

**Sternbach v Michiel**

2011 NY Slip Op 32240(U)

July 25, 2011

Supreme Court, Suffolk County

Docket Number: 267-10

Judge: Daniel Martin

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**SUPREME COURT OF THE STATE OF NEW YORK  
I.A.S. PART 9 SUFFOLK COUNTY**

PRESENT:

HON. DANIEL MARTIN

\_\_\_\_\_ x

TODD STERNBACH,

Plaintiff,

-against-

LESLIE MICHIEL,

Defendant.

\_\_\_\_\_ x

INDEX NO.: 267-10

Motion Dates: 4/28/10; 10/13/10; 11/23/10;  
1/12/11

Submitted: 7/19/11

Motion Sequence Nos.: 01 - MD

02 - MD

03 - MotD

04 - MD

PLAINTIFF'S ATTY:

Bryan L. Salamone, P.C.

90 East Main Street

Melville, New York 11747

DEFENDANT'S ATTY:

DiMascio &amp; Associates, LLP.

300 Garden City Plaza, Ste. 306

Garden City, New York 11530

**The following named papers have been read on this motion:**

<b>Order to Show Cause/Notice of Motion</b>	<b>X</b>
<b>Cross-Motion</b>	<b>X</b>
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

**ORDERED** that the motions of the plaintiff for an order dismissing defendant's counterclaim (001), for an order granting him summary judgment (002), and for an order dismissing defendant's cross motion (004), are consolidated for the purposes of this determination and are decided together with the cross motion of the defendant for an order dismissing plaintiff's summons and complaint (003); and, it is further

**ORDERED** that the motion (001) of the plaintiff for an order dismissing defendant's counterclaim pursuant to CPLR 3211 is denied; and, it is further

**ORDERED** that the motion (002) of the plaintiff for an order pursuant to CPLR 3212

granting him summary judgment is denied; and, it is further

**ORDERED** that the cross motion (003) of the defendant for an order pursuant to DRL 244 directing the entry of a money judgment, pursuant to DRL 245 awarding counsel fees, and pursuant to CPLR 213(8) and 3211 dismissing plaintiff's complaint is determined as follows; and, it is further

**ORDERED** that the motion (004) of the plaintiff for an order dismissing defendant's cross motion and granting attorneys' fees is denied.

On or about January 12, 2010 plaintiff commenced this action to vacate the parties' Stipulation of Settlement dated December 10, 2001 and the Judgment of Divorce entered on March 29, 2002. Plaintiff alleges that the Stipulation of Settlement entered into by the parties must be vacated on the grounds that it fails to comply with DRL 240 (1-b)(h), in that it does not contain the required language under the Child Support Standards Act, and that it was based upon fraud and improper child support calculations. He also alleges that portions of the Judgment of Divorce must be vacated because the underlying settlement agreement was based upon fraud and that the income calculations used for the purpose of determining child support were incorrect.

Defendant contends that plaintiff's claims sounding in fraud are time barred and that plaintiff ratified the December 10, 2001 agreement by complying with its terms for more than eight (8) years, thus estopping him from challenging it. Defendant asserts a counterclaim against plaintiff seeking a money judgment against plaintiff in the amount of \$49,750.00, plus interest of \$4,475.50 totaling \$54,225.50, for child support arrears<sup>1</sup>; accountings in connection with a securities account and Bat Mitzvah funds being held by plaintiff on behalf of the parties' child(ren); reimbursement for certain medical expenses; and attorneys' fees. She alleges that plaintiff is required to pay \$3,000.00 per month as and for child support for the parties' two children pursuant to the terms of the Judgment of Divorce and the written agreement of the parties and that he has not done so since May 2009; that plaintiff is required to pay 67% of the unreimbursed medical expenses of the parties' two children but that he has not done so since May 2009; that plaintiff maintains a securities account for the benefit of their unemancipated daughter, Lauren Sternbach, and that he holds funds received by the parties' two children at their Bat Mitzvahs and refuses to provide accountings for same; and that plaintiff is required to pay her attorneys fees in connection with this matter pursuant to the terms of the December 10, 2001 Stipulation of Settlement.

Plaintiff now moves for an order dismissing defendant's counterclaim, granting summary judgment thereby vacating the Judgment of Divorce, and granting attorneys fees. In support of his

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<sup>1</sup>Pursuant to DRL 244-a, on November 2, 2010, defendant served a notice indicating that she seeks additional arrears against plaintiff for his willful violation of the parties' stipulation of settlement and that she intends to amend the papers in support of her application to include additional arrears which accrue during the pendency of this matter.

motions he submits a copy of the Stipulation of Settlement, Findings of Fact and Conclusions of Law and the Judgment of Divorce, defendant's 1999 W-2 Statement, and the December 27, 2001 Child Support Worksheet prepared by defendant (all in connection with the prior divorce proceeding between the parties), and the pleadings (for the within action).

Plaintiff claims that defendant's first counterclaim, which seeks to enforce the child support provisions of the Stipulation of Settlement and Judgment of Divorce, should be struck as it "fails to set forth what cause of action she is seeking relief under...[and] it would appear that Defendant is seeking to enforce the Stipulation of Settlement which should be done in a different manner." He alleges that defendant's second counterclaim, which seeks accountings in connection with a securities account and Bat Mitzvah funds held by him on behalf of the parties' child[ren], "is not a cause of action" and that it "fails to state a cause of action which the Court could afford relief. Therefore it should be dismissed." Finally, plaintiff argues that defendant's request for counsel fees should be dismissed because "she should not be rewarded for responding to Plaintiff's complaint without setting forth a cause of action which the Court could afford relief."

In determining whether to dismiss a complaint for failure to state a cause of action, a Court must liberally construe the pleadings and minor defects should be ignored unless the rights of a party are prejudiced (*CPLR 3026, see Catli v Lindenman*, 40 AD2d 714, 337 NYS2d 46 [2d Dept 1972] *affd* 33 NY2d 1002, 353 NYS2d 965 [1974]). Here, there is no question that defendant seeks to enforce a contract, to obtain a money judgment for a default under a Judgment of this Court, to obtain an accounting (an equity action), and to recover attorneys fees pursuant to the terms of a contract. Each of defendant's counterclaims clearly states a cognizable, recognizable cause of action under the laws of the State of New York. As such, plaintiff's arguments are specious at best, and his motion to dismiss defendant's counterclaims is denied in its entirety.

Plaintiff avers that he is entitled to summary judgment setting aside all of the financial provisions of the Stipulation of Settlement and the Judgment of Divorce, and a recalculation of the child support provisions claiming that the provisions of the Stipulation related to child support must be vacated because defendant's income was listed differently in the three documents and that the Stipulation was a "product of fraud" and was not in compliance with the applicable Domestic Relations Laws. Defendant's 1999 W-2 wage statement indicates defendant's 1999 wages, tips and other compensation (box 1) were \$61,124.73 and that her social security wages (box 3) were \$63,036.07; the Findings of Fact and Conclusions of Law dated March 21, 2002 indicate that defendant's annual income was \$56,303.00; and, the Child Support Worksheet, sworn to by defendant on December 27, 2001, lists her 1999 income as \$61,125.00 (it lists plaintiff's "estimated" 1999 income of \$144,000.00). In the Stipulation of Settlement dated December 10, 2001 the parties acknowledged that defendant received approximately \$4,400 net retroactive pay from her employer, that each of their attorneys fully explained the provisions of the Child Support Standards Act to them and that they fully understood its provisions and applicability to them, that the presumptively correct amount of child support payable by plaintiff to defendant was \$3,000.00 per month, that "[t]he parties believe that their Agreement is in substantial compliance with the C.S.S.A., and as permitted by law, each of the parties waive any rights he or she otherwise might have pursuant to the said Act, and instead agrees to be bound by the terms and conditions of this Agreement", and that plaintiff's *pro rata* share for non-reimbursed dental, medical and educational expenses for the infant issue of the marriage was determined to be 75% but that he would be obligated to pay only 67% of the cost of health care insurance, non-reimbursed dental, medical, and educational expenses (including

college with a SUNY cap) for the infant issue of the marriage. Each party was represented by counsel of his/her own choosing at the time the Stipulation was executed. Plaintiff complied with the terms of the said agreement until April 2009 when he stopped making payments of \$3,000.00 per month for child support as was agreed upon by the parties.

In response to plaintiff's motion, defendant maintains that the Stipulation is in compliance with DRL, Section 240 (1-b)(h) which states in pertinent part that

“[a] validly executed agreement or stipulation voluntarily entered into between the parties ... presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded. In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.”

Since the agreement indicates that the presumptively correct amount of child support is to be paid to the defendant and that the parties were advised of the provisions of the statute, defendant maintains that it is in compliance and that plaintiff has failed to state a cause of action to set aside the said Stipulation. Defendant states that the references by plaintiff to the different financial documents do not make out a cause of action for fraud and must be dismissed outright. The defendant claims that the income listed in the child support worksheet (*i.e.* \$61,125.00) refers to approximate 1999 income (1999 W-2 box 1 wages, tips and other compensation) and was used to prepare the December 10, 2001 Stipulation of Settlement, while the income contained in the Findings of Fact dated March 21, 2002 refers to the defendant's income at that time. Defendant asseverates that plaintiff knew of, or should have known of the alleged financial “discrepancies” in February 2002, when the documents were delivered to the matrimonial clerk for submission of the divorce and copied to his attorney. In any event, as an action for fraud must be commenced within six (6) years of the date the cause of action accrued or two (2) years from the time the fraud was discovered or could with reasonable diligence have been discovered (CPLR 213[8]), defendant alleges that plaintiff's claim is time barred. Finally, she claims that plaintiff received the financial benefits of the Stipulation and complied with its terms for approximately seven (7) years, thus ratifying it. Therefore, she asserts, plaintiff should be estopped from attempting to vacate it.

Defendant also requests that the Court issue an order directing the entry of a money judgment in the sum of \$54,225.50 (plus additional arrears to date) representing the payment of child support arrears owed by plaintiff to defendant together with interest at the statutory rate (9%); granting attorney fees in the amount of \$20,000.00 pursuant to Judiciary Law 773 and Domestic Relations Law 245 as a result of the prosecution of this enforcement action; and, dismissing plaintiff's summons and complaint based upon CPLR sections 213(8) and 3211 and his ratification of the Stipulation of Settlement and Judgment of Divorce.

Defendant asserts that since April 2009 until the date of her application (November 2, 2010) the plaintiff paid her a total of \$10,250.00 while the sum he was required to pay pursuant to the Judgment of Divorce during that time period was \$60,000.00. She contends that he owes her the

balance of \$49,750.00 plus interest of \$4,475.50 totaling \$54, 225.50 plus interest and arrearage to date. Plaintiff does not contest these amounts, instead he alleges that the agreement must be vacated and new calculations made as to the proper amount of child support to be paid by him. He does not provide any information which would indicate to the Court that the amount of child support he agreed to pay for the children of the parties is incorrect or based upon income which should not have been attributed to him. His sole argument is that the Stipulation of Settlement does not set forth the income of the parties and that the defendant's income is not the same on each of the documents as is indicated above.<sup>2</sup>

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141[1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

The Court finds that the Stipulation of Settlement contains the language required by DRL 240 (1-b)(h), the child support required to be paid by plaintiff pursuant to the terms of the Stipulation appears to be in conformity with the Child Support Standards Act based upon plaintiff's income as listed on the Child Support Worksheet, the plaintiff has offered no evidence of fraud (and based upon the facts as averred, he is time barred from asserting that claim), and the plaintiff ratified the terms of the Stipulation by complying with same for approximately seven (7) years. Plaintiff's motion for summary judgment in his favor is denied. Defendant is granted a money judgment in her favor against plaintiff in the sum of \$54,225.50 plus interest from November 2, 2010. Summary judgment dismissing plaintiff's complaint is granted.

The Stipulation which was incorporated but not merged into the Judgment of Divorce provides for an award of counsel fees in the event of a default under the terms of the Stipulation. Furthermore, plaintiff neither challenged the reasonableness of the fees requested nor did he request a hearing in regard to the value and extent of the services provided (*see, Sieratzki v Sieratzki*, 8 AD3d 552, 779 NYS2d 507 [2d Dept 2004]). Defendant is awarded a money judgment against

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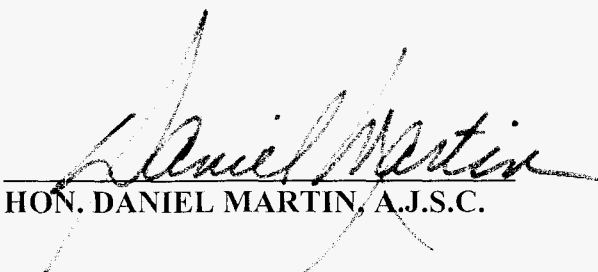
<sup>2</sup>Plaintiff does not deny that he received copies of the proposed Findings of Fact and Conclusions of Law, proposed Judgment of Divorce, and Child Support Worksheet prior to the execution of the Judgment by the Court on March 21, 2002. Nor does plaintiff allege that he was not a party to the negotiations or aware of the terms of the Stipulation of Settlement when he executed it in December of 2001.

plaintiff representing an award of counsel fees in the amount of \$20,000.00. Defendant shall provide to plaintiff, within twenty (20) days of the date of this order, accountings for the Prudential Securities Account which he maintains for the benefit of the parties unemancipated daughter, Lauren Sternbach and the Bat Mitzvah funds he maintains for the benefit of the parties' two unemancipated daughters.

Accordingly, the Clerk of the County of Suffolk is directed to enter and docket a money judgment in favor of defendant and against plaintiff in the amount of \$54,225.50 plus interest from November 2, 2010, representing child support arrears, and a judgment in favor of defendant and against plaintiff in the sum of \$20,000.00, representing counsel fees.

So Ordered.

**Dated: July 25, 2011**  
Riverhead, NY

  
HON. DANIEL MARTIN, A.J.S.C.