Swartz v Swartz
2014 NY Slip Op 31296(U)
May 14, 2014
Supreme Court, Suffolk County
Docket Number: 13-24775
Judge: Thomas F. Whelan

MEMO DECISION & ORD ER

INDEX No. 13-24775

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/26/13
SUBMIT DATE: 3/14/14
Mot. Seq. # 001 - MD
Mot. Seq. # 005 - Mot D
Mot. Seq. # 006 - MotD
Mot. Seq. # 007 - XMotD
Mot. Seq. # 008 - XMD
CDISP: No
Action Stayed

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STARNETTE SWARTZ,

Plaintiff,

-against-

JEROME SWARTZ, JAMES P. KING, JAMES P. KING & ASSOCIATES, LLC, SHANAH SWARTZ-GORDON, NIKOLA SWARTZ-HENNES, JOSHUA SWARTZ, THE SWARTZ FAMILY LIMITED PARTNERSHIP #4, THE JEROME SWARTZ IRREVOCABLE TRUST #1, THE JEROME SWARTZ IRREVOCABLE TRUST #2,THE JEROME SWARTZ IRREVOCABLE FAMILY TRUST, THE JEROME SWARTZ IRREVOCABLE FAMILY TRUST #2, THE JEROME SWARTZ IRREVOCABLE FAMILY TRUST #3, THE JEROME SWARTZ QUALIFIED ANNUITY TRUST No. 1, THE JEROME SWARTZ QUALIFIED ANNUITY TRUST No. 2, THE JEROME SWARTZ QUALIFIED ANNUITY TRUST No. 3, JEROME SWARTZ CHARITABLE LEAD ANNUITY TRUST, THE SWARTZ FAMILY HOLDING CORP., THE KOPELMAN 2001 FAMILY TRUST, THE SWARTZ FOUNDATION, SOUND POINT INVESTMENTS I, LLC, SOUND POINT INVESTMENTS II, LLC SOUND POINT INVESTMENTS III, LLC, SK JOINT VENTURES, LLC, SK JOINT VENTURES II, LLC, OTM DISTRIBUTIONS, LLC, 3151 SW 14TH PL, LLC, 3300 SO CONGRESS AV, LLC, BBD ASSOCIATES, FL, THE SWARTZ ORGANIZATION, LLC, PERSHING, LLC, SWARTZ INITIATIVE FOR COMPUTATIONAL NEUROSCIENCE, INC., SWARTZ NYC, LLC and SPRING CAFÉ REALTY, LLC,

Defendants.

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Upon the following papers numbered 1 to 44 read on these motions for preliminary injunctive relief, dismissal and sanctions Order To Show Cause/Notice of Motion and supporting papers: 1-2 (#001); 10-12 (#005); 19-21 (#006); Notice of Cross Motion and supporting papers 26-28 (#007); 31-34 (#008); Answering papers 8-9; 35-36 (King opposition to #008); 37-38; 39-40; ; Reply papers 29-30 (Swartz reply to #007); 41-42 (plaintiff's reply to #008); Other 3 (plaintiff's memorandum in support of injunctive relief); 4-5 (plaintiff's reply memorandum in support of injunctive relief); 6-7 (defendants' memorandum in opposition to motion for injunctive relief); 13-14 (plaintiff's memorandum in opposition to motions to dismiss); 15-16 (defendants King memorandum in support of motion to dismiss); 17-18 (defendants King memorandum in support of motion to dismiss); 22-23 (memorandum in support of motion); 24-25 (family defendants memorandum in further support of motion to dismiss); 43-44 (plaintiff's memorandum to #008); and see plaintiff's affidavit in opposition to cross motion #008; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by the plaintiff for preliminary injunctive relief is considered under CPLR 6311 and is denied; and it is further

ORDERED that the separate motion (#005) by the King defendants for dismissal of the amended complaint served by the plaintiff or for a stay of this action and the imposition of sanctions is considered under CPLR 3211(a) and 22NYCRR Part 130-1 and is granted to the extent set forth below; and it is further

ORDERED that the separate motion (#006) by defendants, Shanah Swartz Gordon, Nikola Swartz Hennes, Joshua Swartz and the Jerome Swartz family entities to dismiss the amended complaint and for the imposition of sanctions is considered under CPLR 3211 and 22 NYCRR Part 130-1 and is granted to the extent set forth below; and it is further

ORDERED that the cross motion (#007) by defendant, Jerome Swartz, to dismiss the amended complaint and for the imposition of sanctions against the plaintiff is considered under CPLR 3211(a) and 22 NYCRR Part 130-1 and is granted to the extent set forth below; and it is further

ORDERED that the cross motion (#008) by the plaintiff for the imposition of sanctions against the defendants is considered under 22 NYCRR Part 130-a and is denied.

In September of 2013, the plaintiff, Starnette Swartz, commenced this action against her husband, Jerome Swartz, his longtime friend and accountant, James P. King, and his accounting firm (the King defendants), defendant Swartz's children (Swartz-Gordon, Swartz-Hennes and Joshua Swartz) and the various Swartz family Trusts and Entities defendants listed in the amended summons and complaint (collectively, the Swartz Family defendants), in which, defendant Swartz allegedly has some beneficial interest. All are charged with fraud and other tortious conduct allegedly spearheaded by defendant, Jerome Swartz, that purportedly deprived the plaintiff of assets or interests in assets totaling $80,000,000.00 which she acquired during her marriage to such defendant. Of the sixteen causes of action set forth in the amended complaint, claims sounding in fraud, fraudulent conveyances, unjust enrichment, constructive trust, aiding and abetting fraud and conspiracy are advanced against most defendants. The King defendants are separately charged with professional malpractice and breaches of fiduciary duties while defendant Swartz and his children are charged with conversion. The recovery of money damages together with injunctive and declaratory relief setting aside the plaintiff's

2003 transfer of her interest in marital premises in Setauket, New York and several other allegedly fraudulent transfers of assets by defendant, Jerome Swartz, including the forgiveness of loans owing to him from his daughters and gifts to them are included in the relief demanded by the plaintiff.

Pending in this court before another Justice assigned to matrimonial actions is a divorce action which the plaintiff commenced against her husband in April of 2009. A restraint in the form of a preliminary injunction against the transfer of any property held individually or jointly by the parties to that action except those made in the ordinary course of business, for customary and usual household expenses or for reasonable attorney's fees has been in effect since June 3, 2011 [Bivona, J]. In four motions interposed by the plaintiff, defendant Jerome Swartz is charged with contempt by reason of his violation of the restraint against the transfer of assets contained in the June 3, 2011 order. In the papers supporting one or more of those applications, the plaintiff charges her husband with the same wrongs and defalcations that are the subject of this action, all of which allegedly reduced the marital estate by some $80,000,000.00 in a manner actionable under DRL §236(B) [5][d][10][11][12][13][14].

Simultaneously with the commencement of this action, the plaintiff moved by order to show cause dated September 13, 2013 [Rebolini, J], for preliminary injunctive relief restraining all defendants and their agents from transferring, disposing, selling, trading, loaning, assigning, pledging any assets or funds to the extent that the defendants received assets or funds from defendant Swartz from January 9, 2009 to the present and certain mandatory injunctive relief with respect to the deposit and maintenance of assets and accounts. The plaintiff's motion was adjourned numerous times as it was met by separate motions to dismiss the complaint that were served by the three sets of defendants. The limited temporary restraining order contained in Justice Rebolini's January 9, 2013 order was lifted by this court on October 18, 2013 at proceedings conducted by this court on that day. The plaintiff then served an amended summons and amended complaint pursuant to stipulations and orders issued by the court, after which, the three sets of defendants herein interposed their separate motions to dismiss the amended complaint (*see* motion sequences 005, 006 & 007). The plaintiff responded by service of a cross motion for the imposition of sanctions against the defendant. After several stipulated adjournments and the withdrawal of prior motions to dismiss the original complaint, all remaining motions were marked submitted for determination by this court.

The court shall first address the defendants' motions for dismissal of the amended complaint as the granting of same may render the plaintiff's motion (#001) for preliminary injunctive relief, academic. Grounds common to all of the defendants' motions to dismiss include those premised upon the legal insufficiency of the plaintiff's complaint as contemplated by CPLR 3211(a)(7) and upon the prior action pending provisions of CPLR 3211(a)(4).

The legal standard which measures the legal sufficiency of a pleading under CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], *quoting* ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.,*** 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, bare legal

conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]; ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 NYS2d 543 [2d Dept 2012]; ***Parola, Gross & Marino, P.C. v Susskind***, 43 AD3d 1020 [2d Dept 2007]).

The test to be applied is thus "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (***Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC***, 107 AD3d 788, 967 NYS2d 119 [2d Dept 2013]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009], *aff'd* 16 NY3D 775, 919 NYS2d 496 [2011]).

In contrast, CPLR 3211(a)(4) vests this court with broad discretion to dismiss an 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. In determining whether to dismiss an action on the ground that another action is pending between the same or similar parties for substantially the same relief (*see* ***Whitney v Whitney***, 57 NY2d 731, 454 NYS2d 977 [1982]; ***Morgan Barrington Fin. Serv., Inc. v Nahzi***, 85 AD3d 1135, 926 NYS2d 315 [2d Dept 2011]; ***Liebert v TIAA-CREF***, 34 AD3d 756, 826 NYS2d 339 [2d Dept 2006]), "[t]he critical element is that 'both suits arise out of the same subject matter or series of alleged wrongs'" (***Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG***, 110 AD3d 783, 974 NYS2d 476 [2d Dept 2013], *quoting* ***Cherico, Cherico & Assoc. v Midollo***, 67 AD3d at 622, 886 NYS2d 914 [2d Dept 2009]).

Dismissal is warranted under CPLR 3211(a)(4) only where there is a substantial identity of the parties and causes of action (*see* ***Simonetti v Larson***, 44 AD3d 1028, 845 NYS2d 369 [2d Dept 2007]). In addition to dismissal, the court may make such order as justice requires. In cases wherein complete relief can be afforded in the first action to all parties named in the second action, a consolidation or joint trial of the actions may be directed (*see* ***Roberts v 112 Duane Assoc., LLC***, 32 AD3d 366, 821 NYS2d 33 [1st Dept 2006]; ***Graev v Graev***, 219 AD2d 535, 631 NYS2d 685 [1st Dept 1995]). The remedy of a joint trial is especially pertinent in cases wherein there is not a complete identity of issues and parties (*see* ***Security Mut. Life Ins. Co. of New York v DiPasquale***, 271 AD2d 268, 707 NYS2d 39 [1st Dept 2000]). Alternatively, the second action may be stayed until such time as the rights at issue in the first are determined (*see* ***In re Tenenbaum***, 81 AD3d 738, 916 NYS2d 205 [2d Dept 2011]; ***El Greco Inc. v Cohn***, 139 AD2d 615, 527 NYS2d 256 [2d Dept 1988]).

In considering whether the causes of action are the same for purposes of dismissal or other remedy available under CPLR 3211(a)(4), "a comparison must first be made of the allegations of the two complaints to determine whether the suits are indeed for the same cause of action" (***Security Tit. & Guar. Co. v Wolfe***, 56 AD2d 745, 745, 392 NYS2d 30 [1st Dept 1977]). While it is not necessary that the precise legal theories presented in the first action also be presented in the second action (*see*

Simonetti v Larsen , 44 AD3d at 1029, *supra*), it is necessary that both actions arise out of the same subject matter or series of alleged wrongs, and seek the same or substantially the same relief (*see* ***Kent Dev. Co., Inc. v Liccione***, 37 NY2d 899, 901, 378 NYS2d 377 [1975]; ***Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG***, 110 AD3d 783, 974 NYS2d 476 [2d Dept 2013]).

With respect to the identity of parties element, a substantial but not complete identity of parties is all that is required to invoke CPLR 3211(a)(4) and the presence of additional parties will not necessarily defeat a motion pursuant to CPLR 3211(a)(4) (*see* ***White Light Prods. v On The Scene Prods.***, 231 AD2d 90, 660 NYS2d 568 [1st Dept 1997]). Where the plaintiff seeks the same damages for the same alleged injuries relating to the same transaction from close corporate affiliates, a court may properly make a finding that parties have a sufficient identity to warrant a finding that there is a substantial identity of parties (*see* ***Syncora Guar. Inc. v J.P. Morgan Sec. LLC***, 110 AD3d 87, 970 NYS2d 526 [1st Dept 2013]). The absence of even one common defendant will thus not preclude dismissal of a second action in which recovery is sought for the same alleged harm arising from the same underlying transaction that were the subject of the first (*see id*; *see also* ***Rossignol v Rossignol***, 82 AD3d 1335, 918 NYS2d 631 [3d Dept 2011]).

The purpose of the statute is to avoid the duplication of effort and the risk of divergent rulings on issues raised in both actions and to prevent vexatious litigation (*see* ***Liebert v TIAA_CREFF***, 34 AD3d 756, *supra*; ***Certain Underwriters at Lloyd's, London v Hartford Acc. and Indem., Co.***, 16 AD3d 167, 791 NYS2d 90 [1st Dept 2005]). In cases wherein it is apparent that "fragmentation of the litigation would be duplicative and counterproductive" dismissal of a complaint served in a second action having a substantial identity of claims and parties is warranted (***St. John v St. John***, 201 AD2d 552, 607 NYS2d 732 [2d Dept 1994]; *see also* ***Rossignol v Rossignol***, 82 AD3d 1335, *supra*; ***Raik v Clindent Dev., LLC,*** 282 AD2d 513, 722 NYS2d 893 [2d Dept 2001)]). Moreover, where it is clear that the filing of the second action was motivated solely to gain a tactical advantage through forum or judge shopping, dismissal is also warranted (*see* ***Liebert v TIAA_CREFF***, 34 AD3d 756, *supra;* ***Certain Underwriters at Lloyd's, London v Hartford Acc. and Indem., Co.***, 16 AD3d 167, *supra*; ***White Light Prods. v On the Scene Prods., Inc.***, 231 AD2d 90, *supra*). An action that violates the public policy against "forum shopping and the bifurcation of divorce and equitable distribution proceedings is subject to dismissal" (***O'Connell v Corcoran***, 1 NY3d 179, 770 NYS2d 673 [2003]).

The court's authority to determine title pursuant to DRL § 234 and other economic issues between spouses to a divorce or other qualified matrimonial action was significantly broadened with the adoption of the equitable distribution statute in 1980 (*see* DRL § 236[B]). The reach of the equitable distribution statute is so broad that it pre-empts the court's application of the substantive law of real property in matrimonial actions in which demands for determinations of title to real and personal property and for distribution of both marital and separate property is put before the court pursuant to DRL § 234 and DRL § 236(B)(5) (*see* ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin***, 1 AD3d 39, 766 NYS2d 1 [1st Dept 2003]). While the provisions of DRL § 234 which relate to title property determinations are not mandatory upon the court, the provisions of DRL § 236[B] relating to equitable distribution are (*id*). Thus, while the objective of a divorce action is to dissolve the marriage relationship, questions pertaining to important ancillary issues like title to marital property are so certainly intertwined that they constitute issues which can be fairly and efficiently resolved with the issue of dissolution (*see* ***Boronow v Boronow***, 71 NY2d 284, 290, 525 NYS2d 179

[1988]). One of the fundamental policies underlying the equitable distribution process is finality (*see* ***Commodity Futures Trading Commn. v Walsh***, 17 NY3d 162, 927 NYS2d 821 [2011]). The courts and the parties are thus entitled to expect the resolution of all issues relating to the marriage relationship in the single matrimonial action (*see* ***Boronow v Boronow***, 71 NY2d 284, *supra*).

The equitable distribution statute has been frequently amended since its original enactment. It now includes a list of twenty factors which the court must consider in determining the equitable distribution of the parties' property (*see* DRL §236[B][5][d][1-20]). Among the factors to be considered by the court in determining the equitable distribution of marital property, are the dissipation of assets by either spouse, whether any transfer or encumbrance was made in contemplation of a matrimonial action was without fair consideration and any other factor which the court shall expressly find to be just and proper (*see* DRL § 236[B][5][d][15];[17];[18];[20]). Economic misconduct may thus be properly considered by the court (*see* ***DiNoto v DiNoto***, 97 AD3d 529, 947 NYS2d 605 [2d Dept 2012]; ***Hasegawa v Hasegawa***, 290 AD2d 488, 736 NYS2d 398 [2d Dept 2002]; ***Kushman v Kushman*** , 297 AD3d 333, 746 NYS2d 319 [2d Dept 2002]; ***Ferraro v Ferraro***, 257 AD2d 596, 684 NYS2d 274 [2d Dept 1999]). Determination of economic issues that involve theses factors are so intertwined with the dissolution of the marriage relationship as to allow for their fair and efficient resolution in the matrimonial action (*see* ***Boronow v Boronow***, 71 NY2d 284, *supra*; *cf.*, ***Xiao Yang Chen v Fischer***, 6 NY3d 94, 101, 810 NYS2d 96 [2005] holding that "*interspousal personal injury claims are not so intertwined and determination of such claims would be neither fair nor efficient as marital fault, unlike economic fault, is not to be considered by the court except in egregious cases*").

While the joinder of claims is generally permissive in civil litigation, certain property claims will be lost if not asserted in a matrimonial action. The rule is the result of the application of the doctrine of res judicata which bars all claims arising out of a given transaction or occurrence once litigated. In the realm of matrimonial law, the doctrine has been extended to bar a subsequent plenary action concerning the issue of marital property that could have been raised and determined in a prior matrimonial action between the parties but was not (*see* ***Boronow v Boronow***, 71 NY2d 284, 289, *supra*; ***Rakowski v Rakowski***, 109 AD2d 1, 489 NYS2d 929 [2d Dept 1985]; *see also* ***Garver v Brown & Co. Sec. Corp***., 1998 WL 54608 [SDNY 1998]; ***Levy v U.S.***, 776 F.Supp. 831 SDNY 1991]). Where an economic issue is not raised in a divorce action, or if raised, is not decided due to its withdrawal by the party asserting it or otherwise, the issue may not be litigated in a separately commenced, subsequent action since the parties are not free to endlessly commence separate actions to adjudicate issues which could have been adjudicated in the matrimonial action since the permissive nature of the statutory language applies only to the court (*see* ***Boronow v Boronow***, 71 NY2d 284, *supra*; ***Cudar v Cudar***, 98 AD3d 27, 946 NYS2d 630 [2d Dept 2012]; ***Melnitzky v HSBC Bank USA***, 33 AD3d 482, 823 NYS2d 128 [1st Dept 2006]; ***Harrison v Harrison***, 134 AD2d 567, 521 NYS2d 466 [2d Dept 1987]).

Dismissal of a complaint served in a second action by a spouse has been held appropriate where a matrimonial action is pending, in which, the plaintiff seeks a determination as to what constitutes marital property since "fragmentation of the litigation would be duplicative and counterproductive" (***St. John v St. John***, 201 AD2d 552, *supra*). Dismissal has also been held to be appropriate to preclude a second suit for corporate dissolution and distribution by a defendant spouse in a pending

matrimonial where restraints against the transfer of assets and parties' interests therein by the spouses, including their interests in the family company, have been imposed by the matrimonial court (*see* ***Rossignol v Rossignol***, 82 AD3d 1335, *supra*; ***Raik v Clindent Dev., LLC***, 282 AD2d 513, *supra*). A second action to recover damages for allegedly fraudulent conveyances was dismissed as academic where the issues were the subject of an award of equitable distribution in a pending matrimonial action between the spouses (*see* ***Sygrove v Sygrove***, 15 AD3d 291, 791 NYS2d 74 [1st Dept 2005]). Where a wife lodges a fraudulent conveyance claim against her husband in a pending divorce action as is contemplated by DRL § 236(B)(5)(d)(13), the purchasers of the property whose interests in the property may be adversely affected by the court's ruling on such claim may be joined as parties to the divorce action for purposes of defending against that claim (*see* ***Henry v Soto-Henry,*** 89 AD3d 617, 936 NYS2d 84 [1st Dept 2011]).

The rule authorizing dismissal can be no less applicable to this second suit commenced by the plaintiff to recover property, damages and to obtain equitable relief from her husband due to his purportedly tortious conduct which allegedly deprived the plaintiff of her interests in marital and separate property that are the subject of a prior commenced matrimonial, in which, restraints against the transfer of assets have been imposed. Clearly, this action and the prior commenced divorce action arise out of the same subject matter and transactions as the claims interposed here. It is equally clear that the relief sought by the plaintiff from her husband in this action is substantially the same as that which is sought by her in the divorce action, namely, the recovery of assets or the value thereof allegedly lost by the acts of fraud and other defalcations engaged in by her husband which has substantially reduced the marital estate and other property to which she may be entitled under an equitable distribution award. For these reasons, the court grants the cross motion (#007) by defendant Jerome Swartz to dismiss, pursuant to CPLR 3211(a)(4), so much of the amended complaint that asserts any claim against him due to the pendency of the matrimonial action in which similar claims premised upon the same transactions and occurrences are pending. Denied, however, are those portions of this motion wherein he seeks the imposition of sanctions against the plaintiff by reason of the commencement of this action as such conduct does not constitute frivolous conduct within the purview of 22 NYCRR Part 130-1 9 (*see* ***Muro-Light v Farley***, 95 AD3d 846, 944 NYS2d 571 [2d Dept 2012]).

Next considered is the motion (#006) by the Swartz family defendants consisting of the children of Jerome Swartz (Shanah Swartz-Gordon, Nikola Swartz-Hennes and Joshua Swartz) and the multitude of Swartz Trusts and Entities defendants listed in the caption of the amended complaint (*see* amended complaint ¶¶ 48-49). A review of the allegations in the amended complaint reflect that none contain assertions of any facts that may be viewed as charging any of the Trusts and Entities defendants with conduct that is actionable under any theory of New York law.

In the body of the complaint, the Trusts and Entities defendants are described as targeted defendants only in the following Causes of Action: the First sounding in fraud; The Second which sounds in fraudulent conveyance under DCL § 276 for which relief from the conveyance and compensatory and punitive damages are sought although money damages alone are demanded in the wherefore clause; the Third and Fourth Causes of Action which sound in fraudulent conveyance under DCL § 273-a , § 75 and § 278, for which, relief therefrom and compensatory and punitve damages are

sought but only money damages are demanded in the wherefore clause.[1] In addition, the Trusts and Entities are denominated as targets in the Eighth, Ninth, Eleventh, Twelfth, Thirteenth and Fifteenth, sounding in unjust enrichment, aiding and abetting fraud, constructive trust, injunction against transfers of assets, conspiracy and an accounting. They are also targeted defendants in the Sixteenth Cause of Action for recovery of attorneys' fees pursuant to DCL § 276-a in which there appears to be demand for the recovery of attorneys' fees from "all defendants" pursuant to DCL § 276-a. However, the court finds that none of these claims are viable against the Trusts Entities defendants.

All claims sounding in fraudulent conveyances rest upon allegations that a conveyance or other transfer of assets or monies was actually or constructively fraudulently made by a debtor or defendant that is detrimental to the creditors protected by the statute (*see* DCL Article 10). The remedies for a fraudulent conveyance depend upon the status of the creditor and include the recovery of money damages, the setting aside of the fraudulent conveyances in total or to the extent necessary to make the creditor whole and an injunction against further transfers (*see* DCL §§ 278; 279).

As a general rule, the relief to which a defrauded creditor is entitled in an action to set aside a fraudulent conveyance is limited to setting aside the conveyance of the property which would have been available to satisfy the judgment had there been no conveyance (*see* ***Joslin v Lopez***, 309 AD2d 837, 765 NYS2d 895 [2d Dept 2003]). However, a fraudulent conveyance claim for the recovery of money damages can be maintained where the setting aside of the conveyance or the other remedies available under the statute would be unavailing because the transferee or beneficiary has disposed of the wrongfully conveyed property in some manner which makes it impossible to return (*see* ***Constitution Realty, LLC v Oltarsh***, 309 AD2d 714, 766 NYS2d 425 [1st Dept 2003]; ***Marine Midland Bank v Murkoff***, 120 AD2d 122, 508 NYS2d 17 [2d Dept 1986]). In this context, a transferee is one who received the money or other assets constituting the conveyance while a beneficiary is one benefitting from a transfer because there was no consideration given by him or her for it. However, the recovery of such damages under the Debtor and Creditor Law is not available against a non-transferor who participates in the fraudulent transfer, not as transferee or beneficiary, but only as a conspirator or as an aider and abettor of the transferor (*see* ***Federal Deposit Ins. Corp. v Porco***, 75 NY2d 840, 842, *supra*). While claims to set aside fraudulent transfers may be brought against mere transferees and beneficiaries who did not commit fraud, punitive damages are not recoverable without evidence of an actual intent to defraud on their part (*see* DCL§ 276-a; ***U.S. Bancorp Equip. Fin., Inc. v Rubashkin***, 98 AD3d 1057, 950 NYS2d 767 [2d Dept 2012]; ***Marine Midland Bank v Murkoff***, 120 AD2d 122, *supra*).

A claim sounding in fraudulent conveyances separately interposed by a wife against third parties during the pendency of a divorce action instituted by her against her husband may constitute her separate property only if the claim accrued after the commencement of the divorce action (*see* ***Hasegawa v Hasegawa***, 290 AD2d 488, *supra*). Here, the claims sounding in fraudulent conveyances,

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[1]The only wherefore clause demand for the setting aside of any conveyance as fraudulent is set forth in the Seventh Cause of Action wherein the plaintiff seeks a judgment declaring the invalidity of only the transfers of cash by defendant Jerome Swartz to his daughter Shanah Swartz-Gordon and his forgiveness of two loans to his other daughter, Nikola Swartz-Hennes, for which payment thereof is demanded.

including the demands for injunctive relief that target the Swartz family defendants, allegedly occurred after the April 3, 2009 commencement of the divorce action by the plaintiff. However, there are no specific factual allegations regarding conveyances or transfers to any of the Trusts and Entities defendants. The only claims that may be viewed as supporting fraudulent conveyance claims against these defendants are those set forth in ¶¶ 98 - 100 of the amended complaint in which it is alleged that between 2010 and 2012 substantial transfers of cash were made to and from unknown accounts and from unknown accounts into bank accounts of the Swartz Organization Account and allegedly belonging to defendant Swartz NYC, LLC. These allegations are, however, legally insufficient to state claims for the recovery of damages against the Trusts and Entities defendants pursuant to DCL §§ 276, 273-a, 265 and 276-a, since a legally sufficient fraudulent transfer complaint must identify the alleged transfers at issue and cannot simply allude generally to alleged transfers that may have taken place (*see* ***Syllman v Calleo Dev. Corp.***, 290 AD2d 209, 736 NYS2d 318 [1st Dept 2002]). The related claims for an injunction and accounting suffer from the same infirmities. The Second, Third, Fourth, Twelfth, Fifteenth and Sixteenth causes of action are thus dismissed pursuant to CPLR 3211(a)(7).

Also dismissed to the extent asserted against the Trusts and Entities defendants are the First Cause of Action sounding in common law fraud and the Ninth sounding in aiding and abetting fraud. The fraud cause of action lacks allegations regarding misrepresentations made by these defendants to the plaintiff (*see* ***Nanomedicon, LLC v Research Found. of State Univ. of New York***, 112 AD3d 594, 976 NYS2d 191 [2d Dept 2013]). To the extent that the First Cause of Action may be considered as one sounding in fraudulent concealment which carries with it a duty to disclose material facts, it is insufficient due to the absence of any fiduciary or confidential relationship between the Trusts and Entities defendants and the plaintiff (*see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]; ***Sutton v Hafner Valuation Group, Inc.***, 115 AD3d 1039, 982 NYS2d 185 [3d Dept 2014]; ***Nissan Motor Acceptance Corp. v Scialpi***, 94 AD3d 1067, 944 NYS2d 160 [2d Dept 2012]. The aiding and abetting fraud claim fails with the fraud claim and because of the failure to allege "actual knowledge" (*see id.*), and facts regarding acts these defendants engaged in with the intention of advancing the fraud's commission (*see* ***Goel v Ramachandran,*** 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]; ***CDR Creances S.A.S. v First Hotels & Resorts Inv., Inc.***, 101 AD3d 485, 956 NYS2d 16 [1st Dept 2012]; ***National Westminster Bank v Weksel***, 124 AD2d 144, 149, 511 NYS2d 626 [1st Dept 1987] "*The nexus between the aider and abettor and the primary fraud is made out by allegations as to the proposed aider's knowledge of the fraud, and what he, therefore, can be said to have done with the intention of advancing the fraud's commission. It is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud*)".

Also legally insufficient are the Eighth, Eleventh, and Thirteenth Causes of Action sounding in unjust enrichment, constructive trust and conspiracy (*see* ***Miller v Schloss***, 218 NY 400, 408, 113 NE 337 [1916]; ***Leidel v Annicelli***, 114 AD3d 536, 980 NYS2d 431 [1st Dept 2014]; ***Hall v McDonald***, 115 AD3d 646, 981 NYS2d 551 [2d Dept 2014]; ***Faulkner v City of Yonkers***, 105 AD3d 899, 963 NYS2d 340 [2d Dept 2013]; ***Nissan Motor Acceptance Corp. v Scialpi***, 94 AD3d 1067; *supra*; ***Hoeffner v Orrick, Herrington & Sutcliffe LLP***, 85 AD3d 457, 924 NYS2d 376 [1st Dept 2011]; ***Truong v AT&T***, 243 AD2d 278, 663 NYS2d 16 [1st Dept 1997]). These Causes of Action are thus dismissed pursuant to CPLR 3211(a)(7).

The court further finds that dismissal for legally insufficiency is warranted with respect to the claims purporting to target defendant Joshua Swartz as no allegations of wrongdoing nor any demands for relief are posited in the amended complaint. All Causes of Action advanced in the amended complaint are thus dismissed as to defendant Joshua Swartz pursuant to CPLR 3211(a)(7).

As for the claims against defendants Shanah Swartz-Gordon, Nikola Swartz-Hennes, who are the daughters of defendant Jerome Swartz, the court finds that the moving papers established that the First Cause of Action sounding in common law fraud is legally insufficient due to the absence of any alleged misrepresentations made by these defendants to the plaintiff (*see* ***Nanomedicon, LLC v Research Found. of State Univ. of New York***, 112 AD3d 594, *supra*). To the extent that the First Cause of Action may be considered as one sounding in fraudulent concealment, which carries with it a duty to disclose material facts, it is insufficient due to the absence of any fiduciary or confidential relationship between the daughter defendants and the plaintiff (*see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, *supra*; ***Sutton v Hafner Valuation Group, Inc.***, 115 AD3d 1039, *supra*; ***Nissan Motor Acceptance Corp. v Scialpi***, 94 AD3d 1067, *supra*). In addition, the Eighth, Ninth, Tenth, Eleventh and Thirteenth Causes of Action sounding in unjust enrichment, aiding and abetting fraud, constructive trust, conversion and conspiracy fail to allege facts sufficient to state a claim against them for such relief (*see* ***Goel v Ramachandran***, 111 AD3d 783, *supra*; ***Leidel v Annicelli***, 114 AD3d 536, *supra*; ***Hall v McDonald***, 115 AD3d 646, *supra*; ***Sutton Apts. Corp. v Bradhurst 100 Dev., LLC***, 107 AD3d 646, 968 NYS2d 483 [1st Dept 2013]; ***Faulkner v City of Yonkers***, 105 AD3d 899, *supra*; ***Hoeffner v Orrick, Herrington & Sutcliffe LLP***, 85 AD3d 457, *supra;* ***Nissan Motor Acceptance Corp. v Scialpi***, 94 AD3d 1067, *supra*; ***R.U.M.C. Realty Corp. v JCF Assoc., LLC***, 51 AD3d 993, 995, 859 NYS2d 465 [2d Dept 2008]; ***Truong v AT&T***, 243 AD2d 278, *supra*; *see also* ***Nanomedicon, LLC v Research Found. of State Univ. of New York***, 112 AD3d 594, *supra*). Accordingly, the First, Eighth, Ninth, Tenth, Eleventh and Thirteenth Causes of Action to the extent asserted against defendants, Swartz-Gordon and Swartz-Hennes, are dismissed pursuant to CPLR 3211(a)(7).

In contrast, the moving papers failed to demonstrate that the remaining claims asserted against these two defendants, which sound in fraudulent conveyances, declaratory and injunctive relief with respect to any certain allegedly fraudulent transfers are legally insufficient or that a sufficient identity of parties exists so as to warrant dismissal under CPLR 3211(a)(4) (*see* ***Hasegawa v Hasegawa***, 290 AD2d 488, *supra*). The motion to dismiss the Second, Third, Fourth, Seventh, Twelfth and Sixteenth Causes of Action is thus denied pursuant to CPLR 3211(a)(1) and (a)(4). However, the moving papers sufficiently established that such claims will be subject to and affected by the determination of the plaintiff's claims against her husband in the matrimonial action. Under these circumstances, the court, in the exercise of the discretion vested in it pursuant to CPLR 3211(a)(4), finds that these claims should be stayed until the determination of the claims interposed in the matrimonial action pending between the plaintiff and her husband. Accordingly, the Second, Third, Fourth, Seventh, Twelfth and Sixteenth Causes of Action, to the extent asserted against defendants Swartz-Gordon and Swartz-Hennes, are stayed until further order of this court. The remaining portions of the motion by the Swartz family defendants for the imposition of sanctions and other relief are denied (*see* 22 NYCRR Part 130-19; ***Muro-Light v Farley***, 95 AD3d 846, *supra*).

Next considered is the motion (#005) by the King defendants for dismissal of this action pursuant to CPLR 3211(a)(7), 3211(a)(4) and other CPLR provisions. These defendants are charged with fraud, fraudulent conveyances under DCL §§ 276, 278 and 276-a, malpractice, breach of fiduciary duties, unjust enrichment, aiding and constructive trust liability and conspiracy. Injunctive relief and an accounting is also demanded. The fraudulent conveyance claims asserted against the King defendants in the Second, Fourth and Sixteenth Causes of Action are dismissed since the King defendants are neither transferees nor beneficiaries of any transfer of assets made by defendant Swartz (*see* ***Federal Deposit Ins. Corp. v Porco***, 75 NY2d 840, 842, *supra*). The Twelfth Cause of Action sounding in injunctive relief is also legally insufficient and it is premised upon the fraudulent conveyance claims which have been dismissed (*see* ***Weinreb v 37 Apts. Corp.***, 97 AD3d 54, 58–59, 943 NYS2d 519 [1st Dept 2012]). The unjust enrichment claim advanced in the Eighth Cause of Action against the King defendants is legally insufficient since the amended complaint fails to detail how the King defendants were unjustly enriched (*see* ***RK Solutions, LLC v George Westinghouse Info. Tech. High,*** ____AD3d ___, 982 NYS2d 765 [1st Dept 2014]). The aiding and abetting claim advanced in the Ninth cause of action fails as well since it is dependent upon the fraudulent conveyance claims and because it is devoid of allegations of fact regarding the King defendants' "actual knowledge" of the fraud and the acts in which the King defendants engaged with the intention of advancing the fraud's commission (*see* ***Goel v Ramachandran,*** 111 AD3d 783, *supra*; ***CDR Creances S.A.S. v First Hotels & Resorts Inv., Inc.***, 101 AD3d 485, *supra*; ***National Westminster Bank v Weksel***, 124 AD2d 144, 149, *supra*). The conspiracy claim which is advanced in the Thirteenth Cause of Action is also subject to dismissal since there are insufficient allegations of a cognizable tort, coupled with an agreement between the conspirators regarding the tort and overt action in furtherance of the agreement (*see* ***Faulkner v City of Yonkers***, 105 AD3d 899, *supra*), and the aiding and abetting claim advanced in the Ninth cause of action lacks the requisite factual allegations to state a claim. Accordingly, the Second, Fourth, and the Sixteenth Causes of Action sounding in fraudulent conveyances, together with the Eighth (unjust enrichment), the Ninth (aiding and abetting) and the Thirteenth (conspiracy) Causes of Action are dismissed pursuant to CPLR 3211(a)(7) to the extent asserted against the King defendants.

The court agrees with the King defendants that the First Cause of Action sounding in common law fraud is legally insufficient since the factual allegations advanced against the King defendants in the amended complaint fail to set forth the specificity of each of the elements of such a claim, i.e. misrepresentation of a material fact, scienter, justifiable reliance, and injury (*see* ***Fromowitz v W. Park Assoc., Inc.***, 106 AD3d 950, 965 NYS2d 597 [2d Dept 2013]). The amended complaint lacks the necessary specific factual allegations regarding misrepresentations made by the King defendants to the plaintiff (*see* ***Nanomedicon, LLC v Research Found. of State Univ. of New York***, 112 AD3d 594, *supra*). Even if the claim is viewed as one sounding in constructive fraud, for which the elements are the same "except that the element of scienter is replaced by a fiduciary or confidential relationship between the parties" (***Brown v Lockwood***, 76 AD2d 721, 731, 432 NYS2d 186 [2d Dept 1980]; ***Refreshment Mgt. Serv. Corp. v Complete Office Supply Warehouse Corp.***, 89 AD3d 913, 933 NYS2d 312 [2d Dept 2011]), the absence of specific allegations as to misrepresentations made by the King defendants to the plaintiff render it legally insufficient as well.

To the extent that the plaintiff' First Cause of Action may be viewed as one sounding in fraudulent concealment, it too is legally insufficient. An omission or concealment can constitute fraud where the defendant had a duty to disclose material facts alleged to be omitted or concealed (*see* ***Sutton v Hafner Valuation Group, Inc.***, 115 AD3d 1039, 982 NYS2d 185 [3d Dept 2014]; ***Manti's Transp., Inc. v C.T. Lines, Inc.***, 68 AD3d 937, 892 NYS2d 432 [2d Dept 2009]). Allegations regarding the concealment and the duty to disclose must be advanced and such duty must arise from the existence of a fiduciary or confidential relationship between the plaintiff and the defendant (*see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]; ***Sutton v Hafner Valuation Group, Inc.***, 115 AD3d 1039, *supra*).

It is generally recognized that there is no fiduciary relationship between an accountant and his or her client (*see* ***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006]; ***Friedman v Anderson***, 23 AD3d 163, 166, 803 NYS2d 514 [1st Dept 2005]; ***Atkins Nutritionals, Inc. v Ernst & Young, LLP***, 301 AD2d 547, 754 NYS2d 320 [2d Dept 2003]; ***DG Liquidation v Anchin, Block & Anchin***, 300 AD2d 70, 750 NYS2d 753 [1st Dept 2002]). Nevertheless, the existence of special and/or additional circumstances may transform that conventional, arms length, business relationship into one of trust and confidence. Where one party is possessed of superior skill or knowledge in the subject matter of the relationship so as to induce reasonable reliance by the other transacting party, the law will impose fiduciary duties on the part of the non-reliant party (*see* ***Staffenberg v Fairfield Pagma Assoc., L.P.***, 95 AD3d 873, 944 NYS2d 568 [2d Dept 2012]; ***Bullmore v Ernst & Young Cayman Is.***, 45 AD3d 461, 846 NYS2d 145 [1st Dept 2007]; ***Caprer v Nussbaum***, 36 AD3d 176, *supra*; ***Lavin v Kaufman, Greenhut, Lebowitz & Forman***, 226 AD2d 107, 640 NYS2d 57 [1st Dept 1996]). In the discipline of accounting, the special circumstances that may transform the customary relationship into one of trust and confidence include the rendering of financial investment advice and/or the entrustment of funds to the accountant for such purposes (*see* ***Palmetto Partners, L.P. v AJW Qualified Partners***, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]; ***Bullmore v Ernst & Young Cayman Is.***, 45 AD3d 461, *supra*; ***Brooks v Key Trust Co. N.A.***, 26 AD3d 628, 630, 809 NYS2d 270 [3d Dept 2006]; ***Caprer v Nussbaum***, 36 AD3d 176, *supra*; ***Rasmussen v A.C.T. Envtl. Serv., Inc.***, 292 AD2d 710, 739 NYS2d 220 [3d Dept 2002]; ***Lavin v Kaufman, Greenhut, Lebowitz & Forman***, 226 AD2d 107, *supra*; ***Davis v CCF Capital Corp.***, 277 AD2d 342, 717 NYS2d 207 [2d Dept 2000]).

Upon a review of the amended complaint, and after crediting the factual allegations advanced therein with a very liberal reading, the court finds that the plaintiff's First Cause of Action is insufficient to state claim for fraudulent concealment due to the absence of allegations that a fiduciary relationship between the plaintiff and the King defendants arose out of special circumstances. No allegations that investment advice of the type giving rise to a reliant relationship on the part of the plaintiff and fiduciary duties on the part of the King defendants or that the plaintiff entrusted her separate funds to the hands of the King defendants are advanced in the complaint. The First Cause of Action is thus dismissed as legally insufficient due to the absence of allegations regarding the existence of special circumstances out of which a fiduciary or other confidential relationship may be inferred for pleading purposes. For these same reasons, the Sixth Cause of Action set forth in the amended complaint, in which the King defendants are charged with breaches of fiduciary duties owing to the plaintiff, and the Eleventh Cause of Action sounding in constructive trust which is also dependent upon a fiduciary relationship, are dismissed. The demand for an accounting from the King defendants

is also dismissed. The court finds that it too is legally insufficient inasmuch as the plaintiff failed to demonstrate that the money damages potentially available to her on her sole surviving malpractice claim that is premised upon allegedly faulty tax services provides the plaintiff with an inadequate remedy at law or that the defendants owed a fiduciary duty to the plaintiff with respect to the tax return services at issue (*see* ***Weinstein v Natalie Weinstein Design Assoc.***, 86 AD3d 641, 928 NYS2d 305 [2d Dept 2011]; ***Friedman v Anderson***, 23 AD3d 163, 803 NYS2d 514 [1st Dept 2005]). The aiding and abetting fraud claim advanced in the Ninth cause of action, to the extent it relates to the First cause of action, is also insufficient as it is dependent upon the viability of that claim and because the complaint is devoid of allegations of fact regarding the existence of a confidential relationship between the plaintiff and the King defendants (*see* ***Eurycleia Partners, LP v Seward & Kissel, LLP,*** 12 NY3d 553, 883 NYS2d 147 [2009]); and the other elements of an aiding and abetting cause of action (*see* ***Goel v Ramachandran***, 111 AD3d 783, *supra*; *see also* ***CDR Creances S.A.S. v First Hotels & Resorts Inv., Inc.***, 101 AD3d 485, *supra*; ***National Westminster Bank v Weksel***, 124 AD2d 144, 149, *supra*).

Even if a confidential relationship between the plaintiff and the King defendants was discernable from the allegations in the amended complaint, the First cause of action sounding in fraud lacks the factual specificity imposed upon a fraud claim. Although it is clear that a fraud claim may subsist separately from a malpractice claim against an accountant who renders tax advice and accounting services to the plaintiff without disclosing the accountant's divided loyalties, there must be allegations of the plaintiff's justifiable reliance upon words employed or other conduct on the part of the accountant which portrayed the tax advice as serving only the plaintiff's best interests (*see* ***Mitschele v Schultz***, 36 AD3d 249, 826 NYS2d 14 [1st Dept 2006]). A review of the amended complaint served here reveals, even upon a most liberal reading, that no such allegations are advanced therein by the plaintiff.

Those portions of the King defendants' motion for dismissal of the Fifth Cause of Action sounding in accounting malpractice are denied. "Accounting malpractice ... contemplates a failure to exercise due care and proof of a material deviation from the recognized and accepted professional standards for accountants and auditors, generally measured by GAAP and GAAS promulgated by the American Institute of Certified Public Accountants, which proximately causes damage to plaintiff" (***Cumis Ins. Socy. Inc. v Tooke***, 293 AD2d 794, 797–798, 739 NYS2d 489 [3d Dept 2002]). Upon a liberal reading, the Fifth cause of action alleges facts from which a claim for accounting malpractice may be discerned.

The King defendants' alternate claim that the plaintiff's malpractice cause of action is subject to dismissal due to the expiration of the three year statute of limitations period applicable thereto is also rejected as unmeritorious but only to the extent that such claims are not fraud based or based upon breach of fiduciary duties as those claims have been dismissed (*see* ***Ackerman v Price Waterhouse***, 84 NY2d 535, 620 NYS2d 318 [1994], *"A malpractice cause of action sounds in tort and, therefore, absent fraud, accrues when an injury occurs, even if the aggrieved party is then ignorant of the wrong or injury"*). Here, there is evidence that the King defendants' rendition of tax and general accounting services to the plaintiff continued through August of 2011 and beyond (*see* ¶¶ 29 - 41 affidavit of plaintiff attached to motion sequence #008). The plaintiff thus satisfied her burden of establishing that

questions of fact exist which preclude, at this stage, a dismissal pursuant to CPLR 3211(a) of the negligence claim alleging general accounting malpractice that is advanced in the Fifth Cause of Action (*see* ***Symbol Tech., Inc. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]).

Nevertheless, it appears that certain of the facts underlying the malpractice claim are at issue in the prior matrimonial action. The determinations made therein may thus have a direct and substantial effect on the malpractice claim pending here against the King defendants. To avoid potentially inconsistent determinations and to dispel all notions of form shopping, this court stays, pursuant to CPLR 2001 and 3211(a)(4), the prosecution of the malpractice claim advanced in the Fifth Cause of Action in the amended complaint pending the resolution of the matrimonial economic issues, including those pertaining to equitable distribution.

The remaining portion of the motion by the King defendants wherein they seek the imposition of sanctions is denied (*see* 22 NYCRR Part 130-1 9; ***Muro-Light v Farley***, 95 AD3d 846, *supra*).

The motion-in-chief (#001), in which plaintiff demands extensive prohibitive and mandatory preliminary injunctive relief restraining certain of the defendants from transferring assets received from defendant Jerome Swartz after January 1, 2009 and from destroying records of accounts, compelling defendant Jerome Swartz to deposit moneys in escrow and compelling defendant Nikola Swatz-Hennes to pay monies due on a loan and other relief is considered under CPLR 6311 and is denied. The moving papers failed to demonstrate the plaintiff's entitlement to such relief under the traditional three prong test applicable to the granting of preliminary injunctive relief (*see* ***Nobu Next Door, LLC v Fine Arts Hous., Inc.***, 4 NY3d 839, 800 NYS2d 48 [2008]; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 862, 552 NYS2d 918 [1990]; ***County of Suffolk v Givens,*** 106 AD3d 943, 967 NYS2d 387 [2d Dept 2013]).

Also denied is the plaintiff's cross motion (#008) in which she seeks the imposition of sanctions against the defendants. None of the conduct complained of on the part of the defendants or their counsel constitutes frivolous conduct as that term is defined in the rules at 22 NYCRR Part 130-1.

In view of foregoing, the motions are decided as set forth above and the clerk shall note the stay of all remaining claims interposed herein in the court's electronic computer, which stay shall continue until further order of the court.

Dated: May 14 2014

THOMAS F. WHELAN, J.S.C.