

**Heldt v Watnik**

2019 NY Slip Op 31614(U)

June 5, 2019

Supreme Court, New York County

Docket Number: 651464/2018

Judge: Andrew Borrok

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ANDREW BORROK **PART** **IAS MOTION 53EFM**

*Justice*

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<p>KEVIN HELDT</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>ILISSA WATNIK,</p> <p style="text-align: center;">Defendant.</p>	<p><b>INDEX NO.</b> <u>651464/2018</u></p> <p><b>MOTION DATE</b> <u>12/11/2018</u></p> <p><b>MOTION SEQ. NO.</b> <u>002</u></p>
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**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents and for the reasons set forth on the record (6/5/2019), Ilissa Watnik's motion for summary judgment is granted solely to the extent of the below declaratory judgment and the complaint is otherwise dismissed.

**The Relevant Facts and Circumstances**

This action concerns the disposition of certain embryos (collectively, the **Embryos**) held by Reproductive Medicine Associates of New York (**RMA**) and created with Ms. Watnik's eggs and Mr. Heldt's sperm. After the parties' relationship ended in 2016, Ms. Watnik sought sole custody of the Embryos in 2018.

Reference is made to three identical Agreements pursuant to which RMA cryopreserved the Embryos, dated July 16, 2015, September 17, 2015 and November 3, 2015, by and between Ms. Watnik and Mr. Heldt (NYSCEF Doc. No. 42; collectively, the **Agreements**). The Agreements

state that the Embryos are the parties' "joint property" and that RMA "will not permit embryo(s) designated as joint property to be used without the consent of both [parties]" (*id.*, 1-2). If the parties' disagreed on disposition of the Embryos, RMA would not release them "without a court order" (*id.*, 2).

The Agreements expressly contemplated three "changes in circumstances" in which the parties were to choose a specific "Disposition plan" (*id.*). One of three scenarios included the separation of non-married couples. In the event of separation and upon presentation of "legal documentation", the parties explicitly agreed (by both hand writing their initials to the appropriate box) that "[t]he patient Illissa Watnik may have the embryo(s) and may use them for any purpose, including attempting to establish a pregnancy" (*id.*, 5).

Mr. Heldt commenced this action, by order to show cause, and sought a preliminary injunction to prevent RMA from releasing the Embryos to Ms. Watnik. In the decision and order of New York State Supreme Court Justice Jennifer G. Schecter, dated April 24, 2018, Mr. Heldt's motion for a preliminary injunction was denied because he failed to show a likelihood of success on the merits regarding ambiguity and interpretation of the Agreements (NYSCEF Doc. No. 38). Justice Schecter's decision was affirmed by the First Department on August 2, 2018 (NYSCEF Doc. No. 39).

Ms. Watnik filed her answer and counterclaims on August 8, 2018 (NYSCEF Doc. No. 40). Mr. Heldt did not file an answer to the counterclaims. The parties did not exchange discovery or conduct depositions and Ms. Watnik filed note of issue on December 6, 2018. Ms. Watnik now

moves for summary judgment under CPLR § 3212 to dismiss the complaint and for judgment in favor of her counterclaims. Mr. Heldt cross-moves for summary judgment under CPLR § 3212 to dismiss Ms. Watnik's counterclaims.

On a motion for summary judgment, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]. The opposing party must then “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” that its claim rests upon. *Zuckerman v New York*, 49 NY2d 557, 562 [1980]. A party's mere conclusions of fact or law are insufficient to raise a triable issue of fact. *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973].

**A. Defendant's First Counterclaim (Declaratory Judgment that the Agreements are Enforceable)**

Ms. Watnik's first counterclaim is for a declaratory judgment that she had the right to use the Embryos in accordance with the Agreements – i.e. she had the right to use the Embryos for any purpose, including attempting to establish a pregnancy, once she provided RMA with an affidavit regarding her non-marital separation from Mr. Heldt. Ms. Watnik argues that, pursuant to the principles of contractual interpretation, the Agreements are clear and enforceable as written. Mr. Heldt argues that the Agreements are ambiguous and unenforceable because they contain contradictory provisions regarding disposition of the Embryos.

When parties agree “to conduct themselves in accordance with the rights and duties expressed in a contract, a court should strive to give a fair and reasonable meaning to the language used” (*Abiele Contr. v NY City Sch. Constr. Auth.*, 91 NY2d 1, 9-10 [1997]). Whether an agreement is ambiguous is a question of law to be resolved by the court (*Kass v Kass*, 91 N.Y.2d 554, 566). The existence of an ambiguity “is determined by looking within the four corners of the document, not to outside sources” (*id.*). In the reproductive context, “[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them (*id.*, 565).

The Agreements are not ambiguous. The Agreements expressly outline three scenarios in which the parties are to choose a specific disposition plan, including the disposal of embryos upon separation of non-married couples. The plain reading of the Agreements is that the parties were required to identify a specific disposition plan in three instances, and could seek a court order if there was disagreement over any other scenario that was not expressly contemplated in the Agreements. The need for a court order in the absence of the parties’ agreement does not contradict the disposition plan because the Agreements do not contemplate every scenario which may necessitate disposal of the Embryos.

Moreover, Mr. Heldt’s interpretation of the Agreements must be rejected because it fails to give meaning to the disposition plan, which the parties had initialed and indicated their consent to (*See Corhill Corp. v S. D. Plants, Inc.*, 9 NY2d 595, 599 [1961] [holding that “[i]t is a cardinal rule of construction that a court should not ‘adopt an interpretation’ which will operate to leave a ‘provision of a contract ... without force and effect’”). According to the clear language in the

Agreement and the parties' initials and signatures, this court finds that Ms. Watnik could use the Embryos for any purpose, including pregnancy, upon providing legal documentation of separation from Mr. Heldt. It is undisputed that Ms. Watnik and Mr. Heldt are no longer together. Accordingly, summary judgment is granted as to Ms. Watnik's first counterclaim for a declaratory judgment that Ms. Watnik may use the Embryos for any purpose and that Ms. Watnik and Mr. Heldt are separated, and Mr. Heldt's cross motion to dismiss the first counterclaim is denied.

#### **B. Defendant's Second Counterclaim (Breach of Contract by Mr. Heldt)**

Ms. Watnik's second counterclaim is for attorneys' fees resulting from Mr. Heldt's alleged breach of the Agreements. Ms. Watnik argues that Mr. Heldt breached the Agreements by prolonging the time for Ms. Watnik to obtain custody of the Embryos and by breaching the covenant of good faith and fair dealing inherent in every contract, and that as a result she is entitled to attorneys' fees. In his opposition papers, Mr. Heldt argues that Ms. Watnik cannot establish a breach of contract because if anyone breached this Agreement it was RMA and, in any event, she is not entitled to damages in the form of attorneys' fees.

A breach of contract requires (i) the existence of a valid contract, (ii) the plaintiff's performance, (iii) the defendant's breach and (iv) resulting damages (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016]). The general rule is that "attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*A. G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). The Agreements addressed attorneys' fees. To wit, the Agreements provide:

If there is such a dispute, we promise to pay any reasonable attorneys fees that RMA of NY is forced to expend to resolve the dispute. (NYSCEF Doc. No. 42, at 2).

Nowhere in the Agreements does it indicate that anyone other than RMA would be entitled to attorneys' fees in the event of litigation. Accordingly, Ms. Watnik is simply not entitled to the damages that she claims and summary judgment is denied as to Ms. Watnik's second counterclaim.

Mr. Heldt cross moved to dismiss the second counterclaim for breach of contract. Based on the foregoing, Mr. Heldt's cross motion as to the second counterclaim is granted.

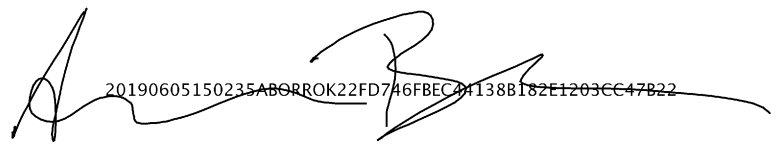
### **C. Plaintiff's Complaint**

In his complaint, Mr. Heldt seeks three declaratory judgments: (1) deeming the Agreements ambiguous and unenforceable (first cause of action), (2) directing a hearing to determine disposition of Embryos (second cause of action) and (3) holding that RMA and Ms. Watnik did not have Mr. Heldt's consent to store the Embryos beyond a year from November 3, 2015, and that the terms of any of the Agreements became null and void upon execution of a new storage agreement a year from November 3, 2015 (third cause of action). For the reasons set forth above, the plaintiff's complaint is dismissed because the Agreements are valid and enforceable as written.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment is granted solely to the extent of the declaratory judgment set forth above and the complaint is dismissed, and the plaintiff’s cross motion is granted solely to the extent that the second counterclaim is dismissed; and it is further

ADJUDGED and DECLARED that Ilissa Watnik has the right to use the Embryos for any purpose, including attempting to establish a pregnancy and that she and Kevin Heldt are separated.

  
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6/5/2019  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: