SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS J.S.C. Justice

PART 7

Ciccone

-v-

Gotta Have It! Collectibles, Inc. et al.

INDEX NO. 156454/17

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for preliminary injunction

Notice of Motion/Order to Show Cause — Affidavits — Exhibits NYSCEF docs. no. | No(s). 2, 23

Answering Affidavits — Exhibits | No(s). 59-122

Replying Affidavits | No(s). 136-143

Upon the foregoing papers, it is ordered that this motion is

decided according to the attached decision and order.

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

Dated: 4/19/18

HON. GERALD LEBOVITS J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

MADONNA CICCONE, in both her individual capacity and as Trustee of the CICCONE 1989 TRUST,

Plaintiff,

-against-

GOTTA HAVE IT! COLLECTIBLES, INC. d/b/a GOTTA HAVE ROCK AND ROLL LLC, PETE SIEGEL, DARLENE LUTZ, JOHN DOEs #1-200 (a fictitious name), GOTTA HAVE ROCK AND ROLL.COM LLC, and EDWARD KOSINSKI,

Defendants.

Index No.: 156454/2017
DECISION/ORDER
Motion Seqs. 001, 005, 006

Proskauer Rose LLP, New York (Sandra A. Crawshaw-Sparks, Charles B. Ortner, Brendan J. O'Rourke, Jennifer L. Jones, Russell T. Gorkin of counsel), for plaintiff.
Jeffrey J. Hass, New York, for defendants Gotta Have It! Collectibles, Inc., Pete Siegel, Gotta Have Rock And Roll.com LLC, and Edward Kosinski.
Grossman LLP, New York (Judd B. Grossman and Lindsay E. Hogan of counsel), for defendant Darlene Lutz.

Gerald Lebovits, J.

This court consolidates motion sequences 001, 005, and 006 for disposition and addresses the first two motions together, as defendants have addressed them. (*See* NY St Cts Elec Filing [NYSCEF] Doc No. 123 and 147.)

Plaintiff, Madonna Ciccone, brings this action under CPLR 7101 for conversion and for replevin of chattels in her individual capacity and as trustee of The Ciccone 1989 Trust.

From 1981 to about 2003, defendant Darlene Lutz and plaintiff had a relationship in which Lutz provided art-consulting services to plaintiff and in which the two socialized together. (NYSCEF Doc No. 59, at 26; Doc. No. 66, at 4; Doc No. 143 at 11, lines 19-20.) Throughout this time, Lutz stored various items of personal property for plaintiff. (NYSCEF Doc No. 112, at 91, lines 20-24; at 92, lines 11-25; at 93, lines 14-23; Doc No. 115, ¶ 5.) Lutz also acquired and accumulated, through various third parties including plaintiff's brother and assistants, mementos connected with plaintiff. (NYSCEF Doc No. 143 at 11, lines 19-25; at 12, lines 1-14; Doc No. 151, at 4-6.)

The relationship between plaintiff and Lutz disintegrated around 2003, after plaintiff accused Lutz of not properly accounting for certain artworks belonging to plaintiff. (NYSCEF Doc No. 59, at 12-13; Doc No. 112 at 93, lines 14-23.) In May 2004, Lutz and plaintiff entered

into a settlement agreement to resolve "all dispute and differences," with Lutz paying a sum of money to plaintiff in exchange for a broad general release from her. (NYSCEF Doc No. 161 at 1.) Plaintiff testified that since the 2004 settlement agreement, her friendship with defendant Lutz ended and the two parties have not spoken. (NYSCEF Doc No. 112 at 104, line 25; at 105, lines 1-6.)

Defendant Edward Kosinski is the managing member of defendant company Gotta Have Rock and Roll.com LLC ("GHRR" or GHRR.com). (NYSCEF Doc No. 60.) In May 2017, Kosinski, GHRR, and Lutz executed a consignment agreement to sell memorabilia related to plaintiff, including personal items that once belonged to her. (NYSCEF Doc No. 136 at 3.) The items ultimately collected for the auction included items from the collections of Lutz and Kosinski.

In July 2017, plaintiff filed this action to stop defendants' auction for about 100 individual items allegedly belonging to plaintiff. (NYSCEF Doc No. 3 at 4.) Plaintiff alleges that she learned about the auction on GHRR.com through media reports. (NYSCEF Doc No. 7, ¶¶ 5-7.) In her original complaint, plaintiff claimed that the auction website was causing irreparable harm to her by disclosing and disseminating "highly personal information, including [the plaintiff's], her friend's and her former boyfriends' confidential mental thoughts and impressions." (NYSCEF Doc No. 3 at 4; Doc No. 7, ¶¶ 13-29.)

Plaintiff advanced the claims that plaintiff never sold, gifted, or otherwise transferred to defendants any possessory interest in the items at issue. (NYSCEF Doc No. 3, at 3, 5-6; Doc No. 7, ¶ 13.) Plaintiff also requested expedited discovery for "a handful of written requests." (NYSCEF Doc No. 3 at 2.) In September 2017, this court granted a temporary restraining order against defendants, requiring limited discovery and defendants' appearance to show cause why a preliminary injunction should not be granted. (NYSCEF Doc No. 23, at 1-2.)

Defendants proceeded with the auction but withheld the lots enjoined by the temporary restraining order. (NYSCEF Doc No. 34, ¶ 33.)

CURRENT MOTIONS

Three motion sequences are at issue now. The first is the order to show cause. The second is the defendants' motion to dismiss the complaint under CPLR 3211 (a) (1) and 3211 (a) (5). (NYSCEF Doc No. 123 at 1.) The third is plaintiff's motion to amend the complaint under CPLR 3025 (b) and (c).

Plaintiff seeks a preliminary and permanent injunction to postpone the auction for a subset of the items in question and to prohibit the display of a subset of the items. (NYSCEF Doc No. 3 at 4; Doc No. 136 at 2, n.1.) Through preliminary discovery, plaintiff has narrowed the number of lots in question. Plaintiff now requests injunctions on the sale of lots 9, 13, 37, 62, 65, 66, 78, 109-119, and 128. (NYSCEF Doc No. 136 at 2, n.1.) Plaintiff requests that the court enjoin defendants from displaying lots 9, 13, 78, and 128. (NYSCEF Doc No. 154 at 14.) Plaintiff argues that defendants' auction will cause her to suffer irreparable injury, because the

auction will severely impair her ability to recover her unique, personal property. (NYSCEF Doc No. 3 at 3.)

Under CPLR 3025 (c), plaintiff seeks leave to amend the complaint so that the complaint will conform to the evidence. Plaintiff argues that through the preliminary discovery, the parties have submitted evidence clarifying plaintiff's theory of recovery. (NYSCEF Doc No. 151 at 2.) Plaintiff points to Lutz's deposition of September 27, 2017 (NYSCEF Doc No. 156), and Lutz's responses to plaintiff's first set of interrogatories (NYSCEF Doc No. 155). Plaintiff and defendant now agree that Lutz received all the items in question in good faith from third parties. (NYSCEF Doc No. 151 at 4.)

Kosinski and Lutz admit to possessing the lots in questions, but they argue that the CPLR statute of limitations for the claims for conversion and replevin bar plaintiff's claims because the lots in question entered into their possession before 2004. (NYSCEF Doc No. 159 at 2-7.) Kosinski and Lutz argue that even if the court finds that the the statute of limitations bars recovery, the 2004 settlement agreement between plaintiff and Lutz ending their relationship contains a general release barring any claim brought now. (NYSCEF Doc No. 59, at 12-13, 14-21.) Kosinski and Lutz argue that plaintiff's conversion and replevin claims fail as a matter of law because plaintiff allegedly unreasonably delayed in demanding the return of the property under Kosinski and Lutz's bailment. (NYSCEF Doc No. 59, at 22-23; Doc No. 159, at 2-5, 5-7.)

Plaintiff argues that plaintiff's claims are barred neither by the 2004 settlement nor by the statute of limitations. (NYSCEF Doc No. 151, at 7-8; Doc No. 162, at 2-7.) Plaintiff argues that the claims for conversion and replevin did not accrue until 2017, after plaintiff learned of the auction and took the affirmative act of demanding the return of the property. (NYSCEF Doc No. 151, at 7-8; Doc No. 136 at 19.)

LEGAL STANDARDS

The New York courts consider a preliminary injunction a drastic remedy, one not granted unless the movant demonstrates "a clear right" to that relief. (*City of New York v 330 Continental, LLC*, 60 AD3d 226, 230 [1st Dept 2009].) The moving party must establish "(1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction." (*22 Irving Place Corp. v 30 Irving LLC*, 57 Misc 3d 253, 255 [Sup Ct, NY County 2017].) The court will weigh a variety of factors and decide the motion in its sound discretion. (*Doe v Axelrod*, 73 NY2d 748, 750 [1988].)

In considering a motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations in the complaint as true, and give the plaintiff every possible favorable inference. (CPLR 3211 [a] [7]; *Chanko v Am. Broad. Companies Inc.*, 27 NY3d 46, 52 [2016].) A party may move to dismiss on the ground that the cause of action may not be maintained because of a previous release or statute of limitations. (CPLR 3211 [a] [5].) Further, the court should grant a motion to dismiss if a valid release would be a complete defense to the cause of action asserted. (*Najjar Indus., Inc. v City of New York*, 57 NY2d 647, 648 [1982].)

MOTION SEQUENCES 001 AND 005

Plaintiff's claims are barred by the statute of limitations for an action in conversion or replevin. Moreover, with respect to certain lots, plaintiff has brought claims for conversion against the wrong parties.

New York courts have established the requirements for a successful claim of the recovery of chattel through claims of conversion and replevin. Conversion is the unauthorized exercise of control and dominion over personal property which interferes with the superior possessory right of another. (14 Lee S. Kreindler et al., *New York Practice Series – New York Law of Torts* § 2:12 [August 2017 Update] [online treatise]; *Komolov v Segal*, 144 AD3d 487, 488 [1st Dept 2016].) An action in replevin determines who has the "superior possessory right to the chattels." (*Christie's Inc. v Davis*, 247 F Supp 2d 414, 419 [SD NY 2002] [internal citations and quotations omitted].)

For the purposes of determining whether statute of limitations will bar an action, the general rule is that the statutory period is computed from the time the cause of action accrued. (CPLR 203 [a].) A cause of action for conversion accrues from the date conversion takes place—the time of the theft. (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 318 [1991]; accord *Vigilant Ins. Co. of Am. v Hous. Auth. of City of El Paso, Tex.*, 87 NY2d 36, 43 [1995]; *Johnson v Smithsonian Inst.*, 189 F3d 180, 187 [2d Cir 1999].) Conversion not concerned with title, but is concerned with possession. (*State v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259 [2002], citing *Pierpoint v Hoyt*, 260 NY 26, 29 [1932].) An action to recover chattel must commence within three years of the claim's accrual. (CPLR 214 [3].)

Further, the Court of Appeals and the First Department have held that "mere ignorance or lack of discovery of the wrong is not sufficient to toll the statute of limitations, which commences running when the wrong is perpetrated." (*Gen. Stencils, Inc. v Chiappa*, 18 NY2d 125, 127 [1966], citing *Guild v Hopkins*, 271 AD 234, 244 [1st Dept 1946], affd, 297 NY 477 [1947].) It is immaterial that the plaintiff may not have discovered the wrongs complained of until long after they were committed. (*Guild*, 271 AD at 244.)

Where there is a manifestation of consent by one person to another to act on behalf of other, be subject to the other's control, New York agency law recognizes this as an agency relationship, wherein the agent has consent and authority to act on behalf of the principal. (*Meisel v Grunberg*, 651 F Supp 2d 98, 110 [SDNY 2009], citing *New York Mar. & Gen. Ins. Co. v Tradeline (L.L.C.)*, 266 F3d 112, 122 [2d Cir 2001].) When an agent acts outside the parameters of the principal's instructions, "the consequences of that dereliction are not visited upon a third party, and any recourse the principal may have would be against the agent." (*Compagnia Italiana Transoceanica Di Navegazione, S.p.A. v Hugo Neu & Sons Intern. Sales Corp.*, 557 F Supp 507, 511 [SDNY 1983].) Agents who risk their principal's property without authority become responsible to the principal for all losses or damages that result from the unauthorized act. (2A NY Jur 2d, Agency § 217, Feb 2018 Update.)

Lot 9 is a letter plaintiff wrote to a former boyfriend. (NYSCEF Doc No. 70.) In his deposition testimony, Kosinski testified that in 2004, he bought a letter plaintiff wrote to Jim

Albright. (NYSCEF Doc No. 71 at 9, lines 4-25; at 10, lines 1-18; at 18, lines 14-25; at 27, lines 1-6.) Kosinski asserts that he purchased Lot 9 on eBay. (NYSCEF Doc No. 71 at 100, lines 18-25; at 101, lines 1-8.) Defendants submitted a receipt purporting to confirm the sale of this letter notarized on February 3, 2004. (NYSCEF Doc No. 72.)

Plaintiff argues that Lot 9 does not belong to Kosinski but, rather, Lutz, who acquired it through the inadvertent transfer from one of plaintiff's assistants to Lutz. (NYSCEF Doc No. 137, ¶¶ 10, 23.) Both parties refer to one of plaintiff's assistants specifically, Caresse Henry, who passed away in 2010. (NYSCEF Doc No. 137, ¶¶ 7-12.) Plaintiff testified that over the course of her career, she has asked her assistants to open and archive letters on her behalf and that she has given her assistants discretion in what to do with the mail once opened. (NYSCEF Doc No. 108, at 89, lines 2-25; at 90, lines 1-6.)

If the court accepts plaintiff's allegations as true, plaintiff's claims for conversion have been brought against improper parties and in any case are time-barred by the CPLR statute of limitations. If one of plaintiff's assistants gave Lutz the letter, plaintiff's claims for conversion should be brought against the assistants who worked for plaintiff at the time of conversion, not against the current parties. Regardless, the transfer of the letter from plaintiff's assistant — whether from Henry or another assistant — to Lutz occurred during the years Lutz and plaintiff had a relationship, before 2004. The 2004 transfer of the property to Kosinski also falls well outside the statute of limitations. Thus, plaintiff's claims about Lot 9 are barred by the CPLR statute of limitations and by New York's accepted principles of agency.

Lot 13 is a set of handwritten notes plaintiff wrote in the early 1990s as part of a tribute to her brother, Christopher Ciccone. (NYSCEF Doc No. 78.) Defendants allege that this lot came into Lutz's possession from Ciccone himself at some point before 2004. (NYSCEF Doc No. 59 at 8; No. 66, at 4-5.) Plaintiff does not controvert that the notes came into Lutz's possession prior to 2004, stating that Lutz gained possession of the notes because of her access to plaintiff's residences and their contents. (NYSCEF Doc No. 65, ¶ 17.) Lutz has not been in contact with plaintiff since 2004 and has not had access to plaintiff's residences for at least as long. Plaintiff's claims for conversion on Lot 13 are accordingly time-barred by the statute of limitations.

Lot 37 is a check related to a now-closed checking account that once belonged to plaintiff. (NYSCEF Doc No. 87.) Lutz does not recall how she came into possession of the checks. (NYSCEF Doc No. 66, at 3.) Plaintiff alleges that Lutz came into possession of the checks while the two had a relationship. (NYSCEF Doc No. 137, ¶ 30.) This means that the time of accrual for claims of conversion on Lot 37 was before 2004. Thus, plaintiff's claims regarding this lot are time-barred.

Lot 62 is a hair brush allegedly containing hair from plaintiff. (NYSCEF Doc No. 89.) Lutz asserts that she came to possess the hairbrush sometime before 2004, although she does not recall the circumstances under which she obtained the item. (NYSCEF Doc No. 66, at 3-4.) Plaintiff alleges that although she never granted anyone the right to transfer her property, Lutz came into possession of the hairbrush through certain third parties. (NYSCEF Doc No. 136 at 11; NYSCEF Doc No. 153, ¶¶ 9-11.) Plaintiff does not deny that Lutz came into possession of the brush prior to the 2004 settlement agreement. Plaintiff's claims are thus barred two-fold. First,

recovery on plaintiff's claims for conversion is barred by the statute of limitations because the time of accrual for her claim was at the time of conversion—i.e., sometime before 2004. As the action was brought in 2017, the time for recovery has passed. Second, if plaintiff's assertions are to be taken as true, the current defendants are not the proper defendants for this claim. The certain third parties alleged to have transferred the brush to Lutz are the proper defendants. Plaintiff's claims against defendants as to Lot 62 are improper and barred by the statute of limitations.

Lot 65 is an archive of photographs taken by a professional photographer of a home owned by plaintiff in Miami, Florida. (NYSCEF Doc No. 92.) Some of the photographs were published in 1994 in a magazine called The World of Interiors. (NYSCEF Doc No. 95.) Defendants assert that Christopher Ciccone gave the photographs to Lutz sometime before 2004. (NYSCEF Doc No. 59 at 9-10; NYSCEF Doc No. 66 at 4.) Plaintiff asserts that her brother acted as the intermediary between plaintiff and the magazine and did not have the rights to the photographs. (NYSCEF Doc No. 137, ¶ 17.) Plaintiff further asserts that although the photographs were sent in an envelope addressed to her brother, the photographs were sent to her for publication approval and, thus, are her property. (NYSCEF Doc No. 93, at 46, line 25; at 47, lines 1-5.) Plaintiff has not refuted the notion that the photographs entered Lutz's possession before 2004; any claims plaintiff may have against her brother for conversion are not before the court. Thus, the statute of limitations bars claims for conversion for Lot 65.

Lot 66 is a set of photographs, including images of plaintiff at a party when plaintiff and Lutz socialized together. (NYSCEF Doc No. 98.) Defendants assert that Lutz was the photographer of the photographs over 20 years ago. (NYSCEF Doc No. 59, at 8; No. 66 at 4.) Plaintiff admits that she herself was not the photographer of the photographs and that she has never owned the negatives. (NYSCEF Doc No. 99, at 36, lines 5-8; at 28, lines 9-11.) She asserts that Lutz somehow came into possession of the photographs and negatives through the relationship the two had "over the years." (NYSCEF Doc No. 137, ¶ 27.) Both parties argue that Lutz has possessed the photographs and negatives from before 2004. The CPLR statute of limitations thus bars claims of conversion against defendants for Lot 66.

Both Lot 78 and Lot 128 are letters plaintiff received in the 1990s from Rosie O'Donnell and Tupac Shakur. (NYSCEF Doc Nos. 101 and 107.) Lutz asserts that she came into possession of these letters because plaintiff's assistants gave them to her. (NYSCEF Doc No. 66, at 5-6; NYSCEF Doc No. 156, at 91, lines 7-25.) Plaintiff asserts that the letters did not knowingly leave her possession, and that the letters "wound up" in Lutz's possession "given [their] close relationship," or perhaps one of plaintiff's assistants gave the letters to Lutz. (NYSCEF Doc No. 137, ¶¶ 7-10.) The statute of limitations for a claim of conversion is not tolled based on lack of discovering the conversion. The claim accrues when the conversion has taken place.

According to plaintiff, plaintiff's assistant gave the letters to Lutz throught the close relationship the two parties had. This would make the time of accrual for the conversion claim before 2004 and the dissolution of the parties' relationship. The claims for conversion on Lots 78 and 128 are time-barred under the CPLR statute of limitations. Further, if plaintiff's allegations are accepted as true — that Lutz received the letters through the inadvertent actions of plaintiff's assistants — the claims for conversion against defendants are improper. Under New York agency

law, the agents who exceeded their authority by giving Lutz the letters would be the proper defendants. Thus, plaintiff's claims for conversion against defendants are time-barred and improper.

Finally, Lots 109-119 are a collection of cassette tapes plaintiff gave her brother Christopher when he worked for plaintiff as a creative art-and-tour director. (NYSCEF Doc No. 104; Doc No. 105 at 64, lines 22-25; at 65, lines 1-15.) Both plaintiff and defendants assert that plaintiff gave her brother the cassette tapes more than 20 years ago. (NYSCEF Doc No. 66 at 5; Doc No. 137, ¶ 16, 18.) Defendants claim that plaintiff's brother gave Lutz the tapes sometime before 2004; plaintiff does not refute that. (NYSCEF Doc No. 66 at 5.) Plaintiff testified that at no point over the last 20 years has she asked her brother to return the tapes. (NYSCEF Doc No. 105, at 65, lines 16-20.)

Plaintiff's conversion claims are barred by the same agency laws applicable to Lots 78 and 128 and are, in any case, time-barred by the statute of limitations. Under New York law, plaintiff's brother — the agent who exceeded his authority by giving Lutz the cassette tapes — would be the proper defendant. Further, even if plaintiff were to bring a cause of action against her brother for converting the tapes, the time of accrual for plaintiff's claims for conversion began "when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court." (*Vigilant Ins. Co. of Am.*, 87 NY2d at 43.) Plaintiff admits that she gave the tapes to her brother some 20 years ago. Thus, the statute of limitations would bar any claim for conversion against him. Plaintiff's claims for Lots 109-119 are therefore improper and time-barred.

Settlement Release

Even if the statute of limitations does not bar plaintiff's conversion claims, the 2004 settlement agreement bars this action against defendant Lutz.

The coverage of a general release depends on the controversy being settled and "may not be read to cover matters the parties did not desire or intend to dispose of." (*Rivera v Wyckoff Heights Med. Ctr.*, 113 AD3d 667, 671 [2d Dept 2014], citing *Huma v Patel*, 68 AD3d 821, 822 [2d Dept 2009].) The scope is "operative not only as to all controversies and causes of action between the releasor and releasees which had, by that time, actually ripened into litigation, but to all such issues which might then have been adjudicated as a result of pre-existent controversies." (*A.A. Truck Renting Corp. v Navistar, Inc.*, 81 AD3d 674, 675 [2d Dept 2011]; *accord Simon v Simon*, 274 AD 447, 449 [1st Dept 1948].)

A valid general release may apply not only to known claims but "may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made.'" (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011], quoting *Mangini v McClurg*, 24 NY2d 556, 566 [1969].)

The best evidence in determining the parties' intent concerning a written agreement is "what they say in their writing." (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992].) If a written

agreement is complete, clear, and unambiguous on its face, it "must be enforced according to the plain meaning of its terms." (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002].)

Sophisticated parties, having negotiated "an extraordinarily broad release with their eyes open," with the aid of counsel, cannot later "invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct." (*Centro Empresarial Cempresa*, 17 NY3d at 278.)

The party seeking to overturn the generality of the release must "establish that he did not intend more than a limited release; that he did not know and could not know of the later revealed injuries, and that different injuries are involved rather than unanticipated consequences of known injuries." (*Mangini*, 24 NY2d at 568.)

Given the law, the court finds unavailing plaintiff's pleadings against the settlement agreement's application in the instant matter.

The language of the settlement agreement provides that both parties and their agents are released "from any and all claims, demands, actions, causes of action, suits, debts, [etc.] . . . whether known or unknown" that the parties had before and at the time of signing the agreement, or which they "may hereafter have" against each other "by reason of any event, transaction or other relationship or cause whatsoever, occurring on or before the Effective Date of this Agreement." (NYSCEF Doc No. 161, ¶¶ 2.1 and 2.2.) Further, the agreement acknowledges that the parties have been advised by legal counsel and provides a broad waiver of claims for any "damages, losses, costs or expenses that are presently unknown and unsuspected" and which "may give rise to additional damages, losses, costs or expenses in the future." (NYSCEF Doc No. 161, ¶ 3.) The settlement agreement also includes an explicit integration and merger clause. (NYSCEF Doc No. 161, ¶ 10.)

Lutz received the lots in question as a result of her two-decade long relationship with plaintiff through third parties in plaintiff's immediate circle and through interactions directly with plaintiff. This relationship and any claims arising from it were explicitly considered in the language of the 2004 settlement release. The release language indicates the end of any relationship between the parties, including the broad waiver for any claims then "unknown and unsuspected." (NYSCEF Doc No. 161, ¶ 3.) Plaintiff knew that throughout her relationship with Lutz, Lutz was in possession of various pieces of plaintiff's personal property. (NYSCEF Doc No. 112, at 103, lines 13-24; at 135, lines 16-25; at 136, lines 1-2.) Yet before this action began, plaintiff did not make any demand for the return of her possessions. (NYSCEF Doc No. 112 at 136, lines 3-9.) Plaintiff could have narrowed the scope of the settlement and broad waiver, but she did not do so. This action falls under the broad scope of the agreement's waiver of claims. Thus, this court grants defendant's motion to dismiss the complaint and denies plaintiff's motion for injunctive relief.

MOTION SEQUENCE 006

The court has discretion of "the widest possible latitude," absent prejudice, to allow parties to amend their pleadings. (CPLR 3025 [b]; *Murray v City of New York*, 43 NY2d 400, 405 [1977]; *accord Dittmar Explosives, Inc. v A. E. Ottaviano, Inc.*, 20 NY2d 498, 502 [1967].)

Leave to amend a pleading is "properly denied only where the proposed amendment plainly lacks merit." (*Kuslansky v Kuslansky, Robbins, Stechel & Cunningham, LLP*, 50 AD3d 1101, 1101 [2d Dept 2008]; *Thone v Crown Equip. Corp.*, 27 AD3d 723, 724 [2d Dept 2006].)

As required by CPLR 3025 (b), plaintiff has provided the court with its proposed amended complaint "clearly showing the changes or additions made to the pleading." Plaintiff proposes changes to the complaint to better align the pleadings with the evidence presented during discovery. Notably, however, plaintiff's amended complaint does not allege that Lutz came into possession of the lots in question at any time after the relationship ended between Lutz and plaintiff. Plaintiff's claims, as explained in her amended complaint, would still be time barred.

The court denies plaintiff's motion to amend the complaint. Plaintiff's amended complaint does not change her legal theories for recovery and, thus, does not overcome the fatal deficiencies of the original complaint. Plaintiff's motion to amend the complaint is denied because the claims made in the complaint are barred by the statute of limitations and the 2004 settlement agreement, and are therefore without merit.

Accordingly, it is

ORDERED that plaintiff's motion for preliminary and permanent injunction (sequence 001) is denied; and it is further

ORDERED that defendants' motion to dismiss (sequence 005) is granted; and it is further

ORDERED that plaintiff's motion for leave to amend the complaint (sequence 006) is denied; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on plaintiff and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: April 19, 2018

J.S.C.
HON. GERALD LEBOVITS
J.S.C.