

**Tiozzo v Dangin**

2020 NY Slip Op 32532(U)

July 31, 2020

Supreme Court, New York County

Docket Number: 157303/2019

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

LAURA TIOZZO

INDEX NO. 157303/2019

- v -

MOT. DATE

MOT. SEQ. NO. 002 and 003

PASCAL DANGIN and LENZ CAPITAL GROUP LLC

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

There are two motions pending. The first, sequence 2, is by plaintiff Laura Tiozzo ("Tiozzo") for summary judgment on all causes of action against both defendants Pascal Dangin ("Dangin") and Lenz Capital Group LLC ("Lenz").

The second motion, sequence 3, is by Dangin, wherein he seeks an order striking a portion of Tiozzo's papers submitted in reply to her motion for summary judgment and in opposition to Dangin's cross-motion and/or permitting Dangin to submit sur reply papers "addressing an argument that Plaintiff failed to raise in her moving papers and which is misleading".

Since the disposition of motion sequence 3 impacts motion sequence 2, they are hereby consolidated for consideration and disposition in this single decision/order. The court will first consider the motion to strike or submit a surreply.

The court now turns to the motion and cross-motion for summary judgment. The undisputed facts are as follows. In 1994, Tiozzo and Dangin were legally married in New York. On August 28, 2003, Tiozzo and Dangin purchased, for \$1,111,000.00, a condominium apartment unit known as Unit No. 5A, (Lot 1143, Block 642 of Section 2) (the "Jane Street property") in the building known as The Jane Street Condominium (the "building").

Dated: 7/31/20

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

Tiozzo and Dangin were legally divorced by a Judgment of Divorce dated November 3, 2004 (the "Judgment of Divorce") and filed in the New York County Clerk's Office on November 17, 2004. Pursuant to the Judgment of Divorce, the stipulation entered into between Tiozzo and Dangin dated June 11, 2004 (the "Stipulation of Divorce") was incorporated by reference therein and survived the Judgment of Divorce. Copies of the Judgment of Divorce and Stipulation of Divorce have been provided to the court.

Pursuant to paragraph 13 (b) the Stipulation of Divorce, plaintiff was entitled to sole ownership of the Jane Street Property. Paragraph 13 (b) of the Stipulation of Divorce reads as follows:

The parties agree that [Tiozzo] shall be entitled to sole ownership and exclusive use and occupancy of the Jane Street property. The parties further agree that [Dangin] shall solely be responsible for and shall continue to make all of the mortgage payments on the Jane Street property pursuant to the terms of the existing mortgage until said mortgage is fully satisfied. It is the intention of the parties that [Tiozzo] have sole legal title to the Jane Street property. [Dangin] shall promptly execute and cause to be promptly recorded a quitclaim deed to [Tiozzo] provided such execution and/or recording does not cause a termination or modification of the terms of the existing mortgage. In the event that [Dangin] is unable, for any reason, to execute and/or record such quitclaim deed, [Dangin] agrees and covenants that notwithstanding the joint ownership of the Jane Street property, he will not act in any way or manner or through any deed or omission, whether directly or indirectly, to interfere with [Tiozzo's] exclusive use and occupancy of the said property, including the sale of the said property by [Tiozzo] should she so choose. In the event that [Tiozzo] elects to sell the property, [Dangin] shall continue to make monthly payments to [Tiozzo] in the amount of the mortgage payments in effect at the time of such sale on the same terms and conditions of said mortgage, until [Tiozzo] has received that amount of money equal to the pay-off amount of the mortgage in effect on the closing date of the sale of the Property. [Dangin] may prepay the amount of the mortgage on Jane Street property at any time.

To date, Dangin has not executed a quitclaim deed to plaintiff. Dangin claims in his sworn affidavit submitted in support of the cross-motion that "[i]n 2004, at Tiozzo's request, [he] refrained from executing a quitclaim deed to Tiozzo for the Jane Street [p]roperty."

On or about December 7, 2018, Dangin, on behalf of Box Services, LLC ("Box Services") and Kids Creative, LLC ("Kids Creative"), as well as personally, executed an Affidavit For Judgment by Confession in which Dangin confessed judgment and authorized Lenz to enter judgment in favor of Lenz and against Dangin, as well as Box Services, LLC ("Box Services") and Kids Creative, LLC ("Kids Creative") in the sum of \$1,948,909.50. That Judgment by Confession was filed under an action entitled Lenz Capital Group, LLC v. Box Services, LLC, Kids Creative, LLC and Pascal Dangin, in Supreme Court, New York County, Index No.: 650878/2019. On February 13, 2019, a judgment was issued and filed in favor of Lenz and against Dangin, Box Services and Kids Creative, jointly and severally, in the sum of \$1,948,909.50. There is no dispute that plaintiff was not involved in any loan from Lenz to Dangin, Box Services and/or Kids Creative.

In her complaint, plaintiff has asserted the following causes of action for declaratory and injunctive relief: [1] the first cause of action seeks a declaratory judgment finding that plaintiff has a 100% equitable interest in the Jane Street property; [2] the second cause of action seeks a declaratory Judgment under RPAPL Article 15 finding that plaintiff is the 100% equitable owner of the Jane Street property and that defendants Dangin and Lenz and every person claiming under any defendant shall be barred from all claim to an estate or interest in the Jane Street property; [3] the third cause of action seeks an injunction permanently barring defendants or any holder of a certain judgment held by Lenz from creating, perfecting or enforcing any lien against the Jane Street property; and [4] the fourth cause of action

seeks an injunction ordering Dangin to execute a quitclaim Deed for the Jane Street property in plaintiff's favor.

Plaintiff's remaining fifth and sixth causes of action seek money damages against Dangin for failure to pay child support, education expenses, and mortgage payments on the Jane Street Property pursuant to the stipulation of divorce. In connection with the former, Tiozzo and Dangin have a child named Cecilia Daphne Dangin ("CD") who was born on July 24, 1996. The Stipulation of Divorce provides in relevant part as follows:

43. ...[Dangin] agrees to pay to [Tiozzo], as and for the support and maintenance of the Child, the sum of \$3,000 on the first business day of each month, by direct deposit by [Dangin] into a separate bank account established by [Tiozzo] for that purpose only. [Tiozzo] shall provide monthly bank statements for said account to [Dangin] as she receives them. [Dangin] shall also be solely responsible for health insurance and educational expenses as set forth in Articles XV and XIX herein.

44. The parties further agree that the \$3,000 shall be subject to an annual cost of living adjustment commencing in 2005, such increase to be based upon the consumer price index published by the US Department of Labor for the previous year. [Tiozzo] shall inform [Dangin] by December 31 of each year of the amount of the cost of living increase for the following year. The failure of [Tiozzo] to request a cost of living increase under this Article in any particular year or years shall not be deemed a waiver of her right to seek such any increase in any subsequent year.

The Stipulation of Divorce further provided that Dangin's obligation to pay child support terminated on the date of an emancipation event, defined as either CD reaching age 18 or up to age 22 while pursuing post-high school education. While CD turned 18 years of age on July 24, 2014, she attended college at Fordham University for four years through May 19, 2018.

Plaintiff claims that Dangin failed to pay any child support for the monthly amount due for August 2014 and thereafter, never paid any more child support. Thus, plaintiff seeks 45 months' worth of child support. Further, plaintiff asserts that defendant has failed to pay CD's educational expenses in an amount "well over \$50,000" and seeks "[f]or purposes of this motion, [] \$53,284.50" representing CD's college tuition and rooming costs.

Plaintiff further maintains that Dangin has failed to pay the mortgage on the Jane Street property since December 2017 and that she has made payments through December 2019 totaling \$134,041.85.

Lenz's amended answer asserts general denials and various affirmative defenses including priority, failure to state a cause of action, estoppel, waiver, laches and unclean hands. In his answer, Dangin also alleges numerous affirmative defenses, including, estoppel, laches, waiver, statute of limitations and unclean hands.

No discovery has been had, although demands for depositions have been served.

#### Parties' arguments

Plaintiff argues that she is the holder of a 100% equitable interest in the Jane Street property and relies on *Pangea Capital Mgt., LLC v Lakian*, 34 NY3d 38 [2019], which held that a spouse's interest in real property granted pursuant DRL § 236 vis-à-vis a divorce judgment is not subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property. Plaintiff also points to *Darling v. Darling*, 22 Misc3d 343 [Sup Ct Kings Co 2008], in which Justice Battaglia held that that an equitable distribution award renders the recipient spouse "a transferee as to

the marital property distributed, rather than a judgment creditor, for purposes of [CPLR] Article 52," with "the transfer deemed to take place, at the latest, when the divorce judgment is entered." Plaintiff maintains that to allow Lenz to execute its judgment on the Jane Street property "would defeat the purpose of awarding plaintiff Tiozzo a 100% Equitable Interest Jane Street Property, for which plaintiff gave up any rights to what was at the time of the divorce, a very valuable interest in a very successful company (plaintiff's former spouse Dangin's 2002 income from Box, Ltd. was \$1,992,497), as well as a valuable house in Amagansett, New York."

Lenz argues that plaintiff's action is time barred pursuant to CPLR § 212[a] because plaintiff "has not been in possession of the subject property within the last ten years. It further argues that that "a mere judicial declaration of equitable distribution, without entry, cannot give a spouse an interest in property superior to that of a creditor holding a valid judgment lien." Lenz cites *Musso v. Ostashko*, 468 F3d 99 [2d Cir 2006], a case distinguished by the Court of Appeals in *Pangea Capital* and Justice Battaglia in *Darling*. Lenz argues that *Pangea* and *Darling* are distinguishable from the facts here. Otherwise, Lenz contends that plaintiff's claims subject to a six-year statute of limitations which began to accrue in 2004.

Dangin argues that plaintiff's Motion should be denied because it is premature as no discovery has been conducted. He contends that plaintiff has not met her burden on the motion and factual issues preclude summary judgment. Dangin further argues that plaintiff's claims based on his failure to deliver to Tiozzo a quitclaim deed to the Jane Street Property are time-barred and therefore he should be granted summary judgment dismissing the plaintiff's first, second, third and fourth causes of action.

On reply, plaintiff maintains that no discovery is needed, that her claims are not time barred, and that *Musso* is not controlling. She further states in her sworn affidavit:

In order not to not to be in default of the expressed terms of the [Chase] Mortgage, I have refrained from obtaining and filing a Quit Claim deed from [] Dangin. Now that I am considering selling the Jane Street Property, which has become more of a financial burden each month since defendant Dangin stopped paying the mortgage, I am seeking to get a Quit Claim deed executed by defendant Dangin, which I understand I can hold and deliver at a closing of the sale by me of the Jane Street Property at the time I am able to use the sale proceeds to pay off the [Chase] Mortgage.

In motion sequence 3, Dangin argues that "Plaintiff, for the first time, attempted to substantively address the statute of limitations issue by disingenuously arguing, without any evidence, inter alia, that Dangin could not deliver the requisite quitclaim deed because doing so would be a default under the [Chase Mortgage]". Dangin's counsel argues that he would have addressed this issue in his opposition/cross-motion if plaintiff had properly raised it in her original papers. Dangin therefore seeks to either have the relevant portions of plaintiff's reply affidavit stricken or the opportunity to submit a surreply. Meanwhile, plaintiff opposes Dangin's application.

## Discussion

At the outset, Dangin's motion to strike portions of plaintiff's reply affidavit on sequence 2 or submit a surreply is denied. The facts asserted by plaintiff are not new such that a surreply is warrant and there is otherwise no basis to strike them from the record. In any event, in light of this court's disposition of plaintiff's motion for summary judgment, Dangin's motion is moot (*see infra*). The court now turns to the motion and cross-motion for summary judgment.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient

evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Dangin argues that he is entitled to summary judgment dismissing plaintiff's first through fourth causes of action because they sound in breach of contract and arise from the date of the Stipulation and/or Judgment of Divorce.

This is not a post-judgment matrimonial enforcement application. This is a plenary action where plaintiff seeks to enforce the terms of a stipulation she entered into approximately fourteen years ago. Therefore, plaintiff's claims are necessarily subject to a six-year statute of limitations for breach of contract claims pursuant to CPLR § 213[2] (see *Holsberger v. Holsberger*, 154 AD3d 1208 [3d Dept 2017]; *Bayen v. Bayen*, 81 AD3d 865 [2d Dept 2011]; *Uzzo v. Hoth-Uzzo*, 32 Misc3d 861 [Sup Ct, Rich Co 2011]; see also *Boardman v. Kennedy*, 105 AD3d 1375 [4th Dept 2013]). The court, however, rejects Dangin's argument that plaintiff's claims accrued outside the statute of limitations. There is no proof that plaintiff demanded Dangin to execute a quitclaim deed and that he failed to do so in breach of the Stipulation of Divorce. The terms of the Stipulation itself do not set a deadline for same. Rather, plaintiff's claims arose from, at the earliest on this record, when Lenz entered judgment against Dangin. Accordingly, Dangin's cross-motion for summary judgment is denied.

It is clear from the Stipulation of Divorce, which was incorporated into and survived the Judgment of Divorce, that Tiozzo and Dangin fully intended for Tiozzo "to have sole legal title to the Jane Street property". The Court of Appeals has explained that in the context of divorce, Tiozzo and Dangin's "legal rights to specific marital property vest[ed] upon the judgment of divorce, with inchoate rights becoming actual ownership interests by virtue of [an] equitable distribution judgment" (*Pangea* at 43). There are, however, fact issues as to whether Dangin did not execute a quitclaim deed in favor of Tiozzo at the latter's request and why. Tiozzo admits that she "refrained from obtaining and filing a Quit Claim deed from [] Dangin" and therefore concedes that she was aware that until doing so, legal title to the Jane Street property remained in both her and Dangin's name.

The recording of legal title is not merely ministerial. If Tiozzo directed Dangin not to execute a quitclaim deed, whatever the reason, she may be barred from enforcing the terms of the Stipulation of Divorce as they are written via laches or unclean hands. Defendants may have other viable defenses, which cannot be disposed of at this preliminary stage of the action. For at least these reasons, plaintiff's motion as to the first four causes of action must be denied.

Further, contrary to plaintiff's claims, Dangin is entitled to discovery regarding the money damages she seeks. Accordingly, the balance of plaintiff's motion is also denied.

## CONCLUSION

In accordance herewith, it is hereby

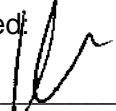
**ORDERED** that the motion and cross motion under sequence 2 as well as motion sequence 3 are all denied.

A preliminary conference order must be completed. Accordingly, it is hereby **ORDERED** that the parties shall meet and confer on or before September 18, 2020 and complete a preliminary conference order. Proposed preliminary conference orders should be filed on NYSCEF as a Preliminary Confer-

ence Order (Proposed)". Forms are available on the New York State Court System's website at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/suptctmanh/PC-Genl.pdf>.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 7/31/20  
New York, New York

So Ordered:   
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Hon. Lynn R. Kotler, J.S.C.