11-1390-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PATRICIA COHEN,

Plaintiff-Appellant,

—against—

S.A.C. TRADING CORP., S.A.C. CAPITAL MANAGEMENT, INC., S.A.C. CAPITAL MANAGEMENT, LP, S.A.C. CAPITAL MANAGEMENT, LLC, S.A.C. CAPITAL ADVISORS, LLC, S.A.C. CAPITAL ASSOCIATES, LLC, SIGMA CAPITAL MANAGEMENT, LLC, BRETT LURIE, EDWARD BAO,

Defendants,

STEVEN A. COHEN, DONALD T. COHEN, C.P.S., P.A.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. STEVEN DOES NOT DISPUTE THAT HE RECEIVED A REPAYMENT FROM LURIE, THAT HE DISCLOSED IT ON HIS FINANCIAL STATEMENT, TOLD PATRICIA IT WAS WORTHLESS, AND THAT SHE RELIED ON HIS REPRESENTATION TO HER DETRIMENT

Defendants-Appellees Response Brief (hereafter "Steven"[1] and "Steven's Br.") does not really dispute the allegation that Steven received a return on his investment with Lurie in 1987. In the district court, Steven's lawyer took the position that Steven's $9 million investment was not a total loss. Rather, Steven accepted mortgages "in lieu of repayment." (A-310, lines 5-9). In Steven's Brief, he sings a different tune: the facts are more complicated and Patricia is wrong about them. (Steven's Br. at 11) ("There is no supposed 'repayment' of $5.5 million unaccounted for, and it appears either that Lurie withdrew his claim of 'repayment' or that Patricia, reviewing his affidavit more than 20 years later, misunderstood what he was saying.") Steven's reference to litigation documents from his lawsuit with Lurie, which he never disclosed to Patricia during their separation and which Steven did not insert into the district court record, only highlights that Patricia was never told the truth by Steven at the time. She contends Steven received $5.5 million from Lurie. Steven's shifting responses

[1] For ease of reference, "Steven" will refer to the arguments raised by both Defendants-Appellees Steven Cohen and Donald Cohen, unless otherwise noted. Both Steven and Donald Cohen are represented by the same counsel and submitted the same brief. Additionally, references to "the Complaint" and/or "the SAC" refer to Patricia's Second Amended Complaint. (A-72-89) Plaintiff-Appellant Patricia Cohen will be referred to as "Patricia" and her opening brief referred to as "Patricia's Br."

essentially boil down to what he might have said to a child: "it's more complicated than it appears, and in any event, it's none of your business."

If Steven received anything of value in 1987 and no longer had it in 1988, then he had to account for its disposition in his Net Worth Statement because, contrary to what Steven says in his Response Brief about the inapplicability of the Equitable Distribution Law, he agreed to provide one to Patricia. (A-165-166, Separation Agreement §14.4).

All Steven does is speculate that he may have received the $5.5 million in 1987 and lost it by 1988, when he prepared his Financial Statement. Steven's Br. at 17-18, 22-23. But if Steven seriously wanted to contend this is what transpired, he could have submitted a declaration to that effect in the district court and asked that his Motion to Dismiss be converted to a motion for Summary Judgment in order to put the issue to rest. But he did not do so.

Thus, the following scenario is quite plausible:

1. Steven invested $9.59 million with Lurie in the mid 1980's;
2. Lurie returned $5.5 million of the investment to Steven in 1987, when Steven was contemplating divorce;
3. Steven never told Patricia about it;
4. Steven filed for divorce in 1988;
5. Steven disclosed the full $9.59 Lurie real estate as an asset on his 1988 Financial Statement but shortly thereafter told Patricia it was "worthless" so he could keep the entire $5.5 million.

II. STEVEN WRONGLY ASSERTS THE EQUITABLE DISTRIBUTION LAW DID NOT APPLY TO HIM

Steven contends that because the Cohens agreed on the material terms of their separation, the Equitable Distribution Law does not apply to him. Steven's Br. at 21 ("The Equitable Distribution Law applies only to contested divorce proceedings"). But New York law is well-settled that parties cannot waive their rights in separation agreements:

> The right to enter into a contractual arrangement as to matrimonial matters is expressly authorized by Domestic Relations Law §236(b)(3), which provides… An agreement by the parties, before or during the marriage… However, the State is deeply concerned with marriage and takes a supervisory role in matrimonial proceedings… [C]ourts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity.

Kessler v. Kessler, 33 A.D. 3d 42, 46 (N.Y. App. Div. 2006) (quotations and citations omitted); *see also, Christian v. Christian*, 42 N.Y. 2d 63, 72 (1977) (holding that a stipulated separation agreement is subject to equitable defenses of fraud and overreaching and that the spouses have fiduciary duties to each other).

Accordingly, and as Patricia argued, as Steven's fiduciary, she was entitled to full and honest disclosure of all marital assets when negotiating the Separation Agreement. Patricia's Br. at 35-36. Thus, there is no difference between the fiduciary duties imposed on a separating spouse opting out of the Law and the Law itself.

> [T]he traditional grounds of fraudulent inducement, duress and overreaching remain as viable bases for attacking an agreement, either standing alone or in conjunction with the statutory standards of equity imposed on post-EDL [Equitable Distribution Law] agreements by N.Y. Dom. Rel. Law §236 Part B(3).

1 N.Y. Matrimonial Law and Practice, §10:5 (2010).

Moreover, the Separation Agreement expressly provided that Steven had tendered Patricia the Net Worth Statement required by the Law:

> <u>Husband [Steven] has provided wife with his net worth statement</u> and the statement of financial condition dated as of July 1, 1988, provided, however, that Husband makes no representation as to the value of the interest in a second and third mortgage on various properties involved in cooperative conversions in queens, New York in which the investment was listed on his statement of financial condition dated as of July 1, 1988 at a value of $8,745,169.

(A-165-166, Separation Agreement, §14.4) (emphasis added).[2]

The Complaint alleges Steven told Patricia it was a total loss, and she relied on this statement. Patricia asserts it was not a total loss because Lurie had already returned $5.5 million to Steven. In the district court, Steven speculated that the return of $5.5 million could have occurred without giving rise to fraud if Steven had lost that $5.5 million between his receipt of it in 1987 and the date of the

[2] The Agreement specifically notes that it takes "into consideration all relevant factors, including those set forth in Part B, Section 236 of the Domestic Relations Law of the State of New York" (A-127).

Financial Statement, July 1988. Patricia asserts that such a "loss" could not have occurred without triggering the obligation to disclose the transfer of that money. Since no such transfer is disclosed, her theory is he hid it.

Steven makes a weak argument that the transfer of the $5.5 million could have been exempt from the disclosure requirement. He states: "the Equitable Distribution Law requires only disclosure of block transfers of significant assets, not a detailed accounting of all expenditures over the previous three years." Steven's Br. at 20. Steven cites no authority for this interpretation. The exception to the disclosure requirement that Steven cites only exempts a transfer for an equivalent asset if that equivalent asset is reflected on the Statement. For the exception to apply to the $5.5 million, Steven would have to establish that this money is reflected on the Asset portion of the Statement. He has not done this. Rather, all he does is speculate that the $5.5 million could be hidden in the other assets listed. *Id.* at 20-21. Patricia is not required to prove the fraud occurred in order to establish plausibility. She has a plausible basis for asserting Steven received $5.5 million in 1987, which is not accounted for, and which vanished between the time Steven prepared his Financial Statement and the time he signed the Agreement.

III. PATRICIA IS ALLOWED TO RAISE STEVEN'S VIOLATION OF THE EQUITABLE DISTRIBUTION LAW ON APPEAL BECAUSE HE IMPROPERLY ASSERTED THAT HE WAS NOT REQUIRED TO DISCLOSE THE $5.5 MILLION TO PATRICIA IN HIS REPLY BRIEF AND DURING ORAL ARGUMENT IN THE DISTRICT COURT

Steven asserted, for the first time, in the last paragraph of his Reply Brief in Support of the Motion to Dismiss (in the district court) that he "was never under an obligation to tell Plaintiff what the Lurie investment was worth in or before 1987. His only obligation was to tell her what assets he had as of the date of the financial Statement, July 1, 1998." (Docket Entry 56 at 9-10, filed September 24, 2010.) Steven's counsel cited no authority for this statement. This was improper, and the fact that Steven's lawyer did so again at the oral argument (Patricia's Br. at 13-14, *citing* transcript of oral argument), cannot be dismissed as mere overzealous advocacy. It was calculated to deny her a chance to respond, and did so.

> The courts have characterized this tactic in a variety of ways-all negative. Blind-siding, gamesmanship, and sandbagging are the most commonly used epithets. Regardless of the name applied, the gambit has no place in the judicial system. Loading-up on a reply brief effectively results in a one-sided presentation, which is hopelessly inconsistent with the very premise on which the adversary system is based. In addition to being unfair to one's opponent, the tactic of saving everything for last adversely affects the accuracy of the judicial process, which depends on comprehensive presentations by both sides.

Autotech Tech. Ltd. Partnership v. Automationdirect.com, Inc., 235 F.R.D. 435, 437 (N.D. Ill. 2006) (*citing* authority). Accordingly, Steven's argument that he had no obligation to disclose where the $5.5 million went should have been waived both in the Reply Brief and at oral argument. *See, e.g., Emigra Group, LLC v. Fragomen, Del Rey, Bernsen & Laevy, LLP*, 612 F. Supp. 2d 330, 349 (S.D.N.Y. 2009) ("Just as a moving party will not be heard to advance a new argument for the first time in its reply brief…"); *In re Monster Worldwide, Inc. Sec. Litig.,* 251 F.R.D. 132, 137 (S.D.N.Y. 2008) (refusing to consider a new argument raised at oral argument).

The unfortunate and unjust result was that the first part of the district court's opinion was based upon the waived argument. Patricia has no choice but to respond to it on appeal, and therefore it is not a "new argument" being raised for the first time on appeal, as Steven asserts with what is best described as chutzpah. Steven's Br. at 18-19.[3] Steven cites *In re Nortel Networks Corp Sec. Litig.,* 539

[3] "With what can only be described as *chutzpah*, defined by Leo Rosten as gall, brazen nerve, effrontery, incredible guts, presumption plus arrogance such as no other word and no other language can do justice to…" *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682, 687 (7th Cir. 2008) (quotations omitted). In any event, the issue of Steven's "obligations to disclose" was ruled on by the district court and served as a basis of its decision. Regardless of whether it was properly raised below by the parties, it can be argued on appeal now. *See, e.g., United States. v. Harrell*, 268 F.3d 141, 146 (2d Cir. 2001) ("An issue is reviewable on appeal only if it was 'pressed or passed upon below.'"); *Grand Street Realty, LLC v. McCord*, No. 04-CV-4738, 2005 WL 2436214, at *11 (E.D.N.Y. September 30, 2005) ("The Supreme Court has held that a reviewing court may hear an 'issue not pressed [in the lower court proceeding] so long as it has been passed upon' by the lower court."). "A claim is 'pressed or passed upon' when it fairly appears in the record as having been raised or decided." *Harrell*, 268 F.3d at 146 (*citing* James Wm. Moore, *et al.,* 19 *Moore's Federal Practice* § 205.05[1] (3d ed.2000)).

F.3d 129, 132 (2d Cir. 2008) in support of his argument that Patricia cannot now raise the Equitable Distribution Law because it is a new argument, *i.e.*, she waived it. *See* Steven's Br. at 19. In that case, this Court held that waiver is applied equitably:

> We recognize that this Court has discretion to consider arguments waived below because our waiver doctrine is entirely prudential. Although we may exercise discretion to consider waived arguments where necessary to avoid a manifest injustice… [it will not be done when a party proffers] no reason for their failure to raise the arguments below.

Id. at 133 (citations and quotations omitted).

Here in contrast, Patricia has a compelling reason for raising the Equitable Distribution Law on appeal. And this is plainly not a case for the "prudential" application of the waiver doctrine. This Court should, as it did in *Nortel*, "review" the record in the district court to determine why Patricia did not raise the Equitable Distribution argument there. *Id.* at 132.

Indeed, it should be noted that the very manner in which Steven requests the Court to apply the waiver doctrine is calculated to conceal his counsel's sandbagging in the district court. Steven's Br. at 19 n. 3 asserts that it raised the issue in his Brief in Support of Defendants' Motion to Dismiss the Second Amended Complaint at 22 (A-293). But, that pleading did not raise the argument. A reading of the second paragraph of that page, from which Steven's Br. quotes, indicates that the argument being asserted there was that the payment of $5.5 million is not "inconsistent" with Steven's later statements that the investment was worthless, *i.e.*, that the value of the investment had declined since he received the payment. This is a separate argument entirely, which Patricia addressed in the district court (Docket Entry 55, filed September 14, 2010, at 22-24). Therefore, Steven's waiver argument should be rejected.

IV. PATRICIA'S DUTY OF DILIGENCE DID NOT REQUIRE HER TO FIND THE *COHEN v. LURIE* COURT FILE IN 1991; STEVEN CITES NO AUTHORITY SUPPORTING HIS CONTENTION THAT IT DID

This Court applies a "diligence discovery rule of accrual" to RICO claims. Patricia's Br. at 23-24. That is, the statute of limitations does not accrue until "the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." *Corcoran v. New York Power Auth.*, 202 F.3d 530, 544 (2d Cir. 1999). Thus, assuming Patricia was on inquiry notice of some sort of hiding of assets in 1991, then she is "charged with constructive knowledge of whatever a diligent inquiry would have discovered." Patricia's Br. at 24 (quotations omitted). To reiterate, the duty to inquire does not by itself start the statute of limitations.

Steven asserts that Patricia should have found her injury and sued Steven in 1991 over the Lurie repayment because she knew she was injured, hired a lawyer, and "asserted a claim." Steven's Br. at 36. Thus, Steven wants the diligence inquiry to be made on the papers, as a matter of law. But Steven cites no case where a court has done this. And this Court has twice held to the contrary, that diligence is a fact question for the jury. *See Robertson v. Seidman,* 609 F.2d 583, 592 (2d Cir. 1979); *Rothman v. Gerger*, 220 F.3d 81, 97-98 (2d Cir. 2000).

Steven tries to distinguish *Rothman* because, according to him, the plaintiff obtained new, previously unavailable evidence after the statute of limitations had run, implicating the accounting firm. Steven's Br. at 37 ("Nor can she [Patricia] claim that the facts on which this action is based were 'not readily accessible to the public'"). Patricia admits the *Cohen v. Lurie* file was in a courthouse in Manhattan available to the public in 1991, but she had no knowledge of the secret Lurie repayment, and did not even know Steven had sued Lurie. Therefore, she had no reason to search for it. There is no general obligation to search public records "in the absence of some knowledge" that would lead the plaintiff to them. *Guedj v. Dana,* 11 A.D. 3d 368 (N.Y. App. Div. 2004). This principle has been applied where a woman sued her ex-husband for concealing assets in their divorce, rejecting the husband's assertion that she lacked diligence for not finding the fraud earlier by searching public documents. *Harding v. Naseman*, No. 07 Cv. 8767, 2009 WL 1953041, at *20 n.37 (S.D. N.Y. July 8, 2009).

This is quite similar to what the plaintiff argued in *Rothman*: "the PC Data report on which they rely contains information that was customized for them, costly to obtain, and not readily accessible to the public." *Rothman,* 220 F.3d at 97-98; *see also* Patricia's Br. at 25-26. This Court held that the dispute as to whether the plaintiff was diligent in waiting a year after inquiry notice to file an amended complaint against the accounting firm was a fact question despite the accounting firm's assertion that all of the data was publicly available. *Id.* Patricia is no less diligent than the plaintiff in *Rothman*. She simply had no reason to know about Lurie's involvement in the fraud, and no readily accessible public information existed which would have done so.

Steven tries to distinguish *Robertson* because the plaintiff there waited for the S.E.C. to sue the accounting firm, which the court found "significant." Steven's Br. at 37. However, this Court held that the plaintiff did not demonstrate a lack of diligence by waiting for the S.E.C. "If the SEC with its commendable expertise and specialized investigative teams was unable to discover the complicity of these accountants until shortly before its Opinion and Order of September 1, 1976 was released, it cannot be said as a matter of law that appellant should have discovered their participation any earlier." *Robertson*, 609 F.2d at 592. This reasoning does not help Steven's argument. It undercuts it because no government agency, or anyone else, gave Patricia any assistance in discovering the secret Lurie repayment. And if a plaintiff is diligent for having waited for the government to do the investigating, then it stands to reason that a plaintiff is diligent for doing it herself.

And at least one district court has applied this reasoning to a divorce case directly on point and refused to find that the failure to discover a court file establishes the divorced woman was not diligent. *See* Patricia's Br. at 28-29 (discussion of *Perlberger v. Perlberger*, No. CIV. A. 97-4105, 1999 WL 79503, at *3-4 (E.D. Pa. Feb. 12, 1999)). Steven contends that case is distinguishable, as did the district court, because the court file the plaintiff discovered in 1996, five years after her divorce, was not available at the time of the divorce. Steven's Br. at 38. Thus, the implication is that because the *Cohen v. Lurie* court file was available in 1991, Patricia should be deemed non-diligent for not having found it. Yet, this is simply another way of saying that the district court was correct in concluding she was not diligent based upon the pleadings. This Court has held otherwise twice. If Steven were correct that the failure to find and rely upon publicly available documents made a plaintiff non-diligent as a matter of law, then both *Robertson* and *Rothman* would have been decided for the defendants. For in both cases, the plaintiffs knew of their injury *and* the identities of some of the injurers before the statute of limitations had run, but waited to sue new parties until they learned more. The *Rothman* Court held that the plaintiff was on inquiry notice of the fraud within the statute of limitations, as does Steven here. *See* Patricia's Br. at 25; *see also Rothman,* 220 F.3d at 96-97. But that was not the same thing as due diligence in suing, which the plaintiff contended required more data. This Court agreed, highlighting the difference between the two concepts. Patricia's Br. at 26. Steven believes the district court was correct in conflating the two concepts. But he cites no authority in support of his view and neither did the district court.[4]

Finally, Steven suggests Patricia should have inquired about the Lurie investment in 1991 because the asset constituted more than half of their net worth. Steven's Br. at 30. No authority is cited to support this proposition. And Steven is wrong because when the Financial Statement was tendered to Patricia, Steven was her fiduciary, and she was entitled to rely on the truth of his assertions and not inquire further. Patricia's Br. at 36. And this was no less the case when Steven orally told Patricia that the Lurie investment was worthless, which was during their settlement negotiations. Patricia's 1991 Motion alleged Steven understated his 1989 income. Patricia's Br. at 5-6. The Motion made no mention of Lurie. *Id*. According to Steven, she should have suspected that everything on the Financial Statement was false and sought to reopen the entire settlement. *See* Steven's Br. at 30 ("It would have been reckless in the extreme for either Patricia or her counsel to

[4] *See also, Harding v. Naseman,* No. 07 Cv. 8767, 2008 WL 4900562, at *9 (S.D.N.Y. Nov. 14, 2008), cited at Patricia's Br. at 29 (same proposition).

make no investigation of the Lurie investment as part of their attempt to void the Settlement Agreement on grounds of fraud").

But this is simply wrong. In response to her 1991 Motion, Steven submitted an affidavit vigorously denying any misrepresentation of his finances and reiterating that the Lurie investment was worthless. *See* Patricia's Br. at 5. He also stated that Patricia had obtained comprehensive discovery of his finances. "Defendant's [Patricia's] counsel repeatedly requested information, more information, clarification, and documentation concerning my finances. They received whatever they requested." (*See* Docket Entry 55-2, Plaintiff's Response to Defendant's Motion Dismiss, ¶ 4; *see also* Patricia's Br. at 4-5).

A party has no obligation to inquire about potential fraud after the defendant offers a "seemingly benign explanation." *Newman v. Warnaco Group, Inc.*, 335 F.3d 187, 190 (2d Cir. 2003). This is especially so when there is a fiduciary duty between the parties. "It is the general rule that the plaintiff's negligence is not a defense to an action for fraud and deceit…Where there is a fiduciary relationship between the parties, there can be no question of negligence in reposing confidence in the one from whom good faith is due." 60A New York Jurisprudence 2d, Fraud & Deceit, §210 (2001 West).

In conclusion, the district court was wrong to conclude that Patricia was not diligent in pursuing her claim on a motion to dismiss. Steven has cited no authority which would sustain that conclusion.

V. THE QUESTION OF WHEN THE FIDUCIARY DUTY BETWEEN THE COHENS ENDED IS ALSO A QUESTION OF FACT

To reiterate, the arguments, *supra*, do not depend upon any tolling of the statute of limitations. As Patricia argued in the district court (in response to the Motion to Dismiss), the statute of limitations for RICO does not *accrue* until Patricia, with reasonable diligence, discovered her injury. This occurred in 2008 and at that point, the statute of limitations began to run. (*See* Docket Entry 55 at 5-6, 12, 21-22.) The discovery rule is not a tolling doctrine. *See, e.g., Rothman,* 220 F.3d at 98 n.1; *Heins v. Potter*, 271 F. Supp.2d 545, 554 (S.D.N.Y. 2003); *see also* Patricia's Br. at 46 n.23. Patricia made this clear in the district court, as Steven notes. Steven's Br. at 39. Therefore, if the Court agrees that Patricia's diligence was wrongly decided by the district court, then her case could proceed without determining if a fiduciary duty between Steven and Patricia existed after their 1990 divorce (and whether the statute of limitations was "tolled"). And Steven has tacitly conceded that he was Patricia's fiduciary until that time. Steven's Br. at 39 ("At that time, [March 13, 1990] if not before, their fiduciary relationship as husband and wife ended"). Accordingly, Steven acknowledges that they were fiduciaries during the separation negotiations, and critically when he provided her with his Financial Statement and made the verbal statement that the Lurie investment was "worthless."

Patricia made an alternative argument for tolling the statute of limitations which contends that the fiduciary duty extended until the Amendment to the Separation Agreement (hereafter "the Amendment") was finalized in 1992. *See* Patricia's Br. at 33. This is so because Patricia's 1991 Motion led to a substantial 16 page revision of the Separation Agreement on January 6, 1992. (A-247). Acceptance of the Amendment resolved Patricia's 1991 Motion. (A-261, ¶17). Patricia believes that the negotiations over the financial and other provisions of the Amendment, which required more exchanges of financial information, continued the close, cooperative relationship required to reach the Separation Agreement. Thus, under this Court's holding in *Ciccone v. Hersh*, No. 08-0702-cv, 320 Fed. Appx. 48, 50 (2d Cir. April 7, 2009), the fiduciary relationship continued until entry of the Amendment. *See also* Patricia's Br. at 40. Steven asserts the fiduciary relationship ended earlier. He cites *Morris v. Crawford,* 304 A.D. 2d 1018, 1021 (N.Y. App. Div. 2003), but that case did not involve any continuing and ongoing relationship and is therefore, not analogous. *See* Steven's Br. at 39-40.

However, it makes little difference when the fiduciary relationship ended. What is key is that there was one, and once it ended, the proper accrual rule must be followed. And the accrual rule for a New York common law breach of fiduciary duty claim (Count III of the Complaint) is "two years from the time the plaintiff...could with reasonable diligence have discovered it." N.Y. Civil Practice Law and Rules §213. *See also* Patricia's Br. at 39 n.19. Steven does not disagree. Thus, as with the RICO claim, if Patricia was diligent in pursuing her claim and learned of it in 2008, as alleged, then it was timely filed in 2009. Similarly, the New York common law fraud claim (Count II) also accrued at the same time. *See Id.* at 30 n. 15.

VI. OTHER ISSUES RAISED BY STEVEN'S BRIEF

A. <u>Divorce Cases Are Not Exempt From RICO</u>

Steven cites a recent opinion from a district court in this circuit dismissing a RICO case brought by a wife against her former husband arising from a similar scheme to conceal assets in their divorce proceedings. Steven's Br. at 47 (*citing Rosner v. Rosner*, 766 F. Supp.2d 422, 426 (E.D. N.Y. 2011)). This case was not cited in the district court and holds:

> There is only one victim in this alleged scheme-namely, the plaintiff- and the alleged societal effect here is minimal… The courts that have previously addressed this type of allegation have almost universally found such claims to be a misuse of RICO.

The *Rosner* court did not mention *Perlberger v. Perlberger*, cited *supra,* which did not find such a claim to be a "misuse of RICO." Steven's argument that a scheme to defraud a spouse of assets in a divorce proceeding cannot form part of a pattern of racketeering activity, and therefore is exempt from the reach of RICO, is wrong and unsupported. This Court rejected a similar argument with regard to the use of RICO against a public utility for charging excessive rates. *County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1307-1308 (2d Cir. 1990). There, the district court had dismissed the County's RICO case for the same reason advanced by Steven now, namely that the dispute belonged in a specialized state court (there, the utility commission, and here, a Manhattan divorce court). Thus, the district court held, "RICO does not apply to a… case such as [this]." *Id.* at 1305. This Court reversed because in enacting RICO, Congress used broad language in defining a "person" (who may use the law as a plaintiff) and decreed the law is to be "liberally construed." *Id.* at 1306-1308.[5] Patricia is a "person," and therefore she has standing to use RICO for an injury to her property. Once that is understood, the question becomes whether the Complaint alleges a pattern of racketeering activity. It does, because unlike the *Rosner* plaintiff, Patricia has alleged Steven has perpetrated four separate schemes violating different, and numerous, victims, not just her. *See, e.g., United States v. Burden,* 600 F3d 204, 216 (2dCir. 2010) (detailing a "pattern of racketeering activity"). For this reason, her Complaint is an appropriate use of RICO

[5] The Supreme Court recently agreed with this approach. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008).

Steven has also reiterated a number of arguments made in the district court but not relied upon in its Opinion. Steven's Br. at 44-52. Patricia responded to all of these arguments in the district court and responds here as well.

B. Steven's Argument that Patricia Could Not Reasonably Rely on Any Statements Relating to the Value of the Lurie Investment

For example, Steven argues that Patricia's fraud allegations are defective because Patricia could not reasonably rely on any statements relating to the value of the Lurie Investment since Steven expressly disclaimed that it had any specific value. Steven's Br. at 45-46. As a matter of law, Patricia cannot waive her right to be told the true value of her martial assets. *See supra* 3-4 (discussion of this issue, *citing Kessler*, 33 A.D.3d at 46 and *Christian*, 42 N.Y.2d at 72). Therefore, she could rely on Steven's oral representation that the Lurie investment was worthless.[6]

C. Patricia's Alternative Tolling Argument

Steven also contends that Patricia's reliance on the doctrine of fraudulent concealment is misplaced. Steven's Br. at 43-44. Patricia addressed these arguments *supra* 15-16 and in Patricia's Br. at 45-57, and incorporates these arguments herein.

[6] *Cohen v. Cohen*, 1 A.D. 2d 586 (N.Y. App. Div. 1956), a case on which Steven strongly relies (Steven's Br. at 46), is easily distinguishable because it was decided *before* the Equitable Distribution Law was enacted. Thus, it does not support Steven's argument that he was under no obligation to disclose the Lurie Repayment, regardless of any disclaimers in the Separation Agreement about its precise value.

D. <u>Steven's "Pattern" Argument</u>

Next, Steven asserts that there is no "pattern of racketeering" because only one scheme injured Patricia. Steven's Br. at 47-50. According to Steven, every scheme and predicate act alleged in a pattern must harm Patricia. *Id.* The Complaint details four schemes, one of which injured Patricia, and three of which injured others. (A-74-83; the one scheme that injured Patricia is called "the Scheme Against Patricia," A-74-79, ¶¶ 12-45). The Complaint alleges all of these predicate acts are related. (A-84, ¶80). Steven cites no Second Circuit authority holding that a RICO plaintiff must be injured by every predicate act within a pattern. The Second Circuit has held that the plaintiff need only be injured by one predicate act alleged in a pattern. *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1347 (2d Cir. 1994); *accord*, *Giuliano v. Everything Yogurt, Inc.*, 819 F.Supp. 240, 243 n.3 (E.D.N.Y. 1993). Therefore, Patricia only needs to be injured by one act in the pattern, which she alleges. This makes perfect sense because as this Court has held, part of the pattern analysis focuses on "the number of both participants and victims, and the presence of separate schemes…" *First Capital Asset Management, Inc. v. Satinwood, Inc.,* 385 F.3d 159, 181 (2d Cir. 2004). And taking all of the victims and schemes alleged in the Complaint, and the duration of these schemes, several years, Patricia has alleged a closed pattern of racketeering.

Steven then argues that securities law violations cannot constitute RICO violations. Steven's Br. at 48-49. The RICO amendment referenced by Steven, however, did not go into effect until December 1995, and it was not retroactive. *See In re MTC Electronic Technologies Shareholder Litig.* 74 F.Supp.2d 276, 277 - 278 (E.D.N.Y. 1999). Here, because the RICO acts involving securities law violations took place in 1985 and 1991 respectively, Patricia can rely on both to establish a pattern.[7]

E. <u>Patricia Suffered an Injury to Her "Business or Property"</u>

Steven also contends that Patricia's injury does not qualify as "business or property" under RICO because her injury is based on a mere expectancy interest. Steven's Br. at 50-51. Steven is wrong. The cases cited by Steven hold that a party in a divorce action has no expectancy in an award by a court of a particular portion of martial assets. These cases do not apply here because Steven and Patricia agreed to a distribution of assets. Her right to receive a share of the assets on the financial statement was stipulated. Therefore, Patricia had an interest in money, and money is clearly "property." *See e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339-340 (1979). Moreover, even if the precise amount of the secret Lurie repayment was not known, this certainly would not preclude Patricia's RICO

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[7] The cases Steven cites on this point (Steven's Br. at 49), including *MLSMK Inv. Co. v. JP Morgan Chase & Co.,* 651 F.3d 268, 274-278 (2d. Cir 2011), do not address this issue and do not alter this analysis in any way.

claim. The Second Circuit has held that RICO claims accrue when they become ascertainable. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988).

F. <u>The Complaint Has Alleged a RICO Enterprise</u>

Additionally, Steven asserts that the Complaint does not allege a RICO enterprise. Steven's Br. at 51-52. The Complaint alleges that Steven perpetrated the racketeering activity through two different enterprises. (A-85-86, ¶¶86-88). Without citation to any applicable authority, Steven asserts that the allegations that he perpetrated the Scheme Against Patricia through the SAC corporation enterprise is inadequate. SAC Trading Corp. is alleged to have been a New York corporation, wholly owned by Steven. (A-74, ¶16).[8] Steven was also president. *Id.* This Court requires the person committing RICO violations "participat[e] in the operation or management of the enterprise itself." *Satinwood, Inc.*, 385 F.3d at 176. Pleading this requirement is a "relatively low hurdle for plaintiffs to clear…" *Id.* The Complaint has done so here. Patricia's allegations that Steven was President and owner of the SAC enterprise does so. (A-74, ¶16).

In a related fashion, Steven then argues that the Complaint does not plead any facts indicating that the alleged RICO enterprise was necessary to the RICO violations of mail fraud perpetrated against Patricia. Steven's Br. at 51. This

[8] Thus, it fits into the broad definition of "enterprise" in the statute. 18 U.S.C. §1961(4).

Court has held that: “That relationship is satisfied if the offense [the RICO violations] was related to the enterprise’s activities, whether or not it was in furtherance of those activities, or if the defendant was enabled to commit the offense solely by virtue of his position in the enterprise.” *United States v. Thai*, 29 F.3d 785, 815 (2d Cir. 1994). Plainly, the Complaint’s allegations that Steven committed the mail fraud constituting the Scheme Against Patricia by using SAC’s money (the Cohens’ martial assets) and disbursing them from SAC to Lurie, would satisfy both of these criteria. Steven was enabled to commit the predicate acts solely by virtue of his position in the SAC enterprise (*i.e.*, president). *United States v. Brandao*, 539 F.3d 44, 53 (1st Cir. 2008) cited by Steven (Steven’s Br. at 51) does not hold to the contrary. Therefore, the Complaint has alleged a proper enterprise, SAC Trading Corp., Steven’s participation in it, and that the RICO predicate acts resulted from his role in it.

G. Patricia’s Claims for Breach of Fiduciary Duty

Finally, Steven reiterates his argument that the Complaint fails to allege a claim for breach of fiduciary duty because there is no fiduciary duty between spouses as a matter of law. *See* Steven’s Br. at 52. Steven earlier has conceded there was a fiduciary relationship between himself and Patricia (*see* discussion *supra* at 15-16). Patricia has cited many New York authorities establishing the fiduciary duty between spouses. *See e.g.,* Patricia's Br. at 33-38. Accordingly, Steven's argument is wrong.

With respect to Donald Cohen, while Steven notes that an accountant does not generally owe a fiduciary duty to a client (Steven's Br. at 52), a claim for a breach of fiduciary duty can arise in situations when the accountant manages the client's investments or when the accountant purposely conceals information about the client's investments. *See, e.g., Caprer v. Nussbaum*, 36 A.D.3d 176, 194 (N.Y. App. Div. 2006) ("As a general rule, accountants are not fiduciaries as to their clients*, except where the accountants are directly involved in managing the client's investments*") (citations omitted, emphasis added, collecting cases)*; Lavin v. Kaufman, Greenhut, Lebowitz & Forman*, 226 A.D.2d 107, 109 (N.Y. App. Div. 1996) (holding that a claim for breach of fiduciary against accountant should not be dismissed when allegations of fraud and omissions are particularized). Both situations have been alleged by Patricia, and for this reason, her claim for breach of fiduciary duty against Donald is also valid. (A-74-75, ¶¶ 17-18, 20, 22).

VII. CONCLUSION

For the reasons stated herein, and in Patricia's Br., the district court wrongly concluded Patricia's claims accrued in 1991and further erred in concluding she was not diligent in pursuing her allegations of fraud at that time. This was error as there are issues of fact in this case with regard to what Patricia knew, when she knew it, and whether the discovery she sought from Steven in 1991 was "diligent" as a matter of law. For these reasons, the dismissal of her Complaint (Counts I, II, and III) pursuant to Rule 12(b)(6) was in error and reversal is required.

Dated: November 14, 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,710 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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