

<b>Borstein v Henneberry</b>
2013 NY Slip Op 33922(U)
June 4, 2013
Supreme Court, New York County
Docket Number: 112421/10
Judge: Donna Mills
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

6

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58**

-----X  
LEON BAER BORSTEIN

Plaintiff,

Index No. 112421/10

-against-

**DECISION AND ORDER**

Motion Sequence No. 2

VIRGINIA MARIE HENNEBERRY,

Defendant.

**FILED**

JUN 10 2013

-----X  
Hon. J. Mills

NEW YORK  
COUNTY CLERK'S OFFICE

This action demonstrates the “fragmented” litigation that res judicata is created to protect against, particularly in concluded matrimonial actions, as in the case herein.

Defendant Virginia Marie Henneberry (Henneberry) is being sued for repayment of a \$27,000 loan and now moves pursuant to CPLR 3212 to dismiss the complaint, arguing that the issue was fully litigated and resolved in her concluded matrimonial action (NY County Index No 350503/05 [the Matrimonial Action]) and is thus barred by res judicata principles. Plaintiff pro se former husband Leon Baer Borstein, (Borstein) an experienced matrimonial litigator, opposes the motion. He argues that the “loan” were never identified as a “marital” asset and/or there was no specific discussion of offset of the “loan” when marital assets were distributed, thus, this independent cause of action remains. The motion is granted for the following reasons.

**Background**

The underlying facts are clear and undisputed.

In the instant action plaintiff filed a one page complaint dated December 20, 2010,

**RECEIVED**  
JUN 07 2013  
IAS MOTION SUPPORT OFFICE  
NYS SUPREME COURT-CIVIL

demanding judgment for payment of a \$27,000 “loan” that he claims he made to defendant in September 2005 (Complaint). Issue was joined in the present action on January 21, 2011 with service of the Answer. Res judicata was pleaded as a defense. Complaint Ex A annexed to Affirmation of Douglas Capuder.

The Complaint does not mention that the parties herein were divorced pursuant to a judgment filed on December 2, 2009, after 12 years of marriage and 4 ½ years of highly contentious litigation (Judgment). Judgment, annexed to Capuder Aff as Ex C. There were no children of the marriage. Describing the marital relationship as “tumultuous”, after a six day trial, Justice Judith Gische went into great detail resolving issues of equitable distribution concerning multi- millions of dollars of marital assets and issues of support between the couple in her 51- page decision, dated April 17, 2009 (Decision). Decision, annexed to Capuder Aff. as Ex K.

Specifically, rejecting Borstein’s argument that his assets, even those acquired during the twelve year marriage, be identified as “separate”, the court cited the general rule that “marital property” is all property acquired by either or both spouses during the marriage but before the commencement of a matrimonial action. DRL§ 236 B (1) ( c ). According to the Decision, the parties “benefitted by pooling their incomes together”, noting that the parties enjoyed a “lavish lifestyle” made possible by “the shared use of their incomes to finance (their) luxuries”. *id.* Thereafter, the marital estate was divided 50/50 except for one marital debt of Henneberry, (which was overturned by the First Department, who found this marriage to be an “economic partnership.” *Henneberry v Borstein*, 87 AD3d 451 [1<sup>st</sup> Dept 2011]). The Judgment was upheld on appeal in all respects material to this motion.

In Borstein's post trial memorandum, he explicitly requested \$1,184,500 worth of credits in a two- page list to be used to offset equitable distribution to be received by Henneberry. The sixth credit sought (out of nine claimed) asserted that he "loaned (Henneberry) about \$27,000 after filing for divorce and should receive credit for the full \$27,000". Matrimonial Post Trial Memorandum, annexed to Capuder Aff as Ex J.

In Borstein's Statement of Proposed Disposition's front page he lists the "loan" under the category of "Assets Claimed to be Marital Property". There is nothing listed under the title "Separate Property." Statement of Proposed Disposition, annexed to Capuder Aff as Ex I.

In Borstein's Statement of Net Worth he has a line item for the same alleged loan to Henneberry which states that the source of the loan was marital funds. Statement of Net Worth, Ex G.

In Borstein's deposition in this matter he concedes that he specifically asked for a credit for the "loan" in the Matrimonial Action. Borstein Deposition, annexed to Capuder Aff as Ex E.

In the Decision, the court noted that the parties reached an agreement on how to distribute their personal property, which was one of the credits sought by Borstein. At page 40 of the Decision in a section heading "Miscellaneous Adjustments and Credits she discussed the various credits sought. She addressed three of the nine credits sought in this section without specifically addressing the "loan" sought herein. The court in the Decision stated that [a]ny arguments raised by the parties which have not been expressly addressed in this decision are rejected." Decision. The Judgment makes note of the three credits permitted to offset the equitable distribution award. Ex C.

Notably, Borstein submitted a post-trial Proposed Counter-Judgment of Divorce dated

October 30, 2009 which did not seek relief with regard to the “loan”. Proposed Counter Judgment, Ex L, where Borstein listed 6 items allegedly due him as a credit but did not mention the “loan”. Subsequently, Borstein filed a motion to amend the Judgment but omitted any claim with respect to the “loan”. Plaintiff’s Notice of Appeal and Pre-Argument Statement in the Appellate Division dated January 11, 2010 did not mention the alleged “loan”. Defendant’s Ex M

### Legal Analysis

In order to obtain summary judgment pursuant to CPLR 3212 (b) the moving party must make a prima facie showing of entitlement to judgment as a matter of law, giving sufficient evidence to eliminate any material issues of fact. *E G Winegrad v New York University Med Center*, 64 NY2d 851, 853. The burden is upon the moving party to produce evidence as would be required on a trial. *Oxford Paper Co. V S M Liquidation Co Inc.*, 45 Misc 2d 612.

The defendant has met her prima facie burden by demonstrating that the alleged “loan” was actually a transfer of marital property that was adjudicated in the concluded Matrimonial Action. Principles of res judicata require that “once a claim is brought to a final conclusion, all other claims arising out of the same transactions are barred, even if it is based upon different theories or if seeking a different remedy (internal citations omitted).” *O’Brien v City of Syracuse*, 54 NY2d 353 [1981]. The Court of Appeals has recognized that res judicata principles are particularly applicable to the financial aspects of a matrimonial action, to settle the parties’ rights pertaining not only to those issues actually litigated, but also to those that could have been litigated. see, *Boronow v Boronow*, 71 NY2d 284 [1988], where the court dismissed the former spouse’s subsequent declaratory judgment action concerning title to real property, citing concerns

of “fragmentation” or duplicative suits that will continue the conflict. As a matter of public policy, without the protective bar of *res judicata*, duplicative suits over property issues following the dissolution of a marriage or “fragmentation” would be the “perverse” and “counterproductive” result, only continuing the conflict among the parties. *id.* at 290-291. Thus, in a matrimonial action, where the objective is to end ongoing conflict, questions pertaining to important ancillary issues are intertwined and are encouraged to be “fairly and efficiently resolved with the core issue... in the single action” *id.* The evidence herein clearly shows that Borstein, like the plaintiff in *Boronow*, raised the same financial issue. Borstein went further in the Matrimonial Action and actively sought specific relief in the concluded action in the form of a credit which was denied.

Summary judgment relief should be granted if the plaintiff, opposing summary judgment, cannot show any material issue of fact sufficient to warrant trial. A fact is “material” if it “might affect the outcome of the suit under the governing law.” *People ex rel Spitzer v Grasso*, 50 AD3d 535 [1<sup>st</sup> Dept 2008]. Only where there is a triable material issue of disputed fact may summary judgment be denied. see *Gibson v American Export Isbrandsten Lines, Inc.*, 125 AD2d 65 [1<sup>st</sup> Dept 1987]. In opposition to the motion for summary judgment Borstein argues that the issue was never “fully litigated” because there was never a finding in the Matrimonial Action that the source of the loan was marital property and the debt was never distributed. He claims that the claim was severed and he retained his right to maintain this separate action. Borstein fails to offer any proof that he ever sought to sever the issue of the “loan” from the financial issues to be resolved or that this relief was granted. Bernstein’s conclusory assertion that there was no finding that the “loan or debt was marital property” Pl Mem of Law in Opp, is clearly

contradicted by the evidence set forth above demonstrating his concession in his many filings in the Matrimonial Action that the source of funds for the "loan" was marital property. Similarly, with regard to his litigation of the equitable distribution of assets/debts, the Court's ruling that "[a]ny arguments raised by the parties which have not been expressly addressed in this decision are rejected" is res judicata.

Finally, when deciding res judicata issues, the cause of action is considered "coterminous with the transaction" no matter how many variant forms of relief is available to the plaintiff. *Smith v Russell Sage College*, 54 NY2d 185 [1981]. Thus, the fact that the same debt is now characterized under another legal theory as a "failure to repay" rather than a credit is immaterial

In sum, the defendant has submitted evidence that reveals that the "loan" was fully and actively litigated by Borstein. Borstein has failed to raise a triable issue of fact.

Thus, based upon the above, the motion to dismiss the complaint pursuant to CPLR 3212 on the grounds of res judicata is granted.

Dated: 6/4/13

**FILED**  
JUN 10 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Hon. JSC Donna Mills

**DONNA M. MILLS, J.S.C**