

Lombardi v Lombardi
2013 NY Slip Op 31478(U)
July 1, 2013
Supreme Court, Suffolk County
Docket Number: 12-24554
Judge: Hector D. LaSalle
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 8-30-12
MOTION DATE 10-12-12
ADJ. DATE 4-16-13
Mot. Seq. # 003 - MD
004 - MG; CASEDISP

-----X
MARY BETH LOMBARDI,

Plaintiff,

- against -

VITTORIO LOMBARDI and DOROTHY
COURTEN,

Defendant.
-----X

JOHN RAY AND ASSOCIATES
Attorney for Plaintiff
122 North Country Road, P.O. Box 5440
Miller Place, New York 11764

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Attorney for Defendants
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Hauppauge, New York 11788

Upon the following papers numbered 1 to 43 read on these motions to consolidate and to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7 Notice of Cross Motion and supporting papers 8 - 34; Answering Affidavits and supporting papers 35 - 38; Replying Affidavits and supporting papers 39 - 43; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the portion of the cross motion of the defendants which seeks an order granting summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that all relief requested by plaintiff in her motion and by defendants in their cross motion, not previously addressed by the Hon. William J. Kent, J.S.C. is denied.

Following a decision by the Hon. William J. Kent, J.S.C. dated June 4, 2012 in the parties' pending divorce action, commenced by plaintiff against defendant under Index No. 11-26233, which, *inter alia*, denied plaintiff's request for an order disqualifying defendant's counsel, for *pendente lite* maintenance, and to set aside the parties' antenuptial agreement (without prejudice to challenging same in a plenary action), plaintiff commenced this plenary action. In it, plaintiff seeks to set aside the parties' antenuptial agreement on the grounds of fraud in the inducement, duress, estoppel, conversion, and rescission, to impose a constructive trust, and to obtain damages for legal malpractice. The action was assigned to the Hon. William J. Kent, J.S.C. for determination. However, when plaintiff moved to consolidate the two actions and defendant cross moved for an order dismissing plaintiff's plenary action, Justice Kent denied the request for consolidation and a joint trial, and directed that the clerk of the court randomly reassign the above captioned civil matter to a different civil

(PR)

part of the Court. Thus, this Court must determine the remaining portion of the cross motion of defendants which seeks an order granting summary judgment dismissing the complaint and sanctions against plaintiff and her attorney.

The parties entered into a pre-nuptial agreement on March 17, 2003, which did not comply with the requirements of DRL § 236 B (3), “[h]owever, the parties subsequently formally executed the same comprehensive antenuptial agreement (“the agreement”) on or about April 14, 2004. The newly executed agreement conform[ed] to the requirements of Domestic Relations Law § 236 B (3) ... In addition, this subsequent execution of the agreement on April 14, 2004 [was] clearly a ratification of its terms” (*Lombardi v Lombardi*, Sup Ct, Suffolk County, June 4, 2012, Kent, J., Index No. 26233/11). The parties were married on April 19, 2003 (as is indicated in the plaintiff’s verified complaint and in the order of the Hon. William J. Kent dated June 4, 2012), or on April 9, 2004 as is indicated in the affirmation of defendant attorney Dorothy Courten. In either case, the date of the marriage was before the April 14, 2004 antenuptial agreement.

Pertinent portions of the agreement state as follows:

FIRST: Disclosure of Earnings, Property and Financial Obligations and Waiver of Further Rights of Disclosure.

(A) Vittorio Lombardi acknowledges that his earnings, property and financial obligations are as set forth on Schedule A attached. Marybeth Woolley acknowledges that her earnings, property and financial obligations are as set forth on Schedule B attached.

Each party to this Agreement understands that some of the values and amounts set forth on Schedule A and B annexed hereto are estimated and such values and amounts are not intended to be precise and may fluctuate over time.

(B) Each party hereby acknowledges that he or she has had the opportunity to ascertain, and is fully acquainted with and aware of, the earnings, property and financial obligations of the other, as set forth in said Schedules and that each has ascertained and weighted (*sic*) the facts, conditions, and circumstances likely to influence his or her judgment in all matters embodied herein.

(C) Each party has been afforded the right to investigate the earnings, property and financial obligations of the other. Each party as of the effective date of this Agreement waives his or her right to any further disclosure beyond the disclosure already provided.

...

SEVENTH: Property Rights in the Event of Annulment, Separation or Divorce.

(A) In the event of an annulment, separation (whether by the operation of law or by mutual agreement), or a pending or final divorce between the parties, each party agrees that there shall be no property settlement or division of Separate Property between them. Rather, each party shall keep and retain sole use and ownership of, and rights of management, use, enjoyment, control and power of disposal over all property of every kind and nature whatsoever now owned or

hereafter acquired from any source whatsoever by that party, and all income, increases, proceeds and profits derived from all such property and all property received in place thereof, free and clear of any interest, rights or claims of the other party and notwithstanding the laws of community property, equitable distribution or similar statutory or case law in any jurisdiction. In the event of any annulment, separation or divorce, each party hereby irrevocably waives any right, interest, claim or demand for any property settlement of Separate Property of the other party notwithstanding the laws of community property, equitable distribution, or similar statutory or case law in any jurisdiction.

(B) It is the parties' intention that any asset to be deemed "marital" will be titled in joint names, and that in the event of an annulment, separation or divorce that jointly owned property shall be divided between them in accordance with their respective financial contributions to the acquisition or maintenance of such joint property.

(C) It is the parties' intention that the 2001 Land Rover purchased by the prospective husband for the prospective wife shall remain her separate property.

(D) It is the parties' intention that the residence to be known as the marital residence ... is currently valued at \$800,000.00, and is currently subject to a \$340,000.00 mortgage. Notwithstanding any contribution that the prospective wife may make to pay that mortgage down in the future, she shall be entitled to one-seventh of 50% of the equity in the prospective marital residence in each of the first seven years of the parties marriage. It is the express intention that the prospective wife shall be the owner of a 50% interest in the prospective residence should the parties remain married for seven years. In the event of divorce, the wife shall receive that applicable percentage of the then-existing equity, following the formula set forth herein. It is the intention of the prospective husband that the prospective wife inherit his interest in the prospective marital residence upon his death, should they be legally married at the time of his demise.

TENTH: Consideration: The consideration for this agreement is the marriage contemplated by the parties and the mutual promises contained herein.

ELEVENTH: Completeness: This agreement contains the entire understanding of the parties, and no representations or promises have been made except as contained herein.

Schedule A, attached to the agreement, lists no earnings for defendant Vittorio Lombardi, but includes descriptions of property with values totaling approximately \$6,782,000.00 and obligations of only \$300,000.00. Schedule B, also attached to the agreements, contains the following hand written statements: Earnings: "To the best of my knowledge Everything I've acquired was placed and entrusted solely under and for my daughter Nicole Marie Troni. This occurred (*sic*) prior to knowing Mr. Vittorio Lombardi. Therefore I'm claiming -0- earnings. The monies received are solely Nicole's. Properties -0- Obligations -0-" Each of the statements

is followed by the handwritten initials “MBW” and the bottom of the page is signed by “Marybeth Woolley”.

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*).

Plaintiff's cause of action which seeks to set aside the agreement on the ground that it was not properly executed is denied. The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (*Ryan v New York Tel. Co.*, 62 NY2d 494, 501-502, 478 NYS2d 823 [1984]; *Breslin Realty Dev. Corp. v Shaw*, 72 AD3d 258, 263, 893 NYS2d 95 [2d Dept 2010]). As is indicated above, Justice Kent previously determined that the April 14, 2004 Agreement conformed to the requirements of DRL § 236 B (3) (*Lombardi v Lombardi*, Sup Ct, Suffolk County, June 4, 2012, Kent, J., Index No. 26233/11), thus the cause of action which seeks to set it aside on the ground that it was not properly executed is dismissed.

A duly-executed antenuptial agreement is given the same presumption of legality as any other contract, and is not burdened by a presumption of fraud simply because the parties subsequently enter into a confidential relationship. The party seeking to invalidate an antenuptial agreement bears the burden of producing evidence showing fraud, [b]ut, in the absence of facts from which concealment or imposition may reasonably be inferred, fraud will not be presumed. Conclusory allegations of fraud are insufficient to raise a question of fact as to the validity of such agreement as would preclude summary judgment ... absence of legal representation, without more, does not establish overreaching or require an automatic nullification of the agreement (*Forsberg v Forsberg*, 219 AD2d 615, 616, 631 NYS2d 709 [2d Dept 1995] [*internal citations and quotation marks omitted*]; see also *Weinstein v Weinstein*, 36 AD3d 797, 830 NYS2d 179 [2d Dept 2007]; *Lombardi v Lombardi*, 235 AD2d 400, 652 NYS2d 549 [2d Dept 1997]).

Generally, agreements which are regular on their face are binding on the parties, unless and until they are set 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 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 agreement was unfair when made or that there was overreaching in its execution. The agreement, originally executed by the parties prior to the marriage, was re-executed over one year later, after the marriage of the parties. Prior to this affirmation of the agreement, plaintiff had a sufficient opportunity to have had the “proposed” agreement reviewed by an attorney and to have been advised of any questions she had as to its terms. In fact, plaintiff was represented by an attorney, William H. Baron, Esq. at least from January 27, 2004 through March 18, 2004 in connection with the agreement.¹ Thus her claims that the agreement was the “product of Defendant Courten and Defendant Lombardi” and that it “was never negotiated with Plaintiff; nor any attorney on Plaintiff’s behalf”, are specious, at best.

Similarly, plaintiff’s claims of fraud are conclusory and without any evidence of concealment of facts, misrepresentation or other form of deception. She was aware of the financial disparity of the parties, as is evidenced by the schedules attached to the agreement, and, in light of the fact that the agreement was re-executed over one year after its original invalid “execution,” plaintiff has failed to show how she was coerced or fraudulently induced into signing it (*see Darrin v Darrin*, 40 AD3d 1391, 838 NYS2d 678 [3d Dept 2007]). Plaintiff’s claim that defendants made promises to her is of no import as the agreement specifically recites that “no representations or promises have been made except as contained herein.” Thus, the causes of action for promissory estoppel fail.

Plaintiff’s cause of action which seeks damages for conversion involves monies totaling \$27,000.00

¹Letters dated January 27, 2004 and March 18, 2004 were sent from William H. Baron, Attorney at Law to defendant Dorothy a. Courten, Esq, attorney for defendant. Each refers to the “proposed” agreement and possible modifications thereto.

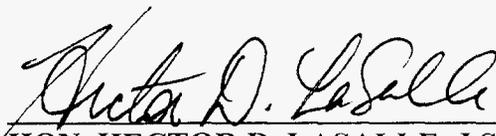
allegedly given to defendant by plaintiff during approximately eight years of marriage. Her claim for the imposition of a constructive trust involves the marital residence as well as separate properties of defendant. All issues relative to the matrimonial action should be resolved in the single divorce action so that a party who had a full and fair opportunity to litigate those issues would be precluded from doing so in a subsequent proceeding by the doctrine of res judicata (*Boronow v Boronow*, 71 NY2d 284, 525 NYS2d 179 [1988]; see also *Kromberg v Kromberg*, *supra*). Such claims are properly before the court in the divorce action and are dismissed in this action as being duplicative of plaintiff's demands for equitable distribution in her pending action for divorce.

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442, 835 NYS2d 534 [2007] quoting *McCoy v Feinman*, 99 NY2d 295, 301-302, 755 NYS2d 693 [2002]). The plaintiff must show that the attorney's breach of a professional duty caused her actual damages in order to recover for legal malpractice; conclusory allegations of damages or injuries based upon speculation will not suffice (*Holschauer v Fisher*, 5 AD3d 553, 772 NYS2d 836 [2d Dept 2004]). To succeed on a summary judgment motion dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of its legal malpractice cause of action (*Gershkovich v Miller, Rosado & Algios, LLP*, ___ AD3d ___, 945 NYS2d 567 [2d Dept 2012]; *Boglia v Greenberg* 63 AD3d 973, 882 NYS2d 215 [2d Dept 2009]). Here, plaintiff seeks damages for legal malpractice as against defendant Courten. As plaintiff has failed to demonstrate that she retained defendant Courten to represent her in connection with any matter, she has failed to show that defendant Courten owed her any duty, let alone that she sustained damages as a result of a breach of that duty. Absent a duty to plaintiff, no negligence (malpractice) can be found against defendant attorney Courten.

Accordingly, that portion of defendants' motion which seeks summary judgment dismissing plaintiff's complaint is granted, and all other relief requested and not previously determined by the Hon. William J. Kent, J.S.C. is denied.

The foregoing constitutes the Order of this Court.

Dated: July 1, 2013
 Riverhead, NY


 HON. HECTOR D. LASALLE, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION