# AMENDED SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN**
**JUSTICE**

----------X **TRIAL/IAS PART 21**

**KENNETH J. WEINSTEIN, ESQ.,**

**Plaintiffs,**

- *against* -

**MARYANN WEINER,**

**Defendants.**

**Index No.** 020032/10
**Mot. Seq. #** 1
**Mot. Date** 2/25/11
**Submit Date** 3/7/11

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit ..... 2
Reply Affidavit..... 3

Plaintiff moves by notice of motion for an order pursuant to CPLR 3212, granting summary judgment on each cause of action set forth in the complaint with costs and disbursements thereof, in connection with his former representation of defendant in her matrimonial action.

Plaintiff states that defendant is obligated for legal fees incurred in his extensive and successful representation of her action for divorce, but she has unjustifiaby failed to pay for same even though she expressly agreed by written stipulation to be responsible for the outstanding balance of $96,365.16 owed. Furthermore, since defendant agreed to a charging lien in the above stated amount, plaintiff expressly waived his right to a retaining lien and turned over the file in its entirety to successor counsel.

Plaintiff attaches a copy of his retainer agreement with defendant in which defendant agreed to pay the rate of $425.00 per hour for his time, $325.00 per hour for an associate's time, and $150.00 per hour for a paralegal's time. Plaintiff delineates the work performed on behalf of

defendant including extensive motion practice, representation at a grounds trial, and representation at a custody trial which lasted approximately 23 days. Plaintiff states that he extensively sought a permanent order of support after her husband's divorce complaint was dismissed on grounds. Additionally, plaintiff indicates that his firm spent countless hours preparing defendant for trial, taking telephone calls, emails and other correspondence, as well as making numerous court appearances.

Plaintiff indicates that on a monthly basis, beginning March 2007, defendant was provided an invoice for services rendered. All of these statements were received and retained without objection. As of August 19, 2009, defendant allegedly owed plaintiff the sum of $96,365.16 for services performed and disbursements incurred.

On August 19, 2009, the parties entered into a stipulation as follows:

> "The undersigned Defendant in the above-captioned action hereby acknowledges to Kenneth J. Weinstein, Esq., that there is due and owing to him the sum of $96,365.16, as and for attorney's fees incurred in his representation of the Defendant herein. Defendant hereby grants a charging lien to Kenneth J. Weinstein, Esq. on any sums, assets or property received by the Defendant, as and for a distributive award in this or any subsequent matrimonial action, and/or in the event Defendant is awarded counsel fees in this or any subsequent matrimonial action arising out of Mr. Weinstein's representation herein.
>
> In exchange for the charging lien granted herein, Kenneth J. Weinstein, Esq. shall immediately prepare and make available the Defendant's entire file to the Defendant's current attorney, Gary P. Field, Esq."

The above stipulation was signed by both parties and defendant acknowledged executing this instrument before her successor attorney, Gary P. Field, Esq., a notary public.

Plaintiff asserts that the defendant's purported answer dated November 16, 2010 does not provide any basis upon which to deny his request for summary judgment. Defendant's first affirmative defense stating that she cannot afford plaintiff's fees is not a defense. Defendant's second affirmative defense alleging improper service of process is waived since she did not move to dismiss within 60 days of asserting same pursuant to CPLR 3211(e). Finally, plaintiff states that defendant's third affirmative defense alleging breach of contract is expressly contradicted by her assertion in the stipulation dated August 19, 2009 that she would be fully responsible for the fees owed and the award of a charging lien to plaintiff.

In opposition, defendant, pro se, argues that a motion is currently before Justice William J. Kent, Supreme Court, Suffolk County, under Index # 027192/06 which addresses the issue of counsel fees as well as other financial issues involving the underlying matrimonial action. Therefore, an issue of fact exists precluding summary judgment.

Defendant additionally disputes, at length, the basis of the fees charged, the adequacy of representation and her own financial hardship. With respect to the stipulation dated August 19, 2009, defendant asserts that she did not state or agree that she would be the individual responsible for payment of the requested fees or that she agreed with the requested amount. Additionally, defendant argues that she signed the stipulation under duress and only after successor counsel told defendant there was "no choice but to capitulate to Mr. Weinstein's demands in order to obtain the needed files to begin the child support trial." Defendant avers that plaintiff assured her that her husband would be required to pay her counsel fees since he was the "monied" spouse and that she was not working outside the home.

Finally, defendant argues that plaintiff should not be awarded summary judgment because the issue of counsel fees relating to the underlying action is pending in Suffolk County Supreme Court, service of process was improper, and plaintiff's bills are excessive.

In reply, plaintiff argues there is no legal or factual reason to deny summary judgment. Of critical importance is defendant's sworn acknowledgment and agreement admitting she owed the $96,365.16 in issue and acknowledgment of the charging lien. All other points raised in opposition are irrelevant as the amount of the fee and the obligation for its payment are proven and established by defendant's sworn admission. Defendant's belated assertion, made only in opposition to the instant motion, that she was purportedly under alleged "duress" is outrageous and belied by the fact that she admits she was represented by successor counsel at the time of the execution of the stipulation. Plaintiff asserts that new counsel prepared the stipulation and sent it to plaintiff for signature, and that he never dealt directly with defendant. In fact, he notes that new counsel notarized defendant's signature.

**Based on the foregoing, the decision of the court is as follows:**

"It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox,* 3 NY2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *Zuckerman v City of New York,* 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *Bhatti v Roche,* 140 AD2d 660, 528 N.Y.S.2d 1020 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor ( *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092, 479 N.E.2d 229, 489 N.Y.S.2d 884 [1985]).

If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary

judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980], supra). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513, 529 N.Y.S.2d 134 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates,* 191 AD2d 631, 595 N.Y.S.2d 236 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957], supra)." *Recine v. Margolis,* 24 Misc. 3d 1244A; 901 N.Y.S.2d 902

On this record, the plaintiff has made a prima facie showing of his entitlement to summary judgment on all the causes of action. Consequently, the burden shifts to the defendant to raise an issue of fact sufficient to defeat the motion.

Even viewing the evidence in the light most favorable to the defendant (*Judice v DeAngelo*, 272 A.D.2d 583 [2nd Dept. 2000]; *Robinson v Strong Memorial Hospital*, 98 A.D.2d 976 [4th Dept. 1983]), the defendant has not sustained her burden of proof. The court finds that defendant has not come forward with extrinsic proof in admissible form sufficient to defeat the motion. "Bald conclusory assertions, even if believable, are not enough." (*Kramer v. Harris*, 9 A D 2d 282, 283; *P. D. J. Corp. v. Bansh Props.*, 23 N Y 2d 971; *Rafner v. Toplis & Harding, Inc.*, 25 A D 2d 826; *Di Sabato v. Soffes* , 9 A D 2d 297).

Defendant's assertion that summary judgment should not be granted due to a pending counsel fee application in Suffolk County Supreme Court is of no moment. The court has determined through conversations between chambers that the fee application involves a request that defendant's husband be responsible for payment of counsel fees relating to the matrimonial action. A determination relating to defendant's husband's obligation does not relieve defendant's contractual obligation for payment of fees to plaintiff. Assuming *arguendo* that defendant's husband is ordered by the Suffolk County Supreme Court to pay some or all of defendant's counsel fees, defendant's recourse would be against her husband, not plaintiff herein.

Furthermore, the self-serving and conclusory statements offered in defendant's affidavit are not sufficient to overcome the documentary evidence contained in the record, to wit: the Retainer Agreement signed by both parties dated March 14, 2007, attached to defendant's opposition as Exhibit "E"; the time slips delineating legal services rendered attached to plaintiff's motion as Exhibit "C"; and the stipulation dated August 19, 2009 attached to plaintiff's motion as Exhibit "B". All the documents reveal a tacit acknowledgment by defendant relating to her counsel fee obligation. The stipulation specifically grants a charging lien on any sums, assets or property received by the defendant as a distributive award in this or any subsequent matrimonial action. Moreover, the court notes that there was never any objection by defendant as to the fees imposed.

An attempt by defendant to deem the stipulation unenforceable is without merit. Defendant failed to move by plenary action to repudiate the stipulation which was entered into a year and a half ago, therefore, the court determines that the contract was ratified. The law is well settled that a party seeking to repudiate a contract procured by duress must act promptly lest he be deemed to have elected to affirm it (*Bethlehem Steel Corp. v Solow*, 63 AD2d 611, app dsmd 45 NY2d 837; *Fowler v Fowler*, 197 App Div 572). Such a belated attempt to nullify the agreement as defendant makes here, is insufficient. A party who executes a contract under duress and then acquiesces in the contract for any considerable length of time, ratifies the contract (*Sheindlin v. Sheindlin*, 88 A.D.2d 930, 931; *Smith v Jones,* 76 Misc 2d 656). Defendant is barred from suddenly raising issues of coercion, duress, and inexperience.

Therefore, defendant is bound by the terms of the fee agreements with plaintiff and the latter is entitled to summary judgment.

Accordingly, it is

ORDERED, that plaintiff's application for an order pursuant to CPLR 3212 granting summary judgment on each cause of action set forth in the complaint is **GRANTED**.

Submit Judgment on Notice.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
March 28, 2011

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED
APR 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

To:
Plaintiff pro se
Kenneth J. Weinstein, Esq.
100 Garden City Plaza, Ste. 408
Garden City, NY 11530
516-742-1400

Defendant pro se
Ms. Maryann Weiner
8 Somner Drive
Dix Hills, NY 11746