

Hinck v Hinck

2012 NY Slip Op 31276(U)

May 4, 2012

Sup Ct, Suffolk County

Docket Number: 08-42441

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 4-29-11 (#003)
MOTION DATE 5-27-11 (#004)
ADJ. DATE 2-10-12
Mot. Seq. # 003 - MG; CASEDISP
004 - X MD

-----X

KERRY HINCK,

Plaintiff,

- against -

CRAIG HINCK,

Defendant.

-----X

ROBERT J. DEL COL, ESQ.
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Upon the following papers numbered 1 to 52 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers 26 - 44; Answering Affidavits and supporting papers 45 - 52; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the portion of the defendant's motion for an order pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint is granted; and, it is further

ORDERED that the portion of the defendant's motion for an order granting him attorney's fees in the sum of \$33,759.36 is granted to the extent that the sum of \$7,042.50 is awarded to defendant as attorney's fees; and, it is further

ORDERED the plaintiff's cross motion for an order denying defendant's motion and pursuant to CPLR 3212 granting her summary judgment on her complaint is denied.

This is a plenary action which seeks the vacatur of an October 18, 2007 Stipulation of Settlement ("the settlement agreement"), which resolved the underlying divorce action between the parties, and was incorporated but not merged into the Judgment of Divorce signed by the Hon. Andrew A. Crecca, A.J.S.C. on April 21, 2008 and entered on May 6, 2008. Plaintiff alleges in this action that the settlement agreement was unconscionable because the terms of the agreement were so "lopsided and shockingly unfair" as to render it void *ab initio*; that it was the product of fraud, duress, mistake, and overreaching; that she is entitled to reformation of the contract because she was "lied to, misled, tricked

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and coerced” into signing the agreement; and, that the agreement should be vacated because the attorney, who represented her at the time she signed the agreement, was suffering from an emotional or mental infirmity. Plaintiff alleges that the settlement agreement was based upon an ante-nuptial agreement entered into by the parties on November 21, 1996, approximately five months after their marriage (*i.e.* June 22, 1996), in which she “waive[d], release[d] and renounce[d] all claims and rights which, she might, or could have, as wife, surviving spouse or otherwise, in the stock of Hinck Electric, Inc., wherever situated, which Mr. Hinck, now has, or may hereafter acquire and/or own as separate property.” She alleges that she was “economically coerced or tricked” into signing the ante-nuptial agreement which significantly affects her share of the matrimonial *res* and, as a result of its “use” in the divorce proceedings, she was forced, coerced, tricked, and misled into signing a one-sided settlement agreement. She alleges specifically that the settlement agreement was unfair because she was not awarded any interest in defendant’s business, Hinck Electric and that she received an inequitable amount for child support and maintenance. Plaintiff claims that the ante-nuptial agreement was actually a “cross purchase agreement” for defendant’s company.

Defendant now moves for an order dismissing all of the claims in plaintiff’s plenary action. He maintains that there are no triable issues of fact, asserting that the settlement agreement was fair and conscionable when made and not the product of fraud or overreaching. Defendant asserts that on October 23, 2006, the Hon. Joseph Farneti, A.J.S.C. denied plaintiff’s application to vacate the ante-nuptial agreement in the course of the matrimonial proceeding, and that the Appellate Division upheld this decision in *Hinck v Hinck*, 44 AD3d 619, 814 NYS2d 884 (2d Dept 2007) when it wrote “[i]n an action for a divorce and ancillary relief, the [plaintiff herein] appeals from an order of the Supreme Court, Suffolk County [Farneti, J.], dated October 23, 2006, which denied her motion, in effect, for summary judgment setting aside the parties’ postnuptial agreement. Ordered that the order is affirmed, with costs.” (*Id* 619). Defendant posits that because the ante nuptial agreement has been determined previously to be valid and enforceable, the stipulation of settlement in the matrimonial action which was negotiated in reliance upon that same ante-nuptial agreement is not the result of fraud, duress, mistake, or overreaching and is therefore, not unconscionable. Defendant seeks counsel fees in connection with this matter claiming that he is entitled to same, pursuant the Stipulation of Settlement, Article XVI which states, “[i]f either party by any action, proceeding, defense, counterclaim or otherwise seeks to vacate or set aside this stipulation or declare any of its terms and conditions as invalid, void, or against public policy, by any reason, including but not limited to fraud, duress, incompetency, overreaching or unconscionability, said party shall reimburse the other party and be liable for any and all such party’s reasonable attorney’s fees and expenses, provided that such action, proceeding, counterclaim or defense results in a decision, judgment, decree or order dismissing or rejecting said claims.” The affirmation of defendant’s attorney, as well as the statements of services rendered, indicate that the total amount of attorney’s fees incurred by defendant were \$33,759.36.

Plaintiff cross-moves, claiming that defendant’s motion must be denied and that she is entitled to summary judgment on her complaint. Her papers in support of her cross motion and in opposition to defendant’s motion do not address the defendant’s request for counsel fees. She does not actually oppose the request for attorney’s fees, nor does she request a hearing in connection with the amount of counsel fees requested by defendant.

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Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

It is clear that agreements to settle matrimonial disputes are judicially favored and must not be easily set aside (*Simkin v Blank*, ___NY2d ___, 2012 NY Slip op 02413 [Ct App 2012]). “Generally, separation agreements which are regular on their face are binding on the parties, unless and until they are put aside. Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions. Furthermore, when there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement, courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided” (*Christian v Christian*, 42 NY2d 63, 72, 73, 396 NYS2d 817 [1977], [citations omitted]). “However, because of the fiduciary relationship between husband and wife, separation agreements generally are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract” (*Levine v Levine* 56 NY2d 42, 47, 451 NYS2d 26 [1982]). Despite this close scrutiny, agreements which are fair on their face will be enforced absent proof of fraud, duress, overreaching or unconscionability (*Schultz v Schultz*, 58 AD3d 616, 871 NYS2d 636 [2d Dept 2009]; *Cosh v Cosh*, 45 AD3d 798, 847 NYS2d 136 [2d Dept 2007]).

An agreement is not unconscionable because there is an unequal division of assets or because some of its provisions may have been “improvident or one-sided” (*Schultz v Schultz, supra* at 616; *Cosh v Cosh, supra*; *O’Lear v O’Lear*, 235 AD2d 466, 652 NYS2d 1008 [2d Dept 1997]). Overreaching is not established by the fact that a party was not represented by counsel, especially when the party was fully informed of his/her right to retain counsel and proceeded without obtaining an attorney (*Wilson v Neppell*, 253 AD2d 493, 677 NYS2d 144 [2d Dept 1998] *appeal denied* 92 NY2d 816, 683 NYS2d 759 [1998]). Unsubstantiated allegations of spousal abuse are insufficient to establish that an agreement was procured by duress (*Cosh v Cosh, supra*), and a claim that an agreement was signed under duress may be rebutted by an acknowledgment to the contrary in the agreement itself (*Gaton v Gaton*, 170 AD2d 576, 566 NYS2d 353 [2d Dept 1991]; *Carosella v Carosella*, 129 AD2d 547, 514 NYS2d 42 [2d Dept 1987]). Conclusory unsubstantiated allegations of unconscionability are

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not sufficient to defeat a motion for summary judgment (*Cioffi-Petrakis v Petrakis*, 72 AD3d 868, 898 NYS2d 861 [2d Dept 2010]).

In a matrimonial proceeding, where a party neither objects to the resolution of the application for attorney's fees on the papers submitted, nor requests an evidentiary hearing on that issue, he/she has waived his/her right to a hearing on that matter (*see Rubio v Rubio*, 92 AD3d 859, 938 NYS2d 807 [2d Dept 2012]; *Pascarella v Pascarella*, 66 AD3d 909, 886 NYS2d 636 [2d Dept 2009]; *Sieratzki v Sieratzki*, 8 AD3d 552, 779 NYS2d 507 [2d Dept 2004]; *Bengard v Bengard*, 5 AD3d 340, 772 NYS2d 526 [2d Dept 2004]).

Here, the settlement agreement provided, *inter alia*, that plaintiff would receive a Qualified Domestic Relations Order for her share (*i.e.* \$122,374.36) of defendant's retirement account, the entire equity in the marital business known as Tweak Design, Inc., approximately ten per cent (10%) of the value of defendant's real estate holding company (*i.e.* \$20,800.00), proceeds from the sale of the marital premises (approximately \$234,400.00, as agreed upon in a separate agreement), and proceeds from a second parcel of realty which appear to be approximately one half of the net equity in the realty at the time of the settlement agreement (approximately \$75,000.00). In addition, plaintiff was to receive \$100.00 per week for three years as and for maintenance and \$2500.00 per month as and for child support for the two infant issue of the marriage (without a recalculation of child support after the emancipation of one child). These figures were based upon defendant's gross income of \$132,000.00, which was agreed to by the parties after Financial Appraisal Services Ltd. conducted an investigation into defendant's earnings, (the basic child support obligation was \$2,431.00 per month for two children, thus there was a slight upward deviation from the basic child support guidelines). The defendant agreed to pay 100% of the co-payments incurred on behalf of the infant issue and 50% of child care expenses incurred by the plaintiff as a result of her employment. Defendant was entitled, pursuant to the terms of the settlement agreement, to claim the two infant issue as tax dependents, unless and until plaintiff's earnings reached \$35,000.00 per year, at which time they would each claim one child as a dependent.

Plaintiff's attorney submitted a fifty-two page, seventy-eight paragraph document entitled "Memorandum of Law in Opposition to Defendant's Order to Show Cause" executed, but not affirmed by him, which included a statement that the "said stipulation was patently unconscionable and awarded Plaintiff zero in equitable distribution." Although she did not receive a distributive share of defendant's interest in Hinck Electric, plaintiff received over \$400,000.00 in equitable distribution as is described in the preceding paragraph. Insofar as the agreement provided for child support and maintenance, based upon an appraisal of his earnings, plaintiff's self-serving declarations that defendant earned over \$500,000.00 at the time the settlement agreement was signed, is of no import to this Court. The underlying ground for each of plaintiff's assertions that the settlement agreement is unconscionable, rests upon the fact that she was awarded no share of Hinck Electric. However, the basis for her failure to receive a distribution from Hinck Electric was the ante-nuptial agreement which the Appellate Division has refused to set aside (*Hinck v Hinck, supra*).

The fact that plaintiff's previous attorney was "infirm" and subsequently suspended from the practice of law by a Decision and Order of the Appellate Division, Second Judicial Department on June 5, 2008, does not, in and of itself, render the settlement agreement unconscionable or void. Plaintiff has

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not shown how his actions rendered the agreement unfair on its face, and as the Courts have held, one-sided provisions or an unequal division of assets do not necessarily render an agreement unconscionable (*Schultz v Schultz, supra* at 616; *Cosh v Cosh, supra*; *O'Lear v O'Lear, supra*).

Accordingly, since plaintiff has failed to show that the settlement agreement should be set aside as unconscionable and the Judgment of Divorce vacated, her motion is denied and defendant's motion for summary judgment dismissing the complaint is granted. Additionally, the defendant is awarded a counsel fee in regard to this application in the amount of \$7,042.50. The settlement agreement which was incorporated but not merged into the Judgment of Divorce provides for an award of counsel fees in the event that either party brings an action to vacate or set aside this stipulation or declare any of its terms and conditions as invalid, void, or against public policy, by any reason, including but not limited to fraud, duress, incompetency, overreaching or unconscionability and is unsuccessful in that action. Furthermore, the plaintiff neither challenged the reasonableness of the fees requested nor did she request a hearing in regard to the value and extent of the services provided (*see, Rubio v Rubio, supra; Pascarella v Pascarella, supra; Sieratzki v Sieratzki, supra; Bengard v Bengard, supra*). However, it appears that the additional \$26,716.86 sought in counsel fees by defendant emanates from matters that were litigated in the Matrimonial Part, and therefore the application for such fees would be more appropriately pursued in that Part.

The defendant is awarded a money judgment against the plaintiff representing an award for counsel fees. Accordingly, the Clerk of the County of Suffolk is directed to enter and docket a money judgment in favor of the defendant and against the plaintiff in the amount of \$7,042.50 representing same.

Dated: 5/4/2012

Hon. Denise P. Moffa

J.S.C.

X FINAL DISPOSITION NON-FINAL DISPOSITION