

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

HON. SARALEE EVANS

PRESENT: _____

PART 51

Index Number : 101501/2009

SIMKIN, STEVEN

VS.

BLANK, LAURA

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The motion has been resolved in accordance with the Court's December 22, 2009 Decision and Order.

Dated: 12/22/09

Saralee Evans
HON. SARALEE EVANS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 51

-----x
STEVEN SIMKIN,

Plaintiff,

Index No.101501/09

-against-

DECISION AND ORDER

LAURA BLANK

Defendant.

-----x
SARALEE EVANS, JSC

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of defendant's motion to dismiss the complaint.

Papers	Numbered
Order to Show Cause, Affidavit & Exhibits	1
Memorandum of Law in Support	2
Memorandum of Law in Opposition	3
Reply Memorandum	4

Upon the foregoing papers, the decision and order of the court is as follows:

Three years after the parties entered into an agreement that divided their marital property and established the basis for their divorce, plaintiff learned that he was a victim of the fraud perpetrated by Bernard Madoff, and suffered financial losses in an undisclosed amount. He now sues to reform his agreement with his former wife, contending that she should shoulder "her share" of the harm he suffered.

The Amended Complaint sets forth two causes of action. The first is premised on the theory of mutual mistake, alleging that, unbeknownst to the parties at the time they divided

their assets in 2006, plaintiff's investment with Bernard L. Madoff Investment Securities did not exist. The second cause of action seeks restitution for unjust enrichment on the theory that defendant has unfairly profited from the alleged mutual mistake.

Defendant moves to dismiss the amended complaint, citing the existence of a documentary defense, i.e., the numerous releases set forth and agreed to in the parties' written agreement. Defendant further contends that the complaint fails to set forth a claim for mutual mistake and therefore fails to state a cause of action upon which relief may be granted.

To prevail on a motion to dismiss the complaint, defendant must establish that the documentary evidence conclusively establishes a defense as a matter of law or that the amended complaint when afforded a liberal construction and every favorable factual inference, fails to state a viable cause of action. *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002).

Defendant produces the parties' separation agreement, entered into in June of 2006, as her initial defense to plaintiff's claims. Under the agreement dividing the marital assets, plaintiff retained sole ownership of all bank, brokerage and financial accounts in his name, as well as a joint account at Citibank, his law practice and partnership capital account at Paul, Weiss, Rifkind, Wharton & Garrison, P.C., and the parties' house in Westchester. Defendant kept any bank and investment accounts in her name, an apartment in Manhattan, and received payment from plaintiff of \$6,250,000. Each of the parties kept the retirement accounts in his or her name, except that \$368,000 was transferred from plaintiff's retirement account into an IRA for defendant, to equalize retirement savings.

The agreement reflects that it was entered into in full and complete settlement of all claims between the parties including equitable distribution of all marital property. It further sets forth multiple comprehensive mutual releases in which each of the parties relinquishes all claim to the property of the other.

The law is clear that “a stipulation of settlement in a divorce action, competently entered into, is entitled to the recognition accorded any other contract.” *Kojovic v. Goldman*, 35 AD3d 65, 71 (1st Dept. 2006) citing *Christian v. Christian*, 42 NY2d 63, 65 (1977). A valid release or waiver bars any action on a claim regarding the subject of the release. *Hack v. United Capital Corp.* 247 AD2d 300, 301 (1st Dept. 1998).

Plaintiff suggests that the releases in question were somehow limited and that the parties did not intend to encompass the contingency at issue. This limitation was nowhere expressed in the agreement, which sets forth repeatedly that each of the parties waived any claim to or upon the property of the other. Plaintiff urges that general releases should not bar an injured party from seeking equitable relief in the unthought-of circumstances presented by the Madoff fraud. When a release unambiguously bars future litigation, the court must, however, dismiss the complaint. *Tavoulareas v. Bell*, 292 AD2d 256 (1st Dept, 2002).

Plaintiff further contends, however, that the releases at issue are ineffective because they were based upon a mutual mistake of the parties at the time they entered in to their agreement. A stipulation may be modified or rescinded despite the releases it contains, where it is the product of a mutual mistake so material that it goes to the foundation of the agreement. *Da Silva v. Musso*, 53 NY2d 543,552 (1981). The Amended Complaint states facts which, if

true, establish that the parties operated under a mutual mistake at the time of their agreement, suit thereon will not be barred by the releases contained in the agreement.

According to the Amended Complaint and despite the absence of any such statement in the written contract, the parties intended to divide the value of the parties' assets equally¹ as of September 1, 2004.² The Amended Complaint further states that this intention was thwarted by the parties' mistaken belief that on the September 1, 2004 valuation date, plaintiff's investment with the Madoff firm was worth \$5.4 million. The Amended Complaint alleges that the Madoff firm in fact never engaged in any stock trades and as of the parties' valuation date, held no assets. The Amended Complaint concludes from this that plaintiff's account was "a fiction."

The complaint does not contend, however, that the account had no value, only that, under the circumstances it was "non-existent". In urging that the Amended Complaint fails to state a viable cause of action, defendant contends without contradiction that on September 1, 2004, and later, on June 27, 2006 when the parties entered into their agreement, and in fact, for the several years thereafter that plaintiff maintained this investment, it could have been redeemed for cash, presumably significantly in excess of its 2004 value.³

¹This assertion is accepted as true for the purpose of the motion. It does not appear to this court, however, that there is any ambiguity on the face of the contract and "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain, meaning of its terms." *Greenfield v. Philles Records*, 98 NY2d 562, 569 (2002).

²The parties had physically separated two years before, in 2002.

³The market value of defendant's investment, i.e., the opinion of informed buyers and sellers, is the best evidence of value for all purposes, particularly in the case of investment trust

A claim of mistake must be set forth with particularity, and the circumstances must be stated in detail. CPLR §3016{b}. Here, the claim of mistake is opaque, stating simply that the account at issue did not exist. There is no assertion, however, that at the time of the agreement the account could not be redeemed for value. In fact, plaintiff allegedly liquidated an undisclosed portion of his investment at the time of the agreement in June of 2006 to fund the payment of defendant's equitable entitlement. [Amended Complaint, para. 55]. An investor's ability to redeem an account for value, was the assumption on which the parties relied in dividing their property and in doing so they made no mistake.

"... Judicial review is to be exercised circumspectly, sparingly, and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions." *Christian v. Christian*, 42 NY2d 63, 65 (1977). Viewed in their most favorable light, the Amended Complaint fails to articulate facts which if true would establish a viable cause of action that the settlement agreement pursuant to which the parties divided all of their assets and were divorced, was the product of a mutual mistake.

Plaintiff also seeks the equitable intervention of this court, claiming that plaintiff has been unjustly enriched. It is clear that as one of Madoff's many victims, plaintiff has been unjustly harmed. There is no evidence, however, that defendant was unjustly enriched. In 2006, at the time of their agreement, each of the parties received the benefit of his and her bargain. Subsequent events have revealed that plaintiff's retention of the Madoff account in the division

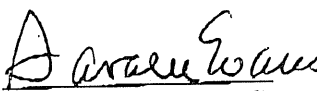
shares. *Jones v Healy*, 184 Misc. 923 (N.Y. Cty. Sup. Ct. 1945.) See also; *Silverman v. Ho & Co. Inc.*, 282 AD 252, 258 (1st Dept. 1953).

of the parties' assets and for three years thereafter was improvident. That fact does not provide the court with an equitable basis, however, to set the agreement aside. *See, Eztion v Eztion*, 62 AD3d 646, 654 (1st Dept. 2009) and cases cited therein.

In the absence of a claim that, on the date of the parties' agreement the Madoff account had no value, the complaint fails to set forth a cause of action, either for mutual mistake or for unjust enrichment, as a matter of law.

For the foregoing reasons, the complaint is dismissed in its entirety. This constitutes the decision and judgment of the court.

Dated: New York, New York
December 22, 2009


Saralee Evans, J.S.C.

HON. SARALEE EVANS