

Arabatzis v Saso

2013 NY Slip Op 30760(U)

April 5, 2013

Sup Ct, New York County

Docket Number: 111054/11

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

Elaine Arabatzis
Plaintiff,
- v -
Holly Saso
Defendants.

INDEX NO.: 111 054111
MOTION DATE:
MOTION CAL. NO. 01
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____ were read on this motion to dismiss + cross-motion
to amend PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion are
decided in accordance with the annexed Memorandum Decision
+ order.

FILED

APR 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 5, 2013

J.S.C.

Check one: [] FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
ELAINE ARABATZIS,

Plaintiff,

-against-

HOLLY SASO,

Defendant.
-----X

JOAN A. MADDEN, J.:

INDEX NO. 111054/11

FILED

APR 15 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

This is an action arising out of a separation agreement between the parties regarding the custody and support obligations with regard to their minor child. Defendant Holly Saso ("Saso") moves for an order (i) dismissing the complaint for failure to state a cause of action, or, in the alternative, (ii) striking certain paragraphs from the complaint on the grounds of irrelevance and possible prejudice. Plaintiff Elaine Arabatzis ("Arabatzis") opposes the motion and cross moves to amend her complaint.

Background

The parties, who were partnered since July 1990 and resided together since approximately February 1991, are the legal parents of Emily Rene Saso, who was born in November, 1993 (hereinafter "the Child"). On December 21, 2007, they entered into a separation agreement ("the Agreement") which provided for joint physical custody of the Child. The Agreement provides that "[n]either parent will directly or indirectly, influence the Child so as to prejudice [the Child] against the other parent. Each parent shall endeavor to guide the Child so as to promote an affectionate relationship between the Child and the other party," [and that] [n]either party shall do or say anything which may estrange the Child from the other party or injure the Child's

opinion of the other party.”

Under the Agreement, beginning on September 1, 2008 and continuing until the child is otherwise emancipated as defined in the Agreement,¹ Arabatzis, agreed to pay child support in the amount of \$2,400 per month, 100% of the cost of the Child’s extracurricular activities and summer camp, and 100 % of the cost of the Child’s unreimbursed medical expenses. Arabatzis also agreed to pay up to \$200,000 towards the Child’s college expenses, after the Child made efforts to apply for financial aid, grants and scholarships. The Agreement states Arabatzis has an annual income of \$190,000 and that Saso has no income.

In March, 2011, Saso brought a petition in Family Court to modify the support provisions of the Agreement to increase the amount of support on the ground that she has de facto sole physical custody of the Child and therefore has increased expenses. Saso also alleged Arabatzis breached the Agreement by failing to pay for 100% of the costs of Child’s extracurricular activities and various other expenses, including educational expenses, and that she is in arrears in the total sum of \$16,827.27.

Arabatzis commenced this action in September 2011. The complaint describes the events

¹The Agreement provides, in part, that “emancipation of the Child shall be deemed to have occurred upon the earliest to occur of any of the following events ...the Child attending full time College (or other institute of higher learning)...or moving into her own residence..(at which point the parties agree Arabatzis will pay directly for the Child’s expenses for school)... if the Child does not attend a full time college or otherwise move into her own residence then until the age of 21 years...marriage of the Child; ...engaging in full time employment or otherwise relocating to her own residence outside the Saso residence, and being either self supporting or supported directly by Arabatzis upon and after attaining the age of 18 years of age, except and provided that (1) engaging by the Child in partial employment will not be deemed an emancipation event, and (2) engaging by the Child in full time employment during vacation and summer periods shall not be deemed an Emancipation Event....;entry into the Armed forces of the United States or other similar services....

leading up to the parties' break-up, including Saso's failure to abide by her agreement with Arabatzis to obtain employment after the Child entered kindergarten, and the Child's serious two-year illness from 2004 until 2006, which delayed Arabatzis intent to separate from Saso. It further alleges that in October 2007, when Arabatzis informed Saso of her intent to live separately from her, Saso threatened to commit suicide, and to leave Arabatzis and the Child, and was admitted to a hospital on suicide watch, and that Arabatzis, on advice of counsel, continued to live with Saso until the Agreement was entered into in December 2007. The complaint contains allegations regarding the deterioration of the Child's relationship with Arabatzis, which the complaint attributes to the actions of Saso, including encouraging the Child not to spend time with Arabatzis as provided for under the Agreement.

The complaint asserts causes of action for (1) rescission of the Agreement based on "the atmosphere of torment and stress under which [Saso] placed [Arabatzis] during the period that the ...Agreement was negotiated and executed [and on the ground that] [Arabatzis] entered into the agreement as a result of force, duress, and coercion" (Complaint ¶ 77); (2) a declaratory judgment that the Child's "total disregard for [Arabatzis's] parental authority, reinforced and encouraged by [Saso], emancipates her as a matter of law;" (Id., ¶ 80) (3) unjust enrichment seeking the return of funds provided by Arabatzis under the Agreement based on Saso's failure to comply with the Agreement.

Saso moves to dismiss the complaint for failure to state a cause of action and seeks to strike certain allegations as prejudicial and irrelevant. She argues that the rescission claim fails to state a claim as duress requires that an unlawful act be committed, and that the complaint does not allege such an act. Furthermore, Saso argues that the complaint is insufficient as it fails to

describe the Agreement, and that the Agreement is fair on its face and cannot be rescinded in the absence of fraud, overreaching, or unconscionability. With respect to the cause of action seeking declaratory relief, Saso argues, inter alia, that the claims of emancipation are not based on the provisions of the Agreement which govern here. Saso also argues that the unjust enrichment claim is not actionable as the Agreement governs the subject matter at issue.

Saso further argues that allegations related to the parties' relationship, including her agreement to refrain from employment until the Child reached kindergarten, and her alleged refusal to work for the duration of the relationship are irrelevant and prejudicial and should be stricken.

Arabatzis opposes the motion, arguing that Saso's threat of desertion of the Child was an unlawful act which provides a predicate for a claim of duress and that the complaint adequately describes the Agreement. She also points to law holding that a separation agreement between spouses is more easily set aside than an ordinary contract. See Christian v. Christian, 42 NY2d 63 (1977). As for the claim for declaratory relief, Arabatzis argues that a child's behavior may result in constructive emancipation thus terminating her payment obligations. See Readick v. Readick, 80 AD3d 512 (1st Dept 2011). Arabatzis also seeks to amend the complaint to add the phrase "and the unconscionable nature thereof" to paragraph 77 describing the rescission claim and a fourth cause of action for breach of contract, and seeks damages in the amount of \$150,000 provided by Arabatzis to plaintiff.

In reply, Saso asserts that the proposed amendments do not cure the defects in the original pleading. Saso also argues that Arabatzis' delay in seeking to rescind the agreement precludes her from seeking this remedy.

Discussion

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be terminated liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff’d, 94 NY2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result “only where ‘it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.’” Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

For the reasons below, the motion to dismiss is granted; however, Arabatzis’ cross motion to amend is granted to the extent of permitting her to assert the proposed cause of action for breach of contract. With respect to the claim for rescission, while actual fraud need to be shown to rescind a separation agreement (Christian v. Christian, 42 NY2d at 72-73), the facts as alleged in the complaint (and the proposed amended version) are insufficient to demonstrate manifest unfairness to Arabatzis or overreaching by Saso, such that the Agreement can be rescinded. See e.g., Mahon v. Moorman, 234 AD2d 1 (1st Dept 1996)(denying motion to set

aside separation agreement on the grounds of duress and overreaching where plaintiff failed to demonstrate that threats made by his wife while the agreement was being negotiated deprived him of his ability to act in furtherance of his own interest).

Furthermore, allegations that the Agreement should be rescinded on the basis of duress due to Saso's unlawful acts are insufficient as Arabatzis acquiesced in the Agreement for more than three years before commencing this action and claiming duress. See Bonem v. Garriott, 159 AD2d 206 (1st Dept 1990)(trial court properly denied defendant's motion to vacate financial provisions of separation agreement when defendant waited a year before challenging such provisions); Groper v. Groper, 132 AD2d 492 (1st Dept 1987)(husband's performance under separation agreement for 21 months constituted ratification of that agreement and, therefore, husband was not entitled to rescission of separation agreement).

Next, as the Agreement governs Arabatzis' obligations to provide child support, its existence precludes the unjust enrichment claim. See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 NY2d 382, 388 (1987)(writing that "[a] quasi contract only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment")(internal quotation marks and citations omitted); Barker v. Time Warner Cable, Inc., 83 AD3d 750 (2d Dept 2011)(unjust enrichment claim could not be asserted where a sales compensation agreement governed the amount commissions earned by plaintiff)

As for the claim seeking a declaration that the Child has been emancipated, even assuming *arguendo* that the terms of the Agreement are not dispositive, this issue is intertwined with those raised in support modification proceeding pending in Family Court and is more

appropriately asserted by Arabatzis in that proceeding.

As to Arabatzis' cross motion to amend, it is granted only to the extent of permitting Arabatzis to assert a breach of contract claim which has prima facie merit and is not prejudicial to Saso (Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1st Dept 2007)). Notably, Arabatzis has sufficiently alleged the existence of a contract, i.e. the Separation Agreement, Arabatzis' performance thereunder, including the fulfilling her financial and parental obligations, and Saso's breach of the Agreement through Saso's alleged conduct which prejudiced the Child against Arabatzis and which failed to promote an affectionate relationship between the Child and Arabatzis. That being said, however, the court urges the parties to resolve the issues raised in this action through mediation.

Finally, regarding Saso's motion to strike certain paragraphs from the complaint on the grounds of irrelevance, CPLR 3024(b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily asserted in a pleading." In determining whether a pleading should be stricken under this provision, the court examines, *inter alia*, whether the allegations are relevant to the claims at issue and whether the allegations would tend to confuse the issues in the litigation. See e.g., Soumayah v. Minnelli, 41 AD3d 390, 392-393 (1st Dept 2007). Here, while the motion to strike is moot as a result of the dismissal of the claims in the original complaint, the court notes that to the extent allegations relating to the parties' history provide relevant background information as to the remaining claim of breach of contract, Arabatzis may include them in her amended complaint.

In view of the above, it is

ORDERED that Saso's motion to dismiss is granted, and the claims for unjust enrichment, rescission, and a declaration that the Child is emancipated are dismissed, without prejudice to Arabatzis asserting the Child's emancipation in connection with the support

modification proceeding pending in Family Court; and it is further

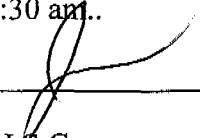
ORDERED that Saso's motion to strike is denied as moot; and it is further

ORDERED that Arabatzis cross motion for leave to amend is granted to the extent of permitting her to serve and file an amended complaint consistent with this decision and order within 30 days of the date of this decision and order; and it is further

ORDERED that Saso shall answer the amended complaint within 20 days of such service; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY on June 20, 2013 at 9:30 am..

DATED: April 5, 2013



J.S.C.

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