss, pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively

dispose of the plaintiff's claims (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]). While CPLR 3211 (a) (1) does not explicitly define "documentary evidence," contracts fall into the category of such evidence (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010]).

2. CPLR 3211 (a) (7) Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211(a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 317 [1995]). Reading the pleading liberally, and accepting a plaintiff's allegations as true, the court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). While a complaint is to be liberally construed in favor of the plaintiff on a CPLR 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

B. Res Judicata and Collateral Estoppel

Defendants argue that Judith's claims relating to the Property, as opposed to her claim about the Apartment, are barred by the doctrine of res judicata. "The doctrine of res judicata, or claim preclusion, is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication" (*Insurance Company of State of Pa. v HSBC Bank USA*, 10 NY3d 32, 38 [2008] [internal quotation marks and citation omitted]). As a general rule, "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 if seeking a different relief" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *see also Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 293 [1st Dept 2005] ["[A] claim will be barred by the prior adjudication of a different claim arising out of the same factual grouping even if the claims involve materially different elements of proof and even if the claims would call for different measures of liability or different kinds of relief"] [internal quotation marks and citation omitted]). Where rights are established in an action, a second action that would result in a judgment which would destroy or impair rights established by the earlier order in declaratory judgment action is not permitted (*see Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304,

306-307 [1929]). The doctrine applies “not only to claims actually litigated but also to claims that could have been raised in the prior litigation” (*Matter of Hunter*, 4 NY3d 260, 269 [2005]).

As res judicata is an affirmative defense, a defendant seeking dismissal on that ground bears the burden of persuasion on two issues: (1) that the prior decision was a decision on the merits; and (2) that the earlier litigations were based on the same claims.

Judith's 1976 action was about Henry's conduct before the divorce in allegedly, without Judith's knowledge, conveying the Property to a corporation that he alone owned, mortgaging it, retaining the proceeds, and then reconveying the Property to Judith and himself, without compensating Judith. While the court stated that Judith conveyed all of her ownership rights in the Property to Henry, nothing in the suit was about Judith's bequeathal rights.

Henry's 1994 petition concerned prepayment of the Second Mortgage to Judith under the Agreement and the mortgage agreement. The relief granted by the trial court was without prejudice to Judith seeking relief under the Agreement concerning what was owed to her through the divorce action. Assuming that the court implicitly confirmed that Judith had no real property interest or estate in the Property, there was still no determination that Henry had not contracted to make a testamentary disposition. Judith's relevant affirmative defenses/counterclaims concerned the effect of the mortgages on the Property, and of mortgage prepayment upon Judith's rights to payment upon sale of the Property or Henry's death.

In the 1996 action, Judith sought relief in the form of a declaration that “Henry would be in breach of the Agreement should he attempt to gift, mortgage or otherwise diminish Judith's interest in the premises, as such would be in violation and avoidance of the terms of the Agreement relating to sale and bequeathal” and that “absent extraordinary circumstances necessitating its sale, Judith had a right to the Property unless she predeceased Henry.” The complaint was dismissed. The factual underpinning of the case involved Henry's attempt to prepay the mortgage, and not pay both of the interest payments, and Judith's attempt to set aside the Agreement due to fraud. Judith also sought to clarify her rights under the Agreement, but in the context of what she deemed to be the loss of a security interest that she held encumbering the Property, through the Second Mortgage. The harm Judith sought to prevent was loss of a security interest in the Property, which is not the same harm as losing any potential future contractual right to the Property. The court itself stated that the gravamen of Judith's 1996 claim involved the Second Mortgage.

In addition, while Henry argued that the issue of gifting had been adjudicated, he also submitted a sworn affidavit in which he averred that he was not challenging Judith's rights under the Agreement to sales proceeds or bequeathal of the Property. Under such circumstances, it cannot be said, as a matter of law, that *res judicata* applies. Prior to the litigation's conclusion in 1997, Henry had not yet transferred the Property or LLC interests, or died. Thus, the factual underpinning of this case had not yet occurred.<sup>6</sup> As this court's determination adopts the court's prior determination that the gravamen of the 1996 action concerned the Second Mortgage, claim preclusion, concerning conduct that had not yet occurred, must be rejected. Because collateral estoppel will only be applied "to matters actually litigated and determined in a prior action" (*Kaufman v Eli Lilly And Co.*, 65 NY2d 449, 456 [1985 [citation and internal quotation marks omitted]]), dismissed on grounds of claim preclusion must be denied.

**C. The Statute of Limitations**

Defendants maintain the complaint is barred by the statute of limitations. They argue that the breach and injury occurred in 2006 or earlier, when Judith claims Henry gifted the Property to Lawton. Plaintiff responds that her claims did not mature until 2018, when Henry died, as she did not have a right to the Property before that time.

The statute of limitations defense requires a review of the Agreement because defendants argue Judith's allegations are contradicted by the Agreement. Judith alleges that Henry breached the Agreement by failing to bequeath the Property to her upon his death (*see* complaint ¶74) but, as discussed more fully below, the Agreement provides that Henry was only required to devise the Property to Judith in the event that he still owned it. The contingent contractual obligation to bequeath the property was never triggered because Henry disposed of the Property years before. Judith asserts that Henry was obligated to either retain ownership of the Property, directly or indirectly, so as to enable triggering of the obligation to bequeath, or to sell it and share of proceeds, if any, with her. In 2006, Henry did not sell the Property, but he also no longer owned it, having transferred his remaining interest in the LLC to Lawton. Thus, any damage Judith may have suffered due to the loss of her future contingent right to bequeathal occurred at the latest in 2006 (*see Kronos*,

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<sup>6</sup> The LLC Defendants' contentions about Henry having relied upon any prior court decision in conveying the Property to the LLC, or the LLC's membership interests to Lawton, is unsupported by evidence.

*Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993] [citations omitted]). Consequently, the tortious interference claims, which has a three-year statute of limitations (*Buller v Giorno*, 57 AD3d 216 [1st Dept 2008]) and the breach of contract claim, which has a six-year statute of limitations (CPLR § 213 [2]), shall be dismissed.

The parties do not dispute that the constructive trust and unjust enrichment claims are governed by a six-year statute of limitations. “Plaintiff[s] claims for . . . unjust enrichment, and constructive trust accrued at the time of [her] injury; these claims are not subject to a discovery rule” (*Gerschel v Christensen*, 143 AD3d 555, 556 [1st Dept 2016]; *Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2011] [constructive trust claim “commences to run upon occurrence of the wrongful act giving rise to a duty of restitution, and not from the time when the facts constituting the fraud are discovered”]).<sup>7</sup> Thus, these claims are also dismissed.

The RPAPL article 15 claim is also time-barred, as any conflicting interest held by Lawton or the LLC arose in 2006, or before, when Lawton received the Property, more than 12 years before Judith filed this action. Consequently, it is unnecessary to reach the LLC Defendants' argument that the prior litigations demonstrated that Judith conveyed all of her interests in the Property to Henry, and that Judith acknowledges in her complaint that Henry obtained sole ownership of the Property.

Concerning her Debtor-Creditor Law §§ 276 and 276-a claim, Judith alleges that unknown to her, Henry transferred to Lawton all of his interest in the LLC without consideration prior to his death, and that this was part of Henry's and Lawton's plan to hinder and defraud Judith. Against Lawton, Judith seeks a judgment for the fair market value of Lawton's interest in the LLC, or to compel Lawton to transfer that interest to Judith. Alternatively, Judith seeks a judgment compelling the LLC to convey the Property to her, or authorizing a sale of the Property, so that Judith may obtain the Property's fair market value. “A cause of action based on actual fraud pursuant to Debtor and Creditor Law § 276 must be brought within six years of the date that the fraud or conveyance occurs or within two years of the date that the fraud should have been discovered, whichever is longer” (*Liberty Co. v Boyle*, 272 AD2d 380, 381[2d Dept 2000]).

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<sup>7</sup> Judith alleges that Henry's transfer to the LLC was a mere change in form of ownership, with Henry retaining sole control of the LLC, and the ability to bequeath the Property through his holding of 100% of the LLC's membership interest. No wrongdoing is alleged against the LLC.

In moving, defendants argue that the statute of limitations is measured from the time when the alleged fraudulent conveyance occurred. However, defendants overlook the discovery prong of this cause of action. Defendants contend that Judith cannot meet her burden to prove that the limitations period should be tolled, but Judith does not claim a tolling of the statute of limitations, and defendants, not Judith, bear the burden on this motion to demonstrate that the claim is time-barred.

The LLC Defendants argue that Judith's repeated claims of Henry's wrongdoing triggered a duty of inquiry. They also argue that certain mortgage documents signed by a different member of the LLC were recorded in the chain of title for the Property, giving Judith notice that Henry was, at a certain point, not the sole member of the LLC. In opposition, Judith contends that she did not learn of the transfer, and that it was not discoverable by her until after Henry's death, when defendants filed the motion to dismiss with documents demonstrating that Henry's member interests were transferred to Lawton.

To support their notice argument, the LLC Defendants rely on *Andy Assoc. v Bankers Tr. Co.* (49 NY2d 13, 20 [1979]), which discusses the recording statute and its aim to furnish potential property purchasers with constructive notice of prior encumbrances. They also rely on *Belle Ayre Conservation Co. v State of New York* (214 App Div 127, 128 [3d Dept 1925], *affd* 246 NY 593 [1927]).<sup>8</sup> Defendants have not established, as a matter of law, that under the circumstances of this case (where Judith was not seeking to purchase the Property) that Judith was on notice that Henry had transferred the Property to Lawton.<sup>9</sup> Nor have Defendants shown that, as a matter of law, the

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<sup>8</sup> In *Belle Ayre Conservation Co.*, (214 App Div at 128), the Court stated that the:

"trustee's deed, which was on record at the time the plaintiff acquired its alleged title, and which recited the bankruptcy proceedings, amounted to constructive notice of the existence of the right of the defendant, or at least was sufficient notice to put the plaintiff upon inquiry, and if it had made the inquiry it would have learned that the title transferred by the trustee in bankruptcy was a good and valid title, and that the title which it was to receive was not valid."

<sup>9</sup> The fact that Joseph Mendler signed a recorded instrument as the manager of the LLC does not demonstrate that he was a member of the LLC. There is no affidavit from Joseph Mendler in the record, and perhaps he managed the office, or signed even though he was not a member. The circumstances under which others signed documents for the LLC have not been demonstrated, but the LLC Defendants' submissions appear to demonstrate that Henry conveyed 100% of the membership interests in the LLC to Lawton, which is the fraud alleged by Judith.

circumstances suggested “to a person of ordinary intelligence the probability that [she] has been defrauded,” thereby triggering a duty of inquiry by plaintiff (*compare Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011] [dismissing fraud claim where “a reasonable investor who had lost millions of dollars would have investigated further, rather than accept the cursory explanation plaintiff allegedly received” and investor received quarterly reports that put him on notice of error or fraud about which he never sought clarification]). “Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts” (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 159 [1st Dept 2017], quoting *Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]). Defendants’ arguments, about information and documents which they do not demonstrate Judith possessed, are not sufficient to meet their burden to demonstrate that the fraudulent conveyance claims are time-barred. Defendants’ argument that Judith was on notice because she alleged Henry’s wrongdoing, presumably in prior actions, does not sufficiently demonstrate, as a matter of law, that a duty of inquiry was triggered.

**D. Failure to State a Claim Based Upon Documentary Evidence**

As it is undisputed that Henry did not own the Property at the time of his death, defendants seek dismissal based upon the language in the Agreement stating that “[i]n the event the Husband [Henry] at the time of his death is the owner of [the Property], [Henry] shall, by appropriate provision contained in his Law Will and Testament, devise and bequeath the [Property] to [Judith].” The Estate contends that Judith’s allegations as to the terms of the Agreement, import into it a requirement for Henry to devise the Property to Judith, “unless he sells and conveys the Property to a third party” (amended complaint ¶ 20), but that language cannot be found in the Agreement.

Relying on the provision Agreement’s that “[n]othing contained herein shall be construed to prevent or restrain [Henry] from selling and conveying the [Property] or encumbering them, during his lifetime, subject to the provisions of this agreement,” the Estate argues that Henry was free to convey and transfer the Property during his lifetime. The Estate interprets the Agreement as providing Judith with rights to share in the net proceeds of a sale, if Henry sold the Property during his lifetime, or to receive a bequest of the Property, if Henry still owned it at the time of his death. Defendants rely upon an interpretation of the Agreement’s phrase “selling and conveying” in the

Bequeathal Provision as meaning selling *or* conveying. They contend that the Agreement permitted a conveyance for no consideration, as “sale” and “conveyance” are different.

The Estate contends that the phrase “subject to the terms of this agreement” in the Bequeathal Paragraph, is meant to ensure that any right of Henry to sell the Property during his lifetime did not negate his obligations to pay the mortgage and share the proceeds. The Estate points out that this language is absent from the bequeathal provisions for the Dutchess County Properties and the West 11th Street Property, and contends that this is because the non-titled party had no right to a mortgage against the respective properties to secure obligations under the Agreement, or to share in the net proceeds of a sale of the properties.

In opposition, Judith argues that the phrase “sell and convey” means “sell,” so that the language “selling and conveying” in the Bequeathal Paragraph should be viewed as a phrase that means “selling.” Applying the maxim of *inclusio unius est exclusio alterius* to the Bequeathal Paragraph’s language “selling and conveying,” Judith contends that Henry was authorized only to sell the Property, and to share the sales proceeds with her, but was implicitly precluded from gifting the Property. With that construction, Judith contends that the language of the Bequeathal Paragraph, stating “[i]n the event [Henry] at the time of his death is the owner of [the Property], followed by the bequeathal requirement, should be interpreted as stating that if Henry did not sell the Property during his lifetime, he must bequeath it to Judith.

Judith argues that: (1) an interpretation of the Agreement that permits Henry to gift the Property, would be no different than if Henry has bequeathed the Property to Lawton, a violation of the Agreement; (2) Henry may not improperly defeat any condition to bequeath; and (3) the movants simply ignore the language, in the Bequeathal Provision, stating that “[u]pon [Henry’s] death, the [then existing] mortgage and the debt it secures shall be deemed satisfied, Judith then becoming the owner of the [Property]” (Agreement, fourth article, ¶ [B] [6] [C]). Judith argues that if the court determines that the language of the Agreement is ambiguous, and reasonably susceptible to more than one interpretation, the motion must be denied, and the language must be construed in the sense in which Henry, the promisor, would have reason to believe it would be understood by Judith.

It is well established that:

"[t]he fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing.' Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous"

(*Riverside South Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009] [internal citations omitted]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). "A contract is unambiguous if 'on its face [it] is reasonably susceptible of only one meaning'" and "is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*id.* [internal citations omitted]).

The parties dispute whether the phrase "selling and conveying," should be construed as conjunctive, meaning selling, or disjunctive, meaning to sell or convey. As a general rule, "and" is interpreted as "or," in those instances where that also makes sense in a contract (*Murphy v Long Is. Oyster Farm*, 112 AD2d 276, 277 [2d Dept 1985], citing *Lamborn v National Park Bank*, 212 App Div 25, 32 [1st Dept 1925], *affd* 240 NY 520 [1925]), and where a court finds it necessary to resort to contract rules of construction in interpretation (*see Sasson v TLG Acquisition LLC*, 127 AD3d 480, 481 [1st Dept 2015]).

The phrase "selling and conveying" can be used as a term of art, signifying only selling as Judith argues. However, while the words "selling" and "conveying" are joined by "and," and followed by "or," concerning encumbering the Property, there is nothing that indicates that a term of art, or a phrase, was intended. The other terms in the Agreement demonstrate that the parties intended that "selling and conveying" be interpreted as disjunctive. For example, the bequeathal provision concerning the Dutchess County Properties contains the same "selling and conveying" language (Agreement at 15, fourth article, ¶ [B] [6] [A]). Yet, the provision in the Agreement transferring those parcels to Judith indicates that Judith had the power to "sell or otherwise convey" any of, or any portion of, the three Dutchess County parcels (*id.* at 9A, fourth article, ¶ [B] [1] [c]).<sup>10</sup>

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<sup>10</sup> Judith argues that she received a future interest in the Property, but this would have left Henry with only a life estate in the Property, when the Agreement expressly states that Judith agreed to transfer and assign to Henry, and to relinquish and release all of her past, present and

Judith contends that this demonstrates that she only did not have a restriction on the ability to gift, but it makes no sense that the words “selling and conveying,” used in the exact same context in the two respective bequeathal paragraphs would preclude Henry from gifting, but not preclude Judith from doing so.

The Agreement generally uses the word “conveying” alone, to mean a transfer (*see e.g. id.* at 9-11, fourth article, ¶¶ B [1] [a]; [B] [2]; [B] [3]; and the word “sale,” to indicate a sale (*see id.* at 13, fourth article, ¶ [B], [5] [c]). The Agreement also contains a bequeathal provision for the West 11th Street Property with the same “selling and conveying” language as the Bequeathal Paragraph. Yet the Agreement provides, concerning Judith’s occupancy of the Apartment at the West 11th Street Property, that Henry “expressly covenants that he will not convey said premises except subject to the provisions herein contained” without using “sell and convey” or otherwise expressing any restriction.

Judith advocates for the application of the maxim *inclusio unius est exclusio alterus*, so that the sentence, “nothing contained herein shall be construed to prevent or restrain [Henry] from selling and conveying [the Property] or encumbering them,” is deemed to authorize Henry to engage in the enumerated conduct only, and thus implicitly restricts other types of conduct. However, the plain language of the provision is not fairly read as imposing restraints on Henry. Had the parties intended to restrict Henry, or Judith, from gifting any of the properties, for example to children or future spouses (not an esoteric concept for a divorcing couple) or from engaging in other conduct, such as converting buildings to condominiums, such prohibitions easily could have been made express.

Had the language of the Bequeathal Paragraph not been a contingent promise to devise the Property, it would be reasonable to infer that Henry had also agreed that he would not gift away the Property during his lifetime, as this would be incompatible with an absolute agreement to devise. However, the plain language of the Bequeathal Paragraph is not absolute, but contingent, as it states that “[i]n the event Henry at the time of his death is the owner.” This plain language means “if” Henry is the owner, and may not be rewritten to be interpreted as “in the event Henry has not sold the Property,” a court may not rewrite agreements, by adding, excising and distorting terms “under

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future right, title and interest in all of the Manhattan properties. As Henry owned the future interest, he could make the promise to devise the Property, which is governed by the laws of contract.

the guise of interpretation [to], fashion a new contract" (*Evans v Famous Music Corp.*, 302 AD2d 216, 217 [1st Dept 2003], *affd* 1 NY3d 452 [2004]).

Judith argues that an interpretation of the words "selling and conveying" as disjunctive would render illusory Henry's promise to pay Judith half of net proceeds upon his sale of the Property, or, if he had not sold the Property prior to his death, to bequeath it to Judith illusory. However, this is true only if the Agreement is interpreted in the manner Judith seeks.

The language "subject to the provisions of this Agreement" does not change the analysis. The language in the Bequeathal Paragraph "[u]pon [Henry's] death, the [then existing] mortgage and the debt it secures shall be deemed satisfied, Judith then becoming the owner of the [Property]" (Agreement at 15A, fourth article, ¶ [B] [6] [C]), which immediately follows the bequeathal obligation, makes explicit that, had Henry still owned the Property, thereby triggering the bequeathal obligation, Judith would have become the Property's owner, and Henry, or his estate, would have been relieved of the remaining mortgage obligation.

As the complaint alleges, Henry did not own the Property when he died. Thus, Henry's contractual obligation to devise never arose. Consequently, the breach of contract cause of action, and the other causes of action that are derivative of the breach claim, that is, all of the causes of action except the fifth concerning Judith's occupancy of the Apartment, shall be dismissed.

#### **E. The Apartment**

The fifth cause of action states that, pursuant to the Agreement, Henry was obligated to provide for Judith's occupancy of the Apartment, without cost or expense to her. The complaint further states that Henry stopped paying those costs and expenses in 2016, and seeks damages for those costs since then.

Concerning's Judith's occupancy of the Apartment, the Agreement provides that: "subject to the further provisions of this agreement, [Judith] shall have the right to the exclusive occupancy of the present marital apartment at 11 West 11th Street, New York, New York, as her personal residence. [Judith] is herewith conveying all of her right, title and interest in the real property known as 11 West 11th Street, New York, New York to [Henry] subject to the [Judith's] right to occupy said apartment free of rent for the time, and under the conditions hereinafter set forth. In connection therewith, it is further understood that [Judith] shall not be obligated to pay for the maintenance of the air conditioning system, the major appliances presently contained in said apartment, all utilities including electric, gas and telephone. . . . Any obligation deemed necessary by this paragraph in order to satisfy the wife's

enjoyment of her life estate may be made directly to her, or directly to the appropriate creditor.”

...

“The provisions of this paragraph shall be binding upon the present and any further owner of premises 11 West 11th Street . . . and the Husband expressly covenants that he will not convey said premises except subject to the provisions herein contained. Upon the termination of the wife's occupancy the owner of said premises shall have the right to re-enter and peaceably take possession of the apartment” (*id.* at 3, first article, ¶ B).

The Estate contends that Judith failed to mention that, in 2006, Henry transferred ownership of the Apartment to Joseph Mendler. The Estate argues that, in the Agreement, Judith transferred ownership of the Apartment to Henry, and that Henry granted Judith exclusive occupancy free of rent, but that he was free to sell the Apartment, subject to the requirement that the new owner continue to pay the maintenance expenses. The Estate further argues that the complaint does not allege that Henry guaranteed a new owner's obligations to continue Judith's free rent arrangement, or that he ever breached his obligation to convey the Apartment subject to the new owner's obligation to continue to pay the maintenance expenses.

In support of its arguments, the Estate provides a copy of a recording document for sale of the Apartment to Joseph Mendler over 12 years ago. Based upon that document, the Estate argues that, after the sale, Henry had no obligation to pay the maintenance expenses discussed in the Agreement, and the claim is time-barred based upon the date of the sale.

In opposition, Judith argues that her claim accrued when Henry stopped paying the maintenance in 2016, and is not time-barred, or barred by a demonstration that the Apartment was sold. Judith also submits the Offering Plan (Plan) for the cooperative building at 11 West 11th Street, for which Henry was the sponsor, and contends that it demonstrates that Henry's maintenance obligation survived the sale of the Apartment. Judith relies on a rider to the 2006 sales contract involving the Apartment, which states that Henry, as the sponsor of the cooperative's plan for the building, was making the sale pursuant to the offering plan as a sale of unsold shares. Judith points to a page in the offering plan, which she states provides that Henry “will remain liable for all maintenance charges pertaining [to the Apartment] pursuant to the . . . Plan” and that his liability would survive a sale or conveyance of the Apartment to a subsequent owner. Consequently, Judith

argues, Henry had a continuing obligation to pay maintenance charges, and the recording document defendants submit showing sale of the Apartment does not conclusively establish a defense as a matter of law.

The Agreement obligated Henry to provide for Judith's occupancy of the Apartment without rent or certain other costs of upkeep and telephone. The Agreement states that it is "expressly agreed that the wife's rights under this paragraph, terminate at the earliest of" Judith's death, her abandonment or intentional vacatur of the Apartment, or if she was "not the sole and exclusive occupant of [the Apartment]" (Agreement at 4, first article, ¶ B). Defendant bears the burden on this motion, and has not demonstrated that the provision of the Agreement concerning Judith's occupancy addressed the sale of the Apartment, individually, as opposed to the sale of the real property located at 11 West 11th Street (the building). Thus, the Estate did not meet its burden of showing the claim is time-barred by demonstrating a sale of the Apartment in 2006. As the complaint alleged that Henry stopped paying his obligations only in 2016, this claim survives.

#### CONCLUSION

In light of the foregoing, it is

**ORDERED** that the motion of defendants Jane-Horatio LLC, Suzanne Lawton, individually and as Personal Representative of the Estate of Henry Mendler, to dismiss the complaint is granted to the extent that the first, second, third, fourth, sixth, seventh, eighth and ninth causes of the action of the complaint are dismissed against Jane-Horatio LLC, Suzanne Lawton individually and as personal representative of the estate of Henry Mendler, and Dime Community Savings Bank f/k/a The Dime Savings Bank of Williamsburgh, and is otherwise denied, with costs and disbursements to Jane-Horatio LLC, taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Jane-Horatio LLC, Suzanne Lawton individually only and Dime Community Savings Bank f/k/a The Dime Savings Bank of Williamsburg defendants; and it is further order

**ORDERED** that the action is severed and the fifth cause of action of the complaint is continued as to defendant Suzanne Lawton as Personal Representative of the Estate of Henry Mendler; and it is further


**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

**ORDERED** that counsel for the remaining parties shall appear at a preliminary conference on Tuesday, March 24, 2020 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York New York.

This constitutes the decision and order of the court.

**DATED: February 18, 2020**

**ENTER,**  
  
**O. PETER SHERWOOD J.S.C.**