

<b>Kaufman v Kaufman</b>
2019 NY Slip Op 32432(U)
August 14, 2019
Supreme Court, New York County
Docket Number: 152865/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM**

*Justice*

-----X INDEX NO. 152865/2017

BETH COPLAN KAUFMAN,

Plaintiff,

MOTION SEQ. NO. 004

- v -

THOMAS ZAHN KAUFMAN,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178

were read on this motion to/for VACATE DECISION/ORDER/JUDGMENT/AWARD.

Plaintiff Beth Coplan Kaufman commenced this action against her former husband, defendant Thomas Zahn Kaufman, seeking to vacate a stipulation of settlement she reached on February 18, 2015 in an underlying divorce action in Supreme Court, Westchester County, styled *Beth Coplan Kaufman v Thomas Zahn Kaufman*, Westchester County Index Number 4815/12. Plaintiff, who also alleges claims of unjust enrichment and breach of fiduciary duty against defendant, moves, by order to show cause, to vacate a stipulation of discontinuance she executed on April 23, 2018 and to restore the case to the court’s calendar pursuant to CPLR 2001, CPLR 3404, and 22 NYCRR 212.14. Defendant opposes the motion and cross-moves, pursuant to 22 NYCRR 130-1.1, for sanctions against plaintiff, including attorneys’ fees he incurred in opposing what he asserts is her frivolous motion. After oral argument, and after a review of the parties’ motion papers and the relevant statutes and case law, the applications are decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

The facts of this case are set forth in detail in the order of this Court entered January 30, 2018 (“the 1/30/18 order”). Doc. 58. That order granted defendant’s motion to dismiss (motion sequence 001) pursuant to CPLR 3211 (a) (1) and (a) (7) to the extent of dismissing plaintiff’s cause of action for unjust enrichment and denied the branches of the motion seeking dismissal of plaintiff’s claims for breach of fiduciary duty and rescission of the settlement agreement based on mutual mistake. Doc. 58.<sup>1</sup> Additional relevant facts are set forth below.

On March 16, 2018, defendant moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Doc. 66. Although defendant stipulated to allow plaintiff additional time to oppose the motion (Docs. 94-95), plaintiff instead opted to file a stipulation of discontinuance with prejudice on April 23, 2018. Docs. 96-97.

Over one year later, on April 26, 2019, plaintiff filed the instant order to show cause seeking to vacate the stipulation of discontinuance and to restore the case to the court’s calendar pursuant to CPLR 2001, CPLR 3404, and 22 NYCRR 212.14. Doc. 113. In support of the motion, plaintiff argues, inter alia, that the stipulation of discontinuance must be vacated because she executed it in reliance on fraudulent representations made by defendant. Docs. 99, 100.

In opposition to the motion, defendant argues that, since plaintiff filed a stipulation of discontinuance with prejudice, this Court is without the jurisdiction to consider her motion to restore this matter to the calendar. Doc. 149. In any event, argues defendant, plaintiff has failed to establish that she executed the stipulation of discontinuance as a result of fraud.

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<sup>1</sup> The 1/30/18 order also denied as moot defendant’s motion (motion sequence 002) to dismiss the complaint based on plaintiff’s failure to provide discovery.

Defendant also cross-moves, pursuant to 22 NYCRR 130-1.1, for sanctions and attorneys' fees he incurred in opposing what he asserts is plaintiff's frivolous motion. Doc. 151. In support of the cross motion, defendant argues, inter alia, that plaintiff must be sanctioned since she "executed an affidavit in the divorce action seeking to hold defendant in contempt of court for his alleged failure to comply with the provisions of the divorce stipulation, [ ] the very stipulation she is disavowing and seeking to void in this action." Doc. 153 at par. 6.

In a reply affirmation in further support of the OSC, plaintiff argues that defendant is barred by the law of the case doctrine from arguing that plaintiff cannot challenge the stipulation of settlement because she already accepted part of the equitable distribution award. Specifically, plaintiff argues that this Court rejected this argument in the 1/30/18 order denying defendant summary judgment.<sup>2</sup>

## LEGAL CONCLUSIONS:

### Plaintiff's Motion to Vacate

Plaintiff's motion to vacate the stipulation of discontinuance and to restore this case to the active calendar is denied. The "express and unconditional" stipulation of discontinuance was so ordered by this Court (Docs. 135, 136) and terminated the captioned action. *Estate of Franzese v Zear LLC*, 172 AD3d 629, 630 (1<sup>st</sup> Dept 2019) (citations omitted).

<sup>2</sup> As noted previously, the 1/30/18 order decided defendant's motion to dismiss pursuant to CPLR 3211. The motion made by defendant in March 2018 was for summary judgment dismissing the complaint pursuant to CPLR 3212.

Although a trial court has the power "to exercise supervisory control over all phases of pending actions and proceedings" (*Teitelbaum Holdings v. Gold*, 48 NY2d 51, 54 [1979]), it lacks jurisdiction to entertain a motion after the action has been "unequivocally terminated . . . [by the execution of] an express, unconditional stipulation of discontinuance" (*id.* at 56). "When an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified" (*Newman v. Newman*, 245 AD2d 353, 354 [2d Dept 1997]; see *Brown v. Cleveland Trust Co.*, 233 NY 399 [1922]; *Weldotron Corp. v. Arbee Scales, Inc.*, 161 AD2d 708 [2d Dept 1990]). Because the court is divested of jurisdiction by reason of the discontinuance, it may not even entertain a motion to vacate the stipulation of discontinuance and restore the action; the movant must instead commence a new plenary action (see *Estate of Abrams v. Seaview Assn. of Fire Is. N.Y., Inc.*, 151 AD3d 809, 810 [2d Dept 2017]; *Matter of Serpico*, 62 AD3d 887, 887-888 [2d Dept 2009]; *Moshe v. Town of Ramapo*, 54 AD3d 1030 [2d Dept 2008]).

*Nemirovsky v. Brailovskiy*, 2018 NY Slip Op 30432(U), \*6-7 (Sup Ct, Kings County 2018).

It is clear from the face of the stipulation of discontinuance that both parties were represented by counsel and plaintiff does not contend that her attorney lacked the authority to enter into the stipulation. See *Hallock v. State of New York*, 64 NY2d 224, 230 (1984); see also *Vermilyea v. Vermilyea*, 224 AD2d 759, 761 (3d Dept 1996). Thus, "the stipulation [of discontinuance] must be regarded as a valid, binding contract" between the parties. *Demetriou v. Wolfer*, 165 AD3d 1230, 1231 (2d Dept 2018) (citation omitted). "In seeking to vacate the stipulation [of discontinuance], the plaintiff failed to meet her burden to establish good cause sufficient to invalidate a contract, such as that the stipulation was the result of duress, fraud, mistake, or overreaching, or that the terms of the stipulation were unconscionable." *Demetriou*, 165 AD3d at 1231 (citations omitted). Despite plaintiff's allegation that defendant fraudulently induced her to enter into the stipulation of discontinuance, she failed to substantiate this claim by clear and convincing evidence. *Muller v. New York State Division of Housing and Community Renewal*, 263 AD2d 296, 308 (1<sup>st</sup> Dept 2000).

Additionally, although not raised by defendant, plaintiff failed to vacate the stipulation “with reasonable promptness under the circumstances.” *Charlop v A.O. Smith Water Prods.*, 64 AD3d 486, 486 (1<sup>st</sup> Dept 2009) citing *Hallock*, 64 NY2d at 231; *see also Structured Asset Sales Group LLC v Freeman*, 45 AD3d 327 (1<sup>st</sup> Dept 2007). As noted above, the stipulation of discontinuance was filed on April 23, 2018 and plaintiff failed to move to vacate the same until April 26, 2019, over one year later, without setting forth any explanation for her delay.

### **Defendant’s Cross Motion For Sanctions**

This Court finds, in its discretion, that plaintiff’s motion, “however unpersuasive on the merits, was not frivolous, and did not warrant the imposition of sanctions.” *Lucheux v William Macklowe Co. LLC*, 166 AD3d 519, 520 (citations omitted). Thus, defendant’s cross motion is denied.

In light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Beth Coplan Kaufman seeking to vacate the stipulation of discontinuance is denied; and it is further

ORDERED that the cross motion for sanctions by defendant Thomas Zahn Kaufman is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

8/14/2019

DATE

~~KATHRYN E. FREED, J.S.C.~~

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE