

Hart v Rosenthal
2012 NY Slip Op 33971(U)
December 14, 2012
Supreme Court, New York County
Docket Number: 6379/12
Judge: Roy S. Mahon
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

DEAN HART,

TRIAL/IAS PART 5

Plaintiff(s),

INDEX NO. 6379/12

- against -

MOTION SEQUENCE
NO. 1 & 2DEBORAH ROSENTHAL,MOTION SUBMISSION
DATE: October 3, 2012

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Notice of Cross Motion	X
Affidavit in Reply/Opposition	X
Reply Affirmation	X
Memorandum of Law	XXX

Upon the foregoing papers, the motion by the defendant for an Order dismissing the plaintiff's Verified Amended Complaint against defendant; awarding defendant disbursements and counsel fees incurred in connection with defending the above-captioned proceeding in an amount to be determined; imposing sanctions upon plaintiff for his frivolous conduct in commencing a non-meritorious lawsuit and the cross motion by the plaintiff for an Order pursuant to CPLR 3025(b) granting plaintiff's cross motion for leave to amend the complaint, are both determined as hereinafter provided:

This action sounding in causes of action for money had and received; breach of contract; accounting; conversion; unjust enrichment; misappropriation of funds and specific performance arise out of a so-ordered final stipulation dated June 9, 2004 between the respective parties. In pertinent part, said stipulation provides:

"IT IS HEREBY STIPULATION AND AGREED by and between the undersigned counsel for the parties, petitioner, Deborah Rosenthal ("Mother") residing at 1106 Park Place, Springfield, NJ 07081 and respondent, Dean Hart, ("Father") residing at 54 Ivy Drive, Jericho, NY 11753 (the parties are sometimes collectively referred to as the "parents") that;

WHEREAS, there is a proceeding pending in the Family Court of the State of New York, Docket No. F1967/01 (the "Proceeding"), concerning the child and;

WHEREAS, the parties desire that this Agreement, which is entered into after due and considered deliberation, shall be, and shall constitute, a complete, final and effective settlement between them of the proceeding with respect to child support.

NOW THEREFORE, the parties agree as follows:

ARTICLE 1
CHILD SUPPORT

1. The Father shall pay to the Mother on the first (1st) of each month, to be received on the first (1st) of each month, as and for his contribution to basic child support, for Zachary, which support shall not be taxable to the Mother, nor deductible to the Father the following sums:

a. The sum of Three Thousand Four Hundred and Sixteen Dollars \$(3,416.00) per month, by the Father to the mother on or before the first (1st) day of the month until the Child is emancipated as that term is defined below, with every other year increases as set forth below. Said payments shall continue to be paid through the Child Support Collection Unit, unless the Mother indicates, in writing, that she desires to have said payments made directly to her by the Father. If the Father pays directly, then the Mother will so notify the support collection unit to close said account.

b. In addition, as retroactive payment and for arrearages and legal fees incurred by the Mother which have accrued in connection with the Petition for Child Support of the Mother and the Petition for custody, pending this litigation, the Father shall pay, 184,869.00, payable to the Mother two weeks after the execution of this Agreement, By acceptance hereof, Mother hereby waives all rights she might otherwise have had to said arrears. The arrears total 104,869.00 and the legal fees total 80,000.00

2. EMPLOYMENT RELATED CHILD CARE COSTS:

a. The Father shall pay the sum of \$16,250.00 in monthly increments per annum for the employment related child care expenses and -pre-school tuition for Zachary commencing on the execution hereof, of One Thousand Three Hundred and Fifth Four Dollars (\$1,354.00). The Father shall pay an increase on the employment related child care expenses equal to five percent (5%) of said expense every other year.

b. The Mother's "employment related child care expense" is defined as the cost for an nanny, babysitter or pre-school tuition. It is further agreed that the Father's obligation to contribute to the cost of a nanny or babysitter shall cease when Zachary reaches the age of Twelve (12). The Mother shall provide the Father with a copy of the annual W-2 statement for any child care provider and a copy of any pre-school tuition bills.

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c. The total cost for employment related child care costs for both parents shall not exceed a base of \$25,000.00 per year plus the increase provided herein.

9. This Agreement shall be construed in accordance with the laws of the State of New York without giving effect to the choice of law provisions thereof.

10. Each of the respective rights and obligations of the parties hereunder shall be deemed independent and may be enforced independently, irrespective of any other right and obligations set forth herein.

11. Each of the parties hereto agrees at any time and from time to time to make, execute and deliver any and all documents and instruments necessary to effectuate the provision; of this Agreement.

12. All of the provisions of this Agreement shall be binding upon, and inure to the benefit of the respective heirs, next-of-kin, executors, administrators, estates, legatees, distributees, beneficiaries, legal and personal representatives and assigns of the parties hereto."

In addition the plaintiff seeks specific performance of a June 14, 2006 so-ordered stipulation between the parties annexed as plaintiff's exhibit D.

The Court initially observes that while the defendant seeks certain relief pursuant to the provisions of CPLR §3211, the defendant has not included a copy of the verified amended complaint to which the defendant's requested relief is addressed. In light of the fact that the verified amended complaint is contained within the plaintiff's motion as exhibit 1, the Court has considered the defendant's application.

In examining an application pursuant to CPLR 213211(a)(7), the Court in **Doria v Masucci**, 230 AD2d 764, 646 NYS2d 363 (Second Dept., 1996) set forth:

"In considering a motion to dismiss for failure to state a cause of action (*see CPLR 3211[a](7)*), the pleadings must be liberally construed (*see, CPLR 3026*). The sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17, *see also, Bovino v Village of Wappingers Falls*, 215 AD2d 619, 628 NYS2d 508). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see, Morone v Morone*, 50 NY2d 481, 429 NYS2d 592, 413 NE2d 1154; *Gertler v Goodgold*, 107 AD2d 481, 487 NYS2d 565, *affd.* 66 NY2d 946, 498 NYS2d 779, 489 NE2d 748). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he had stated one" (*Guggenheimer v Ginzburg, supra*, at 275, 401 NYS2d 182, 372 NE2d 17). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*Guggenheimer v Ginzburg, supra* at 275, 401 NYS2d 182, 372 NE2d 17; *Siegel, Practice*

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Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3211:25 at 39).

Doria v Masucci, supra at p. 365

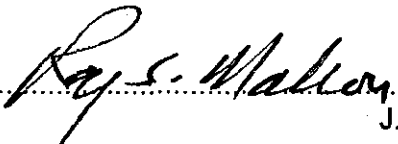
A review of the respective affidavits of the plaintiff and the defendant set forth divergent and conflicting positions whether the defendant is in compliance with the respective June 9, 2004 and June 14, 2006 so-ordered stipulations (*supra*). Based upon this "significant dispute" (see, **Doria v Masucci, supra**), to the extent that the defendant seeks an Order pursuant to CPLR §3211(a)(7), said application is denied.

The defendant additionally seeks relief pursuant to the provisions of CPLR §3211(a)(1). While the defendant has included certain Court Orders (see *defendant's exhibits A thru H; L-M*) and certain transcripts of Court proceedings (see *defendant's exhibits J and K*), a review of said submissions sets forth the right and duties of the respective parties and is not dispositive of the issues as set forth in the plaintiff's verified amended Complaint and as contained in the respective parties' affidavits (see, *Commentaries by David D. Siegel C 3211.10*). As such, to the extent that the defendant seeks an Order pursuant to CPLR 3211(a)(1), said application is denied.

The plaintiff's cross motion for an Order for leave to amend the complaint, is granted. The plaintiff shall serve the plaintiff's second Verified amended complaint in the form annexed as plaintiff's exhibit 2 within 60 days of this Order.

SO ORDERED.

DATED: 12/14/2012


..... J.S.C.

ENTERED

DEC 24 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE