

Bregman v Bregman
2011 NY Slip Op 33723(U)
October 17, 2011
Sup Ct, New York County
Docket Number: 109817/2010
Judge: Richard F. Braun
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. RICHARD F. BRAUN**
J.S.C.

PART 23

Index Number : 109817/2010

BREGMAN, MARTIN

vs.

BREGMAN, ELIZABETH

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE 7/21/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for dismiss

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted to the extent
of dismissing the Complaint, and it is further
ORDERED that the Clerk shall enter judgment
accordingly.
This constitutes the decision and order of this
Court. See separate Opinion.

FILED

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York, October 14, 2011 ENTER: [Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

-----X
MARTIN BREGMAN,

Index No. 109817/2010

Plaintiff,

OPINION

-against-

ELIZABETH BREGMAN, a/k/a BETTY BREGMAN,

FILED

Defendant.

OCT 19 2011

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NEW YORK
COUNTY CLERK'S OFFICE

RICHARD F. BRAUN, J.:

This is an action for damages and a declaratory judgment that a confession of judgment is void. The complaint alleges that through fraud or undue influence plaintiff was induced by defendant to give defendant a confession of judgment for 6 years of arrears due defendant for maintenance and support under the parties' separation agreement. Defendant moves to dismiss contending that the complaint fails to state a cause of action for fraud or undue influence and that plaintiff is barred, pursuant to CPLR 3211 (a) (1), by waiver and judicial estoppel from contesting the validity of the confession of judgment based upon his failure to do so in various enforcement proceedings to date. Plaintiff counters that reading the allegations broadly he has made out a claim for fraud and undue influence sufficient to withstand a motion to dismiss and that waiver and estoppel are inapplicable. Alternatively, plaintiff seeks leave to re-plead.

On a motion pursuant to CPLR 3211, a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Molina v Phoenix Sound*, 297 AD2d 595, 596 [1st Dept

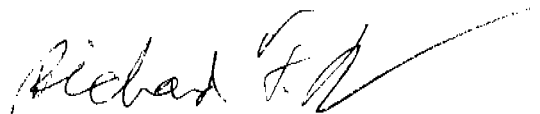
2002]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). “The essential elements of a cause of action for fraud are ‘representation of a material existing fact, falsity, scienter, deception and injury’ ” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995], quoting *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]; accord *Waggoner v Caruso*, 68 AD3d 1, 6 [1st Dept 2009], *affd* 14 NY3d 874 [2010]). Here, defendant’s allegation that “defendant represented that the sole purpose of signing the confession of judgment was to preserve plaintiff’s property for her inheritance rights under the separation agreement and for the parties’ children” fails to state such a claim. That the confession of judgment would preserve plaintiff’s property for the benefit of defendant’s inheritance and for the parties’ children is neither necessarily false nor was it a misrepresentation of a future intention (*see Lanzi v Brooks*, 43 NY2d 778, 779-780 [1977]). The enforcement of a confession of judgment could certainly help assure that the plaintiff’s assets would be available for defendant and the parties’ children, and nothing in the alleged representation is sufficient to justify a reasonable reliance that the confession of judgment would not be executed upon. Moreover, insofar as the confession of judgment was for arrears under the parties’ separation agreement, plaintiff can claim no damages from having confessed such a judgment as defendant would have been entitled to such a judgment in any event.

Similarly, based upon these allegations, plaintiff fails to state a claim for undue influence (*see In re Walther's Will*, 6 NY2d 49, 53-54 [1959]; *Girylyuk v Girylyuk*, 30 AD2d 22, 24 [1st Dept 1968], *affd* 23 NY2d 894 [1969] [no opinion]). Plaintiff has not alleged how, under the circumstances, his ex-wife was in a position to exert undue influence over him or how he was susceptible to same. Indeed, the allegations are palpably insufficient to state such a cause of action.

Accordingly, by separate decision and order, dated October 14, 2011, the claim for damages

has been dismissed. The declaratory judgment cause has also been dismissed because it fails to state a cause of action (*see Dweck v Oppenheimer & Co., Inc.*, 30 AD3d 163 [1st Dept 2006]; *cf. 200 Genesee St. Corp. v City of Utica*, 6 NY3d 761, 762 [2006] [where the motion was for summary judgment and thus it was appropriate to declare the parties' rights on the merits in favor or the defendant rather than dismiss the complaint]). Plaintiff fails to make a factual showing sufficient to support repleading (*see Sanders v Schiffer*, 39 NY2d 727, 729 [1976]; *Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011]; *see generally Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2nd Dept 2008] ["the standard to be applied on a motion for leave to replead pursuant to CPLR 3211 (e)[as amended] is consistent with the standard governing motions for leave to amend pursuant to CPLR 3025"]; *cf. Elliman v Elliman*, 259 AD2d 341 [1st Dept 1999] ["Leave to replead was properly granted upon an affidavit by a person with knowledge of facts supporting a proposed amended complaint that cured the pleading deficiencies of the original complaint"]).

Dated: New York, New York
October 17, 2011



RICHARD F. BRAUN, J.S.C.

FILED

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