Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

KORNEL LJUBA,

Plaintiff,

-against-

SALVATRICE ROSETTE LJUBA,

Defendant.

Index No: 25642/11

Motion Date: 2/29/12

Motion Cal. No.: 9

Motion Seq. No.: 1

The following papers numbered 1 to 8 read on this motion by defendant for an Order dismissing the complaint pursuant to CPLR 3211(a)(1) & (7)

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8

Upon the foregoing papers it is ordered that this motion is determined as follows.

The parties were former husband and wife who were married in 1969. In 2004, the defendant, wife, commenced an action for divorce and ancillary relief. The parties settled the matrimonial action by a stipulation entered on the record, in open court on March 24, 2006 (hereinafter the March stipulation) before the assigned IAS Justice the Hon. Jeffrey D. Lebowitz. A subsequent stipulation dated August 11, 2006 (hereinafter the modification), executed by the parties and their respective attorneys modified portions of the March stipulation. The parties were divorced by a Judgment of Divorce dated November 27, 2006, and entered almost one year later, on September 26, 2007, which incorporated, but did not merge, the March stipulation. The parties also executed additional stipulations on March 16, 2007, August 8, 2007, October 24, 2007 and January 30, 2008, each of which was So Ordered by Judge Lebowitz.

The plaintiff commenced this action on November 14, 2011 seeking to, in effect, rescind, vacate and set aside the March stipulation, the amendment and all of the subsequent stipulations

on the ground that they were not acknowledged in accordance with the provisions of Domestic Relations Law (DRL), Section 236, Part B Subd. 3, and/or that they are the product of overreaching, duress, coercion and are unconscionable and unjust.

The defendant now moves to dismiss the complaint pursuant to CPLR 3211(a)(7) & (1); that this action is barred by the doctrines of collateral estoppel and res judicata; that it is procedurally defective since plaintiff's remedy for relief from the so Ordered stipulations was an appeal rather than a plenary action.

As an initial matter the commencement of a plenary action to challenge the March stipulation, the modification and the subsequent stipulations is the proper procedural mechanism where, as here, the matrimonial action was terminated by the entry of a judgment (see White House Manor, Ltd. v. Benjamin, 11 NY3d 393, 401 [2008]; Church Extension Plan v. Harvest Assembly of God, 79 AD3d 787, 788-789 [2010]; Luisi v. Luisi, 6 AD3d 398 [2004]).

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine whether the plaintiff has a legally cognizable cause of action and not whether an action has been properly plead (see Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]; Rovello v. Orofino Realty Co., 40 NY2d 633 [1976]). However, allegations consisting of bare legal conclusions or those that are inherently incredible or flatly contradicted by the documentary evidence are not presumed to be true nor accorded every favorable inference (see Sweeney v. Sweeney, 71 AD3d 989 [2010]; NCJ Cleaners, LLC v. ALM Media, Inc., 48 AD3d 766 [2008]; Pincus v. Wells, 35 AD3d 569, 570 [2006]). The court may consider affidavits submitted by the plaintiff in its determination of the motion to dismiss (see Leon v. Martinez, supra at 87-88; Rovello v. Orofino Realty Co., supra at 635; Integrated Const. Services, Inc. v. Scottsdale Ins. Co., supra at 1162).

To succeed on a motion to dismiss the complaint based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must be such that it utterly refutes the plaintiff's factual allegations and conclusively establishes a defense as a matter of law (see Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Integrated Const. Services, Inc. v. Scottsdale Ins. Co., 82 AD3d 1160, 1162-1163 [2011]).

The plaintiff's first cause of action alleging that the stipulations are null and void and unenforceable since they were not acknowledged in accordance with the provisions of DRL §236, Part B Subd. 3 is erroneous and fails to state a basis for relief.

Stipulations of settlement are favored by the courts and are not lightly set aside (see Hallock v. State of New York, 64 NY2d 224, 230 [1984]; Yuwei Zhang v. Ming Ting, 72 AD3d 678, 679 [2010]; Castellano v. Castellano, 66 AD3d 942 [2009]). The Second Department has consistently held that the statutory formalities of DRL § 236(B)(3) are inapplicable to stipulations settling property issues within a pending matrimonial action and will be upheld as valid and enforceable if it complies with CPLR § 2104 (see Nordgren v. Nordgren, 264 AD2d 828 [1999]; Jensen v. Jensen, 110 AD2d 679 [1985]; Harrington v Harrington, 103 AD2d 356 [1984]; see also Rickles v. Rickles, 88 AD3d 780[2011] lv dismissed 18 NY3d 871 [2012]; Castellano v. Castellano, supra; Balkin v. Balkin, 43 AD3d 967 [2007]). It is undisputed that the March stipulation was entered into on the record in open court. The subsequent stipulations were the result of the parties' settlement of various motions which they negotiated under the supervision of the court, and signed in court by the parties and their attorneys and so Ordered by the court (CPLR 2104). They are not subject to DRL 236(B)(3) and thus, the first cause of action fails to state a cause of action and is dismissed.

Plaintiff's second and third causes of actions seek to rescind the March Stipulation the amendment and the subsequent stipulations based upon claims of mistake, duress, coercion and unconscionability.

A stipulation, read into the record in open court and found by the court to be fair and reasonable, or a written stipulation signed by all the parties in accordance with CPLR 2104 will not be set aside unless it was tainted by mistake, fraud, duress, overreaching or unconscionability (see Matter of Dolgin Eldert Corp., 31 NY2d 1, 10 [1972]; Libert v. Libert, 78 AD3d 790 [2010]; Harrington v. Harrington, supra at 359). The plaintiff's complaint fails to state a cause of action warranting the relief requested.

To set aside an agreement on the ground of duress plaintiff must establish that he was forced to agree to it as a result of the defendant's wrongful threat which precluded the exercise of his free will (see Austin Instrument v. Loral Corp., 29 NY2d 124, 130 [1971]; Matter of Guttenplan, 222 AD2d 255,256-257, lv. denied 88 NY2d 812; Sontag v. Sontag, 114 AD2d 892, 894).

However, the complaint fails to allege any specific facts or acts with respect the defendant which deprived him of the ability to exercise his own free will that constitute legal duress. The general, conclusory assertions of duress and coercion are insufficient to plead an actionable duress (see Stearns v. Stearns, 11 AD3d 746 [2004]).

More importantly, however, the defendant's documentary evidence conclusively establishes that the plaintiff was represented by counsel at all times, that several times during the inquest the court cautioned and instructed the parties to consult with their respective attorneys and ask any questions to make sure they understood the terms of the settlement. During plaintiff's allocution, he testified that he discussed the settlement for weeks, months with his attorney, and he understood and agreed with the terms. The August 11, 2006 stipulation also expressly provides that the parties enter into the agreement voluntarily and without any duress or coercion and that each has discussed the amendment with his or her attorney and that they have each "read and understood" all of the poisons (see Rubenfeld v. Rubenfeld, 279 AD2d 153, 154 [2001]).

With respect to plaintiff's claim that the threat of incarceration by the court forced him to enter into one of the stipulations is equally insufficient to support a claim of duress (see DRL §245; Desantis v. Ariens Co., 17 AD3d 311 [2005]; Helwig v. Wilkens, 51 AD2d 694 [1976],appeal dismissed 39 NY2d 798[1976]). In addition, the documentary evidence conclusively demonstrates that the threat of incarceration in the August 8, 2007 so Ordered stipulation was the direct result of Judge Lebowitz' finding plaintiff in contempt for his continued failure to obey the Judgment and Orders of the court (see DRL § 245; Doppelt v. Doppelt, 215 AD2d 715 [1995]; Willig v. Rapaport, 81 AD2d 862 [1981]; Helwig v. Wilkens, 51 AD2d 694 [1976],appeal dismissed 39 NY2d 798 [1976]).

Furthermore, one who claims to have entered into an agreement under duress and has accepted it for a considerable length of time has ratified the contract (see Beutel v. Beutel, 55 NY2d 957; Bethlehem Steel Corp. v. Solow, 63 AD2d 611 [1978] aff'd 45 NY2d 837 [1978]). "[A] party seeking to repudiate a contract procured by duress must act promptly lest he be deemed to have elected to affirm it" (Stampfel v. Stampfel, 170 AD2d 595 [1991] quoting Stoerchle v. Stoerchle, 101 AD2d 831, 832 [1984]). The plaintiff commenced this action almost 6 years after entering into the March stipulation and the amendment, over four years after entry of the Judgment of Divorce and after there has been at least partial compliance without any explanation for the

delay and has, thus, ratified the settlement and modification (see Cosh v. Cosh, 45 AD3d 798, 800-801 [2007]).

An unconscionable agreement is one which no person in his or her senses and not under delusion would make on the one hand, and which no honest and fair person would accept on the other (see Christian v. Christian, 42 NY2d 63, 71 [1977]; McCaughey v. McCaughey, 205 AD2d 330, 331, [1994]). The plaintiff's allegation that the March stipulation and its amendment were unconscionable and unjust rests upon the unsubstantiated claim that the defendant received more than 60% of the total marital assets. Merely alleging an unequal division of assets, however, is not sufficient to state a claim to rescind based upon unconscionability (see Cosh v. Cosh, 45 AD3d 798, 799 [2007]; Morand v. Morand, 2 AD3d 913, 915 [2003]; see also Barocas v. Barocas, ___ AD3d ___ [2012], 2012 WL 1293783). DRL §236 Part B Subd. 5(c) provides for "equitable" distribution of the marital property. Equitable means fair and just, and does not necessarily mean equal (see Arvantides v. Arvantides, 64 NY2d 1033 [1985]; Hathaway v. Hathaway, 16 AD3d 458 [2005]; Schenkman Practice Commentaries, McKinney's Cons Laws of NY Book 14, C236B:24 at 227). In addition, the transcript of the inquest demonstrates that Judge Lebowitz determined, and so stated on the record, that the settlement was fair and reasonable when it was made.

To the extent that plaintiff alleges that he did not understand the words of the Stipulation of Settlement due to his limited understanding of English, it is also insufficient to state a claim for recision. An inability to understand the English language, without more, is insufficient to avoid the general rule that a party who executes an agreement is presumed to know and agree to its contents (see Pimpinello v. Swift & Co., 253 NY 159, 162-163 [1930]; Gillman v. Chase Manhattan Bank, 73 NY2d 1, 11 [1988]; Holcomb v. TWR Express, Inc., 11 AD3d 513, 514 [2004]). The complaint does not allege that he expressed his lack of understanding at any time, or that he made any effort to have any of the agreements translated or explained to him and that he was prevented from doing so (see Flusserova v. Schnabel, 92 AD3d 464 [2012]; Kassab v. Marco Shoes, 282 AD2d 316 [2001]; Shklovskiy v. Khan, 273 AD2d 371 [2000]). It is noted that the plaintiff submitted an affidavit in opposition, certified by him under the penalties of perjury, that he has "carefully read and reviewed" it and which contains, among other things, legal arguments and precedents. Curiously, the plaintiff has not stated how the contents of his affidavit was explained to him.

Dated: April 20, 2012
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J.S.C.