

<b>Schmid v Bank of Am.</b>
2016 NY Slip Op 30175(U)
January 25, 2016
Supreme Court, Suffolk County
Docket Number: 14389/2015
Judge: Jr., Andrew G. Tarantino
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**ORIGINAL  
WHEN BLUE**

SUPREME COURT - PART 50  
COUNTY OF SUFFOLK - STATE OF NEW YORK

**COPY**

PRESENT

HON. ANDREW G. TARANTINO, JR.  
A.J.S.C.

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Index No. 14389/2015

**HANS SCHMID,**

Plaintiff(s)

Motion seq. 004: MD

Motion seq. 009: MG

-against-

**BANK OF AMERICA, BANK OF NEW YORK,  
DREYFUS CORP., NUVINE SECURITIES, HSBC  
BANK, WELLS FARGO, M&T BANK, CAPITOL  
ONE, MEN ON THE MOVE, J.P. MORGAN  
CHASE, DOUGLAS ELLIMAN REAL ESTATE  
and JOANNE SCHMID,**

Defendant(s).

Motion seq. 001: MotD

002: MotD

003: MotD

005: MotD

006: MotD

007: MotD

008: MotD

Orig. Date: 10/8/2015

Adj. Date: 12/8/2015

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**ORDER DENYING A  
DEFAULT JUDGMENT AND  
DISMISSING THE  
COMPLAINT**

Upon consideration of the motion to dismiss the complaint on behalf of the defendant Joanne Schmid ["Joanne"], the supporting affidavit, affirmation, and exhibits (sequence 001), the "Response to Motion of Joanne Schmid" by the self-represented plaintiff Hans Schmid ["the plaintiff" or "Hans"], and supporting exhibits, Joanne's reply affirmation, and the plaintiff's "Response to Defendant's Joanne Bober's (Schmid) Second Request for Dismissal", and

upon consideration of the motion to dismiss the complaint on behalf of the defendants RBC Wealth Management and Christopher Seefeldt [collectively "RBC"], the supporting affirmation and exhibits (sequence 002), and the plaintiff's "Response to Defendants Request for Dismissal" dated November 20, 2015, and

upon consideration of the motion to dismiss the complaint on behalf of the defendant M&T Bank ["M&T"], the supporting affirmation, memorandum of law in support of dismissal motion, and supporting exhibits, (sequence 003), the plaintiff's "Response to Defendants Request for Dismissal" dated November 20, 2015, and M&T's affirmation in reply and in further support of dismissal, and

upon consideration of the plaintiff's motion for a default judgment against the defendants,

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the supporting affirmation and exhibits (sequence 004), the affirmations and /or affidavits and/or memoranda of law in opposition by the defendants Capital One, Morgan Stanley Smith Barney, LLC, ["Morgan Stanley"], JPMorgan Chase Bank, N. A. ["Chase"], M&T Bank, and the plaintiff's "Response to Defendants Request for Dismissal of Default Judgment", and

upon consideration of the motion to dismiss the complaint against the defendants The Bank of New York Mellon ["BNY Mellon"], sued herein as "Bank of New York" and The Dreyfus Corporation ["Dreyfus"], sued herein as "Dreyfus Corp.", the supporting affirmation, affidavit, and exhibits (sequence 005), plaintiff's "Response to Defendants Request for Dismissal" and the reply affirmation, and

upon consideration of the motion to dismiss the complaint on behalf of the defendant Bank of America, N.A., ["BANA"], sued herein as Bank of America, the supporting affirmation, affidavit, and exhibits, (sequence 006), plaintiff's "Response to Defendants Request for Dismissal" and the reply affirmation, and

upon consideration of the motion to dismiss the complaint on behalf of the defendant Wells Fargo Bank, N.A., sued herein as Wells Fargo ["Wells Fargo"], the supporting affirmation, affidavit, and exhibits, (sequence 007), and plaintiff's "Response to Defendants Request for Dismissal", and

upon consideration of the motion to dismiss the complaint on behalf of the defendant Nuveen Investments, Inc., ["Nuveen"], the supporting affirmation, affidavit, exhibits, and memorandum of law, (sequence 008), plaintiff's "Response to Defendants Request for Dismissal" and the reply affirmation, and

upon consideration of the motion for summary judgment in favor of the defendant Capital One, National Association, ["Capital One"], sued herein as Capitol One, (sequence 009), the supporting affirmation, affidavit and exhibits, and there being no opposition thereto, it is now

*ORDERED* that motion sequences 001 through and including 009 are considered together for purposes of this determination; and it is further

*ORDERED* that Joanne's motion to dismiss the complaint (sequence 001), is granted; and it is further

*ORDERED* that RBC's motion to dismiss the complaint (sequence 002), is granted; and it is further

*ORDERED* that M&T's motion to dismiss the complaint (sequence 003), is granted; and it is further

*ORDERED* that the plaintiff's motion for a default judgment against the defendants (sequence 004), is denied; and it is further

*ORDERED* that the motion to dismiss the complaint against the defendants BNY Mellon and Dreyfus (sequence 005), is granted; and it is further

*ORDERED* that the motion to dismiss the complaint against the defendant BANA (sequence 006), is granted; and it is further

*ORDERED* that the motion to dismiss the complaint on behalf of the defendant Wells Fargo (sequence 007), is granted; and it is further

*ORDERED* that the motion to dismiss the complaint on behalf of the defendant Nuveen (sequence 008), is granted; and it is further

*ORDERED* that the motion for summary judgment in favor of the defendant Capital One (sequence 009), is granted.

A matrimonial action between Hans and Joanne Schmid was commenced in October, 2012 under Index Number 30736-2012 [“the matrimonial action”]. After an inquest following the failure of Hans and his attorney to return to the courtroom on the day of the trial after the luncheon recess, or to appear at the continuation of the trial, by order dated August 11, 2015, (Iliou, J.), the Court made the following conclusions. With the assistance of his son, Hans had collected and secreted substantial rent receipts from rental property located in Long Beach. The Court was convinced by the undisputed evidence that there was a wasteful dissipation of at least \$34,000.00 of marital assets by the defendant, Hans, and that Hans engaged in a course of conduct designed to conceal his waste of assets from estranged wife, Joanne. The August, 2015 order contained a direction to the plaintiff to file all papers necessary to finally dispose of the action on or before October 16, 2015, and to settle judgment on notice. Hans has apparently taken an appeal from the August, 2015 order. The parties have not informed the Court as to the status of that appeal.

In this separate action the plaintiff, Hans, alleges the following. The 46 year marriage of Joanne and Hans came to an abrupt end in September, 2012, when Hans “discovered the constant theft and abuse of trust by Joanne.” The complaint alleges that Joanne stole many of the plaintiff’s assets, including earned and investment income, inheritances, cash loans, real property, and cash. Further, Hans alleges that Joanne transferred much of these assets into private accounts with the named defendants, with her aunt, Mrs. Stella Bober, and her daughter, Kristyn Schmid.

The complaint alleges that on September 17, 2014, Justice John Iliou issued and signed 17 subpoenas in the matrimonial action commanding the defendants to produce all financial statements and correspondence with and for Joanne on any and all accounts from their inception. Joanne was also commanded to produce all financial statements from bank accounts and financial money markets, stock and mutual funds and any and all joint accounts or any wealth held by others for her. Although some institutions complied with the subpoena, the complaint alleges that the defendants failed to do so. Subsequent attempts by the plaintiff’s then attorney and by Hans himself to obtain documents from the named defendants were unsuccessful.

The complaint in the WHEREFORE clause requests this court to command the defendants to produce the previously commanded statements and documents. The plaintiff seeks \$3 million in damages due to the defendants' disobedience of the court's "order". Hans also seeks to fine each defendant and requests a punitive award as well as compensatory damages for pain and suffering in his divorce court actions.

In motion sequence 001, Joanne seeks dismissal of the complaint based upon lack of personal jurisdiction, another action pending, collateral estoppel, and res judicata pursuant to CPLR 3211 (a) (8), (4), and (5), respectively. Joanne's motion is granted. In an affidavit Joanne asserts that she was served via regular mail addressed to her place of employment. This method of service to obtain personal jurisdiction over an individual is not authorized by the CPLR (*see generally* CPLR 308). However, even if the court had personal jurisdiction over Joanne it would still dismiss the action as there is another action pending concerning the same subject matter entitled *Joanne M. Schmid against Hans G. Schmid*, Index No. 030736-2012, before Acting Supreme Court Justice John Iliou (*see* CPLR 3211 [a][4]). There has been no proof put forth by any party that the matrimonial action has been terminated by a final judgment.

RBC moves to dismiss the complaint for, *inter alia*, failure to state a cause of action and lack of personal jurisdiction pursuant to CPLR 3211 (a) (7), (8). The moving affirmation states that a copy of the complaint was electronically mailed to RBC. No documents were attached to the emailed complaint. No affidavit of service for RBC or Seefeldt was in the case file in the office of the Suffolk County Clerk. In addition, an RBC employee attested in an affidavit that he performed a review of RBC's records maintained in the ordinary course of RBC's business and that he found no account in the name of Joanne, Hans, or a joint account of Joanne and Hans. RBC's motion to dismiss the complaint (sequence 002), is granted. The plaintiff failed to obtain personal jurisdiction over RBC.

M&T's dismissal motion recites numerous reasons warranting the relief sought. Among them, the plaintiff has failed to offer evidence that the subject subpoena was properly served on M&T. The plaintiff has not provided a copy of the alleged subpoena or an affidavit of service. The complaint fails to state a cause of action for civil contempt as the complaint does not allege the material elements necessary to sustain a cause of action for civil contempt but rather contains merely bare legal conclusions.

M&T also asserts that the plaintiff is precluded from maintaining this action and from seeking monetary damages for the defendants' alleged failure to comply with the subpoena based upon the doctrine of collateral estoppel. In the matrimonial action, by certifying the action the defendant represented that all discovery was complete. The decision of Justice Iliou dated August 11, 2015, resolves for all purposes the equitable distribution of the marital assets between Hans and Joanne. Thus, M&T argues, the action is barred by the doctrines of res judicata and collateral estoppel. Notably, although the August, 2015 order contains a directive to settle a judgment, no

judgment has been provided in any of the moving papers.<sup>1</sup>

Pursuant to CPLR 3211(a)(5), a cause of action may be dismissed because of ... collateral estoppel ... payment, release, [and/or] res judicata. Under the doctrine of res judicata, a final judgment precludes reconsideration of all claims which could have or should have been litigated in the prior proceedings against the same party (*Breslin Realty Dev. Corp. v. Shaw*, 72 A.D.3d 258, 263, 893 N.Y.S.2d 95; see *Goldman v. Rio*, 104 A.D.3d 729, 730, 961 N.Y.S.2d 288). Under the related doctrine of collateral estoppel, relitigation of an issue which has necessarily been decided in a prior action and is determinative of the issues disputed in the present action is precluded provided that there was a full and fair opportunity to contest the decision now alleged to be controlling (see *Capellupo v. Nassau Health Care Corp.*, 97 A.D.3d 619, 621, 948 N.Y.S.2d 362; *Breslin Realty Dev. Corp. v. Shaw*, 72 A.D.3d at 263, 893 N.Y.S.2d 95). In their respective moving applications, the defendants have failed to demonstrate that the issues involved in this matter have been brought to a final conclusion in the matrimonial action. There has been further motion practice since the August, 2015 order. Thus, the defendants have failed to demonstrate that either res judicata or collateral estoppel bars this action (see *Rudovic v. Rudovic*, 131 A.D.3d 1225, 1227, 16 N.Y.S.3d 856, 858-59, citing *Kossover v. Trattler*, 82 A.D.2d 610, 612, 442 N.Y.S.2d 554).

In any event, prescinding from the issue of whether there is a final judgment thereby triggering the doctrine of res judicata as a bar to this action, the plaintiff may not recover damages in a separate action for the alleged failure of M&T to comply with subpoenas that were so-ordered in a separate action almost one year before the inquest. Having defaulted at the trial, the plaintiff may not now seek damages for the defendants' alleged failure to comply with the subpoenas, even assuming they were duly served upon the defendants in 2014, which M&T denies. Therefore, M&T's motion to dismiss the complaint is granted.

Plaintiff moves for a default judgment against the defendants for the failure to answer the complaint (sequence 004). The motion is denied as the plaintiff has failed to demonstrate that he obtained personal jurisdiction over the defendants and having done so, that the defendants failed to respond to the complaint in accordance with the CPLR (see CPLR 3215 [f]). However, even if the plaintiff had obtained personal jurisdiction over the defendants, the plaintiff's motion for a default judgment is defective because there was no notice of motion (see CPLR 2214 [a]), and the court is without jurisdiction to grant a default judgment on an *ex parte* application pursuant to CPLR 3215. The failure to provide proper notice of a motion for a default judgment is a fundamental defect because it deprives the opposing party of a fair opportunity to oppose the motion. CPLR 3215 (g) requires the plaintiff to provide the defendant with at least five days notice of the time and place for his application for a default judgment. Since plaintiff provided no notice in his motion papers, the application seeking a default judgment is fundamentally defective and is denied in its entirety.

The defendant The Bank of New York Mellon ["BNY Mellon"], sued herein as "Bank of

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<sup>1</sup> E-Courts indicates that a long form order submitted by the plaintiff, Joanne, was signed by Justice Iliou on December 3, 2015.

New York” and The Dreyfus Corporation [“Dreyfus”], sued herein as “Dreyfus Corp.”, move to dismiss the complaint on the basis that the plaintiff failed to obtain personal jurisdiction over the defendants (sequence 005). As it is undisputed that these defendants received a copy of the summons and complaint by regular mail only, the motion to dismiss is granted as the court lacks jurisdiction over these defendants.

The defendant Bank of America, N.A., [“BANA”], sued herein as Bank of America, likewise moves to dismiss the complaint on the basis that the plaintiff failed to obtain jurisdiction over this defendant (sequence 006). It is undisputed that BANA received the summons and complaint by ordinary mail. BANA’s motion to dismiss is likewise granted as the court lacks jurisdiction over BANA.

The defendant Wells Fargo asserts multiple bases for dismissal of the complaint. Wells Fargo received a copy of the summons and complaint by certified mail at its offices in San Francisco, California. Wells Fargo also received a copy of an undated subpoena issued by the plaintiff’s attorney in the matrimonial action by first class mail at its offices in San Francisco, California. Wells Fargo did not comply with the subpoena because, among other things, the subpoena was not properly served. In any event, Wells Fargo did not locate any accounts maintained in the name of Joanne M. Schmid. Further, Wells Fargo urges that in order to hold a party in civil contempt, the plaintiff must commence a special proceeding. The plaintiff’s remedy for any alleged failure to comply with the subpoena issued in the matrimonial action was to make a motion to compel compliance with the subpoena in that action, not to commence a separate action seeking damages due to any alleged noncompliance. In any event, the plaintiff failed to personally serve the subpoena upon Wells Fargo. Finally, Wells Fargo argues that all matters in the matrimonial action have been judicially determined including discovery issues and that the plaintiff is barred from asserting any claims in a separate action against Wells Fargo by the doctrine of collateral estoppel.

Plaintiff failed to obtain personal jurisdiction over Wells Fargo in this action. Even if the plaintiff had properly served Wells Fargo, the complaint would still be dismissed since the court agrees that all discovery matters in the matrimonial action have been judicially determined and that if plaintiff believed himself to be entitled to further discovery in that action his recourse was to make an application to the court in that action. Wells Fargo’s motion to dismiss the complaint against it is granted.

As with the other defendants, the complaint is dismissed against Nuveen because Nuveen was never properly served with the summons and complaint (*see* CPLR 311). Even if the complaint had been properly served, Nuveen has demonstrated that it was never served with the subject subpoena or with the plaintiff’s motion for a default judgment (sequence 004). Moreover, the complaint fails to state a cause of action for civil contempt (*see generally* CPLR 2308 [a]).

Finally, the motion for summary judgment dismissing the summons and complaint made on behalf of Capital One, National Association, sued herein as Capitol One, is granted. Capital One filed a verified answer to the complaint dated October 8, 2015, asserting as an affirmative defense,

