

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D36151
O/kmb

____AD3d____

Submitted - September 11, 2012

RANDALL T. ENG, P.J.
REINALDO E. RIVERA
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2011-04792

DECISION & ORDER

Robert S. Trinagel, respondent-appellant,
v Mindy L. Boyar, appellant-respondent.

(Index No. 3633/02)

Paul Eisenstein, Woodbury, N.Y., for appellant-respondent.

Michael N. Klar, Carle Place, N.Y., for respondent-appellant.

In a matrimonial action in which the parties were divorced by judgment entered October 30, 2003, the defendant appeals, as limited by her brief, from so much of an order of the Supreme Court, Suffolk County (McNulty, J.), dated April 8, 2011, as denied, after a hearing, her motion for an award of an attorney's fee pursuant to the parties' stipulation of settlement dated August 4, 2003, and the plaintiff cross-appeals from so much of the same order as denied his motion for an award of an attorney's fee.

ORDERED that the cross appeal is dismissed as abandoned; and it is further,

ORDERED that the order is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The facts underlying this appeal are set forth in our decision and order on a previous appeal (*see Trinagel v Boyar*, 70 AD3d 816).

“Where the parties have agreed to provisions in a settlement agreement which govern the award of attorney's fees, the agreement's provisions, rather than statutory provisions, control” (*Matter of Berns v Halberstam*, 46 AD3d 808, 809; *see Arato v Arato*, 15 AD3d 511, 512). In this

case, the parties' stipulation of settlement dated August 4, 2003, which was incorporated but not merged into their judgment of divorce, contained provisions governing the award of an attorney's fee. Those provisions do not expressly provide that the defendant can recover an attorney's fee incurred in defending against the plaintiff's motion to modify the child custody provisions of the parties' stipulation of settlement. In addition, they do not provide for the recovery of an attorney's fee incurred in defending against the plaintiff's appeal from the order denying that motion. Accordingly, the Supreme Court properly denied the defendant's motion for an award of an attorney's fee pursuant to the stipulation of settlement.

The cross appeal must be dismissed as abandoned (*see Sirma v Beach*, 59 AD3d 611, 614), as the brief filed by the plaintiff does not seek reversal or modification of any portion of the order.

ENG, P.J., RIVERA, HALL and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court