

<b>Moses v Estate of Moses</b>
2010 NY Slip Op 31306(U)
May 11, 2010
Supreme Court, New York County
Docket Number: 110098-09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Index Number : 110098/2009

**MOSES, BERNICE**

vs.

**MOES, WILLIAM A.**

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
MAY 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

*and PC  
Scheduled for  
July 15, 2010 @ 9:30 am  
Part 10*

MAY 10 2010

Dated:

~~HON. JUDITH J. GISCHE~~

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
Bernice Mosés,

Plaintiff (s),

**-against-**

The Estate of William A. Moses and  
Andrew Moses, individually and as  
Executor of the Estate of William A.  
Moses,

Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 110098-09  
Seq. No.: 001, 002

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

**Papers**

**Motion seq no. 1**

- Defs' n/m (stay action) w/HL affirm, exhs ..... 1
- Pltf's opp w/WDF affirm, exhs ..... 2
- Defs' reply w/HL affirm, exhs ..... 3

**Mot seq no. 2**

- Pltf's n/m (amend complaint) w/WDF affirm, exhs ..... 4
- Defs' response w/HL affirm w/exh ..... 5
- Pltf's reply w/WDF affirm ..... 6

**Numbered**

**FILED**

MAY 26 2010

NEW YORK  
COUNTY CLERK'S OFFICE

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

Plaintiff is the ex-wife of William A. Moses, who is now deceased (the  
"deceased" or "ex-husband"). This action seeks enforcement of support arrears and  
other obligations set forth in the settlement agreement in the divorce action. Pursuant  
to the settlement agreement between plaintiff and the deceased made February 11,  
2000 ("settlement agreement"), her ex-husband agreed to pay plaintiff the sum of

\$8,000 a month as maintenance, said payments to continue until plaintiff died, remarried, etc.

The plaintiff has named the estate, the executor and Andrew Moses, individually as defendants in this action. Andrew Moses contends that there is no basis for him to have been individually named since there are no facts to support any claim against him. Furthermore, according to the defendants, by naming Andrew Moses as someone who is obligated to make payments, etc., to or for the benefit of plaintiff under the settlement agreement, plaintiff is altering the terms of the settlement agreement and challenging it. Thus, defendants contend that under Article VII of the settlement agreement, if plaintiff mounts any kind of challenge to the agreement, she must reconvey to her ex-husband (i.e. now the estate) some of the money that has already been paid to her. These arguments are the foundation for defendants' motion for a stay of this action until plaintiff repays the sum of \$348,000 to the estate.

Plaintiff opposes the stay, arguing she is not challenging the agreement, but enforcing it. She has separately moved for leave to serve an amended complaint. The proposed amended complaint eliminates all claims against Andrew Moses in his individual capacity. Andrew Moses opposes plaintiff's motion, arguing that plaintiff is trying to circumvent having to repay the money to the estate. Furthermore, Andrew Moses contends the damage to his reputation has already been done. Although he does not provide a sworn affidavit, his attorney states that the case has the "potential" of being financially devastating to his client.

Leave to amend and supplement pleadings should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise.

CPLR § 3025 (b); Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590 (1<sup>st</sup> Dept., 1990). Leave, however, may not be granted where the amended pleading fails to state a cause of action (Stroock & Stroock & Lavan v. Beltramini, *supra*).

Andrew Moses has placed himself in the unusual position of opposing a motion to withdraw claims against him - - the very claims which he contends are completely unfounded. This illogical legal stance is apparently motivated by defendants' desire to show that by having Andrew Moses named individually, plaintiff is *challenging* the agreement, not enforcing it.

These arguments all lack merit and it illogical for the court to deny plaintiff's motion not only because this case is at an early stage, but also because defendants have shown no prejudice and apparently plaintiff has no claim against Andrew Moses, individually. Therefore, plaintiff's motion for leave to amend is granted. Plaintiff may serve the proposed complaint.

In deciding whether to allow service of the proposed amended complaint, the court also considered whether defendants are entitled to a stay of this action until plaintiff reconveys the sum of \$348,000 to the estate. With or without Andrew Moses as an individually named defendant, defendants have not established they are entitled to the interim relief sought or that they have met any of the requirements for injunctive relief<sup>1</sup>. According to plaintiff, she did not receive maintenance payments for the months of July - October 2009 and other money or benefits are due to her. She contends this is a breach of the settlement agreement with her ex-husband.

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<sup>1</sup>In fact, defendants have not identified which section of the CPLR they are moving under.

The settlement agreement only requires a reconveyance of money by plaintiff if she starts an action terminating, altering, etc., the agreement in any way, but plaintiff is not prevented from enforcing according to its terms. Even were the agreement construed to mean that an enforcement action is really a "challenge" to the settlement agreement, such provision would be unenforceable, if not void or voidable as against public policy which encourages parties to settle their difference and treats matrimonial agreements like any other contract (Christian v. Christian, 42 N.Y.2d 63 [1977]).


Since the settlement agreement provides for payment of maintenance, but plaintiff alleges the payments were not made, this action is to enforce, not challenge, the agreement. There is no basis for a stay or repayment of money, and the motion for that relief is denied.

Plaintiff's motion pursuant to CPLR § 3025 is hereby granted for the reasons stated and she may serve the proposed amended complaint along with a copy of this decision/order with notice of its entry. Defendants' time to answer the amended complaint shall be according to the CPLR. **A preliminary conference is scheduled in this case for JULY 15, 2010 at 9:30 a.m. in Part 10.** No further notices will be sent.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
May 11, 2010

**FILED**  
MAY 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE  
So Ordered:  
  
Hon. Judith J. Gische, J.S.C.