SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 652700/2012
HERMAN, ROSEMARIE A.
vs.
36 GRAMERCY PARK REALTY
SEQUENCE NUMBER : 011
RENEW/REARGUE

INDEX NO. _____
MOTION DATE 12/14/17
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 364-387
Answering Affidavits — Exhibits _____ | No(s). 388-404
Replying Affidavits _____ | No(s). 409-416

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 2/6/18

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ROSEMARIE A. HERMAN, individually, as beneficiary of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990, and ROSEMARIE A. HERMAN as Natural Guardian for GAVIN I. ESMAIL and JESSE A. ESMAIL, individually, as beneficiaries of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990,

Plaintiffs,

-against-

36 GRAMERCY PARK REALTY ASSOCIATES, LLC, COSMOPOLITAN PROPERTY ACQUISITION COMPANY, LLC, MMANN LLC, MANN MANAGEMENT, INC. d/b/a MANN REALTY ASSOCIATES, MAURICE A. MANN, "ABC COMPANY #1" through "ABC COMPANY #10," the last ten entities being fictitious and unknown to the Plaintiffs, the entities intended being the entities, if any, involved in the acts or omissions described in the Complaint, and "JOHN DOE #1" through "JOHN DOE #10," the last ten names being fictitious and unknown to the Plaintiffs, the persons intended being the Persons, if any, involved in the acts or omissions described in the Complaint,

Defendants.

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36 GRAMERCY PARK REALTY ASSOCIATES, LLC, COSMOPOLITAN PROPERTY ACQUISITION COMPANY, LLC, MMANN LLC, MANN MANAGEMENT, INC. d/b/a MANN REALTY ASSOCIATES, MAURICE A. MANN,

Third-Party Plaintiffs,

-against-

ARDENT INVESTMENTS, LLC, J. MAURICE HERMAN, and MICHAEL OFFIT,

Third-Party Defendants.

Index No.: 652700/2012
(Action No. 1)

DECISION & ORDER

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36 GRAMERCY PARK REALTY ASSOCIATES, LLC, 320 E. 22ND REALTY ASSOCIATES, LLC, 10 W. 74TH STREET REALTY ASSOCIATES, LLC, 150 W. 82ND STREET REALTY ASSOCIATES, LLC, 425 E. 76TH STREET REALTY ASSOCIATES, LLC, COSMOPOLITAN PROPERTY ACQUISITION COMPANY, LLC, MMANN LLC, MANN MANAGEMENT, INC. d/b/a MANN REALTY ASSOCIATES, and MAURICE A. MANN,

Plaintiffs,

-against-

ROSEMARIE A. HERMAN, individually, and in any Representative capacity she asserts,

Defendant.

Index No. 654067/2012
(Action No. 2)

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 011, 012, and 013 in Action No. 1 and motion sequence numbers 004 and 005 in Action No. 2 are consolidated for disposition.[1]

I. Introduction

The two above captioned cases are part of a larger universe of litigation that has been pending before this court since 2011. Fundamentally, the litigation concerns disputes between brother (Maurice)[2] and sister (Rosemarie) over the brother's now-adjudicated malfeasance in connection with real property gifted to these siblings by their father. These cases have been heavily litigated, and are the subject of multiple extensive written decisions by this court and the

[1] Motions 004 and 005 in Action No. 2 are duplicative of Motions 011 and 012 in Action No. 1. Unless otherwise indicated, all citations to Dkt. refer to documents filed on NYSCEF in Action No. 1.

[2] The court refers to the parties with the surname Herman by their first names to avoid confusion. It should be noted that Maurice should not be confused with Maurice Mann, who is one of the "Mann Parties" (defendants and third-party plaintiffs in Action No. 1 and plaintiffs in Action No. 2). All other capitalized terms not defined herein have the same meaning as in the court's prior decisions.

Appellate Division. The court assumes familiarity with this extensive history and addresses the factual and procedural background of the litigation only to the extent necessary to decide the instant motions.

The Mann Parties move for renewal (Seq. 011) of the court's April 21, 2017 decision granting Rosemarie's motion for partial summary judgment (Seq. 008) on her claim to quiet title to the unsold condominiums at 36 Gramercy Park East (36 Gramercy). *See* Dkt. 332 (the April 21 Decision). The issue is whether, by virtue of events that have transpired in the "Main Action" (*Herman v Herman*, Index No. 650205/2011), the court should vacate its quiet title holding because of (1) Rosemarie's election of remedies in the Main Action; and/or (2) the collateral estoppel effect of the judgment entered in the Main Action. For the reasons that follow, the court grants the Mann Parties' renewal motion. Upon renewal, the court denies Rosemarie's partial summary judgment motion on her quiet title claim.[3]

Consequently, the court declines to reach the remainder of the issues raised in the Mann Parties' motion (i.e., reargument of certain holdings in the April 21 Decision) and its stay application, the latter request now being moot. Also moot is Rosemarie's motion (Seq. 012) for relief pursuant to the court's previous rulings, since she no longer is entitled to the relief she seeks. Finally, for the reasons set forth at the end of this decision, the court denies the Mann Parties' motion (Seq. 013) for a prejudgment attachment against and discovery from Maurice and one of his entities.

[3] While the court contemplated *sua sponte* granting summary judgment to the Mann Parties on Rosemarie's quiet title claims – because those claims would appear, necessarily, to fail as a matter of law by virtue of the court's election of remedies and collateral estoppel rulings – out of an abundance of caution, the court will not do so pending further briefing.

II. Background

It is *res judicata* that Maurice is liable to Rosemarie "for his breach of fiduciary duty and fraud upon [Rosemarie] for selling 36 Gramercy and other properties to himself in 1998 for $8,000,000 dollars [the 1998 Transaction], and later, in 2002, to the Mann Parties for nearly $102,000,000 [the 2002 Transaction; collectively, the Transactions]." *See* Dkt. 365 at 7. These claims were litigated in the Main Action where, in July 2015, the court struck Maurice's answer for serial, egregious discovery violations. That ruling was affirmed by the Appellate Division. *See Herman v Herman*, 134 AD3d 442 (1st Dept 2015). After violating further court orders, in May 2016, the court precluded Maurice from participating in the inquest on the amount of Rosemarie's damages. That order of preclusion was affirmed by the Appellate Division and the Court of Appeals. *See Herman v Herman*, 30 NY3d 925 (2017).

On January 12, 2017, an inquest in the Main Action was conducted before a Special Referee, who issued his report on January 26, 2017. *See* Main Action, Dkt. 1480 (the Report). Rosemarie moved to confirm the Report on February 7, 2017. By order dated April 28, 2017, the court modified the report in part and otherwise confirmed it. *See* Main Action, Dkt. 1611 (the April 28 Decision). On September 26, 2017, a judgment in excess of $100 million was entered against Maurice. *See* Main Action, Dkt. 1695 (the Judgment).

Approximately one week *prior* to ruling on the Report, the court issued the April 21 Decision in the instant actions, in which Rosemarie was granted partial summary judgment on her quiet title claims. When the April 21 Decision was issued, there had not been any decision on the proper measure of damages in the Main Action, nor, of course, had Rosemarie sought or procured the entry of judgment against Maurice. On May 24, 2017, the Mann Parties filed the instant motion for reargument and renewal of the April 21 Decision. The court finds their

principal arguments to be dispositive. First, the Mann Parties argue that to procure the Judgment against Maurice, Rosemarie necessarily was required to elect her remedy on her claims challenging the Transactions. That is, she was required to either (a) seek damages in the form of lost profits, i.e., all amounts she would have received had she not been deprived of her interest in 36 Gramercy; or (b) seek rescission of the Transactions to recover such interest – and Rosemarie elected the former and reduced that recovery to judgment. Second, the Mann Parties contend that final adjudication of Rosemarie's damages claim against Maurice in the Main Action collaterally estops her from seeking rescission of the 2002 Transaction, including all forms of inconsistent relief. They aver that Rosemarie cannot recover title to 36 Gramercy from the Mann Parties through rescission when she has chosen to obtain a monetary judgment making her whole for all damages she incurred by virtue of losing her interest in 36 Gramercy. The court agrees with both arguments. Rosemarie cannot obtain inconsistent relief that amounts to a double recovery.

Rosemarie's opposition is predicated on her contention that the relief she seeks from the Mann Parties is permissible so long as the Judgment entered against Maurice has not been satisfied.[4] She cites cases that supposedly stand for the proposition that the election of remedies doctrine does not apply where, as here, the plaintiff seeks recovery in another action against a different defendant. As explained below, while this is true under certain circumstances, this rule does not apply to the facts of this case. That said, even if Rosemarie were not required to make an election of remedies in the Main Action, the entry of the Judgment triggered the doctrine of collateral estoppel. Indeed, the collateral estoppel effect of the Judgment reinforces the notion that Rosemarie was required to make an election of remedies. The court's reasoning follows.

[4] Even though Maurice clearly has assets capable of satisfying the Judgment, the Judgment has not been satisfied because he has been resisting enforcement.

III. Renewal

CPLR 2201(e)(2) permits a party to seek renewal of a motion "based upon new facts not offered on the prior motion that would change the prior determination." "A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *Queens Unit Venture, LLC v Tyson Court Owners Corp.*, 111 AD3d 552 (1st Dept 2013) (citation omitted). However, "[t]he court has discretion to relax the requirement that a motion to renew be based on newly discovered evidence or evidence not previously available, **and to grant such a motion in the interest of justice, absent prejudice to the opposing party resulting from any delay**." *Hines v New York City Transit Auth.*, 112 AD3d 528 (1st Dept 2013) (emphasis added); *see BLDG ABI Enterprises, LLC v 711 Second Ave Corp.*, 116 AD3d 617, 618 (1st Dept 2014) (same). Here, the new facts, which are pertinent to both the election of remedies and collateral estoppel, are the court's April 28 Decision and the entry of the Judgment against Maurice in September 2017 – both of which postdated the court's April 21 Decision on Rosemarie's quiet title claim (and, of course, postdated full briefing on Rosemarie's summary judgment motion).[5] In any event, to the extent Rosemarie complains that the Mann Parties ought to have raised the election of remedies argument at an earlier stage of the litigation,[6] the court excuses such oversight in the interest of justice since there is no prejudice to

[5] Rosemarie filed her motion in April 2016, which not only was prior to the inquest in January 2017, but also prior to the court's May 2016 order that precluded Maurice from participating in the inquest.

[6] As discussed herein, the Mann Parties could not have prevailed on their collateral estoppel argument at an earlier stage since such argument only became available to them upon entry of the Judgment (which, frankly, means that their motion for renewal on this ground was somewhat premature, as it was filed more than four months prior to the entry of the Judgment, though oral argument occurred afterward).

Rosemarie.[7] The First Department has held that even if, as here, a litigant does not plead an election of remedies affirmative defense in its answer, that is of no moment absent prejudice. *See Bank of New York v River Terrace Assocs., LLC*, 23 AD3d 308, 310 (1st Dept 2005) ("BNY may raise the defense of election of remedies, even though it failed to include it in its answer, where it raised the defense in the summary judgment motions before the motion court, and River Terrace opposed the defense without claiming prejudice from the failure to plead."); *see also Schwartz v Hotel Carlyle Owners Corp.*, 132 AD3d 541, 543 (1st Dept 2015) (election of remedies can even be raised for the first time on appeal). Since there is no prejudice here, there is no basis for the court to conclude that the Mann Parties have waived their right to assert an election of remedies defense.

IV. Election of Remedies

CPLR 3002(a) provides that "[w]here causes of action exist against several persons, the commencement or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others." Nonetheless, "[w]hile a party is permitted to plead inconsistent theories of recovery (CPLR 3014), it must elect among inconsistent positions upon seeking expedited disposition." *On the Level Enterprises, Inc. v 49 E. Houston LLC*, 104 AD3d 500, 501 (1st Dept 2013).[8] Consistent with this rule, CPLR 3002(e) provides that "[i]n action for rescission ... the

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[7] *See Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 (1981) ("Prejudice, of course, **is not found in the mere exposure of the defendant to greater liability**. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position") (emphasis added); *see Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 (2014) (same).

[8] The court need not decide when exactly Rosemarie should be deemed to have sought "expedited disposition" in the Main Action since, at this juncture – after the entry of Judgment – there is no question that Rosemarie has done so. *See Unisys Corp. v Hercules Inc.*, 224 AD2d

aggrieved party shall be allowed to obtain complete relief in one action, including rescission, restitution of the benefits, if any, conferred by him as a result of the transaction, and damages to which he is entitled because of such fraud or misrepresentation; **but such complete relief shall not include duplication of items of recovery**" (emphasis added). *See Brown v Delon*, 215 AD2d 424, 426 (2d Dept 1995) ("Without knowledge of the reconveyance, the jury was led to mistakenly conclude that the plaintiff had lost the entire value of the property. As a result, the jury's award of damages was contrary to the law in that it 'include[d] duplication of items of recovery' (CPLR 3002[e]).").

The parties do not dispute that where a plaintiff prevails on a claim based on the improper taking of property against a particular defendant, the plaintiff must choose whether to seek return of the property or a monetary judgment to compensate her for the lost value of the property. This principal was demonstrated in *Wynyard v Beiny*, 82 AD3d 665 (1st Dept 2011), where the Court explained:

> Petitioners' cause of action for a judgment declaring "ACNY the owner of the 'Z' goods held by the Liechtenstein Trusts" is barred by the doctrine of the election of remedies (*see American Woolen Co. of N.Y. v Samuelsohn*, 226 NY 61 [1919]). Petitioners have already been awarded a money judgment equivalent to 45% of the value of the "Z" goods as against respondent Rotraut Beiny, who is the sole beneficiary of the Liechtenstein Trusts (*see Matter of Beiny*, 16 AD3d 221 [2005]). **They now seek a judgment declaring against the same wrongdoer (Rotraut Beiny) based on the same wrongdoing** (conversion of the "Z" goods) (*see Sabeno v Mitsubishi Motors Credit of Am.*, Inc., 20 AD3d 466 [2005]).
>
> ... **Petitioners' present contention that ACNY should be declared to own 100% of the "Z" goods not only is inconsistent with the factual basis for the**

365, 367 (1st Dept 1996) ("Even where a plaintiff may seek recovery on alternative theories, he must make an election of remedies at trial, or upon submission of a motion for summary judgment, the grant of which is the procedural equivalent of a trial.") (internal citations and quotation marks omitted); *see also Wilmoth v Sandor*, 259 AD2d 252, 254 (1st Dept 1999). That said, there is authority that stands for the proposition that where, as here, a plaintiff seeks to strike a defendant's pleadings based on a discovery violation, that triggers the need to make an election of remedies. *See Crossett v Sweeney*, 144 AD2d 955 (4th Dept 1988).

> **monetary award, but also would result in both a double payment by Rotraut Beiny and a double award to petitioners**, who, pursuant to the parties' settlement agreement, now own 100% of ACNY.

Id. at 666 (emphasis added).

In the Main Action, Rosemarie claimed to be aggrieved by the 1998 Transaction due to Maurice depriving her of her interest in 36 Gramercy without paying her market value for the property. Four years later, in the 2002 Transaction, Maurice sold 36 Gramercy to the Mann Parties, and made a substantial profit.[9] The Judgment has afforded Rosemarie all of the compensatory damages she is legally entitled to recover, including disgorgement of her share of the profit on the 2002 Transaction (i.e., monies paid by the Mann Parties). Hence, she was made whole for having lost 36 Gramercy. Yet, in the instant actions, Rosemarie seeks to unwind the 2002 Transaction by quieting title to 36 Gramercy. In other words, after obtaining judgment making her whole for losing 36 Gramercy, she wants the property returned. The result, were she to prevail, is that she would reacquire her interest in 36 Gramercy after being paid for its loss, giving her a double recovery. The Mann Parties object to her "receiving the benefit from a sale of [36 Gramercy to them] and quieting title and gaining possession of the exact same parcel [from them]." *See* Dkt. 365 at 8.

Rosemarie contends that this would only be a problem if she was seeking inconsistent relief from Maurice. She contends that she is not required to elect her remedies here because she is permitted to recover inconsistent relief from separate defendants in separate actions so long as she does not actually enforce the inconsistent judgments. She avers that the only protection afforded to Maurice and the Mann Parties is their ability to resist an attempt by Rosemarie to

[9] The court, obviously, is simplifying by omitting the details of which entities were involved, but that detail is immaterial to the instant motions.

collect an aggregate amount in excess of her damages.[10] She cites no authority that expressly stands for this proposition or examples of cases where such policing of inconsistent judgments occurred.

As an initial matter, it is of no moment that Maurice has yet to satisfy the Judgment because Rosemarie is not seeking to hold another tortfeasor jointly and severally liable for Maurice's conduct. If that was the posture, the Judgment remaining unsatisfied would permit Rosemarie to pursue claims against other jointly and severally liable parties. *See Blanco v J & B Assocs.*, 177 AD2d 370, 371 (1st Dept 1991), citing *Velazquez v Water Taxi, Inc.*, 49 NY2d 762, 764 (1980) ("It is well settled that the satisfaction of a judgment rendered against one tort-feasor discharges all joint tort-feasors from liability to the plaintiff."). Here, by contrast, the Mann Parties are not jointly and severally liable for Maurice's breaches of his fiduciary duties to Rosemarie. Rather, the Mann Parties stand to lose 36 Gramercy based on a defect in title. When they purchased 36 Gramercy in the 2002 Transaction, they failed to notice the defect in the transfer of title in the 1998 Transaction, thereby, as discussed in the April 21 Decision, subjecting themselves to Rosemarie's right to quiet title and effectively rescind the 2002 Transaction. Although the defect in title arose by virtue of Maurice's improper transfer of 36 Gramercy in the 1998 Transaction, the Mann Parties face no liability for the 1998 Transaction.

To this court's knowledge, and based on the cases cited by the parties, it appears that there is no controlling authority that expressly governs this situation. Specifically, the question of whether a plaintiff may obtain a monetary judgment against one defendant to make her whole for the loss of property, and then seek replevin of that property from another defendant, appears

[10] This would likely entail further complex and expensive proceedings to compare the value of the unsold condominiums to the portion of the Judgment against Maurice related to 36 Gramercy.

to be one of first impression under the current version of the CPLR. Nonetheless, if unreasonable and inequitable, inconsistent relief should be unavailable from multiple defendants. For instance, were the Mann Parties named as defendants in the Main Action, Rosemarie surely would have had to decide whether her relief would include disgorgement of profits on the 2002 Transaction or its rescission. It is cynical gamesmanship to seek both merely by virtue of commencing separate actions. Underpinning Rosemarie's right to the entry of the Judgment against Maurice is the occurrence of the 1998 and 2002 improper transfers of 36 Gramercy. The basis of the judgment Rosemarie seeks from the Mann Parties is that those transactions never took place. These two premises are incompatible; only one may be true. Judgment on one is *res judicata* as to the other.

Rosemarie's desire to treat each litigation as entirely distinct is at odds with the principal of election of remedies. At the beginning of the case, where facts are yet to be adjudicated, the plaintiff's pleadings may conflict. For example, the plaintiff may claim that a contract was fraudulently induced and seek its rescission, and simultaneously allege the contract's validity and seek its enforcement. *Citi Mgmt. Grp., Ltd. v Highbridge House Ogden, LLC*, 45 AD3d (1st Dept 2007); *see Island Intellectual Prop. LLC v Reich & Tang Deposit Sols., LLC*, 155 AD3d 542 (1st Dept 2017). But a judgment requires a final, consistent adjudication of facts. Courts generally loathe the possibility of inconsistent judgments. *See Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 NY3d 543, 551 (2012); *Bruno v Bruno*, 83 AD3d 165, 172 (1st Dept 2011). Here, Rosemarie seeks inconsistent judgments from the *same* court.

To be sure, and as noted earlier, while there is no controlling caselaw that postdates the operative version of CPLR 3002, there is persuasive authority that supports the Mann Parties'

position. In *Mulligan v Amo*, 211 AD 498 (4th Dept 1925), a case similar to this, the court stated:

> [A]t the time when Mary Ann McQuaid had title to the premises, she held it as trustee for Rose Mulligan to the extent of the amount unpaid to Rose Mulligan on the Parry mortgage. When Mary Ann McQuaid mortgaged the property for $3,500, and then conveyed the equity to the Campbells, she breached that trust
>
> **At that time Rose Mulligan had the choice of two remedies: She could follow the trust res into the hands of the mortgagees and purchasers, provided they took with notice of the trust, or she could follow the substitute for the trust res, which was the money received by Mary Ann McQuaid as the product of the mortgage and sale**. Having that choice, she elected the latter. She brought an action against Mary Ann McQuaid, the trustee, alone. She charged the existence of the trust, the transfer of the trust res, the receipt by the trustee of the product thereof, and asked for an accounting and for judgment against the defendant on the basis of the accounting. That is precisely what she got under the decision of this court, which held that Mary Ann McQuaid took the property charged with a trust in favor of the plaintiff, that she was bound to account out of the moneys received by her for the sum shown by the evidence to have been due said Rose Mulligan, with interest thereon, and directed a judgment accordingly.
>
> ... Plaintiff, having elected to pursue that course, in effect ratified the transfer. **Her judgment, whether it is collectible or not, represents the proceeds**. She is in no position, after having failed to realize anything on her execution, to start anew and pursue the alternative remedy, which she had originally rejected.

Id. at 498-99 (emphasis added).[11]

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[11] The Mann Parties explain that the facts here are basically the same:

> [Maurice] was held to have breached his duty to the 1990 Trust by transferring away [Rosemarie's] interest in 36 Gramercy. [Rosemarie] in the Inquest proceedings elected to follow the 36 Gramercy property until 2002 by only taking rents and profits and crediting the $8,000,000 consideration for the 1998 Transaction. Then, as of 2002, [Rosemarie] elected to take half the proceeds of the nearly $102,000,000 paid by the Mann Parties, representing their alleged one-half interest. Stated another way, in 1998 [Maurice] converted 36 Gramercy (the trust res) into a portion of $8,000,000 (the substitute res). In 2002, he converted 36 Gramercy into a portion of nearly $102,000,000 dollars (the second substitute res). [Rosemarie] followed the original res until 2002 when they decided to take the second substitute res. As in McQuaid, the acceptance of the substitute res (the proceeds of the 2002 Contract of Sale) was an election of [Rosemarie's] remedy foreclosing the alternative title claim against the Mann Parties.

Dkt. 416 at 10.

While not binding on this court, a court of coordinate jurisdiction recently (i.e., under the current version of CPLR 3002) held that a party who accepts monetary relief in one action based on an improper transfer of property may be precluded, under the doctrine of election of remedies, from seeking rescission of a sale through a claim to quiet title:

> Defendants ... assert that plaintiff accepted a distribution from the Estate ... constituting a portion of the proceeds of the sale of the property to [defendant], and such acceptance constituted an election by plaintiff of a monetary distribution in lieu of her fee interest, as her remedy for the fiduciary's unauthorized sale of her ownership interest in the property. ... [Defendants] have raised a triable issue of fact as to whether plaintiff, **by accepting a portion of the property sale proceeds from the Estate rather than having the Surrogate Court set aside the sale, elected to forego any claim to quiet title to the property and have been fully or partially paid for the loss of her ownership interest.**

Mack v Igwegbe, 2013 WL 1699247, at *5 (Sup Ct, Queens County 2013) (emphasis added).

This conclusion is consistent with settled law governing when a fraudulently induced contract, such as the 1998 Transaction (which gave rise to the 2002 Transaction) is voidable:

> It is well established that a contract induced by fraudulent representation is voidable, and that the defrauded party has several remedies.
>
> > "On discovery of the fraud ... (1) He [or she] may rescind the contract by promptly tendering back all that he [or she] has received under it. He [or she] may then bring an action at law upon the rescission to recover back what he [or she] has paid, or (2) defend an action brought against him [or her] on the contract, setting forth the fraud and rescission as a defense. (3) He [or she] may bring an action in equity for rescission.... These remedies are based upon a disaffirmance of the contract, in which the party rescinding or desiring to rescind in effect says, you have induced me to enter into this contract by fraud. I offer you what I received. Give me back that which you received, or if that be impossible pay me its value. (4) He [or she] may affirm the contract and sue for his [or her] damages. (5) If sued upon the contract, he [or she] may counterclaim his [or her] damages."
>
> [*Wood v Dudley*, 188 AppDiv 136, 140 (1st Dept 1919) (internal citations omitted)]. The defrauded party may not, however, affirm the transaction by continuing to perform, keep the property and also recover the costs of acquiring and maintaining it. [*Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461, 466 (2d Dept 1982)].

VisionChina Media Inc. v S'holder Representative Servs., LLC, 109 AD3d 49, 56-57 (1st Dept 2013) (emphasis added); *see Rennie v Pierce Cards, Ltd.*, 65 AD2d 527, 528 (1st Dept 1978) ("The court awarded plaintiff the nominal sum of $100 for lost profits, but plaintiff, having elected to rescind, cannot recover lost profits.").

By deciding to accept the benefits of the 2002 Transaction, Rosemarie has forgone her right to challenge its validity. Rosemarie has made the choice to accept the Mann Parties' money, via Maurice, for acquiring 36 Gramercy. She cannot also keep the property.[12]

V. Collateral Estoppel

Even if Rosemarie was not required to elect her remedy, the entry of the Judgment in the Main Action forecloses her quiet title claim in the instant actions.

Collateral estoppel "is rooted in principles of fairness." *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 226 (2011). "It is well settled that the doctrine may be invoked in a subsequent action or proceeding to prevent a party from relitigating an [identical] issue decided against that party in a prior adjudication." *Id.* (citations and quotation marks omitted). Thus, a "party [that] had a full and fair opportunity to litigate [an] issue" may not later relitigate the issue in a subsequent action. *Vera v Low Income Mktg. Corp.*, 145 AD3d 509, 510 (1st Dept 2016), citing *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 (1985). "[C]ollateral estoppel allows 'the

[12] It should be noted that a cause of action to quiet title to real property is an equitable claim. *See Acocella v Wells Fargo Bank, NA*, 139 AD3d 647, 649 (2d Dept 2016). It would be inequitable for Rosemarie to reacquire title to 36 Gramercy under these circumstances. *See Barry v Clermont York Assocs., LLC*, 144 AD3d 607, 608 (1st Dept 2016), citing *McClure v Leaycraft*, 183 NY 36, 41 (1905) ("A court of equity will not do an inequitable thing. It is not bound by the rigid rules of the common law, but is founded to do justice, when the courts of law, with their less plastic remedies, are unable to afford the exact relief which the facts require. Its fundamental principle, as its name implies, is equity. It withholds its remedies if the result would be unjust, but freely grants them to prevent injustice when the other courts are helpless."); *see also Van Wagner Advert. Corp. v S & M Enterprises*, 67 NY2d 186, 195 (1986) ("It is well settled that the imposition of an equitable remedy must not itself work an inequity.").

determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was **necessarily raised and decided**." *Ryan v N.Y. Tel. Co.*, 62 NY2d 494, 500 (1984) (emphasis added). "What is controlling is the identity of the issue which has **necessarily been decided** in the prior action or proceeding." *Id.* (emphasis added). In other words, "the issue must have been material to the first action or proceeding and **essential to the decision** rendered therein." (emphasis added).

Normally, the defense of collateral estoppel is invoked by a defendant where the plaintiff was the subject of an *adverse* ruling in another action. Here, the subject ruling was decided in Rosemarie's favor. Under these circumstances, the defense usually raised is judicial estoppel. *See Becerril v City of New York Dep't of Health & Mental Hygiene*, 110 AD3d 517, 519 (1st Dept 2013) ("The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed."). "Also known as the doctrine of estoppel against inconsistent positions, the doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise." *Id.* (citation and quotation marks omitted). That is the case here. *See 71 Clinton St. Apts. LLC v 71 Clinton Inc.*, 114 AD3d 583, 584 (1st Dept 2014) ("Defendants are judicially estopped from arguing that the merger between nonparties Bank of Smithtown and People's United Bank was not completed before plaintiff brought this foreclosure action. They obtained dismissal of the Bank of Smithtown's foreclosure action by arguing that the bank had merged into People's United. They may not now turn around and argue that the Bank of Smithtown did not merge into People's United.") (citation

omitted). Regardless, the outcome should be the same to avoid the possibility of inconsistent judgments. *See Swezey*, 19 NY3d at 551; *Bruno*, 83 AD3d at 172.

That said, and notwithstanding how the court ruled in the April 21 Decision (*see id.* at 4), the court rejects Rosemarie's contention that the Mann Parties have waived their collateral estoppel defense. Collateral estoppel does not apply until there is a "**final judgment** on the merits." *Conason v Megan Holding, LLC*, 25 NY3d 1, 17 (2015) (emphasis added); *see Clark v Newbauer*, 148 AD3d 260, 266 (1st Dept 2017). Here, Rosemarie both moved for and was granted summary judgment on her quiet title claim prior to the court deciding the proper measure of damages and entering the Judgment against Maurice in the Main Action. In contesting Rosemarie's summary judgment motion in these actions, it would have been premature for the Mann Parties to rely on the collateral estoppel effect of the Judgment in the Main Action since there had not yet been a final adjudication. Rosemarie does not cite any authority for the proposition that a party may be deemed to have waived a collateral estoppel defense prior to the occurrence of the final adjudication that gives rise to that defense. Here, the Mann Parties pleaded a collateral estoppel defense, but did not address that defense in opposing Rosemarie's summary judgment motion, as the basis for that defense did not yet exist. Hence, the court grants the Mann Parties' motion to renew.

Turning now to the merits of that defense, the Mann Parties aver that:

> the [April 28 Decision] awarded Plaintiffs fifty percent of the profits of the 2002 Contract of Sale, less set offs for the costs of the 2002 Transaction and the benefits to the Plaintiffs from the 1998 Transaction. Basically the Court held Plaintiffs could disregard the 1998 Transaction but still participate in the 2002 Transaction as if they had sold their share of the Properties themselves in 2002.

Dkt. 365 at 19-20. They further argue that:

> The issue of the Deed was decided in the Main Action because it is a constituent component of the 2002 Transaction, which the Court implicitly determined was

> valid based on Plaintiffs' argument to take the proceeds of that transaction. In this respect, the 2002 Transaction transferred a 100% interest in 36 Gramercy. In order to disgorge the profits of the 2002 Transaction and take the proceeds, Plaintiffs must have surrendered the title claim. Thus, as Plaintiffs were held entitled to the proceeds, whether they are foreclosed from voiding the 1997 Deed was necessarily decided in the affirmative.

Dkt. 416 at 12-13 (citation omitted).

The Mann Parties contend that, as with the election of remedies issue, Rosemarie has a collateral estoppel problem because an essential predicate of her claim to quiet title is incompatible with an essential predicate of the Judgment in the Main Action. *See id.* at 12 ("Do Plaintiffs really intend to argue the Deed is valid in the Main Action and invalid, even in part, in this action simultaneously? The position would require inconsistent findings of fact where Plaintiffs are party to both actions."). In the Main Action, Maurice was held liable for monetary damages for wrongfully divesting Rosemarie of her interest in 36 Gramercy in the 1998 Transaction, which caused her to lose out on the opportunity to share in the profit on the 2002 Transaction. Rather than seek rescission of the Transactions, which she could have done since Maurice lacked title to effectuate the 1998 Transaction (*see* April 21 Decision at 22),[13] she chose to allow the transfers to stand and sought to be made whole for her loss. Based on her claim that the consideration she received in the 1998 Transaction was below market value, she sought disgorgement of the profit Maurice made on her interest in 36 Gramercy in the 2002 Transaction. *See* April 28 Decision at 6. The court awarded the monetary damages she sought. *See id.* at

[13] *See also* April 21 Decision at 28 ("The Mayfair Deed did not convey the Trust's fifty percent interest in [36 Gramercy] to Mayfair. A deed made by one without title is void and cannot convey interest in real estate.").

10.[14] Rosemarie's award for this divestiture were premised on the actual occurrence of the Transactions.

Consequently, it is now an adjudicated fact that the 2002 Transaction validly occurred because, but for that transaction, there would be no profit for Rosemarie to disgorge from Maurice. Rosemarie cannot have it both ways. Either there was no valid transfer (in which case she could quiet title), or there was (in which case she can obtain her share of the profits). She cannot take the property back while also keeping her profits from selling it. During the pendency of this motion, knowing full well that the Mann Parties were asserting election of remedies and collateral estoppel arguments, Rosemarie chose to enter the Judgment against Maurice to recover those profits. Thus, there is now a final adjudication validating the 2002 Transaction. Rosemarie, therefore, is collaterally estoped from challenging the legitimacy of the 2002 Transaction. As a result, notwithstanding the defect in title at the time of the 1998 Transaction, Rosemarie is precluded from litigating the issue of whether the 2002 Transaction resulted in an effective transfer of title to the Mann Parties. *See Buechel v Bain*, 97 NY2d 295, 303 (2001) ("The policies underlying [the doctrine of collateral estoppel] are avoiding relitigation of a decided issue and the possibility of an inconsistent result.").

VI. Remaining Motions (Seq. 012 & 013)

All of the relief Rosemarie seeks in Motion 12 is predicated on her having an interest in 36 Gramercy after prevailing on her quiet title claim. Having now denied her summary judgment, Rosemarie's motion for this relief is denied.

[14] The court also awarded her other damages to compensate her for the lost revenue she would have received by virtue of not having her ownership interest between the 1998 and 2002 Transactions. *See id.* at 13. However, this award did not apply to Mayfair York, LLC, the entity to which title to 36 Gramercy was transferred. *See id.* at 14-15.

Finally, the Mann Parties seek an attachment from Maurice and discovery regarding his assets. They allege that if Rosemarie "is entitled to a judgment against the Mann Parties, then the Mann Parties are entitled to a judgment against the Maurice." *See* Dkt. 484 at 6. While this may be true, leaving aside the fact that Maurice appears capable of satisfying (or at least being compelled to satisfy) such a judgment, the upshot of this decision is that Rosemarie's claims against the Mann Parties are no longer viable and, therefore, the Mann Parties have no claims against Maurice grounded in their liability to Rosemarie. In other words, having prevailed on their renewal motion, the Mann Parties can no longer demonstrate a likelihood of success on their claims against Maurice. This warrants denial of their motion. *VisionChina*, 109 AD3d at 59; *see Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111 (1st Dept 1997), citing CPLR 6212(a) ("On a motion for an order of attachment, ... the plaintiff shall show ... that it is probable that the plaintiff will succeed on the merits."). Accordingly, it is

ORDERED that the motion by the Mann Parties' for renewal of Rosemarie's motion for partial summary judgment is granted and, upon renewal, Rosemarie's motion for partial summary judgment on her claim to quiet title to the unsold condominiums at 36 Gramercy is denied; and it is further

ORDERED that the balance of Motion 011 and the entirety of Motion 012 in Action No. 1 (and the duplicative balance of Motion 004 and the entirety of Motion 005 in Action No. 2) are denied as moot; and it is further

ORDERED that Mann Parties' motion for an attachment against and financial discovery from Maurice is denied; and it is further

ORDERED that by February 22, 2018 at 4:00 pm, the parties shall e-file and fax a joint letter, splint evenly and not to exceed 5 pages, that addresses how the parties intend to proceed in these actions in light of this decision; and it is further

ORDERED that the parties shall be prepared to discuss their letter on a telephone conference that will be held on March 1, 2018 at 3:30 pm.

Dated: February 6, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C