

**York v York**

2021 NY Slip Op 34251(U)

March 29, 2021

Supreme Court, Queens County

Docket Number: Index No. 719749/2019

Judge: Ulysses B. Leverett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
ESTHER YORK,

Plaintiff(s)

-against-

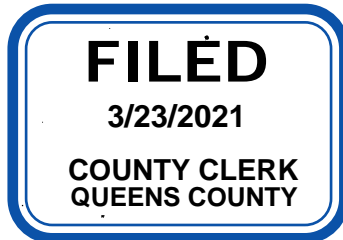
Index #: 719749/2019  
Motion Seq. # 2

WILLIAM YORK, BETTY OFFMAN YORK AND  
JOSPH YORK, individually and in concert with  
each other,

Defendant(s)

-----X  
PRESENT: HON. ULYSSES B. LEVERETT

**DECISION/ORDER**



Joseph York's Notice of Motion-Affirmation-Exhibits  
Affirmation in Opposition  
Affirmation in Reply by Defendant Joseph York

Papers Numbered  
EF 25-36  
EF 48-50  
EF 59-60

Upon the foregoing papers, the decision and order on this motion is as follows:

C Defendant Joseph York's motion to dismiss plaintiff's Esther York's amended complaint is granted without prejudice to a pending matrimonial action. Plaintiff Esther York's complaint dated March 2, 2020, and amended complaint dated October 29, 2020 alleged five causes of action, to wit: (1) fraudulent conveyance of Joseph's undistributed income, (2) unjust enrichment by Joseph at plaintiff Esther York's expense, (3) fraud regarding defendant Joseph York's income, (4) conspiracy by defendants to commit fraud, and (5) fraudulent concealment of information from plaintiff.

Defendant Joseph York seeks dismissal of plaintiff complaint with prejudice pursuant to New York Civil Practice Law and Rules (CPLR) §3211(a)(5) and/or; CPLR §213(8) Statute of Limitations for Fraud; CPLR §3211(a)(1) defense based on documentary evidence; CPLR §3211(a)(7) and §3016(b) failure to state a cause of action with requisite particularity; CPLR §2104 open court stipulation and CPLR §3211(a)(4) action pending between parties.

Plaintiff Esther York and Joseph York are married. Plaintiff commenced a matrimonial action against defendant Joseph York in 1998 in Queens County Supreme Court under index #11853/1998 which remains active and is currently pending before Justice Margaret Parisi-McGowan. In December 1999 plaintiff commenced a separate Supreme Court action under index #28772/2019 against defendant Joseph York and his brother defendant, William York alleging fraud, constructive fraud and constructive trust to settle a 1994 Stock Purchase Agreement Action. On November 7, 2001, the action was settled pursuant to an open court stipulation before

Justice Herbert Posner wherein plaintiff Esther York settled with prejudice, her interest in the York Kissena Realty Inc. shares held by defendant Joseph York for \$125,000. The stipulation also provided that at the commencement of the 1998 matrimonial action defendant Joseph York was deemed to have ownership of 50% of the stocks in Affiliated Leisure Clubs, Inc., Travel Dimensions Tours, Inc. and Elite Dimensions Tours, Inc. for “the purposes of equitable distribution and without prejudice for each party to argue before the matrimonial court with respect to valuation date to be applied to such assets.”

The stipulation further provided

(5) Nothing herein shall preclude either Esther York as plaintiff or Joseph York in the matrimonial action from arguing ---- from making any argument in connection with the net worth or income of Joseph York – of Joseph York, including but not limited to any claim that Joseph York has received additional income beyond that which is reflected in the W-2 he receives.... and undistributed income.

Esther York shall receive .... reasonable discovery regarding any post 1998 income received by Joseph York...

“Esther York shall have no claim and that this matter settles finally, fully and finally, any rights with regard to equitable distribution in the matrimonial action or any other claims arising out of or relating to the ownership of stock in York Kissena Realty, and that she shall make no claim for equitable distribution with regard to such corporation.”

Plaintiff York confirmed to the Court that she understood the terms of the November 7, 2001 stipulation stating

“Ms. Esther York: I understand that they’re going to pay me \$125,000 for --- York Kissena Realty... that is the settlement with respect to York Kissena Realty. And, the other three entities, he will be deemed the owner as of 1998 and forward, and I can go to the matrimonial court and make my claim as far as support and everything else, that he didn’t take all the monies, that he lowered his salary.”

Plaintiff Esther York subsequently sought to make William York a third-party defendant in her pending 1998 matrimonial action. The matrimonial Court’s permission to do so was reversed in the Appellate Division decision and order dated May 22, 2019 wherein the Appellate Court found “[t]he third-party complaint failed to state a cause of arising out of the divorce action.” The Appellate Court also denied defendant leave to appeal the Court ordered directed hearing on plaintiff Esther York motion to hold the defendant in civil contempt “as no appeal lies

as of right from an order which directs a hearing to aid in the disposition of a motion [*See Serraro v. Straropoli*, 94 A.D.3d 1083, 1084 (2012)].”

Plaintiff subsequently filed a summon and notice against defendants herein William York, Betty York and Joseph York under Supreme Court, Queens County index # 709139/2019. Defendants moved to dismiss plaintiff summons with notice based upon improper service. Plaintiff filed a notice of discontinuance dated October 15, 2019 and defendants motion to dismiss was granted without prejudice by this Court decision and order dated October 30, 2019.

In this action plaintiff claims that the defendant has perpetrated a continuing fraud on plaintiff since the November 7, 2001 stipulation was entered with defendants Joseph and William York. Plaintiff claims the fraud was the reducing and redistributing of defendants Joseph's salary, income and asset level as to make defendant Joseph incapable of paying directly from Joseph's own bank accounts and other assets the alleged multiple judgments plaintiff has obtained against him as well as recent support arrears. Plaintiff also states that the amended complaint alleges that the fraud occurred within 6 years prior to the commencement of this action and with the 6-year statute of limitation.

Defendants seek dismissal of the action or causes of action pursuant to CPLR §3211(a)(5) statute of limitation and res judicata and CPLR §3016(b) failure to state a cause of action.

CPLR §231(8) provides that

“an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.”

The pleading requirements of fraud claim stated in CPLR §3016(b) which provides:

“(b) Fraud or Mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”

To state a claim for fraud, plaintiff must allege defendants' misrepresentation or material omission of fact, with knowledge of falsity by the defendant, made for the purpose of inducing plaintiff's reliance on it, justifiable reliance by plaintiff of the misrepresentation and damages. *See Swartz v. Swartz*, 145 A.D.3d 818 (2016) and *Ginsburg Dev. Companies, LLC v. Carbone*, 134 A.D.3d 890 (2015).

Plaintiff asserts in the amended complaint that the fraud, and conspiracy to commit fraud by all defendants occurred with the reduction of defendant Joseph employment income from defendant's jointly own businesses and/or delinquent support payments since 2003. Plaintiff claims that despite discovery that was stipulated in the 2001 agreement and otherwise in the

pending matrimonial action, she reasonably relied on defendant's fraudulent misrepresentation of income from the 2003 and continuing the commencement of this action.

All plaintiffs alleged causes of action relating to fraud, to the extent they are not pending in the matrimonial action, are time barred pursuant to CPLR §213(8). Plaintiff has alleged fraudulent conveyance of defendants undistributed income, fraud regarding defendant's income, conspiracy to commit fraud, and fraudulent concealment of information from plaintiff during the matrimonial action. This action occurred more than 6 years after the alleged fraud and more than 2 years after plaintiff, acting with reasonable diligence, could have discovered the alleged fraud. *See* CPLR §203(g).

Plaintiff cause of action for unjust enrichment, to the extent it is not pending in the parties' matrimonial action, is time barred by the 6-year statute of limitation pursuant to CPLR §213(1). The action for unjust enrichment accrues upon the occurrence of the wrongful act giving rise to a duty of restitution. *See Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 192 A.D.2d 501 (1993). Here, plaintiff alleges that the wrongful act occurred at least in 2003 and continues to present.

Defendants seek dismissal of plaintiff's complaint pursuant to CPLR §3211(a)(4) as there is a pending matrimonial action between the parties seeking the same relief.

CPLR §3211(a)(4) provides for dismissal of causes of action where "there is another action pending between the same parties for the same cause of action in a Court of any state or the United States." Here, plaintiff Esther York and defendant Joseph York have a matrimonial action that has been pending since its commencement in 1998.

Plaintiff asserts that the matrimonial action seeks a judgment of divorce, equitable distribution and support, as well as fines and penalties resulting from defendant Joseph York contempt of orders for pendente lite relief and additional expended and cost borne by plaintiff. Plaintiff also argues that defendant's fraudulent acts have prevented her from obtaining court ordered support including \$1.9 million dollars in money judgments engendered by defendant Joseph York arrears and current support arrears in excess of \$3 million dollars. Plaintiff argues that the matrimonial action does not involve Betty and William York but that the actions for fraud, unjust enrichments and fraudulent conspiracy to hide defendant Joseph income is not pending.

Pursuant to CPLR §3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same. It is not necessary that the precise legal theories presented in the first action also be presented in the second action [so] long as the relief is the same or substantially the same. *See Whitney v. Whitney*, 57 N.Y.2d 731 (1982), *Daij Inc. v. Roth*, 85 A.D.3d 959 (2011), *JP Morgan Chase Bank, Nat'l Ass'n v. Luxama*, 172 A.D.3d 1341 (2019).

“A court may dismiss an action pursuant to CPLR §3211(a)(4) where there is a substantial identity of the parties, the two actions are **sufficiently similar**, and the relief sought is **substantially the same....**” *Dec v. BFM Realty, LLC*, 153 A.D.3d (2017).

The court finds that this lawsuit and the pending 1998 matrimonial action involves sufficient similar facts as to inter alia defendants Joseph York’s assets and undistributed income known or discoverable to satisfy outstanding obligation of judgments and ongoing supports due plaintiff in the matrimonial action. The issue relating to equitable distribution are currently being litigated in the matrimonial action. Plaintiff claim of unjust enrichment requires a balancing of the equities which can occur in the matrimonial action.

The court also finds that plaintiffs claim for fraud, fraudulent conveyance which allegedly occurred after the 2001 stipulation but prior to the commencement of this action are not within the 6-year statute of limitation or 2-years from the discovery of the alleged fraud.

Accordingly, defendant Joseph York motion to dismiss plaintiff’s complaint pursuant to CPLR §3211(a)(4) on the ground that there is an action pending between the parties and to dismiss the action under CPLR §3211(a)(5) as barred by the statute of limitations is granted. The action is dismissed.

This is the decision and order of this Court.

Dated: 3/29/2021

  
Ulysses B. Leverett, JSC

