

**Schmid v Schmid**

2017 NY Slip Op 31029(U)

April 19, 2017

Supreme Court, Suffolk County

Docket Number: 5390/2015

Judge: Joseph Farneti

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_  
HANS SCHMID & ERICK SCHMID,

Plaintiffs,

-against-

JOANNE SCHMID & KRISTYN SCHMID,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: MAY 13, 2015  
FINAL SUBMISSION DATE: AUGUST 25, 2016  
MTN. SEQ. #: 002  
MOTION: MG

ORIG. RETURN DATE: NOVEMBER 10, 2016  
FINAL SUBMISSION DATE: NOVEMBER 10, 2016  
MTN. SEQ. #: 003  
MOTION: MG

ORIG. RETURN DATE: NOVEMBER 17, 2016  
FINAL SUBMISSION DATE: DECEMBER 1, 2016  
MTN. SEQ. #: 005  
MOTION: MG

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Upon the following papers numbered 1 to 20 read on these motions \_\_\_\_\_  
TO DISMISS AND QUASH SUBPOENAS \_\_\_\_\_

Notice of Motion and supporting papers 1-3; Affidavit in Opposition and supporting papers  
4, 5; Second Response to Motion for Dismissal and supporting papers 6, 7; Reply

Affidavit and supporting papers 8, 9; Notice of Motion and supporting papers 10-12; Affidavit in Response and supporting papers 13, 14; Notice of Motion and supporting papers 15-17; Affidavit in Opposition and supporting papers 18, 19; Reply Affirmation 20; it is,

**ORDERED** that this motion (seq. #002) by defendants JOANNE SCHMID & KRISTYN SCHMID ("Joanne" or "Kristyn" and collectively "defendants") for an Order, pursuant to CPLR 3211 (a) (4), (5) and (8), dismissing this action on the grounds that: (1) there is another action pending between the same parties for the same cause of action; (2) lack of personal jurisdiction; and (3) the relief sought is barred by the statute of limitations, is hereby **GRANTED**, for the reasons set forth hereinafter; and it is further

**ORDERED** that this motion (seq. #003) by non-party DOUGLAS ELLIMAN REALTY ("Douglas Elliman") for an Order, pursuant to CPLR 2304, quashing the subpoena served by plaintiffs HANS SCHMID & ERICK SCHMID ("Hans" or "Erick" and collectively "plaintiffs") upon Douglas Elliman dated October 4, 2016, is hereby **GRANTED** given the Court's ruling on defendants' motion to dismiss; and it is further

**ORDERED** that this motion (seq. #005) by defendants for an Order:

(1) pursuant to CPLR 2304, quashing the subpoena served by plaintiffs upon Joanne dated October 4, 2016;

(2) enjoining, restraining and prohibiting plaintiffs from commencing additional actions against defendants unless: (a) permission of the Supreme Court is first obtained; (b) they are represented by an attorney duly licensed to practice law and who is actively engaged in the practice of law in the State of New York; and, in the event plaintiffs act in violation of such injunction (c) defendants may submit to the Court an *ex-parte* Order to dismiss the action; and (d) that they be sanctioned and directed to pay defendants' counsel fees and costs pursuant to 22 NYCRR 130-1.1; and

(3) awarding defendants reasonable counsel fees and costs in this matter,

is hereby **GRANTED** to the extent that the subpoena served by plaintiffs upon Joanne dated October 4, 2016, is hereby quashed given the Court's ruling on defendants' motion to dismiss, and is otherwise **DENIED**.

Plaintiffs, father and son, commenced this action on or about March 26, 2015, against their wife and sister, respectively. A matrimonial action was commenced previously by Joanne against Hans in or about October of 2012, and an inquest was held therein on March 30 and 31, 2015 (Iliou, J.). A decision was issued thereafter on August 11, 2015, which addressed the issues of equitable distribution, maintenance, the parties' real property, and all other ancillary requests for relief. A judgment of divorce was granted on January 13, 2016, and entered with the Clerk of the Court on March 2, 2016.

Hans seeks herein, among other things, "fair and reasonable distribution of the marital assets, namely of the \$6,800,000 . . . of total wealth or \$3,400,000." In addition, Hans seeks reimbursement from Joanne for monies that are allegedly due and owing Hans relative to various bank accounts, loans, inheritance, stocks, and sales of personal property. Hans further seeks the return of personalty and family heirlooms from both defendants. Erick requests of Joanne, among other things, the return of \$80,000 that was allegedly loaned to Hans and Joanne in June of 2005. Erick requests of Kristyn damages in the amount of \$50,000 for pain and suffering "for extreme mental, foul verbal and physical abuse, false police reports and false imprisonments and the social, news reporting, humiliation associated therewith."

Defendants have made the instant motion to dismiss the complaint on the grounds that: (1) there is another action pending between the same parties for the same cause of action; (2) lack of personal jurisdiction; and (3) the relief sought is barred by the statute of limitations. Initially, with respect to personal jurisdiction, the affidavits of service filed by plaintiffs constitute *prima facie* evidence of personal service upon both defendants pursuant to CPLR 308 (1). A defendant can rebut a process server's affidavit by a detailed and specific contradiction of the allegations in a process server's affidavit (see *Bankers Trust Co. of Cal., N.A. v Tsoukas*, 303 AD2d 343 [2003]).

Here, the Court finds that defendants have failed to specifically rebut the process server's affidavits. Accordingly, this ground cannot serve as a basis for dismissal herein.

On a motion to dismiss a claim on statute of limitations grounds pursuant to CPLR 3211 (a) (5), the moving defendants must establish *prima facie* that the time in which to commence the action has expired. The burden then shifts to the plaintiffs to raise an issue of fact as to whether the statute of limitations is tolled, is otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period (*see e.g. Baptiste v Harding-Marin*, 88 AD3d 752 [2011]; *Rakusin v Miano*, 84 AD3d 1051 [2011]).

The Court finds that defendants have established *prima facie* that Erick's claim regarding the \$80,000 loan to Hans and Joanne in June of 2005 must be dismissed as time-barred pursuant to the six-year statute of limitations prescribed by CPLR 213 (*see Ceglio v BAB Nuclear Radiology, P.C.*, 120 AD3d 1376 [2014]), and plaintiffs have failed to raise an issue of fact as to whether this claim is timely.

Next, defendants seek dismissal based upon Hans and Joanne's matrimonial action. Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending (*see Whitney v Whitney*, 57 NY2d 731 [1982]; *DAIJ, Inc. v Roth*, 85 AD3d 959 [2011]), and may dismiss an action where there is a substantial identity of the parties and causes of action (*see Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622 [2009]; *Simonetti v Larson*, 44 AD3d 1028 [2007]). Here, the Court finds that this action and the matrimonial action both arise out of the same set of facts and circumstances, and seek substantially the same relief (*see Matter of Willnus*, 101 AD3d 1036 [2012]; *cf. Zirmak Inves. v Miller*, 290 AD2d 552 [2002]). In addition, it is undisputed that the matrimonial action was commenced prior to the instant action; thus, dismissal is available under CPLR 3211 (a) (4) (*see e.g. Izquierdo v Cities Service Oil Co.*, 47 Misc 2d 1087 [Sup Ct, Kings County 1965]). However, as noted, a judgment of divorce was entered in the matrimonial action on March 2, 2016; therefore, that action is no longer pending. As such, CPLR 3211 (a) (4) cannot serve as a basis for dismissal. Nevertheless, the Court notes that there have been post-judgment proceedings in the matrimonial action as recently as April 4, 2017.

Notwithstanding the foregoing, New York law analyzes *res judicata* questions using a transactional approach. Once a claim has been adjudicated, all other claims arising out of the same transaction or series of transactions are barred. This is true even if the new allegations are based upon different theories or seek a different remedy (see *O'Brien v City of Syracuse*, 54 NY2d 353 [1981]; *Matter of Allstate Ins. Co. v Williams*, 29 AD3d 688 [2006]). It is well-settled that if the party against whom *res judicata* is invoked had a full and fair opportunity to litigate the claim in a prior proceeding based on the same transaction, but did not raise it therein, he will be barred from raising it in a subsequent action (*Browning Ave. Realty Corp. v Rubin*, 207 AD2d 263 [1994]). Generally, a set of facts will be deemed a single "transaction" for *res judicata* purposes if the facts are closely related in time, space, motivation, or origin, such that treating them as a unit would be convenient for trial and would conform to the parties' expectations (see *Smith v Russell Sage Coll.*, 54 NY2d 185 [1981]). To apply the preclusive effects of *res judicata*, the original action must have been decided on the merits, not upon default (see *Miller Mfg. Co. v Zeiler*, 45 NY2d 956 [1978]; *Espinoza v Concordia Intl. Forwarding Corp.*, 32 AD3d 326 [2006]; *Brandenberg v Primus Assocs.*, 304 AD2d 694 [2003]). *Res judicata* bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction; and (ii) the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was (*Matter of People of the State of New York, by Eliot Spitzer, as Attorney Gen. v Applied Card Sys., Inc.*, 11 NY3d 105 [2008]; *Sainval v City of New York*, 57 AD3d 508 [2008]).

Moreover, in order to invoke the doctrine of collateral estoppel, two well-settled requirements must be satisfied: "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]). The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result (see *Buechel v Bain*, 97 NY2d 295 [2001]; *Altegra Credit Co. v. Tin Chu*, 29 AD3d 718 [2006]).

In the instant matter, the Court finds that the doctrines of *res judicata* and collateral estoppel act as a bar to any claims with respect to marital assets,

marital debt, dissipation of marital assets, and any other claim that was raised or could have been raised by the parties in the matrimonial action. Indeed, Justice Iliou rendered a detailed decision and Order which addressed the issues in the divorce at that time.

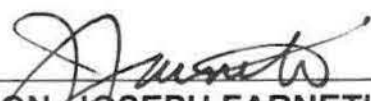
Furthermore, there have been other actions commenced by these plaintiffs seeking the relief sought herein that have been dismissed by various Courts. In particular, Erick commenced an action against Kristyn in Suffolk County District Court seeking repayment of the purported \$5,000 loan, which was dismissed by Decision After Trial dated August 7, 2013 (Hackeling, J.), and Hans commenced a separate action against Joanne and multiple financial institutions in Suffolk County Supreme Court making the same allegations of theft and abuse of trust against Joanne that was dismissed by Order dated January 25, 2016 (Tarantino, Jr., J.).

Therefore, under the circumstances presented, the Court finds that dismissal of plaintiffs' complaint in its entirety is warranted. Accordingly, this motion to dismiss by defendants is **GRANTED**. As such, the motions by Douglas Elliman and defendants to quash subpoenas are **GRANTED**, and the subject subpoenas both dated October 4, 2016, are hereby quashed.

The foregoing constitutes the decision and Order of the Court.

Dated: April 19, 2017



  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION