

Valkavich v Valkavich
2012 NY Slip Op 31927(U)
July 12, 2012
Supreme Court, Suffolk County
Docket Number: 11-17166
Judge: Ralph T. Gazzillo
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longer pending, a money judgment and a modification order having been entered after a decision was rendered in February 2012; and, it is further

ORDERED that the motion by defendant Alan L. Finkel for an order dismissing the complaint as against him is granted; and, it is further

ORDERED that the cross motion by defendant Carol Marie Valkavich for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against her is granted.

Plaintiff's complaint contains thirty causes of action, twenty-two of which seek to cancel, set aside, and declare null and void a Stipulation of Settlement dated March 13, 2007 and the First Amendment dated July 7, 2007 executed by plaintiff and defendant Carol Marie Valkavich and prepared by The Divorce Mediation Center, of which defendant Alan L. Finkel is a principal. Plaintiff also seeks punitive damages, future child support and reimbursement of child support paid, and attorney's fees in his action. Plaintiff, Paul Robert Valkavich, and defendant Carol Marie Valkavich ("the parties") were married on January 25, 1997 and have two issue of the marriage, to wit: Tyler James (d.o.b. September 8, 1998) and Ashley Dona (d.o.b. October 22, 2001). In or about May 2005¹ the parties entered into a written agreement with The Divorce Mediation Center for mediation of a settlement concerning the dissolution of their marriage. On March 13, 2007 the parties executed a Stipulation of Settlement prepared by defendant Alan L. Finkel, the director of The Divorce Mediation Center, and on July 7, 2007 they executed a First Amendment to the stipulation.

Pertinent portions of the agreement between the parties and The Divorce Mediation Center state as follows: "[a]t the end...of the first session, you will be asked to complete a financial disclosure package. However, you are free to waive this homework assignment, provided you both agree to do so. ... **We highly recommend that prior to signing the final agreement**, each of you spend sufficient time in fully reviewing it (and bringing it to your attorney, accountant, guru, parent, sibling, or other adviser or confidant) to be confident that it contains everything you need, and that the agreement is fair." Each of the parties executed a Financial Waiver on May 27, 2005 which stated: "[t]he undersigned being advised by The Divorce Mediation Center of Suffolk, Inc., that full financial disclosure is mandatory in any matrimonial dissolution, hereby waives the filling out and filing of a net worth statement in this matter. I understand that this may effect my ability to recover any hidden assets in the future and have been advised against this by The Divorce Mediation Center, Inc. However, fully voluntarily, I hereby waive the right to same."

The stipulation of settlement of the parties provided, *inter alia*, for equitable distribution, child

¹The agreement is not dated, nor was it signed by defendant Finkel, although his printed name appears on it after "Very truly yours". The parties' signatures appear under "AGREED AND CONSENTED TO" and financial waivers were signed and dated by the parties on May 27, 2005. The agreement mentioned that the waivers would be available some time at the end of the first mediation session. Thus, it can be inferred that the agreement was signed prior to May 27, 2005.

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support, a waiver of maintenance by both parties, and custody and visitation. It stated that “[t]he Husband and Wife agree that the custody, supervision, care and control of the Children, shall be held jointly by the Husband and Wife with the Wife to have physical custody subject to the visitation rights of the Husband hereinafter set forth. ... The Husband shall pay to the Wife, as and for the support and maintenance of both minor Children, the sum of Three Thousand Three Hundred Dollars (\$3,300.00) per month ... [that] [t]he parties to this Agreement have been advised of the provisions of Domestic Relations Law §240 (1-b), a statutory provision commonly known as the Child Support Standards Act (‘CSSA’), as well as the interpretation of the statute given by the Court of Appeals of the State of New York ... and that the basic child support obligation as defined therein presumptively results in the correct amount of child support to be awarded. The parties acknowledge that they have been advised of the provisions of said statute and Cassano decision, understand them, and have had a full opportunity to discuss them with counsel. ... the adjusted gross income of the Husband who is the non-custodial parent is \$158,344.50 per year ... the applicable child support percentage is 25% ... [t]he non-custodial parent’s pro rata share of the child support obligation on combined income over \$80,000.00 is \$39,439.02 per year of \$3,286.58 per month ... The parties entered into this agreement wherein the Husband agrees to pay \$39,600.00 per year or \$3,300.00 per month directly to the Wife as child support. ... In connection with this Agreement, both parties have agreed to allow the Director of The Divorce Mediation Center of Suffolk, Inc., Alan L. Finkel [to] prepare this Separation Agreement, while not representing either party. Mr. Finkel nor any of his staff has not acted as an attorney in the Mediation, however, is an active matrimonial attorney, duly admitted to practice before the Courts of the State of New York. Both parties fully recognize that Mr. Finkel has not represented, nor does he represent either party, and has prepared this Agreement at the request of both parties. ... Both parties acknowledge that they have had ample opportunity to address and discuss with their respective counsel or such other advisors as they deemed appropriate any questions and issue that they may have respecting the standard of living established during their marriage.”

Thereafter, on July 7, 2007, the parties entered into a “First Amendment” to the Stipulation of Settlement. By its terms the following language was “added” to the child support provision of the original stipulation, “...the adjusted gross income of the [plaintiff herein] who is the non-custodial parent is \$158,344.50 per year... the parties have agreed to apply the Child Support Standards Act to combined income over \$80,000.00 ... The non-custodial parent’s pro rata share of the child support obligation on combined income to \$80,000.00 is \$16,200.00 per year, or \$1,350.00 per month. The non-custodial parent’s pro rata share of the child support obligation on combined income over \$80,000.00 is \$23,345.12 per year of \$1,945.43 per month. ... The parties entered into this agreement wherein the [plaintiff herein] agrees to pay \$39,545.12 per year of \$3,300.00 per month directly to the [defendant Valkavich herein] as child support.”

The parties have lived separate and apart pursuant to the terms of the Stipulation of Settlement and the Court’s records reflect that they were divorced by Judgment dated September 10, 2007. Plaintiff now seeks to set aside the Stipulation of Settlement and have it declared void *ab initio*. He maintains that the child support provisions contained therein did not comply with the Child Support Standards Act because his gross earnings for 2007 were \$22,457.00 and not \$158,344.50 as stated in the Stipulation and the First Amendment to the Stipulation. On May 13, 2011, he sought a modification of the child support provision in a Family Court Petition wherein he stated “[a]t the time of the signing of the

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Agreement, I was a self-employed mortgage broker and my earnings were \$158,344.50 per year as set forth in the Agreement. In 2007 the mortgage industry started to deteriorate slowly along with the housing industry.” He sought a downward modification based upon his change of financial circumstance. Thereafter, plaintiff commenced the within action by filing on June 21, 2011 and on June 30, 2011, after retaining counsel, plaintiff amended his Family Court petition for modification of child support wherein he claimed “[a]t the time of signing of the Agreement, I was a self employed mortgage broker and my gross adjusted annual income was \$22,457.00 for 2007.”

Plaintiff seeks to consolidate the within action with the Family Court petitions filed by him and by defendant Carol Marie Valkavich (hers were to enforce the child support provisions of the Judgment of Divorce.) However, the court’s records reflect that decisions were rendered by the Family Court in February 2012 in connection with the petitions pending thereat, accordingly, the motion to consolidate is denied as moot.

Each defendant seeks an order granting summary judgment dismissing the complaint as to each of them. Defendant Finkel maintains that he is not a proper party and that he was incorrectly named as an individual defendant. He claims that he never acted in a personal capacity and that The Divorce Mediation Center, Inc. was the only entity which provided services to plaintiff. He also seeks sanctions against plaintiff’s lawyers and counsel fees on this action. Defendant Carol Marie Valkavich requests an order granting summary judgment dismissing the complaint against her on the ground that plaintiff has failed to allege facts sufficient to support a cause of action to rescind or set aside the stipulation.

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*).

“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

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

Here, plaintiff has not demonstrated that the Stipulation of Settlement was unfair when made or that there was overreaching in its execution. Four years elapsed from the time the stipulation was executed until plaintiff first alleged that his adjusted gross income as stated in the agreement was not correct. Additionally, it was clear from the agreement between the parties and the mediator, as well as the Stipulation of Settlement, that the parties were advised to seek guidance from an outside attorney, if they so chose. This was certainly sufficient opportunity for plaintiff to have had the proposed agreement reviewed by an attorney and to have been advised of any questions he had as to its terms. There is no allegation made that plaintiff was unaware of his income or that he did not know that the mortgage industry was in a decline prior to, or at the time, he executed the agreement. He is the one who provided the information to the mediator. Additionally, he ratified the agreement by complying with its terms and failing to seek nullification until four years after its execution (*see Culp v Culp*, 117 AD2d 700, 498 NYS2d 846 [2d Dept 1986]; *Barry v Barry*, 100 AD2d 920, 474 NYS2d 803 [2d Dept 1984]). By the terms of the agreement, plaintiff acknowledged that he had the right to obtain counsel, that he knew and understood what he was signing, and that he entered into it freely and voluntarily.

Finally, plaintiff has failed to offer any proof that circumstances regarding custody are anything other than what was provided in the agreement of the parties. Thus, absent some showing that there has been some circumstance which would engender a change of physical or residential custody from defendant Carol Valkavich to plaintiff, no award of child support to him for arrears or for future payments is justifiable. Similarly, since plaintiff has made no showing sufficient to substantiate a claim for punitive damages, no credible cause of action has been established. Attorney’s fees are not warranted where plaintiff has been unsuccessful on all of his claims.

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Accordingly, defendants' motions for summary judgment dismissing plaintiff's complaint seeking rescission of the March 13, 2007 Stipulation of Settlement and the July 7, 2007 First Amendment to the stipulation is granted to the extent that the complaint is dismissed and all other relief requested in the motions is denied.

Dated: 7/2/12



A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION