

**Kamil v Richenthal**

2010 NY Slip Op 31553(U)

June 17, 2010

Sup Ct, NY County

Docket Number: 601908/09

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 57

Jusan Kamel  
- v -  
David Richenthal

INDEX NO. 601908/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion for Summary Judgment

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2, 2A</u>
Replying Affidavits _____	<u>3, 4A, 5</u>

*Memos of Law M1-M2  
Supp Memos Suppl-Suppl2*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion + cross-motion are  
*Determined as per accompanying decision/order  
dated 6-17-10*

**FILED**  
JUN 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6-17-10

Marcy S. Friedman  
MARCY S. FRIEDMAN 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 -- PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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SUSAN KAMIL,

*Plaintiff,*

- against -

DAVID RICHENTHAL,

*Defendant.*

Index No.: 601908/09

DECISION/ORDER

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Plaintiff Susan Kamil brought this action to enforce a contract with defendant David Richenthal, made at the end of their ten-year relationship, in which he agreed to pay her \$500,000 "upon the death" of his father. The complaint alleges a sole cause of action for breach of contract. Defendant's answer pleads a counterclaim for rescission of the contract. Plaintiff moves for summary judgment on the complaint, pursuant to CPLR 3212. Defendant cross-moves for summary judgment on the counterclaim.

It is undisputed that the parties lived together as an unmarried couple from 1991 through June 2001. (Kamil Affidavit, ¶ 7.) The parties ended their relationship in 2001. On June 19, 2001, they entered into a written agreement "fix[ing] their respective financial and property rights and all other rights, privileges and obligations and matters with respect to each other arising out of their relationship." The agreement, among other things, disposed of the parties' personal property; provided for both parties not to incur any debts or obligations for which the other could be liable (Agreement, Art. III[a], [b]); required defendant to refinance, in his own

name, the home equity loan on the cooperative apartment in which the parties had resided together (*id.*, Art. III[c]); and provided for defendant to pay plaintiff a lump sum payment of \$75,000 upon execution of the agreement, and \$500,000 “upon the death of DAVID’S father, ARTHUR RICHENTHAL.” (*Id.*, Art. IV[a], [b].)

It is undisputed that defendant’s father died on October 11, 2007. Plaintiff now seeks to enforce defendant’s obligation to make the \$500,000 payment to her. Defendant argues that the agreement lacks legal consideration and is unenforceable.

“For almost a hundred years, the courts of this State have held that illicit sexual relations cannot provide part of the consideration for a contract.” (*Kastil v. Carro*, 145 AD2d 388, 389 [1st Dept 1988], *lv dismissed* 74 NY2d 650 [1989].) Defendant points to this principle as grounds for holding the parties’ agreement unenforceable. (See Def.’s Supplemental Memo. at 2.) In cases involving agreements between unmarried couples, however, courts have applied this rule only where the relationship involved adultery or unlawful objectives. (See *e.g. Kastil v. Carro*, 145 AD2d 388, *supra* [adultery]; *Pizzo v. Goor*, 50 AD3d 586 [1st Dept 2008] [adultery]; *Anonymous v. Anonymous*, 293 AD2d 406 [1st Dept 2002] [prostitution]; *Paulus v. Kuchler*, 214 AD2d 608 [2d Dept 1995] [facilitation of a divorce]; *Pfeiff v. Kelly*, 213 AD2d 916 [3d Dept 1995] [adultery].) In contrast, “New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together, provided only that illicit sexual relations were not part of the consideration of the contact.” (*Morone v. Morone*, 50 NY2d 481, 486 [1980] [internal citations and quotation marks omitted].)

While a promise of “love and affection” in the future is inadequate consideration for an executory contract (*McCray v. Citrin*, 270 AD2d 191 [1st Dept 2000]), past cohabitation, in a

relationship in which the parties cared for each other's needs, is adequate consideration for a written agreement, made at the termination of the relationship, to provide financial support. (See Kastil, 145 AD2d at 389-390; Silver v. Starrett, 176 Misc2d 511, 520 [Sup Ct, New York County 1998]; see also General Obligations Law § 5-1105 [contract for past consideration valid if in writing].) Here, the parties' agreement recited that it was "in consideration of the parties' mutual love and affection during the years they resided together tending to each other's needs." (Agreement, Whereas Clause). On the above authority, this consideration is sufficient.

The parties' agreement set forth additional consideration in the form of the parties' mutual release of claims against each other, except those involving breach of the agreement. (Id., Art. II.) As it is well-established that "[a] waiver on the part of the promisee of a legal right is sufficient consideration" (Jemzura v. Jemzura, 36 NY2d 496, 504 [1975]), plaintiff's release of claims against defendant constitutes another form of consideration which renders the agreement enforceable.<sup>1</sup>

Defendant contends that the \$500,000 payment provision was an unenforceable promise to make a future gift, not a contractual obligation. (Birbaum Aff., ¶ 16; Richenthal Aff., ¶ 8). The court rejects this contention in light of the above holding that the parties entered into an enforceable contract. The court further finds that while the payment provision was conditional (see generally Merritt Hill Vineyards Inc. v Windy Heights Vineyard, Inc., 61 NY2d 106, 112 [1984]), the only condition of payment was the death of defendant's father. Defendant's argument that the payment was intended to be contingent on the settlement of his father's estate,

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<sup>1</sup> Defendant's reliance on a recent decision regarding an agreement between unmarried parties, Reno v. Mellon, (2009 NY Slip Op 30868[U][Sup Ct, New York County 2009]), is misplaced. While the Reno court dismissed the agreement in that case for lack of consideration, the court did so upon finding that the plaintiff's waiver of a legal claim was not sufficient because the claim was not colorable. To the extent that the Reno court otherwise found the consideration insufficient, this court is unpersuaded by the holding.

or on the size of the estate, is unavailing. “The law is clear that a party will not be relieved of its contractual obligations on the basis of an intervening contingency when it would have been ‘reasonable’ to provide for such contingency in the contract.” (P.K. Dev., Inc. v. Elvem Dev. Corp., 226 AD2d 200, 202 [1st Dept 1996], citing Raner v. Goldberg, 244 NY 438 [1927].) In addition, defendant’s argument that the agreement does not accurately reflect the parties’ understanding (Richenthal Reply Aff., ¶¶ 2, 3) is barred by the merger clause (Article VII) and the modification clause (Article VIII) of the agreement, which provide that the agreement represents the entire agreement of the parties and that any modifications must be in writing. As the only legally binding condition for the \$500,000 payment has been met, defendant has breached the contract by not making the payment.

In so holding, the court finds that defendant’s remaining bases for opposing enforcement of the agreement are without merit. Although defendant asserts unilateral or mutual mistake about the expected size of his father’s estate, defendant is silent as to both the amount he expected to inherit and the amount he actually inherited. (See Birnbaum Aff., ¶ 10[4]; Richenthal Aff., ¶¶ 2, 7.) Defendant’s wholly conclusory assertions of mistake are insufficient to raise a triable issue of fact on this defense.

Defendant also fails to raise a triable issue of fact on the defense that he lacked capacity to contract. (See Birnbaum Aff., ¶ 19.) A stipulation or other contract will not be set aside for mental incapacity unless a contracting party was “incompetent to comprehend and understand the nature of the transaction” or, alternatively, unless the contracting party was suffering from a condition such as a psychosis that rendered him “incapable of making a voluntary decision” or controlling his conduct. (See Blatt v Manhattan Med. Gp., P.C., 131 AD2d 48, 51-52 [1<sup>st</sup> Dept 1987][internal quotation marks and citation omitted]; Knox v HSBC Bank, USA, 16 AD3d 199

[1<sup>st</sup> Dept 2005], lv denied 5 NY3d 702; Scarfone v Village of Ossining, 23 AD3d 540 [2d Dept 2005].) Defendant's psychiatrist opines that defendant suffered major depression which "could . . . easily have led him, purely out of depression and guilt, . . . to make a promise of a gift to Ms. Kamil without being sufficiently aware of the consequences of his action." (Miller Aff., ¶ 6.) This opinion is not only unsupported by any factual detail, but fails to diagnose a condition that would support a claim of mental incapacity under the governing legal standard.

To the extent that defendant seeks to avoid enforcement based on the fact that he was not represented by counsel when he signed the agreement, this claim is wholly without merit, particularly in light of his training and prior practice as an attorney. To the extent that plaintiff claims that he signed the agreement under duress, he failed to promptly disaffirm the contract. (See Kranitz v. Strober Org., Inc., 181 AD2d 441 [1st Dept 1992].)

Defendant's argument that additional discovery is required (Birnbaum Aff., ¶¶ 5, 11, 19; Richenthal's Reply Aff. ¶ 3) is also misplaced. Summary judgment may not be avoided based on a claimed need for discovery unless some evidentiary basis is offered to show that discovery may lead to relevant evidence. (See Bailey v New York City Tr. Auth., 270 AD2d 156 [1st Dept 2000].) Defendant has not made any showing that discovery would lead to relevant evidence on any of his defenses to enforcement of the contract. Indeed, information as to what occurred during the execution of the agreement is within defendant's knowledge; yet he has failed to make factual averments to support any legally viable defense.

The court has considered, and is unpersuaded by, defendant's remaining contentions.

It is accordingly hereby ORDERED that plaintiff's motion for summary judgment is granted to the following extent: Plaintiff is awarded judgment for \$500,000, with interest from October 11, 2007; and the Clerk shall enter judgment accordingly; and it is further

ORDERED that Defendant's cross-motion for summary judgment on its counterclaim for rescission of the agreement is denied.

This constitutes the decision and order of this court.

Dated: New York, New York  
June 17, 2010

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
JUN 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE