

<b>Martel v Matt</b>
2018 NY Slip Op 31905(U)
August 7, 2018
Supreme Court, New York County
Docket Number: 158117/16
Judge: Douglas E. Hoffman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 44

-----X

BRIGITTE B. MARTEL,	:	Index No. 158117/16
	:	
Plaintiff,	:	DECISION/ORDER
	:	
-against-	:	Mot. Seq. 001
	:	
FREDERICK J. MATT,	:	

-----X

DOUGLAS E. HOFFMAN, Judge

This action comes before the court upon post-judgment motion by defendant Frederick J. Matt for an order pursuant to CPLR § 602(a) consolidating plaintiff Brigitte B. Martel’s post-judgment proceeding with what he asserts is a closely-related post-judgment proceeding presently being heard by Special Referee Steven E. Liebman on a hear and determine basis, Index No. 350262/2004, together with other appropriate relief. Plaintiff opposes the motion.

The salient facts are that the parties settled their divorce action before Special Referee Liebman on September 14, 2006 and stipulated that Referee Liebman would hear and determine that action. The terms placed on the record that day were incorporated into a written stipulation of settlement dated January 25, 2008, which was later incorporated, but not merged, into a judgment of divorce dated March 13, 2008. The Presiding Justice of the Part at that time allocated the parties concerning the stipulation of settlement.

On May 27, 2016, defendant filed a motion for downward modification of his child support obligations established by the stipulation of settlement and plaintiff cross-moved for

upward modification of defendant's child support obligations. On April 18, 2018, the parties again stipulated that the hearing upon the motion and cross-motion would be referred to Ref. Liebman on a hear and determine basis. The Referee has commenced the hearing.

Ms. Martel filed an amended summons and complaint in the instant plenary action on January 19, 2017, describing her new action as one for fraudulent misrepresentation, fraudulent concealment and breach of contract emanating from fraud and deceit by Mr. Matt. In essence, Ms. Martel alleges that Mr. Matt omitted from the parties' underlying divorce and the negotiations leading up to its finalization specific accrued but unvested assets that he held that could have been subject to equitable distribution. Ms. Martel alleges that as part of their divorce agreement, the parties stipulated that she would be entitled to 75% of any undisclosed assets. Plaintiff also claims that defendant breached their agreement by not tendering certain monies pursuant to the stipulation for the years 2007, 2008, 2010 and 2011.

Defendant contends that plaintiff's action should be consolidated with the pending post-judgment hearing before Referee Liebman concerning modification of child support, as the two cases involved common issues of law and fact, as, he asserts, both cases arise out of the parties' stipulation of settlement of their divorce action, involve the same parties and substantially similar issues, include one relating to life insurance that he alleges was resolved during Referee Liebman's recent hearing. In addition, Mr. Matt states, the parties agreed in the original divorce action to have the Referee preside over their case for all purposes on a hear and determine basis. From a substantive standpoint, defendant posits that all of plaintiff's claims are without merit on a variety of bases, including, but not limited to, defendant's prior timely disclosure of the asset in question and plaintiff's specific knowledge of and waiver with respect to any claim concerning

this asset. Defendant asserts that virtually all of plaintiff's claims for monies not paid from 2007-11 are barred by the statute of limitations. From a further procedural perspective, Mr. Matt contends that to the extent Ms. Martel seeks equitable relief, her jury claim is barred, thereby facilitating a referral to the Referee to hear and determine plaintiff's new action.

Ms. Martel opposes consolidation, arguing that the issues in the two pending matters are not substantially identical, as the claims raised in the instant action do not concern child support. In addition, plaintiff asserts that discovery in the instant matter is not yet complete, that the life insurance issue has not been resolved, that her claims are not barred by the statute of limitations, and that plaintiff is entitled to have her complaint heard by a jury.

At the outset, the court notes that defendant has not moved to dismiss the instant complaint based upon waiver, res judicata, expiration of the statute of limitations, or upon any other basis and those issues are therefore not before the court in the instant motion. The instant action is not ripe for final adjudication as discovery is not complete. Referral to the Referee to hear and determine would also compromise plaintiff's right to trial by jury.

Where the substance of the action is based upon a claimed violation of a contract, a legal issue, the right to a jury trial exists. That right is not waived even where, as here, plaintiff also maintains an equitable claim and "money damages alone afford a full and complete remedy." Cadwalader Wickersham & Taft v. Spinale, 177 A.D.2d 315, 316, 576 N.Y.S.2d 24, 25 (1<sup>st</sup> Dept. 1991). See also Staunton v. Brooks, 129 A.D.3d 1371, 1374-75, 12 N.Y.S.3d 324, 327 (3<sup>rd</sup> Dept. 2015)("In determining whether a party is entitled to a jury trial, the relevant inquiry is not whether an equitable counterclaim exists but whether, when viewed in its entirety, the primary character of the case is legal or equitable)(citation omitted); Pac Fung Feather Co. v. Porthault

NA LLC, 118 A.D.3d 472, 987 N.Y.S.2d 379, 380 (1<sup>st</sup> Dept. 2014)(“Defendant did not waive its right to a jury by seeking ... the equitable remedy of disgorgement since its claims ... are primarily legal in nature and monetary damages would afford a full and complete remedy”).

Furthermore, although under CPLR § 4101, equitable claims shall be tried by the court, where, as here, plaintiff alleges both equitable and legal claims, the court may either decide the equitable claims while submitting the legal claims to the jury, or, alternatively, may submit all claims to a jury, “treating the jury’s determination on the [legal claims] as advisory” in order to “minimize the danger of conflicting verdicts.” Le Bel v. Donovan, 96 A.D.3d 415, 416-17, 945 N.Y.S.2d 669, 671 (1<sup>st</sup> Dept. 2012). Under all the circumstances presented herein, the court is constrained to deny defendant’s motion for consolidation. This matter is restored to the Part 44 calendar for September 21, 2018, 12:00 PM for a combination compliance and settlement conference. This constitutes the decision and order of the court.

Dated: New York, New York  
August 7, 2018

  
DOUGLAS E. HOFFMAN, J.S.C.

**HONORABLE DOUGLAS HOFFMAN**