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Sergey P., Plaintiff v. Svetlana B., Defendants, [Index Number Redacted by Court]

Supreme Court, Kings County, IAS Term, Part 5G

[Index Number Redacted by Court]

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[Index Number Redacted by Court]

Justice Jeffrey S. Sunshine

Decided: August 8, 2013

ATTORNEYS

Attorneys for Plaintiff: Lubov Stark, Esq., Juan Luciano, Esq., Brooklyn, NY.

Attorney for Defendant: Allan Mayefsky, Esq., Ann Cynthia Diamond, Esq., Aronson Mayefsky & Sloan, LLP, New York, NY.

Alla Roytberg, P.C., The Chrysler Building, New York, NY.

The following papers numbered 1 to 17 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed... 1-2, 4-6, 7-9

Opposing Affidavits (Affirmations)... 10-12, 13-14

Reply Affidavits (Affirmations)... 15, 16, 17

Affidavit (Affirmation)

Other Papers

DECISION & ORDER

Introduction

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Upon the foregoing papers in this action by plaintiff against defendant for divorce, plaintiff moves by emergency order to show cause for an order: (1) restraining defendant from disposing, encumbering, or transferring any assets, including real estate and any assets of any business, in which she is a principal; (2) granting plaintiff liberal access to the parties' two children; (3) granting plaintiff exclusive use and occupancy of the premises located in Brooklyn, New York; (4) directing defendant to pay all of the carrying charges for the apartment; (5) granting plaintiff an award of pendent lite maintenance in compliance with DRL 236(B)(5-a); and (6) granting plaintiff an award of interim attorneys' fees in the sum of \$30,000. In a separate order to show cause, plaintiff moves for an order setting aside the judgment of divorce procured by defendant from a court in the Russian Federation which was entered on February 3, 2009. Alternatively, plaintiff seeks leave to amend his complaint for divorce by adding causes of action to set aside the Judgment of Divorce issued by the court in the Russian Federation, equitable distribution of marital assets, and a constructive trust. Defendant cross-moves pursuant to CPLR 3211(a)(1), (2), (5), and (7) for an order dismissing the action and for an order pursuant to 22 NYCRR §130-1.1(c) awarding her costs and attorneys' fees as well as imposing sanctions against plaintiff.

Background

On February 3, 1994, plaintiff and defendant were married in Odessa, Ukraine. In or about 1997, while expecting her first child, plaintiff and her parents immigrated to the United States as refugees. Shortly thereafter, in March, 1997, a daughter was born as a

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result of the marriage. Between 1997 and or about 2012, while defendant resided in the United States with her daughter, plaintiff resided in Russia where he worked for a time period in a well-paid position as Chief Financial Officer for a corporation in Russia. During this period, plaintiff made periodic visits to defendant and their daughter in the United States. On February 3, 2009, a divorce decree was issued by a district court in the Russian Federation dissolving plaintiff and defendant's marriage. During this divorce proceeding, both parties appeared by proxies who had power of attorney. On March 16, 2009 and October 1, 2009, defendant's proxy and plaintiff-movant himself executed two agreements entitled: "Agreement regarding the division of marital property" whereby certain real property located in Russia was transferred from plaintiff to defendant. At some point after the divorce, a second child was conceived by defendant by in vitro fertilization using plaintiff's previously frozen sperm. This child, a daughter, was born in 2010.¹

On August 9, 2012, plaintiff commenced the instant action against defendant by filing a verified complaint seeking a divorce pursuant to Domestic Relations Law §170(7), in addition to equitable distribution of the marital property and joint custody of the parties' children. Among other things, the complaint alleged that, "[u]pon information and belief there is no valid judgment in any court for a divorce and no other matrimonial action for divorce between the parties is pending in this court or in any other court of competent jurisdiction." On August 24, 2012, defendant served an answer generally denying the allegations in the complaint. The answer also asserted several

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affirmative defenses alleging the plaintiff's action was barred by the doctrines of collateral estoppel, res judicata, arbitration and award, and comity inasmuch as the plaintiff previously obtained a judgment of divorce in Russia dissolving the marriage.

In or about October of 2012, plaintiff filed a claim in a Russian court seeking an order declaring the March 16, 2009 and October 1, 2009 division of marital property agreements invalid and void and to reinstate his rights of ownership in the property transferred by these agreements. In this regard, plaintiff's statement of claim alleged that:

[Defendant] convinced me to divorce and transfer all real property in her name, since she was not considered a Resident of Russia for tax purposes and had a legal right not to pay taxes on sale of real property on the territory of Russia. She promised me, that as soon as I will move my residence permanently to the USA, we will reinstate our marital status. Moreover, she, in all ways emphasized, that regardless of who formally owns our property, it is still considered mine, and she has no claim to it.

The statement of claim also alleged that "the dissolution of our marriage was of fictitious nature and factually our marital relationship did not end." In a decree dated February 27, 2013², the Russian court ruled that:

"Having considered the evidence submitted by the parties in their entirety, the court finds that there are no grounds for the annulment

of the agreements on the division of the jointly owned property of the spouses, which were entered into by the plaintiff and defendant on March 16, 2009 and October 1, 2009, and therefore there are no grounds for the application of the consequences of the invalidity of transactions."

In this regard, the Russian court determined that plaintiff's claims were barred by an applicable three-year statute of limitations.

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Plaintiff's Contentions

According to plaintiff's affidavit, he traveled with defendant and her family to the United States in 1997 but shortly thereafter, he and defendant decided that it would be best if he moved back to Russia where he could secure employment that would enable him to provide his family in the United States with a comfortable standard of living. In Russia, plaintiff secured a lucrative position as the Chief Financial Officer of a corporation in Russia, a company that produced military and civilian equipment ranging from household appliances to weapon systems. He states that

[i]n Russia, I worked as the Chief Financial Officer for [the corporation in Russia]; a company that produces military and civilian equipment ranging from household appliances targeting the Russian market, to equipment used for locomotives, to air defense anti-aircraft missiles and other military equipment for the Russian and international market. (Exhibit B). [the corporation in Russia] worked on many projects with the Russian military, particularly the navy. Many of the projects [the corporation in Russia] worked on were classified as they involved products of national security interest. As a result of the sensitive nature of my work, I could not spend too much time outside of the Russian Federation; specifically the United States.

From 1997 until April 2012, when he returned to the United States to permanently join his family, plaintiff sent over 10 million dollars to defendant which was used to support defendant, her parents, as well as plaintiff's daughters. These funds were also used to purchase real estate properties and to establish a professional practice for defendant. According to plaintiff, all of these assets were placed in defendant's name because "in Russia it is not uncommon for the government to arrest businessmen and appropriate

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their businesses and properties."

With respect to the February 3, 2009 divorce, plaintiff contends that he only consented to the divorce based upon defendant's fraudulent representations that it would allow the parties to maximize the profitability of certain properties owned by the parties in Russia. In particular, plaintiff avers that defendant convinced him that if the parties obtained a divorce in Russia, plaintiff could transfer to her the title to his Russian properties as part of the divorce settlement and that defendant could use her Ukrainian citizenship to avoid paying the transfer taxes on these properties. According to plaintiff, when he expressed concern as to his ability to share in the profits of the Russian properties in the future, defendant assured him that they could enter into another agreement whereby the parties would refute the transfer of properties and the divorce judgment and share all of the properties obtained during the marriage. Plaintiff also claims that defendant promised him that when he joined the family in the United States, she would remarry him and all of their assets would be owned as husband and wife. In this regard, plaintiff submits an October 1, 2009 document entitled "Agreement between spouses" which is signed by plaintiff and defendant's proxy. In this document, the parties "acknowledge and confirm that the [February 3, 2009] divorce...by the decision of the [Russian court] between the parties is of a fictitious nature." The document also states that defendant "acknowledges and confirms that the property of the parties located on the territories of the United States, Russia and Ukraine, consisting of real estate, corporations, and monetary funds...was not divided between the parties because of the fictitious nature of the divorce." Finally, the document states that the "parties had agreed

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that the marriage will be solemnized in the United States to preserve the status of the family...and to legalize [plaintiff] upon his arriving for the permanent residence in the United States."

According to plaintiff, following the divorce and up until June 2012, he and defendant continued their relationship as it had been from the date of their marriage. In particular, defendant gave birth to a daughter in January 2010 and plaintiff sent defendant an additional 3 million dollars which was used to purchase certain properties. In November 2011, plaintiff resigned his position as CFO with [the

corporation in Russia] and in April 2012, he traveled to the United States to reunite with his family on a permanent basis.³ In this regard, plaintiff submits a June 5, 2012 immigration form signed by defendant in which she states that plaintiff is her husband and that the two had been married since February 1995. However, plaintiff claims that a few weeks after defendant signed this immigration document, "she revealed her true motive for divorcing me in 2009. She told me that unless I signed a prenuptial agreement...renouncing my interest in the majority of our assets, she was going to enforce the 2009 divorce judgment." Thereafter, plaintiff refused to sign the prenuptial agreement and in August 2012, he commenced the instant divorce action.

Defendant's Contentions

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According to defendant's affidavit, after marrying plaintiff in 1994, she and her parents were able to obtain permanent residence status in the United States as Jewish refugees. However, plaintiff refused to come to the United States and only visited this country when their first daughter was born and for short periods of time on tourist visas. In the United States, defendant lived with her parents, grandmother, and brother in a house purchased by her brother with a mortgage loan. According to defendant, she made the mortgage payments on the house and eventually paid off the mortgage after selling her apartment in Odessa. Thereafter, defendant's brother transferred the house to her. Defendant concedes that plaintiff wired her money from time to time, which she thought of as her daughter's patrimony and used to acquire residential and commercial properties throughout New York State. In addition, plaintiff enrolled at a New York professional school in 2002 and finished her residency in 2006, after which she set up a practice. According to defendant, plaintiff did not pay for her to attend school as all tuition payments were funded through her student loans.

Defendant avers that in 2009, plaintiff asked her for a divorce, claiming that having an American Jewish wife was a disadvantage to his business career and that he had no intention of ever moving to America. According to defendant, she consented to this divorce inasmuch as "the marriage had been dead for many years" and gave power of attorney to an attorney employed by plaintiff's company to appear as her proxy before the Russian court. Defendant states that after the divorce was instituted, the parties entered into two agreements (i.e., the March 16, 2009 and October 1, 2009 marital property agreements) whereby two Russian properties were transferred to her. For all other

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properties, defendant maintains that she was to keep the New York properties held in her name and plaintiff was to keep all property owned by him whether in New York, Russia, or elsewhere. With respect to the October 1, 2009 "Agreement between spouses" submitted by plaintiff, defendant states that she had never seen this document until plaintiff's motion papers were served and that she never authorized her proxy to make such an agreement in her name. Finally, defendant avers that when plaintiff asked for the divorce, she insisted that she be permitted to use plaintiff's previously stored sperm in order to conceive a full-blooded sibling for the parties' first child. According to defendant, after the divorce, the parties "had no romantic or sexual relationship, and very little communication."

The Russian Divorce Decree

As a threshold matter, the court must address defendant's motion to dismiss the action based upon the previous dissolution of the marriage by the Russian court, as well as that branch of plaintiff's motion which seeks an order setting aside the judgment of divorce issued by the Russian court and/or to otherwise refuse to grant comity to the Russian divorce judgment. In this regard, a "divorce action may lie in New York only if the parties are still married" (Matter of Gotlib v. Ratsutsky, 83 NY2d 696, 699 [1994]). Thus, the majority of the claims before the court hinge on the issue of whether or not the Russian divorce should be recognized by this court under the doctrine of comity.

In support of her motion to dismiss the action, defendant initially notes that in the absence of a subsisting marriage, no cause of action for divorce may be maintained. Defendant further points to the undisputed facts that as part of a bilateral divorce

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proceeding, the Russian court issued a decree dated January 20, 2009 dissolving plaintiff and defendant's marriage. Finally, defendant maintains that the parties never remarried. Thus, defendant concludes that there is no basis for plaintiff's divorce cause of

action or for his claim seeking equitable distribution.

In opposition to defendant's motion to dismiss, and in support of his own motion to set aside the 2009 judgment of divorce issued by the Russian court and/or for an order refusing to grant comity to the Russian divorce, plaintiff argues that the divorce is fictitious in nature and was otherwise procured by fraud. In support of this argument, plaintiff submits his own affidavit in which he alleges that defendant convinced him to consent to the divorce so as to enable the parties to transfer the Russian properties to her without paying a transfer tax. Plaintiff further contends that defendant promised him that the parties would subsequently remarry in the United States whereupon all of their assets would be held jointly as husband and wife. According to plaintiff, he would not have consented to the divorce but for defendant's fraudulent misrepresentations. In further support of this claim, plaintiff submits a copy of the October 1, 2010 Agreement between spouses which states that the divorce was fictitious and that the parties would remarry in the United States. Under the circumstances, plaintiff contends that the court should set aside the Russian judgment of divorce and otherwise decline to grant full faith and credit to the Russian divorce pursuant to the doctrine of comity.

It is well-settled that "comity should be extended to uphold the validity of a foreign divorce decree absent a showing of fraud in its procurement or that recognition of the judgment would do violence to some strong public policy of the state" (Frag v

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Frag, 4 AD3d 502, 504 [2004]). Further, "a departure from settled comity principles can be justified only as a rare exception...[and] [s]ome evidentiary basis to support the proposition that the particular divorce decree of the foreign country was the product of individualized fraud or coercion or oppression or rested on proximately related public policies fundamentally offensive and inimical to those of this State must be demonstrated" (Matter of Gotlib v. Ratsutsky, 83 NY2d 696, 699-700 [1994]). With respect to the issue of fraud, a foreign judgment cannot be attacked on the ground that it is procured by intrinsic fraud, "which goes to the existence of a cause of action, and is held to be no defense" (Altman v. Altman, 150 AD2d 304, 306 [1989]). Rather, courts will only refuse to extend comity to foreign judgments which are obtained by extrinsic fraud, whereby the aggrieved party is deprived of the opportunity to make a full and fair defense in the foreign action through some deception (Greschler v. Greschler, 51 NY2d 368, 376 [1980]; Altman, 150 AD2d at 306; Tamimi v. Tamimi, 38 AD2d 197, 199-200 [1972]). In particular, "[t]he rule is that there must be facts which prove it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, *unmixed with any fraud or negligence in himself or his agents*" (Tamimi, 38 AD2d at 200, quoting Kinnier v. Kinnier, 45 NY 535, 542-543 [1871] [emphasis added]).

Here, crediting plaintiff's version of the events surrounding the Russian divorce proceeding as being accurate, it is clear that he was not deprived of the opportunity to participate in the proceeding through some deception on defendant's part. In fact, plaintiff was fully aware of the divorce proceeding, appeared in the proceeding by proxy

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and was represented by counsel throughout the pendency of the matter. The court also notes that even after plaintiff commenced the instant action, plaintiff continued to litigate matters related to the divorce in the Russian court. In particular, plaintiff (unsuccessfully) sought to invalidate agreements dividing the marital property. However, at no point did plaintiff seek to have the Russian court itself invalidate the divorce decree.

Furthermore, plaintiff's claim that he was deprived of the opportunity to defend himself in the Russian divorce proceeding inasmuch as he relied upon defendant's fraudulent misrepresentation that the parties would remarry is unavailing. In this regard, "the elements of...fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (Fromowitz v. W. Park Assocs., Inc., 106 AD3d 950 [2013]). Even assuming that plaintiff can demonstrate that defendant had no intention of remarrying plaintiff at the time the alleged false promise was made, plaintiff could not have reasonably relied upon a promise to remarry which is legally unenforceable (Daleccio v. Kressler, 6 AD3d 57, 62 [2004], citing Civil Rights Law §80-a).

In any event, as noted above, a party claiming that he or she was deprived of the opportunity to make a full and fair defense in a foreign action through some fraudulent deception must themselves be untainted by fraud. Here, by plaintiff's own admission, defendant's alleged fraudulent promise to remarry him was part of a larger fraud in which plaintiff himself was a willing and active participant. In particular, the parties obtained a divorce decree from the Russian court under false pretenses as part of a tax avoidance scheme.

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Under the circumstances, this is not one of those "rare" instances where a departure from the principles of comity is justified and the court must recognize the 2009 Russian divorce decree dissolving the parties' marriage. Accordingly, that branch of defendant's motion which seeks to dismiss plaintiff's divorce cause of action pursuant to CPLR 3211 (a)(1), (2), (5), and (7) is granted. Those branches of plaintiff's cross motion which seek to set aside the Russian judgment of divorce and to amend the complaint to assert a cause of action to set aside the Russian judgment of divorce are denied.

Equitable Distribution Claims

Given the court's determination that the Russian divorce decree must be recognized as valid, plaintiff's claims seeking equitable distribution of the property obtained by defendant following the February 3, 2009 divorce decree must be dismissed as the parties were not married at the time this property was acquired. However, plaintiff maintains that even if this court recognizes the Russian divorce as valid, he is entitled to equitable distribution of property located in New York which was acquired by defendant prior to the issuance of the divorce decree. Accordingly, plaintiff cross-moves for leave to amend his complaint to assert a cause of action seeking equitable distribution pursuant to Domestic Relations Law §236.

In support of this branch of his cross motion, plaintiff notes that under Domestic Relations Law §236B(5)(a), a divorced spouse who possesses an interest in marital property within New York may seek equitable distribution of that property following the entry of a foreign judgment of divorce. Here, plaintiff maintains that he has an interest in the properties the parties purchased in New York during the marriage since they were

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purchased with his funds. Plaintiff further argues that the Court of Appeals' determination in *O'Connell v. Corcoran* (1 NY3d 179 [2003]) does not preclude him from relying upon Domestic Relations Law §236B(5)(a) inasmuch as he did not have a full and fair opportunity before the Russian court to seek equitable distribution of the New York property due to defendant's fraud. Plaintiff further contends that under Russian law, Russian courts cannot address any issues pertaining to real estate held in a foreign country.

Plaintiff also argues that under established principles of law, New York is only required to give the same preclusive effect of the Russian divorce judgment as Russian courts would under their own law. In this regard, plaintiff notes that unlike New York, in Russia, parties may raise marital property claims after a judgment of divorce. Under the circumstances, plaintiff argues that he is entitled to seek equitable distribution of the marital property located in New York notwithstanding the fact that the Russian court already issued a divorce decree.

In opposition to plaintiff's cross motion for leave to amend his complaint to assert a claim under Domestic Relations Law §236B(5)(a), defendant maintains that this claim is completely without merit. In particular, defendant argues that because plaintiff could have raised and resolved all issues involving marital property in the Russian divorce proceeding, he is barred from attempting to litigate this issue in New York. In this regard, defendant avers that plaintiff's attempt to distinguish the facts of this case from those in *O'Connell* by claiming that plaintiff's fraud prevented him from seeking equitable distribution of the marital property is without merit given the fact that the

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divorce proceeding in Russia was bilateral. Finally, defendant argues that there is no merit to plaintiff's claim that the Russian court lacked jurisdiction to rule on the marital property located in New York. In support of this argument, defendant submits a "legal opinion" dated February 28, 2013 by a Russian attorney, A.I. Kapba. In particular, Mr. Kapba states that under Article 161 of the Family Code of the Russian Federation:

Personal non-property and property rights and responsibilities of the spouses are determined by application of the law of a state, on the territory of which they have joint place of residence, and in the absence of such joint place of residence, by the law of the state, on the territory of which they had their last joint place of residence. Personal non-property and property rights and responsibilities of the spouses, who do not have a joint place of residence, are determined on the territory of the Russian Federation by application of the law of the Russian Federation

Here, since the last joint place of residence of the parties was located on the territory of the Russian Federation, Mr. Kapba states that the division of all property of the spouses, including property located on the territory of foreign countries must be governed by the laws of the Russian Federation. Mr. Kapba further points out that under Article 38 of the Family Code of the Russian Federation, division of joint property of the spouses can be divided by an agreement between the spouses, or in the case of a dispute, through a

court process. Accordingly, defendant maintains that the Russian court had the authority to determine the distribution of all marital property, including the property located in New York.

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Domestic Relations Law §236(B)(2) and (5)(a) permit parties to obtain equitable distribution of marital property following a foreign divorce. However, where such marital distribution claims were or could have been litigated and resolved in the foreign divorce proceeding, the doctrine of res judicata precludes a party to the foreign divorce from subsequently seeking equitable distribution in New York (O'Connell, 1 NY3d at 184-185; Caiazza v. Merola, 90 AD3d 491 [2011]). Here, plaintiff has failed to demonstrate that his proposed equitable distribution claim could not have been litigated and resolved in the Russian divorce proceeding. It is of particular significance herein that the parties did enter into two agreements in connection with the Russian divorce proceeding whereby two marital properties in Russia were distributed to defendant. Indeed, as previously noted, plaintiff continued to litigate the distribution of these properties in a Russian court after commencing the instant action in Kings County. Further, defendant has presented evidence in the form of Mr. Kapba's legal opinion that the Russian court had jurisdiction over the distribution of all marital property, whether located in Russia, the United States, or elsewhere. Plaintiff has failed to produce any evidence contradicting this evidence.

The court also rejects plaintiff's attempt to distinguish this case from the ruling in O'Connell by claiming that defendant's fraud prevented him from litigating his equitable distribution claims in the Russian divorce action. As previously noted, crediting plaintiff's allegations as being true, it was plaintiff's own willing participation in the fraud underlying the Russian divorce proceeding that prevented him from fully litigating his equitable distribution claims in that proceeding.

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Also without merit is plaintiff's argument that the court should consider his equitable distribution claims inasmuch as marital property claims may be raised in Russian courts after a judgment of divorce. While it is true that under applicable Russian law, a marital property claim may be raised after a divorce judgment is issued, by plaintiff's own admission, such claims are subject to a three-year statute of limitations. Moreover, there is no merit to plaintiff's claim that the statute of limitations did not begin to run until June of 2012 when he first learned of defendant's alleged fraud. In this regard it must be stressed that plaintiff raised this same argument before the Russian court when challenging the distribution of the two Russian properties pursuant to the March 16, 2009 and October 1, 2009 marital property agreements. However, in its February 27, 2013 ruling, the Russian court rejected this argument and found that plaintiff's claims were barred by the statute of limitations. Thus, any attempt by plaintiff to raise a marital property claim in a Russian court more than three years after the divorce decree would also be time barred.

Accordingly, that branch of plaintiff's cross motion which seeks leave to amend his complaint to assert a cause of action seeking equitable distribution pursuant to Domestic Relations Law §236 is denied as the proposed claim lacks merit.

Proposed Constructive Trust Claim

Plaintiff also seeks leave to amend his complaint to assert a constructive trust claim against defendant. In support of this branch of his motion, plaintiff alleges that there was a confidential relationship between the parties as husband and wife and parents of their children. Plaintiff further alleges that he transferred some 10 million dollars to

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defendant during the marriage and after the issuance of the divorce decree based upon her promise that the parties would share the assets that were accumulated with this money. Finally, plaintiff alleges that defendant will be unjustly enriched if she is permitted to appropriate all the assets acquired with the money that he provided.

In opposition to this branch of plaintiff's motion, defendant argues once the property issues incident to a divorce have been resolved by a settlement or judgment, or could have been resolved, a claim for a constructive trust arising from events that predate the divorce judgment will not lie. Accordingly, defendant maintains that inasmuch as the subject marital property claims could have been resolved in the Russian divorce proceeding, plaintiff may not seek to obtain this property under a constructive trust theory. Further, with respect to the assets allegedly obtained after the Russian divorce decree, defendant contends that any constructive trust claim must fail inasmuch as no confidential relationship existed between the two ex-spouses.

The "necessary elements for the imposition of a constructive trust are: 1) a confidential or fiduciary relationship; 2) a promise; 3) a

transfer in reliance on that promise; and 4) unjust enrichment" (Watson v. Pascal, 65 AD3d 1333, 1334 [2009]). However, "[t]hese requirements...are not to be rigidly applied [as] [t]he ultimate purpose of a constructive trust is to prevent unjust enrichment" (Broderson v. Parsons, 106 AD3d 677, 679 [2013]). Here, to the extent that plaintiff seeks to impose a constructive trust upon the assets that were acquired prior to the February 2009 divorce decree, the motion to amend must be denied. In particular, the court has already determined that since plaintiff could have resolved all issues relating to the marital

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property in the Russian divorce proceeding, he is precluded from litigating these issues in this court. This is true regardless of whether the cause of action plaintiff asserts in seeking to obtain the marital assets is based upon an equitable distribution or constructive trust theory.

However, plaintiff has also alleged that after the Russian divorce decree was issued, he transferred an additional 3 million dollars to plaintiff which she used to invest in real estate and business ventures. Plaintiff has further alleged that he transferred this money based upon defendant's promise that they would share these assets and that she would be unjustly enriched if she were allowed to appropriate them. Consequently, plaintiff has a viable constructive trust claim with respect to the assets allegedly acquired with this 3 million dollars he provided after the 2009 judgment of divorce. Nevertheless, inasmuch as plaintiff's matrimonial claims have been dismissed, plaintiff's motion to amend the complaint to assert a constructive trust claim in this action is denied as the claim should be brought in a separate plenary action.

Remaining Issues

Given the dismissal of plaintiff's divorce and equitable distribution claims, plaintiff's motion for an order awarding him pendente lite relief and interim attorney's fees is denied as such claims are dependent upon an existing marriage (Bourbon v. Bourbon, 300 AD2d 269 [2002]). Further, plaintiff's motion for an order restraining defendant from disposing, encumbering, or transferring any real estate or assets, awarding him exclusive use and occupancy of the premises located in Brooklyn, and directing that defendant pay all carrying charges for the premises is denied. With respect

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to the issues of child custody and visitation rights, inasmuch as the matrimonial action has been dismissed, plaintiff may pursue such claims in any court of appropriate jurisdiction.

Finally, defendant motion for attorney's fees and sanctions against plaintiff is denied. Under 22 NYCRR 130-1.1(a), a court may award costs including attorney's fees as well as sanctions against a party that engages in frivolous conduct. 22 NYCRR 130-1.1 (c) (3) defines conduct as frivolous when "it asserts material factual statements that are false." Here, the statement in plaintiff's complaint "upon information and belief there is no valid judgment in any court for a divorce" comes perilously close to being a false statement of material fact given the existence of the 2009 Russian divorce decree. In particular, at the time the complaint was filed, the divorce decree had not been found invalid by any court, whether in Russia or elsewhere. Nevertheless, inasmuch as plaintiff never attempted to conceal the existence of the divorce decree and proceeded in this matter under the theory that the divorce decree is of a fictitious nature, the court declines to impose costs or sanctions.

Conclusion

In summary, the court rules as follows: (1) those branches of plaintiff's motion (motion sequence #1) which seek an order granting exclusive use and occupancy of the premises located in Brooklyn, New York and directing that defendant pay all carrying charges for the premises, granting him pendente lite relief and interim counsel fees, and an order restraining plaintiff from disposing, encumbering, or transferring any assets are denied; (2) that branch of plaintiff's motion which seeks an order granting him liberal

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access to the parties children is granted only to the extent that plaintiff may seek custodial and/or visitation rights in a court of competent jurisdiction; (3) that branch of defendant's cross motion (motion sequence #2) which seeks an order dismissing the complaint pursuant to CPLR 3211 (a)(1), (2), (5) and (7) is granted; (4) that branch of defendant's cross motion which seeks an order imposing costs and sanctions against plaintiff is denied; (5) those branches of plaintiff's motion (motion sequence #3) which seek an order setting aside the Russian judgment of divorce and granting him leave to amend his complaint to add causes of action

to set aside the Russian judgment of divorce and for equitable distribution pursuant to Domestic Relations Law §236(B)(5)(a) are denied; and (6) that branch of plaintiff's motion which seeks leave to amend his complaint to assert a constructive trust claim is denied without prejudice to plaintiff commencing a plenary action asserting such a claim as provided in this decision.

This constitutes the decision and order of the court.

ENTER:

1. To protect the privacy of this child all names have been redacted from this decision including the businesses and business associates.
2. Although the decree is dated February 27, 2013, the decree also states that "[t]he decision in its final form was made on March 26, 2013.
3. "Plaintiff claims he cannot return to Russian because "I am the target of the Russian Government due to my association with a known supporter of the political opposition to Vladimir Putin." The defendant explains that her husband's "...partner in Russia was a supporter of the opposition to Russian Prime Minister Vladimir Putin. The Putin government filed false charges against [that individual] and consequently, [he] was arrested and imprisoned by the Russian government. The Russian government issued a warrant for the arrest of [plaintiff], under false charges, due to his association with [that individual]. [Plaintiff] is seeking asylum in the United States as he cannot return to Russian for fear of persecution."

