

Barr v Denton

2013 NY Slip Op 30174(U)

January 11, 2013

Supreme Court, New York County

Docket Number: 400755/11

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BILLINGS
Justice

PART 46

BAER IV, THOMAS

INDEX NO. 400755/11

- v -
LYDIA DENTON

MOTION DATE _____

MOTION_SEQ. NO. 06

MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for dismiss the complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

The court grants defendant's motion to dismiss the complaint, but denies her motion for attorney's fees, expenses, or other sanctions, pursuant to the accompanying decision. C.P.L.R. §§ 213(2), 3211(a)(1), (5), and (7); 22 N.Y.C.R.R. § 130-1.1(c).

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/11/13

Lucy Billings
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

THOMAS BARR IV,

Index No. 400755/2011

Plaintiff

- against -

DECISION AND ORDER

LYDIA DENTON,

Defendant

-----X

LUCY BILLINGS, J.S.C.:

The parties stipulated July 17, 2012, to consolidation under Index Number 400755/2011 of two actions under Suffolk County Index Numbers 33964/2010 and 33965/2010, transferred here from the Supreme Court in Suffolk County. C.P.L.R. § 602. After consolidation, the court grants defendant's motion to dismiss the action based on conclusive documentary evidence, C.P.L.R. § 3211(a)(1), namely final orders in Thomas B. v. Lydia D., 69 A.D.3d 24 (1st Dep't 2009), and the proceedings below, Denton v. Barr, Docket No. F-03040-06A, and Barr v. Denton, Docket No. F-14747-06/06A (Fam. Ct. N.Y. Co. May 2, 2008), and plaintiff's failure to allege a viable claim not determined by those orders, C.P.L.R. § 3211(a)(5) and (7), and within the applicable statute of limitations. C.P.L.R. §§ 213(2), 3211(a)(5).

I. DISMISSAL

Plaintiff's only claim not resolved by prior proceedings and actions is a claim for damages from defendant's breach of a stipulation governing the parties' rights and obligations

regarding their minor son, incorporated in the parties' divorce settlement: a breach of contract claim to which a statute of limitations of six years applies. C.P.L.R. § 213(2). Plaintiff originally commenced his two, now consolidated, actions in Suffolk County in September 2010. The parties' son reached 21 years of age September 26, 2007, at which point the stipulation's child support rights and obligations were of no further effect. Barr v. Barr, Index No. 63996-89, Stipulation of Settlement § 5.05 (Sup. Ct. N.Y. Co. Jan. 18, 1991); N.Y. Fam. Ct. Act § 413(1)(a) and (b)(2); N.Y. Dom. Rel. Law § 240(1-b)(b)(2). Even if the stipulation's rights and obligations regarding parental access to the child and decisionmaking for the child, the focus of this action, also extended until he reached 21 rather than 18 years of age, the statute of limitations would require plaintiff to allege a breach of the stipulation between September 2004 and September 2007. C.P.L.R. § 213(2). See Barr v. Barr, Index No. 63996-89, Stipulation of Settlement § 4.01; N.Y. Dom. Rel. Law § 2; Osmundson v. Held-Cummings, 20 A.D.3d 922, 923 (4th Dep't 2005); Lazaro v. Lazaro, 227 A.D.2d 402 (2d Dep't 1996); People ex rel. Minardi v. Cesnavicius, 208 A.D.2d 663, 664 (2d Dep't 1994); Mark D. v. Brenda D., 27 Misc. 3d 713, 715 (Sup. Ct. Nassau Co. 2010).

The damages plaintiff claims from such a breach, however, are for his emotional distress. Non-economic damages, as for emotional distress, are not recoverable from a breach of contract, but are recoverable only if defendant breached a duty

apart from a contractual duty that would form the basis of a separate personal injury claim, which plaintiff does not allege. Johnson v. Jamaica Hosp., 62 N.Y.2d 523, 527-28, 531 (1984); Wehringer v. Standard Sec. Life Ins. Co. of N.Y., 57 N.Y.2d 757, 759 (1982); Bettan v. Geico Gen. Ins. Co., 296 A.D.2d 469, 470 (2d Dep't 2002).

Plaintiff further alleges that, because he paid child support as was his obligation under the stipulation, but defendant did not fulfill her reciprocal obligations, including to foster a close relationship and encourage visitation between him and their son, plaintiff is entitled to a refund of his child support payments. Even if plaintiff alleged that his former wife deprived him of information about his son or frustrated or interfered with his visitation rights, a series of Family Court orders of protection prohibited him from any contact or communication with his son and former wife beginning July 7, 2004, and extending until November 30, 2006. Thus it was plaintiff who caused any lack of contact, breakdown in communication, or alienation between him and his son during that period. See Kordes v. Kordes, 70 A.D.3d 782, 783 (2d Dep't 2012); Dewitt v. Giampietro, 66 A.D.3d 773, 774 (2d Dep't 2009); Boccalino v. Boccalino, 59 A.D.3d 901, 903 (3d Dep't 2009). Therefore, assuming the statute of limitations extended beyond September 2004 when the son reached 18 years of age, the only window within the limitations period when an actionable breach by defendant might have occurred would have been between December

2006 and September 2007. Yet plaintiff alleges no specific breach of the stipulation, whether denying him information about their son or affecting his visitation rights, during that potential window period within the statute of limitations.

Most significantly, plaintiff already moved, in the Family Court, for summary judgment terminating his obligation to pay and his former wife's right to receive child support. The doctrine of res judicata required him then and there to raise any grounds relieving him of his child support obligation. Matter of Hunter, 4 N.Y.3d 260, 269-70 (2005); Vermont Dept. of Social Welfare v. Louis T.T., 90 A.D.3d 534 (1st Dep't 2011); Lusk v. Weinstein, 85 A.D.3d 445, 446 (1st Dep't 2011). See Simmons v. New York City Health & Hosps. Corp., 71 A.D.3d 410, 411 (1st Dep't 2010); Ginezra Assoc. LLC v. Ifantopoulos, 70 A.D.3d 427, 429 (1st Dep't 2010). Nowhere, however, did he claim that that obligation was unenforceable due to the breaches of the stipulation he now alleges. He claimed only that his child support obligation was unenforceable due to his son's emancipation and his former wife's failure to notify plaintiff of that fact, a claim the court ultimately rejected. That determination bars him from raising a new ground for a refund of child support payments here. Matter of Hunter, 4 N.Y.3d at 269-70; Vermont Dept. of Social Welfare v. Louis T.T., 90 A.D.3d 534; Lusk v. Weinstein, 85 A.D.3d at 445-46; Majid v. Commissioner of Social Servs., 24 A.D.3d 251 (1st Dep't 2005). See Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 12-13 (2008); Josey v. Goord, 9 N.Y.3d 386, 389-90 (2007);

Van Lines, Inc. v. American Intl. Cos., 38 A.D.3d 450, 451 (1st Dep't 2007); AmBase Corp. v. Pryor Cashman Sherman & Flynn LLP, 35 A.D.3d 174, 175 (1st Dep't 2006).

II. SANCTIONS

Because plaintiff did attempt, albeit unsuccessfully, to allege a claim outside the scope of the determinative Appellate Division and Family Court orders, the court denies defendant's motion insofar as it seeks attorney's fees and expenses based on plaintiff's willful nondisclosure of those orders and reliance on a prior Magistrate's order that those orders reversed and superseded. 22 N.Y.C.R.R. § 130-1.1(c); Parkchester S. Condominium Inc. v. Hernandez, 71 A.D.3d 503, 504 (1st Dep't 2010); Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d 221, 227 (1st Dep't 2007); Parametric Capital Mgt., LLC v. Lacher, 26 A.D.3d 175 (1st Dep't 2006). See Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intl., Inc., 94 A.D.3d 580, 582 (1st Dep't 2012); Newman v. Berkowitz, 50 A.D.3d 479, 480 (1st Dep't 2008). Although defendant intimates that plaintiff has pursued his claims solely to harass her, no concrete evidence demonstrates more than poor pleading, lack of cognizable damages, and legal impediments posed by prior proceedings and time limits. Komolov v. Segal, 96 A.D.3d 513, 514 (1st Dep't 2012); Parkchester S. Condominium Inc. v. Hernandez, 71 A.D.3d at 504; Peach Parking Corp. v. 346 W. 40th St., LLC, 52 A.D.3d 260, 261 (1st Dep't 2008). See Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intl., Inc., 94 A.D.3d at 582.

III. CONCLUSION

For the combination of reasons delineated above, the court grants defendant's motion to dismiss this action in its entirety. C.P.L.R. §§ 213(2), 3211(a)(1), (5), and (7). As also discussed above, the further relief defendant seeks, a form of sanctions, is unwarranted and therefore denied. 22 N.Y.C.R.R. § 130-1.1(c). Nevertheless, should plaintiff commence a further similar action, the history of this litigation may lead to a finding that he has engaged in vexatious, frivolous litigation. See Komolov v. Segal, 96 A.D.3d at 514; Pentalpha Enters., Ltd. v. Cooper & Dunham LLP, 91 A.D.3d 451, 452 (1st Dep't 2012).

This decision constitutes the court's order and judgment of dismissal. The court will mail copies to plaintiff and to defendant's attorney.

DATED: January 11, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.