

Polay v Pastorelli

2008 NY Slip Op 30070(U)

January 3, 2008

Supreme Court, Suffolk County

Docket Number: 0024167/2006

Judge: Emily Pines

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Short Form Order

Index Number: 24167-2006

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

*Present:***HON. EMILY PINES**

Justice Supreme Court

Original Motion Dates: 08-23-2007
 Motion Submit Dates: 10-18-2007
 Motion Sequence No's.: 003MD; 004 MG

<p>_____X JONATHAN POLAY, <div style="text-align: right;">Plaintiff,</div> <p style="text-align: center;">-against-</p> JANE PASTORELLI (f/k/a JANE POLAY), <div style="text-align: right;">Defendant.</div> _____X</p>	<p>ATTORNEY FOR PLAINTIFF Karen Silverman, Esq. 83 Prospect Street, 2nd Floor Huntington, New York 11743</p> <p>ATTORNEY FOR DEFENDANT Law Offices of Sherri L. Kaplan, Esq. 575 Jericho Turnpike, Suite 210 Jericho, New York 11753</p>
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ORDERED, that the motion (motion sequence no. 003) by plaintiff for an Order vacating and setting aside a Stipulation of Settlement dated May 7, 2004 and amendment thereto dated October 18, 2005 and for ancillary relief is denied in its entirety; and it is further

ORDERED, that the cross-motion (motion sequence no. 004) by defendant for summary judgment dismissing the complaint and for a judgment on the counterclaim is granted; and it is further

ORDERED, that a hearing on the issue of reasonable counsel fees shall be held on February 11, 2008, at 9:30 a.m. before the undersigned.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff commenced this action seeking to set aside a Stipulation of Settlement and Judgment of Divorce by filing of a Summons and Verified Complaint on or about April 16, 2007. Issue was joined by defendant's service of a Verified Answer and Counterclaim dated May 30, 2007. The counterclaim seeks counsel fees pursuant to the Stipulation of Settlement and plaintiff served a Verified Reply on or about June 20, 2007. The relevant facts are as follows:

The parties were married July 26, 1997 and have two (2) minor children, Daniel (born May 22, 2000) and Brendan (born April 29, 2002). The parties

separated and ultimately entered into a Stipulation of Settlement (the "Stipulation") on or about May 7, 2004. Plaintiff is a college graduate and Vice President of Sales for an international company and his 2003 annual gross income was \$133,583.41. Defendant is also college educated and currently a teacher in the Northport School District and her 2003 annual gross income was \$29,522.91.¹ The Stipulation was incorporated, but not merged, into a Judgment of Divorce (BIVONA, J.) granted June 24, 2004. Prior to the execution of the Stipulation, the parties had attempted to resolve their disputes through the use of mediator, and a "Memorandum of Understanding" was drafted, although never executed. The Stipulation was drafted by defendant's counsel and plaintiff elected to proceed *pro se*, despite written recommendation from defendant's counsel that plaintiff retain an attorney to review the Stipulation. The Stipulation itself further contained a provision wherein plaintiff acknowledged he was advised of his right to seek independent counsel, it was in his best interests to consult with an attorney specializing in matrimonial law and defendant's counsel did not represent him.

Substantively, the Stipulation provided plaintiff would receive \$60,000 for his share of the equity in the former marital residence, defendant would be responsible for the payment of the mortgage indebtedness, property taxes and homeowner's insurance and the parties would split the cost of certain repairs to the residence. The Stipulation further provided plaintiff would retain 100% of his retirement accounts, pension, annuity, 401(k) and profit sharing plan, including his "Ryan Beck IRA".² Regarding custody and child support, the parties agreed to share joint custody of the children, with residential and physical custody to defendant. Initially, the Stipulation stated that the parties were advised of the Child Support Standards Act ("CSSA") and the unrepresented party, defendant herein, received a copy of the CSSA chart.³ The Stipulation provided that plaintiff would pay child support to defendant in the amount of \$4,000 per month, exclusive of child care costs. The Stipulation specifically provided:

The parties have deviated from the Husband's basic child support obligation, under the Act, in light of the Husband's acknowledgement and agreement that the children's needs warrant a higher child support amount, and also in consideration of the Wife's agreement to waive maintenance. In the event that the Husband's child support obligation is modified downward for any reason, the Wife's waiver of maintenance shall become null and void and the Wife shall be free to petition a Court of competent jurisdiction for an award of maintenance without the necessity of showing any hardship or change of circumstance.⁴

The parties further agreed defendant would pay 82% and plaintiff would pay 18%

¹ At the time the parties entered into the Stipulation, defendant was not working full-time since the children were only two and three years old.

² Stipulation at Article X, ¶2.

³ Plaintiff admitted service of the CSSA chart on May 7, 2004.

⁴ Stipulation at Article XIV, ¶2(viii).

of the children's reasonable child care and day care expenses, exceeding \$500, and defendant would pay the first \$500 of such monthly expenses.

ARGUMENTS

Plaintiff commenced the instant action to vacate the Judgment of Divorce and set aside the Stipulation on the ground of fraudulent misrepresentation, i.e., that defendant advised plaintiff he did not need an attorney and the terms of the Memorandum of Understanding were going to be incorporated into the Stipulation. Plaintiff alleges he reasonably relied on material misrepresentations, including that defendant's income exceeded \$60,000 and the Stipulation is "one-sided, unreasonable and unconscionable".⁵ Plaintiff alleges the Stipulation was the product of overreaching and is manifestly unfair and unreasonable because it requires him to pay a higher amount of child support than required by CSSA, allowed defendant to claim one child as a dependent for income tax purposes, required plaintiff to pay 82% of child care, extracurricular activities and unreimbursed health care expenses and plaintiff was not represented by counsel. Essentially, plaintiff challenges the entire child support obligation contained in the Stipulation as unconscionable and the product of overreaching by defendant. Plaintiff thus moves by Notice of Motion for a an Order, *inter alia*, vacating and setting aside the Stipulation; directing a *de novo* hearing on the issue of child support; and awarding reasonable counsel fees.

In his affidavit in support of the motion, plaintiff claims defendant told him that all of the terms of the Memorandum of Understanding were going to be incorporated into the Stipulation and he did not need to have his own lawyer review the document. Based on this representation, he signed the Stipulation without obtaining separate counsel, or purportedly reading the document. He claims the Stipulation is not as agreed in the Memorandum of Understanding and is a "one sided, heavily slanted Agreement" which should "shock the conscience of the Court". Plaintiff points to the difference in the child care provisions and that defendant started working full-time after the execution of the Stipulation. Plaintiff alleges that he did not receive his fair share of the equity of the former marital residence, which defendant sold subsequent to the granting of the Judgment of Divorce. Plaintiff further claims defendant's waiver of maintenance was "illusory" in that she was entitled to seek maintenance in the event plaintiff obtained a downward modification of his child support obligation. Based upon these allegations, plaintiff asserts that the Stipulation was facially unfair and a hearing is required on the issues of unconscionability and unreasonableness of the Stipulation.

Defendant cross-moves for summary judgment dismissing the complaint and for a judgment on her counter-claim for attorney's fees. The counterclaim is based on Article XXI, ¶13 of the Stipulation which states in relevant part that:

If either party ... seeks to vacate or set aside this Agreement,

⁵ Complaint at ¶41.

or declare any of its terms and/or conditions invalid, void or against public policy, by any reason including without limitation, fraud, duress, incompetency, overreaching or unconscionability, said party shall reimburse the other party and be liable for any and all of the other's reasonable attorney's fees and expenses provided and to the extent that such action, proceeding, counterclaim or defense results in a decision, judgment, decree or order in favor of the party asserting the validity of this Agreement.

In support of the cross-motion, defendant submits an affidavit wherein she states she never told plaintiff not to read the Stipulation or get his own attorney. Defendant argues the Stipulation is fair on its face in that it afforded plaintiff approximately 47% of the assets of the marital estate, taking into consideration the value of the equity in the marital residence at the time of the Stipulation and plaintiff's retention of his retirement accounts. Defendant asserts she never misrepresented her income and the fact that she returned to work full-time at a higher salary, subsequent to the execution of the Stipulation cannot be considered a fraud. Additionally defendant refers to the Memorandum, wherein it sets forth the calculations used to determine the equity of the marital residence which was ultimately incorporated into the Stipulation. Defendant further points out however, that the parties never signed the Memorandum, but rather it was just a draft, although she claims that the material provisions of the two documents are essentially the same or similar. Specifically, both documents award plaintiff \$60,000 for his share of the equity of the former marital residence, allowed each party to retain their own retirement benefits and required each to pay 50% of the costs of repairs to the residence. With regard to child support, both documents required plaintiff to pay \$4,000 per month, although the Stipulation required a pro rata split of unreimbursed medical expenses, child care and extracurricular activities whereas the Memorandum divided these costs on a 50/50 basis. Additionally, the Stipulation provided that each party could claim one child as a dependent for income tax purposes whereas the Memorandum gave defendant the option of retaining both children as dependents. Finally, the Stipulation provided that child support would increase if plaintiff's income increased, although the Memorandum provided that child support would increase if the CPI and plaintiff's income increased. Notwithstanding the foregoing, however, it is undisputed the parties did not execute the Memorandum of Understanding, but rather, executed the Stipulation of Settlement.

Based on the foregoing, defendant argues the Stipulation is not unconscionable or unfair on its face as to warrant vacating the Stipulation and Judgment of Divorce. Defendant argues the parties properly agreed to deviate from the Child Support Standards Act based in part, on plaintiff's agreement to waive maintenance to which she would have otherwise been entitled based on the disparity in the parties' respective incomes at the time of the execution of the Stipulation. Defendant's counsel also argues that plaintiff was advised repeatedly, and in writing, that he should obtain his own attorney to review the agreement. Counsel argues that plaintiff received approximately 47% of the marital assets, as calculated in the Memorandum of Understanding on which plaintiff relies, and thus,

the Stipulation cannot be considered unfair on its face or unconscionable. Finally, defendant argues that plaintiff has accepted the benefits of the Stipulation for the three year period prior the commencement of this action including the \$60,000 distributive award, joint custodial arrangement and retention of his retirement assets, thus ratifying the Stipulation and precluding challenge thereto. Therefore, defendant seeks summary judgment dismissing the complaint and awarding judgment on the counterclaim for counsel fees.

In reply, plaintiff argues that genuine issues of material fact preclude the granting of summary judgment. Plaintiff argues he is entitled to a hearing on the issues of the totality of the circumstances surrounding the execution of the Stipulation and the allegations of fraud and overreaching by defendant. Again, plaintiff asserts defendant told him he did not need an attorney to review the Stipulation and that he should simply sign it without reading it himself. Thus, he argues the Stipulation should be vacated and set aside and a hearing held on the issues presented herein.

STIPULATIONS OF SETTLEMENT

It is well settled that a party seeking to set aside a stipulation of settlement must demonstrate good cause sufficient to invalidate a contract. **Cappello v. Cappello**, 274 A.D.2d 539, 712 N.Y.S.2d 42 (2d Dept. 2000). A stipulation of settlement which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching or unconscionability. **Rubin v. Rubin**, 33 A.D.3d 983, 823 N.Y.S.2d 218 (2d Dept. 2006); **Brennan-Duffy v. Duffy**, 22 A.D.3d 699, 804 N.Y.S.2d 399 (2d Dept. 2005); **Linder v. Linder**, 297 A.D.2d 711, 748 N.Y.S.2d 599 (2d Dept. 2002). It is the not the defendant's burden to demonstrate the agreement was fair and reasonable, but rather the plaintiff's burden to show the agreement was the result of fraud or overreaching or that its terms were unconscionable. **Brennan-Duffy, supra**. Moreover, the fact the party seeking to set aside the stipulation was not represented by counsel when the stipulation was executed, does not, in and of itself, establish overreaching or mandate automatic nullification of the stipulation. **Korngold v. Korngold**, 26 A.D.3d 358, 810 N.Y.S.2d 206 (2d Dept. 2006). This is "especially true where, as here, the plaintiff expressly acknowledged that he was fully informed of his right to retain his own counsel and the defendant's attorney, who drafted the agreement, repeatedly urged him to do so." **Brennan v. Brennan**, 305 A.D.2d 524, 759 N.Y.S.2d 744 (2d Dept. 2003); **Korngold, supra**. **See also, Cantilli v. Cantilli**, 40 A.D.3d 1023, 837 N.Y.S.2d 285 (2d Dept. 2007).

In an action commenced by one spouse to rescind a stipulation, "the party moving for summary judgment dismissing the claim for rescission must make a prima facie showing that the agreement should not be set aside and, in opposition, the spouse seeking to rescind the agreement must demonstrate the existence of a triable issue of fact sufficient to raise an inference of fraud, duress, overreaching, or unconscionability. Unsubstantiated and conclusory allegations are not sufficient to raise a triable issue of fact." **Rubin, supra**. Finally, where a party to an

agreement accepts the benefits of the agreement for more than a year, they may be deemed to have ratified the agreement and be precluded from later challenging its validity. **Weissman v. Weissman**, 42 A.D.3d 448, 839 N.Y.S.2d 798 (2d Dept. 2007); **Korngold, supra**.

Here, plaintiff has moved for what it refers to as an “ **O’Malley** hearing” under the recent case of **O’Malley v. O’Malley**, 41 A.D.3d 449, 836 N.Y.S.2d 706 (2d Dept. 2007). At the outset, the Court finds that plaintiff’s reliance on such case is without merit. **O’Malley** involved a challenge to a postnuptial agreement, not a stipulation of settlement of a matrimonial action. There, the Second Department held that because of fiduciary relationship of the parties to a postnuptial agreement, to wit, husband and wife, no actual fraud need be shown to set aside the agreement if it is manifestly unfair to a spouse because of the other’s overreaching. The Court held that in “examining a challenge to a *postnuptial agreement*” the Court must view the agreement in its entirety and under the totality of the circumstances. Here, the agreement between the parties is a Stipulation of Settlement in a matrimonial action, and not a postnuptial agreement executed between the parties in their fiduciary capacity as husband and wife. Thus, the standard to be applied by the Court herein is as set forth above; whether the Stipulation was the result of fraud or overreaching or whether its terms were unconscionable.

Defendant has met her *prima facie* burden of demonstrating that the Stipulation should not be set aside. The Stipulation, providing for equitable distribution of the marital estate resulting in plaintiff receiving approximately 47% of the marital assets⁶, including retention of his retirement accounts, cannot be said to be unfair on its face. Moreover, the provision for plaintiff’s payment of child support in excess of that mandated by the Child Support Standards Act of the Domestic Relations Law does not mandate a finding of unfairness or unconscionability. While the stipulation may have placed a substantial child support obligation on plaintiff, the Court will not set aside the agreement on the ground of unconscionability because plaintiff’s agreement to such term may have been improvident. **Cappello v. Cappello**, 274 A.D.2d 539, 712 N.Y.S.2d 42 (2d Dept. 2000). In fact, when viewing the Stipulation as a whole, including defendant’s waiver of spousal maintenance, the agreement cannot be deemed unfair on its face, or unconscionable.⁷

In opposition, plaintiff has failed to demonstrate the existence of a triable issue of fact requiring a trial on the issue of fraud, duress, overreaching or unconscionability. Rather, plaintiff’s opposition consists of conclusory allegations his lack of representation, failure to read the Stipulation before he signed the document and reliance on an unexecuted Memorandum of Understanding. Such allegations are insufficient to defeat the motion for summary judgment. Plaintiff’s claim that he “did not like to read legal papers” and “really do not understand

⁶ Plaintiff has not challenged defendant’s calculation of this figure.

⁷ Even applying the **O’Malley** standard, the Stipulation is fair in its entirety under the totality of the circumstances.

legal documents or writings”, belied credulity in light of plaintiff’s college education and obvious business acumen in view of his position as a vice president of an international company and substantial salary. Plaintiff was advised, in writing, by defendant’s attorney, to obtain counsel of his own choosing to review the Stipulation and he elected not to do so. Thereafter, plaintiff executed the 48-page Stipulation, and initialed every single page, including the provision wherein he expressly waived the right to obtain his own counsel, despite being advised to do so.

Based upon the foregoing, plaintiff’s motion to vacate and set aside the Stipulation of Settlement is denied, and defendant’s cross-motion for summary judgment is granted and the action is dismissed. Defendant’s application for counsel fees pursuant to the terms of the Stipulation is granted to the extent that the matter is set down for a hearing on the amount of reasonable attorney’s fees to be awarded.

Submission of a Judgment shall abide the determination on the issue of counsel fees.

The foregoing constitutes the *DECISION* and *ORDER* of the Court.

Dated: 1/3/08
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.