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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

DAVID M. LEVINE,
Plaintiff,

- against -

STACEY ELLEN LEVINE,
Defendant.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 3467/09

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2
Answering Affidavits 3, 4
Replying Affidavits 5
Briefs: Plaintiff's / Petitioner's 6
Defendant's / Respondent's .....

The plaintiff moves to reform a stipulation of settlement dated December 2, 2003 between the plaintiff and defendant by substituting the adjusted gross income of $123,251.00 in place of the adjusted gross income stated in that stipulation of settlement as $165, 575.00, and grant the plaintiff judgment for $62,307.23 for the overpayment of child support for which the defendant has been unjustly enriched. The defendant cross moves to dismiss the plaintiff's motion, grant summary judgment for the defendant, dismiss the plaintiff's complaint, impose sanctions against the plaintiff, and award the defendant counsel fees in the amount of $7,500.00. Each party opposes the other's motion. This

Court has carefully reviewed and considered all of the parties' papers submitted with respect to this motion.

The New York Court of Appeals stated:

> The sole issue before us is whether reformation should have been granted. In ***Ross v. Food Specialties*** (6 N Y 2d 336, 341) this court stated: "We have consistently and repeatedly held that before a reformation can be granted the plaintiff 'must establish his right to such relief by clear, positive and convincing evidence. Reformation may not be granted upon a probability nor even upon a mere preponderance of evidence, but only upon a certainty of error' nor may the plaintiff 'secure reformation merely upon a showing that he or his attorney made a mistake. In the absence of fraud, the mistake shown "must be one made by both parties to the agreement so that the intentions of neither are expressed in it" ' (***Amend v. Hurley***, 293 N. Y. 587, 595; ***Salomon v. North British & Mercantile Ins. Co.***, 215 N. Y. 214; ***Strong v. Reeves***, 280 App. Div. 301, ***affd.*** 306 N. Y. 666). ... Reformation is not designed for the purpose of remaking the contract agreed upon but, rather, solely for the purpose of stating correctly a mutual mistake shared by both parties to the contract; in other words, it provides an equitable remedy for use when it clearly and convincingly appears that the contract, as written, does not embody the true agreement as mutually intended" (emphasis in original)

Nash v. Kornblum, 12 N.Y.2d 42, 46-47, 234 N.Y.S.2d 697 [1962]; see also ***Simek v. Cashin***, 292 A.D.2d 439, 738 N.Y.S.2d 393 [2nd Dept., 2002].

The Second Department reiterated the jurisprudence of reformation when it stated:

> The mistake cured by reformation is not a mistake of fact or law under which the parties labored in entering the agreement. Instead, it is the error they (or their scrivener) made in failing to reduce the substance of their agreement to a writing drafted in such a way as to describe no more, and no less, than the limited issues as specifically resolved by their agreement (***see Harris v. Uhlendorf, supra***, p. 467, 301 N.Y.S.2d 53, 248 N.E.2d 892; ***Nash v. Kornblum, supra***, p. 47, 234 N.Y.S.2d 697, 186 N.E.2d 551; ***Salomon v. North British & Mercantile Ins. Co.***, 215 N.Y. 214, 219, 109 N.E. 121; ***Christopher & Tenth St. R.R. Co. v. Twenty-Third St. Ry. Co.***, 149 N.Y. 51, 56, 58, 43 N.E. 538; ***Allison Bros. Co. v. Allison***, 144 N.Y. 21, 30, 38 N.E.

956; ***Nevius v. Dunlap***, 33 N.Y. 676, 680-681; ***Rider v. Powell***, 28 N.Y. 310; ***Eastern Air Lines v. Trans Caribbean Airways***, 29 A.D.2d 379, 383, 288 N.Y.S.2d 317, ***affd.*** 23 N.Y.2d 709, 296 N.Y.S.2d 153, 243 N.E.2d 756; ***Stolitzky v. Linscheid***, 150 App.Div. 253, 134 N.Y.S. 805).

A party relying on the instrument cannot defeat a claim for reformation on the ground of the other party's failure to read or understand the instrument (***see Hart v. Blabey, supra***, p. 262, 39 N.E.2d 230; ***Albany City Sav. Inst. v. Burdick***, 87 N.Y. 40; ***Meier v. Brooks, supra***, p. 60, 253 N.Y.S.2d 564; ***Raby v. Greater N.Y. Development Co.***, 151 App.Div. 72, 135 N.Y.S. 813, ***affd.*** 210 N.Y. 586, 104 N.E. 1139; ***Jamaica Sav. Bank v. Taylor***, 72 App.Div. 567, 573-574, 76 N.Y.S. 790). Nor is the failure to plead reformation a bar to such relief (***see Susquehanna S.S. Co. v. Andersen & Co.***, 239 N.Y. 285, 146 N.E. 381; ***Born v. Schrenkeisen, supra***, p. 60, 17 N.E. 339; ***Pitcher v. Hennessey***, 48 N.Y. 415, 423; ***Hotel Credit Card v. American Express Co.***, 13 A.D.2d 189, 194, 214 N.Y.S.2d 921; ***Carvalho v. Sudderly***, 169 App.Div. 652, 655, 155 N.Y.S. 413; ***Arlt v. Whitlock***, 65 App.Div. 246, 72 N.Y.S. 522). Proof of the variance between the meeting of the minds and its expression in the writing must be clear (***see Backer Mgt. Corp. v. Acme Quilting Co.***, 46 N.Y.2d 211, 219-220, 413 N.Y.S.2d 135, 385 N.E.2d 1062, ***supra***). " ' "If the environment and the motive of the parties, the consideration and the necessities to be met, make the contract as it is written a highly improbable one, one for which there was no motive, or necessity, or consideration, then the writing has little self-supporting force, and a relatively small amount of clear and credible evidence will establish the mistake" ' " (***Meier v. Brooks, supra***, p. 60, 253 N.Y.S.2d 564)

Surlak v. Surlak, 95 A.D.2d 371, 391-392, 466 N.Y.S.2d 461 [2nd Dept., 1983].

Here, under reformation, viewing analysis of the contract,, the sole issue is whether there was a meeting of the parties' minds upon the question of the basis for the calculation of the child support figure. The Second Department also state

> "any mistake * * * was unilateral" and that the former husband failed to demonstrate any right to the requested relief (***see, Surlak v. Surlak***, 95 A.D.2d 371, 380, 466 N.Y.S.2d 461; ***see also, Matter of Scalabrini v. Scalabrini***, 242 A.D.2d 725, 662 N.Y.S.2d 581; ***Silvers v. Silvers***, 196 A.D.2d 863, 603 N.Y.S.2d 764). "[T]o overcome the heavy presumption that a deliberately prepared and executed written instrument manifested the true

intention of the parties, evidence of a very high order is required" (***Backer Mgt. v. Acme Quilting Co.***, 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062, citing ***Christopher & Tenth St. R.R. Co. v. Twenty-Third St. Ry. Co.***, 149 N.Y. 51, 58, 43 N.E. 538)

Friedman v. Friedman, 247 A.D.2d 430, 431, 668 N.Y.S.2d 713 [2nd Dept., 1998].

The Court finds the plaintiff has not met the burden with respect to reforming the December 2, 2003 stipulation of settlement, to wit substituting $165, 575.00 in place of the $123,251.00 adjusted gross income in that stipulation, and grant him a $62, 307.23 judgment for overpayment of child support claim to be an unjust enrichment to the defendant. The plaintiff has not shown the alleged mutual mistake existed at the time of the execution of the stipulation. Moreover, the Second Department points out: "An action to reform an agreement based on mutual mistake must be commenced within six years of the occurrence (CPLR 213, subd 6) or two years from the discovery of the mistake (CPLR 203, subd [f])" (***Davis v. Davis***, 95 A.D.2d 674, 463 N.Y.S.2d 462 [2nd Dept., 1983]. It appears the underlying action by the plaintiff may be time barred by his ratification of court order stipulation on October 30, 2006, after he discovered the alleged mistake.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that

is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

The defendant has shown a prima facie entitlement to summary judgment, and cause to dismiss the underlying complaint. In opposition, the plaintiff has not shown there is a triable issue of fact.

"The former wife was entitled to an award of attorney's fees in accordance with Article 26, Paragraph 4, of the agreement (***see, e.g., Gillman v. O'Connell***, 176 A.D.2d 305, 574 N.Y.S.2d 573; ***Willis v. Willis***, 149 A.D.2d 584, 540 N.Y.S.2d 677)" (***Friedman***

v. Friedman,

247 A.D.2d 430, ***supra***, at 431). Here, there is similarly a provision in the stipulation of settlement for reasonable attorneys' fees, to wit Article XXI, at p. 36, p. 1. The attorney for the defendant recites the retaining circumstances and the work provided to the defendant, and requests an interim award of $7,500.00. It is clear the defendant is entitled to attorneys' fees, but the measurement of attorneys' fees is an issue requiring a hearing.

Accordingly, the plaintiff's motion is denied in all respects, and the defendant's cross motion is granted in all respects in accord with this decision and order of the Court. A copy of this order shall be served and accompany the note of issue when filed to add this matter to the Calendar Control Part of this court for a hearing on reasonable attorneys' fees in accord with this decision and order of the Court. Entry of judgment is stayed pending a determination of reasonable attorneys' fees.

So ordered.

Dated: **October 30, 2009**

ENTER:

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION XXX