| **Markov v Katt** |
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| 2018 NY Slip Op 30558(U) |
| March 29, 2018 |
| Supreme Court, New York County |
| Docket Number: 156493/2015 |
| Judge: Shlomo S. Hagler |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
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DMITRY MARKOV,

Index Number: 156493/2015

Plaintiff,

-against-

MALCOLM KATT,

DECISION/ORDER

Defendant.
---------------------------------------X
HON. SHLOMO S. HAGLER, J.S.C.:

Defendant Michael Katt ("Katt" or "defendant") moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and judgment on its counterclaim for rescission. Plaintiff Dmitry Markov ("Markov" or "plaintiff") cross-moves, pursuant to CPLR 3212, for summary judgment on its complaint and to dismiss defendant's counterclaim. This Court heard oral argument on the motion and cross-motion on March 20, 2017 (the "March Hearing") and December 13, 2017 (the "December Hearing").

**Underlying Allegations and Procedural Background**

This case arises out of a consignment of twenty Russian Republic Orders and ten badges form the early Soviet era (the "Collection") by Katt to Markov for sale under a consignment agreement on August 1, 2007, Markov's purchase of the Collection and his sale of the Collection a few days later, and the

resolution of the dispute between the parties by an agreement (the "Agreement") in January 2008, under which Markov agreed to pay Katt the sum of $100,000, at the rate of $10,000 per month, and Katt agreed not to sue Markov. Markov paid Katt the $100,000, but on or about May 16, 2012, Katt commenced an action in Supreme Court, New York County under Index Number 651699/2012 (the "Prior Action").

On April 9, 2013 (the "April 2013 Order"), Justice O. Peter Sherwood granted summary judgment to Katt on the breach of fiduciary duty claim and dismissed Markov's affirmative defense of accord and satisfaction. After a non-jury trial, on June 21, 2013 (the "June 2013 Order"), Justice Sherwood dismissed Katt's complaint and directed entry of judgment in favor of Markov. The basis of the decision was "settlement and release as a result of the [A]greement" (June 2013 Order at 18). The Appellate Division, First Department, affirmed the judgment, finding that the Agreement was "an arm's length" transaction (*Katt v Markov*, 121 AD3d 542, 542 [1st Dept 2014] leave denied 29 NY3d 915 [2015]).

On June 29, 2015, Markov commenced this action by filing a summons with notice and a motion for summary judgment in lieu of complaint. By order dated February 22, 2016, this Court denied Markov's motion and Katt's cross-motion and directed Markov to file a complaint within 30 days and Katt to file an answer within 30 days thereafter.

On March 4, 2016, Markov filed his complaint alleging breach of contract and unjust enrichment, seeking the $100,000 he had paid pursuant to the Agreement and alleging that Katt had violated the Agreement by commencing the Prior Action (complaint, ¶ 23). On April 21, 2016, Katt filed his answer including affirmative defenses of res judicata and collateral estoppel and a counterclaim seeking rescission of the Agreement and damages in the amount he sought in the Prior Action (answer, ¶¶ 10-11; March 2013 Order at 3).

On November 25, 2016, Katt moved for summary judgment, seeking dismissal of Markov's complaint and summary judgment on his counterclaim for rescission. On December 23, 2016, Markov cross-moved for summary judgment on his claim for $100,000, for attorneys' fees in the amount of $94,000 and for dismissal of Katt's rescission counterclaim.

**Summary Judgment Standard**

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material

fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

**Attorneys' Fees**

"[T]he general rule [is that] attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989], *citing Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]).

**Contract Interpretation**

Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced

according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Put another way, "[c]ourts will give effect to the contract's language and the parties must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] internal quotation marks and citation omitted; *see also McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

**Unjust Enrichment**

"[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another which, in good conscience,

ought to be returned" (*Carriafielo-Diehl & Assoc., Inc. v D & M Elec. Contr., Inc.*, 12 AD3d 478, 479 [2d Dept 2004]) However, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello,* 18 NY3d at 790; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). Also "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out the same subject matter" (*id.* at 388; *see also L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 [1st Dept 2017]).

**Rescission**

"As a general rule, rescission of a contract is permitted where there is a breach of contract that is 'material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract'" (*Lenel Sys. Intl., Inc. v Smith*, 106 AD3d 1536, 1538 [4th Dept 2013] [citation omitted]; *see also Matter of Kassab v Kasab*, 137 AD3d 1138, 1140 [2d Dept 2016]; *RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2d Dept 2005]). "A contract may be voided on the ground of a unilateral mistake of fact only where the enforcement of the contract would be unconscionable, the mistake is material and made despite the exercise of ordinary care by the party in error" (*William E.*

*McClain Realty v Rivers*, 144 AD2d 216, 218 [3d Dept 1988], *app dismissed* 73 NY2d 995 [1989]). A party may also establish a claim to rescission "based on . . . the parties' mutual mistake" (*Silver v Gilbert*, 7 AD3d 780, 781 [2d Dept 2004]; *see also Almap Holdings v Bank Leumi Trust Co. of N.Y.*, 196 AD2d 518, 519 [2d Dept 1993], *lv denied* 83 NY2d 754 [1994]). "Moreover, the party seeking rescission has the burden of establishing these elements by clear and convincing evidence" (*Executive Risk Indem. Inc. v Pepper Hamilton LLP*, 56 AD3d 196, 206 [1st Dept 2008], *affd as mod* 13 NY3d 313 [2009]; *see also Silver*, 7 AD3d at 781).

**Res Judicata and Collateral Estoppel**

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation [since] ... a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Under New York's "transactional analysis approach [to res judicata] ... once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357

[1981]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 474 [1st Dept 2011]).

In distinction to res judicata or claim preclusion, "[c]ollateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same'" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel "applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*id.*; *BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556, 560 [1st Dept 2010]; *Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 334 [1st Dept 2006]).

**Discussion**

At the March Hearing, this Court granted the portion of defendant's motion that sought dismissal of plaintiff's claim for attorneys' fees, since the Agreement did not include a provision for attorneys' fees, and absent such agreement, parties must bear their own legal fees (March Hearing at 7-8, 18; *see Hooper Assoc. v AGS Computers*, 74 NY2d at 491). This Court also granted the

portion of defendant's motion that sought dismissal of plaintiff's cause of action for unjust enrichment, since a claim does not lie where, as in this case, there is an Agreement between the parties on the same subject matter (March Hearing at 8-9,18; *see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d at 388).

Defendant has contended that, by commencing this action, plaintiff has sought to rescind the Agreement. As set forth above, in order to prove a claim for rescission, a party must show mutual mistake or a unilateral mistake that is material and wilful (see *Lenel Sys. Intl., Inc. v Smith*, 106 AD3d at 1538; *see also Executive Risk Indem. Inc. v Pepper Hamilton LLP*, 56 AD3d at 206). Since this has not been shown, this Court grants the portion of plaintiff's motion that seeks dismissal of defendant's counterclaim for rescission.

The terms of the Agreement are set forth in the June Order, which was affirmed by the Appellate Division (June Order at 13-16). The Agreement does not have a provision for damages in the event that Katt breached the Agreement by commencing the Prior Action. "[T]he time to [insert such a provision was] at the bargaining table" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d at 424). Therefore, plaintiff cannot rewrite the Agreement now to insert such a damage clause.

Moreover, claims regarding the Agreement and its breach were capable of being raised and were raised in the Prior Action. Consequently, all such claims are barred by res judicata (*see Matter of Hunter*, 4 NY3d at 269; *O'Brien v City of Syracuse*, 54 NY2d at 357). Accordingly, the portion of defendant's motion that seeks dismissal of plaintiff's breach of contract cause of action must be granted.

**Conclusion**

It is, therefore,

ORDERED that defendant Malcolm Katt's motion for summary judgment is granted to the extent of dismissing plaintiff Dmitry Markov's complaint and is otherwise denied; and it is further

ORDERED that plaintiff Dmitry Markov's motion for summary judgment is granted to the extent of dismissing defendant Malcolm Katt's counterclaim and is otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: March 29, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.