

Mehran v Mehran
2012 NY Slip Op 31664(U)
June 19, 2012
Supreme Court, Suffolk County
Docket Number: 08-5986
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-12-11 (#002)
MOTION DATE 12-29-11 (#003)
ADJ. DATE 2-7-12
Mot. Seq. # 002 - MD
003 - MotD

-----X
NICOLE MEHRAN n/k/a NICOLE BENEDICT, : ANDREA SEYCHETT SCHEAR, ESQ.
: Attorney for Plaintiff
Plaintiff, : 425 Broad Hollow Road
: Melville, New York 11747
-against- :
: KING & STREISFELD
ALEXANDER MEHRAN, : Attorney for Defendant
: 3000 Marcus Avenue, Suite 2E7
Defendant. : Lake Success, New York 11042
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause (motion sequence number 002) by the plaintiff, dated September 22, 2011, and supporting papers; (2) Affirmation in Opposition by the defendant, dated October 25, 2011, and supporting papers; (3) Notice of Motion/Order to Show Cause (motion sequence number 003) by the plaintiff, dated December 9, 2011, and supporting papers; (4) Affirmation in Opposition by the defendant, dated January 11, 2012, and supporting papers; (5) Reply Affirmation by the plaintiff, dated January 27, 2012, and supporting papers (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by plaintiff dated September 22, 2011 for an order granting summary judgment on the second cause of action, partial summary judgment on the fourth cause of action, awarding plaintiff a judgment in the amount of \$3,664.00, and granting summary judgment awarding counsel fees in the amount of \$12,994.66 on the sixth cause of action is denied as moot, it being withdrawn or superceded by the motion by plaintiff dated December 9, 2011 which seeks the same, as well as additional, relief; and, it is further

ORDERED that the motion by plaintiff dated December 9, 2011 for an order granting leave to amend the complaint on her fourth cause of action pursuant to CPLR 3025 (b), granting summary judgment pursuant to CPLR 3212 on her second and fourth causes of action, directing defendant to obtain a life insurance policy pursuant to the parties' Agreement dated September 17, 2003, awarding her a judgment against defendant in the sum of \$3,664.00, and granting an award of counsel fees in the sum of \$12,994.66 is determined as follows.

This is a post judgment application brought by plaintiff to enforce several provisions of the parties' settlement agreement dated September 17, 2003 which was incorporated but not merged into their judgment of divorce dated March 22, 2004 and granted by the Hon. William R. Lamarca, J.S.C. (Nassau County). The pertinent portions of the agreement state:

XIX. LIFE INSURANCE

1. The [defendant] agrees that he will maintain in full force and effect, and neither pledge, hypothecate nor encumber the existing policies insuring his life in the minimum face value of One Million (\$1,000,000.00) Dollars naming the [plaintiff] as Trustee for the benefit of the children as irrevocable beneficiaries of said policy, with [sic] such time as the children are emancipated.

2. It is the intention of this article that the [defendant] maintain sufficient Life Insurance to cover all of his obligations to this agreement.

3. In the event of the [defendant's] demise and the payment to the [plaintiff] of the life insurance proceeds as trustee, she shall pay the sums due from the [defendant] pursuant to this agreement. When all sums pursuant to this agreement have been fully paid, and if there is any balance in said account, said balance shall be distributed equally among the [defendant's] children surviving him.

4. Promptly after the execution of this Agreement, the [defendant] shall deliver to the [plaintiff] certificates or instruments, if any, evidencing such irrevocable designation of the children as beneficiaries under said insurance policies, and the [defendant] further agrees that he will, at any time upon request, execute and deliver to the [plaintiff] whatever instruments or documents or letter of authorization which may be required to enable the [plaintiff] to document that the [defendant] has complied with all the provisions hereof.

...

XX. INCOME TAX RETURNS

...

3. The [defendant] shall be entitled to claim both children as dependents for income tax purposes. However, in consideration for same, the [defendant] shall pay to the [plaintiff] a sum equal to any refund she would have been entitled to receive had she taken one (1) of the children as a dependent. The [plaintiff's] accountant shall calculate said sum on a yearly basis and said calculation shall be produced to the [defendant]. The [defendant] shall pay said sums within of [sic] ten (10) days of his receipt of the calculation.

...

XXXVI. COUNSEL FEES IN EVENT OF DEFAULT

In the event that either party defaults with respect to any obligation under this Agreement and said default is not remedied within fifteen days after the sending of a written notice to the defaulting party specifying such default, such defaulting party shall and hereby does indemnify the other party against, or shall reimburse his [sic] or her for, reasonable attorney's fees, disbursements and Court costs incurred by the non-defaulting party in bringing suit or other proceeding to enforce any of the terms, covenants or conditions of this Agreement to be performed or complied with by the other, provided such suit or other proceeding results in a judgment, decree, or order in favor of him or her.

Plaintiff sets forth six causes of action in her complaint, she requests the court to permit her to amend her fourth cause of action, and after granting such permission, she asks the court to grant summary judgment on the second and sixth causes of action and partial summary judgment on the fourth cause of action. Plaintiff's second cause of action seeks specific performance of section XIX, the life insurance provision of the contract. Alternatively, the second cause of action seeks a money judgment in the amount of \$1,000,000.00 as damages for defendant's alleged failure to comply with this provision. The fourth cause of action requests that the court grant a money judgment for the alleged failure of defendant to comply with certain portions of the agreement (the plaintiff moves to amend this cause of action in the complaint, pursuant to CPLR 3025 [b], so that it more specifically states that she seeks to recover, in part, for his failure to comply with Article XX of the agreement for the tax years ending 2008, 2009, and 2010). The sixth cause of action seeks counsel fees pursuant to XXXVI of the agreement.

Plaintiff maintains that permission to amend her fourth cause of action should be granted because she is seeking summary judgment on one portion of it, that portion she wishes to amend. She alleges that at the time the complaint was filed, defendant had "announced" that he had no intention of complying with the income tax reimbursement provision of the agreement but that the taxes were not yet due for the years ending in 2008, 2009, and 2010. Since then, the taxes have become due and plaintiff contends that defendant has failed and refused to reimburse her for those years pursuant to Article XX of the agreement. (She seeks reimbursement for other sums of money she claims is due her in this part of the complaint but is not seeking summary judgment relative thereto.) The amount she claims she is owed in connection with Article XX for the years 2008, 2009, and 2010 is \$3,664.00. Plaintiff argues that leave to amend the complaint should be freely given pursuant to CPLR 3025 (b) and that defendant can show no prejudice or surprise as a result of the amendment as he has been aware of her claim for this reimbursement at least from June of 2011. Because defendant admits that he has not reimbursed her for the tax dependent calculations under Article XX of the agreement, plaintiff seeks summary judgment on that issue.

Similarly, plaintiff requests a direction that defendant obtain life insurance pursuant to Article XIX of the agreement. She contends that the agreement is clear and unambiguous and that defendant's failure to abide by its terms in connection with the life insurance provisions entitles her to summary judgment on that issue. Finally, she requests an award of counsel fees in the sum of \$12,994.66 pursuant to Article XXXVI, in connection with these enforcement proceedings.

In opposition to the plaintiff's motion, defendant contends that he and plaintiff have been unable to agree to the terms of a proposed trust agreement and that he has an insurance policy in existence with the children named as irrevocable trustees. He argues that he needs a trust agreement to "protect his other children" from his first marriage and seeks to name a son from his first marriage as "co-trustee." Notwithstanding the fact that plaintiff has not been named as the trustee, he avers that he has "met the gravamen of the Second Cause of Action" and requests that her motion to direct him to obtain insurance pursuant to Article XIX be denied.

Defendant argues that plaintiff is not entitled to a refund for permitting him to claim both children as tax dependents for the years after 2007 because "the intention of the parties at the time the Agreement was negotiated and executed was that the Plaintiff was to get the refund as long as she was working and was single. When she stopped working and/or remarried, the refunds should cease." He alleges that plaintiff stopped working in March 2008 and remarried and, therefore, is not entitled to the refund. Defendant opposes plaintiff's attempt to amend her complaint and contends that it is a surprise and prejudicial to him. He offers no explanation as to how he is prejudiced or surprised by the proposed amendment.

In opposition to plaintiff's request for counsel fees, defendant posits that plaintiff is not entitled to them since she should be unsuccessful on the merits. Additionally, he argues that plaintiff seeks counsel fees on all of her causes of action, no delineation is made for the portions for which she seeks summary judgment. He suggests that her counsel fee request should be limited to the time spent in connection with the causes of action for which she seeks summary judgment.

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*).

Naming a party as a "beneficiary" on a life insurance policy instead of an "irrevocable beneficiary" as required by the terms of a post nuptial agreement that is incorporated into, but not merged with the parties judgment of divorce, is not substantial compliance with the provision, but constitutes a material breach for which a contempt finding and an award of counsel fees may be proper (*see Sutton v Sutton*, 93 AD3d 779, 939 NYS2d 882 [2d Dept 2012]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the

contract, giving practical interpretation to the language employed and the parties' reasonable expectations (see, *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; *Costello v Casale*, 281 AD2d 581, 583, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). Here, the parties' agreement is clear and unambiguous in directing that defendant name plaintiff "as Trustee for the benefit of the children as irrevocable beneficiaries of said policy" until such time as they are emancipated. The agreement provides for the distribution of any remaining funds from that policy to all of defendant's children, after his obligations under the agreement are paid, in the event he dies prior to the emancipation of the parties' two children. Therefore, defendant's arguments concerning his failure to comply with the terms of the Life Insurance provision (XIX), are specious, at best, and defendant is directed, within fifteen (15) days of the date of this order, to obtain or to amend the life insurance policy he presently maintains insuring his life in the minimum face value of one million (\$1,000,000.00) dollars naming plaintiff as Trustee for the benefit of the children as irrevocable beneficiaries of said policy, until such time as the children are emancipated.

"Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment" (*Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 830 NYS2d 262 [2d Dept 2007]; *Dynamics Corp. of America v Marine Midland Bank-New York*, 69 NY2d 191, 513 NYS2d 91 [1987]; see, CPLR 3025 [b]). The fact that the plaintiff's motion to amend comes after the plaintiff has filed a note of issue does not automatically require the application of a different rule (see *Sheppard v Smith Well Drilling & Water Systems*, 102 AD2d 919, 477 NYS2d 480 [3d Dept 1984]; *Perkins v New York State Elec. & Gas Corp.*, 91 AD2d 1121, 458 NYS2d 705 [3d Dept 1983]; see also *Plattsburgh Distributing Co., Inc. v Hudson Valley Wine Co.*, 108 AD2d 1043, 485 NYS2d 616 [3d Dept 1985]). The most important consideration in deciding a motion for leave to amend a pleading is whether the grant of leave to amend will result in actual prejudice or surprise to the opponent (see *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959, 471 NYS2d 55 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 408 NYS2d 314 [1978]).

Plaintiff's request to amend her complaint to more specifically state some of the sums for which she seeks reimbursement under her fourth cause of action should come as no surprise to defendant. Her original complaint states in pertinent part, at paragraphs numbered "21, 22, and 23" that "[p]ursuant to the terms and conditions of the Settlement Agreement ... Defendant was to pay, to Plaintiff, certain sums of money. Defendant has failed and refused to make those payments as provided for within the Agreement. Plaintiff has, on numerous occasions, demanded that Defendant comply with his financial obligations, pursuant to the Agreement, but Defendant continues to remain in default thereof, and to refuse to make said payments." Inasmuch as the reimbursement of the tax refunds would be a part of the relief sought prior to the amendment and as defendant was questioned about the tax refunds pursuant to Article XX of the Agreement, there is no surprise or prejudice to him by plaintiff's particularizing them at this juncture. Moreover, as the claims ripened during the course of the pretrial discovery, it is proper to amend the complaint to add them now. Accordingly, plaintiff's motion to amend the complaint pursuant to CPLR 3025 (b) is granted.

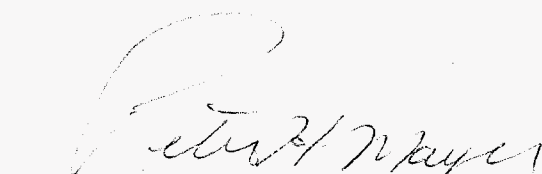
It is clear and unambiguous that plaintiff is entitled to be reimbursed, under Article XX of the complaint, for a sum equal to any refund she would have been entitled to receive had she taken one (1) of the children as a dependent on her tax returns. It is not necessary to consider extrinsic evidence to

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determine the clear meaning of this paragraph. If the parties' intention was for this refund to end upon plaintiff's remarriage or cessation of work, it should have appeared within the four corners of the agreement. Given that the language of the contract is clear and concise with regard to defendant's obligation to reimburse plaintiff in consideration of her permitting him to take both children as dependents on his tax returns (*see, W.W.W. Assoc., Inc. v Giancontieri, supra; Costello v Casale, supra*), partial summary judgment is granted to plaintiff on her fourth cause of action and a judgment in the sum of \$3,664.00 is granted in favor of plaintiff and against defendant for the 2008, 2009, and 2010 tax years.

Where the parties' settlement agreement expressly provided that in the event that either party is required to incur legal fees to enforce the terms of the agreement, then the defaulting party would be required to reimburse the nondefaulting party for attorney's fees, an award of reasonable counsel fees under the circumstances is appropriate (*see Rubio v Rubio*, 70 AD3d 805, 894 NYS2d 146 [2d Dept 2010]; *Rawlings v Rawlings*, 50 AD3d 998, 857 NYS2d 187 [2d Dept 2008]). Here, plaintiff requests summary judgment on her sixth cause of action, a request for counsel fees pursuant to Article XXXVI of the parties' agreement. Plaintiff has been successful on the two causes of action for which she sought summary judgment, therefore, pursuant to Article XXXVI of the parties' agreement, she is entitled to an award of counsel fees from defendant. However, since defendant has challenged the reasonableness and amount of the fees requested, a determination as to the amount due plaintiff from defendant in connection herewith is referred to the trial court.

Dated: 6/19/12


PETER H. MAYER, J.S.C.