

Stack-Gibbs v Gibbs
2014 NY Slip Op 32140(U)
July 11, 2014
Supreme Court, Suffolk County
Docket Number: 13-30480
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 2-28-14
ADJ. DATE 3-18-14
Mot. Seq. # 001 - MG; CASEDISP

-----X

JENNIFER STACK-GIBBS,

Plaintiff,

- against -

RICHARD A. GIBBS,

Defendant.

-----X

FOSTER, VANDENBURG & RIYAZ, LLP
Attorney for Plaintiff
4 Montauk Highway
Westhampton, New York 11977

WICKHAM, BRESSLER, GORDON & GEASA
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Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated January 24, 2014, and supporting papers including affidavit of the defendant dated January 24, 2104; (2) Affirmation in Opposition by the plaintiff's attorney, dated March 14, 2014 and affidavit of the plaintiff dated March 17, 2014, and supporting papers; (3) Reply Affirmation and affidavit by the defendant's attorney and the defendant, dated March 24, 2014, and supporting papers; (4) Other ___ (~~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 defendant for an order pursuant to CPLR 3211 (a) (1), (5), and (7) dismissing the complaint is granted; and, it is further

ORDERED that defendant's request for counsel fees is granted to the extent that the parties are directed to appear on September 9, 2014 at 2:00pm for a hearing to determine the amount of counsel fees to be awarded to defendant.

This is a plenary action which seeks to rescind a stipulation of settlement dated March 20, 2012 ("the stipulation"), which resolved the various financial and custodial issues in the underlying divorce action between the parties, and was incorporated but not merged into the judgment of divorce signed by the Hon. Marlene L. Budd, A.J.S.C. on September 28, 2012 and entered on October 9, 2012. Plaintiff alleges in this action that the stipulation was the result of improper and inadequate discovery of assets,

lack of legal representation, defendant's misrepresentation of his income and assets, and manipulation and coercion by defendant. In addition plaintiff claims that the stipulation was "manifestly unfair and unreasonable at the time of its making" and that it was "the product of fraud, undue influence, coercion, duress and overreaching." Plaintiff insists that she was intimidated by defendant's "imposing physical size and presence" which he used to "gain her assent to certain issues of equitable distribution" and that he "utilized bullying tactics" throughout the mediation process which intimidated her and caused her to "[become] so anxiety-ridden that she did not have capacity to enter into the Stipulation as a rational, fully-informed, reasonable person with full use of their senses and cognitive abilities." Although she had been represented by counsel in previous divorce proceedings with defendant, the same law firm which represents her in this proceeding, plaintiff asserts in her complaint that "at no time was [she] specifically advised and/or informed as to all of [her] rights arising from the parties' marital relationship and, therefore, [she] relied wholly on the Defendant's representations." However, the Stipulation specifically states that "[t]he Wife consulted with Frederic C. Foster, Esq. of FOSTER, VANDENBURGH, & RIYAZ, LLP prior to entering into mediation and this Stipulation of settlement, and acknowledges and represents that she was fully advised of her rights and responsibilities under the law." Plaintiff avers that the values of businesses and real property "were premised entirely on the Defendant's sole representations" and claims that the distribution of the value of real property "was so inequitable as to be unconscionable." Finally, plaintiff states in her complaint that defendant misrepresented and manipulated his income in order to avoid paying his proper child support obligation and the attendant "add-ons" to child support.

Defendant now moves for an order dismissing all of the claims in plaintiff's plenary action pursuant to CPLR (a) (1), (5), and (7). In support of the motion, an affidavit of defendant, copies of the summons, verified complaint, and verified answer, the stipulation, and other documentary evidence are provided. Defendant seeks counsel fees in connection with this matter claiming that he is entitled to same, pursuant Article 16 of the Stipulation.

Defendant states in his affidavit in support of the motion that plaintiff filed a summons with notice for divorce in November 2008 and was represented by Foster, Vandenburg, & Riyaz, LLP (her attorneys in the instant action). He indicates that after a failed reconciliation plaintiff commenced another action for divorce in this court using the same law firm. During the second action, plaintiff moved for *pendente lite* relief submitting her own affidavit as well her statement of net worth and various exhibits. Plaintiff stated in her September 10, 2010 affidavit in support of that motion that "[t]he primary issues that will ultimately be before the Court are spousal maintenance, child custody and support as well as equitable distribution of marital property. My attorney has further advised me that there are many factors set forth in the Domestic Relations Law which the court is required to consider, in making appropriate determinations of maintenance, child support and property distributions." She indicated therein that she "suspected" that defendant earned in excess of \$300,000.00 per year and recited the "history" of the business and real property acquisitions made during the marriage by the parties, including the purchase prices of the properties. She claimed that she would be teaching full-time earning approximately \$50,000.00 annually. Her statement of net worth estimated the value of R & J East Lake Properties, LLC to be approximately \$6,000,000.00, the purchase price for the ZBL Properties, LLC to be \$1,100,000.00 with the "current value unknown." Plaintiff listed no income but claimed that her annual expenses were \$97,028.40. Defendant opposed her motion, cross-moved for

custody, and submitted a statement of net worth which indicated that there was a mortgage payment on their Southold property (which was part of the ZBL Properties, LLC) in the amount of \$6,430 per month, and that he owned 100% of a business known as Rick's Food Service, Inc., a 37.5% interest in R & J East Lake Properties, LLC, with a current net worth "to be determined", and a 50% ownership of a business known as ZBL Properties, LLC with a current net worth "to be determined". He did not list his income but claimed that his total annual expenses were \$131,160.00. After various settlement meetings, a preliminary conference, and the exchange of discovery demands, plaintiff discontinued the action on December 13, 2010.

Defendant maintains that the parties pursued mediation after the second action was discontinued but again attempted reconciliation. When that attempt failed, the parties continued the mediation process with Valerie Marvin, Esq. On March 20, 2012, the parties entered into the stipulation, which was signed and initialed on each and every page by each party. The stipulation recites in pertinent part:

. . .the parties each warrant and represent to the other that they and each of them fully understands all of the terms, covenants, conditions, provisions and obligations incumbent upon each of them by virtue of this Agreement to be performed or contemplated by each of them hereunder, and each believes the same to be fair, just, reasonable and in his or her respective best interests; and . . .

. . .both the Husband and the Wife hereby represent that he or she is fully familiar with the assets, property, holdings and income prospects of the other spouse; and . . .

5. The parties herein are aware of the provisions of Section 236-B of the Domestic Relations Law, denominated Equitable Distribution Laws, and make this STIPULATION OF SETTLEMENT pursuant to Section 236, Part B(3) which authorizes the parties to agree upon a division of separate and marital property and grants to the parties the option of deciding for themselves what property is the separate property of each and agreeing upon a distribution in lieu of leaving the decision to the court.

6. The parties, in making this STIPULATION OF SETTLEMENT, have taken into consideration such factors as the court is obliged to consider, to the extent that same apply in this particular case, in accordance with Section 236, Part B(5)(d)(1) through (14) inclusive, of the Domestic Relations Law, namely
 [the agreement lists each of the 14 factors]

. . .

1. Agreed Upon Child Support: The Father agrees to pay, and the Mother agrees to accept, as and for child support of the parties' children, the following sums:

(A) The sum of \$1,000.00 per month during the calendar months October through June . . .

(B) The sum of \$3,000.00 per month during the calendar months July through September. . .

2. The parties have been advised of the provisions of Section 240 (1-b) of the Domestic Relations Law, commonly known as the Child Support Standards Act (the “Act”), and both parties have received a copy of the child support standards chart promulgated by the Commissioner of Social Services pursuant to Social Services Law Section 111-I. The parties are aware that this statute sets forth guidelines for child support obligations, and that the agreements pertaining to child support made herein in this STIPULATION OF SETTLEMENT have been reached with knowledge and understanding of the provisions of the Act.

3. The parties are aware that, under the Act, in the case of three (3) unemancipated children, the non-custodial parent may be required to pay the custodial parent twenty nine (29%) percent of his or her total gross income, less deduction for FICA taxes, in addition to a pro-rated share of child care expenses and unreimbursed medical expenses, if any, and a discretionary amount for educational purposes. . .

5. . . .In signing this STIPULATION OF SETTLEMENT, the parties acknowledge that they are waiving their right to seek a court determination as to the extent of combined parental income to be utilized for child support calculation purposes and that they, instead, have elected to accept provisions for child support as set forth in this STIPULATION OF SETTLEMENT.

6. Calculation of the Presumptively Correct Amount of Child Support Under the Guidelines: The parties have been advised that, although they are free to determine the issue of child support based on their own sense of fairness and the needs of their family, the Act requires that agreements as to child support are only binding if the agreement includes a calculation of what the child support obligation of the parties would be if the Child Support Guidelines were applied to joint parental income. [The calculations are then made based upon gross income of “approximately \$80,000.00” for the “non-custodial” Father and \$57,400 for the “custodial parent” Mother.] . . .

ix. The Father’s pro rata share of the basic child support obligation on the first \$136,000 of combined parental income is \$21,423.80, or \$1,785.32 per month.

Deviation from the Presumptively Correct Amount of Child Support:

Notwithstanding the foregoing, the parties are aware that they have the right to “opt-out” of the child support guidelines if valid reasons exist for

doing so. Toward that end, the parties' computation of child support herein is NOT in accord with the Child Support Standards Act. The parties have specifically agreed to "opt-out" of the Act, in that the Father has agreed to pay and the Mother, in, as and for child support for their children, the amount of **\$1,000 per month for the months October through June and \$3,000 per month for the months July through September.**

7. The parties acknowledge that this amount is slightly less than the monthly presumptive amount due under the Act for combined parental income up to \$136,000.00. The parties agree that the amount set forth is neither unjust nor inappropriate for the following reasons, among others:

- i. The parties' parenting plan provides that the children will be spending approximately 50% of their time with each of their parents.
- ii. The parties acknowledge and agree that they each shall have sufficient income to provide for their children while in their care.
- iii. The parties have agreed that child support will continue unchanged until the Emancipation, as more fully defined herein, of their youngest child LUKE. . .

ARTICLE 8: COLLEGE EXPENSE

1. The parents agree to pay for their children's college expenses on the following basis: ... the Father shall pay 75% and the Mother 25% of the costs thereof. . .

ARTICLE 10: POST DIVORCE OF FINAL MAINTENANCE

1. The Husband hereby acknowledges and represents that he is currently employed and self-supporting and has the capacity, ability, intention and assets with which to continue to be self-supporting.
2. The Wife hereby acknowledges that she is currently employed and self-supporting and has the capacity, ability, intention and assets with which to continue to be self-supporting.
3. In consideration of the parties present status of employment and their ability and expectation to continue in their chosen employment, business or career, the duration of the marriage and the equitable distribution of assets set forth herein in this STIPULATION OF SETTLEMENT, the parties have agreed that neither shall pay to the other any spousal maintenance. . .

ARTICLE 11: PROPERTY OR EQUITABLE DISTRIBUTION

...

50. The Wife acknowledges and represents that she has taken the opportunity to consult with independent counsel of her own choosing with whom she has discussed her rights and obligations with regard to the Husband's business.

51. The Husband acknowledges and represents that he has taken the opportunity to consult with independent counsel of his own choosing with whom he has discussed his rights and obligations with regard to the business.

52. The parties acknowledge that they have been advised that **formal valuations of the businesses and formal appraisals of the real properties of the parties** may be obtained to assist them in their considerations and distribution, if any, of the business and the properties **and the parties have expressly waived same**. The parties have each expressly waived any further discovery with regard to the business, and each represents that they have provided true and accurate information to the other. Each has had full opportunity to consult with an attorney regarding their decision to waive formal appraisals and all of the circumstances and conditions of this STIPULATION OF SETTLEMENT. Each party feels satisfied with the advice they have received and knowingly and voluntarily waives their right to obtain any said formal appraisals. . . .

ARTICLE 16: DEFAULT

...

3. If either party by any action, proceeding, defense, counterclaim, motion or otherwise, seeks to vacate or set aside this STIPULATION OF SETTLEMENT or declare any of its provisions, terms or conditions as invalid, void, or against public policy, for any reason including but not limited to; duress, fraud, coercion, incompetency, overreaching, unfairness, or unconscionability, that party shall reimburse the other party and be liable for the other party's reasonable attorneys' fees, costs and disbursements, provided that such action proceeding, defense, counterclaim, motion or otherwise results in a decision, judgment, decree or order withdrawing, dismissing or rejecting such claims. . . .

ARTICLE 17: DISCLOSURE AND LEGAL REPRESENTATION

1. The Husband and Wife acknowledge and declare that each has been advised to secure and have, in fact, had the opportunity to secure, independent legal counsel of their own selection . . .

3. The Husband consulted with Curt Arnel, Esq. Of CURT ARNEL & ASSOCIATES prior to entering into mediation and this STIPULATION OF SETTLEMENT, and acknowledges and represents that he was fully advised of his rights and responsibilities under the law.

4. The Wife consulted with Frederic C. Foster, Esq. Of FOSTER, VANDENBURGH & RIYAZ, LLP prior to entering into mediation and this STIPULATION OF SETTLEMENT, and acknowledges and represents that she was fully advised of her rights and responsibilities under the law.

5. In addition, the Husband and Wife each acknowledge that they have been advised of their right to have investigators investigate the assets and financial circumstances of the other. Each is aware that each has the right to have an accountant or business valuation expert value the financial activities of the other, a real estate appraiser appraise any real estate in question, a pension expert evaluate any pension or annuities of the other, tax experts provide advice with respect to issues of taxation, and investigators determine the exact nature and extent of the property of the other, and to have an attorney of their own choosing fully probe the other party's finances by means of various disclosure devices (and to have the Court make a determination as to the responsibility of the other party to pay for such investigation if he or she is unable to pay.)

6. The Husband and Wife further acknowledge, individually and jointly, that notwithstanding the right each has to the investigation and disclosure above, each with full knowledge and understanding absolutely waives any right or interest he or she may have or had to conduct discovery into the other party's holdings, as those rights may have been exercised prior to the signing of this STIPULATION OF SETTLEMENT. Further, by signing this STIPULATION OF SETTLEMENT, each party hereto is making a knowing waiver, now and forever, of their rights to such investigation and/or disclosure. . .

ARTICLE 21; CAPACITY TO ENTER INTO AGREEMENT

By executing this Stipulation of settlement, each party hereby represents and attests to the following:

1. **Read Agreement:** That each has fully read and understands each and every term, provision or condition of this STIPULATION OF SETTLEMENT prior to their executing same. . .

3. **No Coercion – Access to Counsel:** That each is making this STIPULATION OF SETTLEMENT of his/her own volition and free will, and represents that no coercion, force, pressure or undue influence has been used by either party (including their agents, servants or employees) in making this STIPULATION OF SETTLEMENT, and that each party has

been afforded the opportunity to obtain counsel.

4. **Voluntary Execution:** Each has had ample time to consider the legal and practical implications of this STIPULATION OF SETTLEMENT, and does not feel rushed or pressured into executing this STIPULATION OF SETTLEMENT. The parties acknowledge that they are entering into this STIPULATION OF SETTLEMENT freely and voluntarily; with full control and utilization of their faculties; that they have ascertained and weighed all the facts and circumstances likely to influence their judgment herein; that they have sought and obtained legal advice independently from each other, or have voluntarily declined to do so; that each has been appraised of their respective legal rights; that all the provisions hereof, as well as all questions pertaining thereto, have been fully and satisfactorily explained to him/her; that each has given due consideration to the provisions hereof and each clearly understands and assents to the provisions hereof. . .

With regard to Article 11 of the stipulation, which involved the equitable distribution of their assets, the parties acknowledged and represented that they were the owners of two properties and two limited liability companies which were acquired during the marriage. One of the limited liability companies, known as R & J East Lake Properties LLC (“R & J”), consisted of one asset 431, 433, and 435 East Lake Drive, Montauk, New York, and the other limited liability company, known as ZBL Properties LLC (“ZBL”) consisted of one parcel 57685 Main Road, Southold, New York. The parties wholly owned the ZBL parcel, and each owned 37.5% of the R & J assets with plaintiff’s parents, each owning 12.5% of the R & J assets. The parties agreed within the Stipulation that the approximate fair market value of R & J assets was \$5,500,000.00 and that mortgages totaling \$3,150,000.00 encumbered the properties (leaving total equity of approximately \$2,350,000.00). Pursuant to the Stipulation, the approximate fair market value of the ZBL parcel was \$1,000,000.00. Plaintiff was to receive the Southold parcel along with assuming a \$450,000.00 mortgage, defendant was to receive the Montauk parcels and assumed the remaining \$2,700,000.00 in mortgages. (Plaintiff’s parents agreed to take \$200,000.00 for their share of the R & J assets.) Thus, the approximate value of the property plaintiff acquired pursuant to the Stipulation was \$650,000.00, and the approximate value of the property defendant acquired pursuant to the Stipulation was \$2,600,000.00. In addition, defendant retained the business known as Rick’s Food Service Inc. and Rick’s Crabby Cowboy Café, which were operated on the Montauk properties, and plaintiff waived any interest she may have had in them, plaintiff retained all rights to her pension with defendant waiving any interest he may have had in it.

Finally, with regard to the stipulation, each of the parties executed an affidavit which states that they each read the stipulation, understands its contents, assented to it after “mature deliberation after consultation with counsel of his [her] choice”, and “[t]hat neither the property settlement ... nor his [her] signing and acknowledging of the [stipulation] was occasioned, brought about or influenced by the use of duress, coercion or undue influence practiced, brought or exercised upon him [her] in any manner by any person whomsoever.”

Defendant moves pursuant to CPLR 3211 (a) (1) for an order dismissing the complaint based upon documentary evidence. The “documentary evidence” submitted by defendant to justify his motion consists of the Stipulation and the underlying documents in the divorce action (*i.e.* the statements of net worth and affidavits submitted on a prior motion). In addition, defendant seeks a dismissal based upon CPLR 3211 (a) (5) alleging that the parties’ Stipulation contains a release. He maintains that the allegations regarding his “bullying tactics” all took place during the marriage and the mediation process, and thus, the claims were released by the terms of the Stipulation. Finally, defendant moves for an order dismissing the complaint on the ground that the complaint fails to state a cause of action pursuant to CPLR 3211 (a) (7).

“In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail. When parties submit affidavits in connection with a motion to dismiss and where ... the court does not convert the motion to one for summary judgment, the affidavits may be considered in determining whether the plaintiff has a cause of action” (*Morad v Morad*, 27 AD3d 626, 626, 627, 812 NYS2d 126 [2d Dept 2006] *internal citations omitted*). “When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion has not been converted to one for summary judgment, the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one” (*Basile v Wiggs*, 98 AD3d 640, 641, 950 NYS2d 148 [2d Dept 2012]; *Chalos v Chalos*, 128 AD2d 498, 512 NYS2d 426 [2d Dept 1987]).

It is clear that agreements to settle matrimonial disputes are judicially favored and must not be easily set aside (*Simkin v Blank*, 19 NY3d 46, 945 NYS2d 222 [2012]). “Generally, separation agreements which are regular on their face are binding on the parties, unless and until they are put aside. Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions. Furthermore, when there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement, courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided” (*Christian v Christian*, 42 NY2d 63, 72, 73, 396 NYS2d 817 [1977], [*citations omitted*]). “However, because of the fiduciary relationship between husband and wife, separation agreements generally are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract” (*Levine v Levine* 56 NY2d 42, 47, 451 NYS2d 26 [1982]). Despite this close scrutiny, agreements which are fair on their face will be enforced absent proof of fraud, duress, overreaching or unconscionability (*Schultz v Schultz*, 58 AD3d 616, 871 NYS2d 636 [2d Dept 2009]; *Cosh v Cosh*, 45 AD3d 798, 847 NYS2d 136 [2d Dept 2007]).

An agreement is not unconscionable because there is an unequal division of assets or because some of its provisions may have been “improvident or one-sided” (*Label v Label*, 70 AD3d 898, 895 NYS2d 192 [2d Dept 2010]; *Schultz v Schultz*, *supra* at 616; *Cosh v Cosh*, *supra*; *O’Lear v O’Lear*, 235 AD2d 466, 652 NYS2d 1008 [2d Dept 1997]). A claim that an agreement was signed under duress

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may be rebutted by an acknowledgment to the contrary in the agreement itself (*Gaton v Gaton*, 170 AD2d 576, 566 NYS2d 353 [2d Dept 1991]; *Carosella v Carosella*, 129 AD2d 547, 514 NYS2d 42 [2d Dept 1987]). Conclusory unsubstantiated allegations of unconscionability are not sufficient to defeat a motion for summary judgment (*Cioffi-Petrakis v Petrakis*, 72 AD3d 868, 898 NYS2d 861 [2d Dept 2010]). Nor do bare legal conclusions or factual claims, which are clearly contradicted by the evidence, constitute a cause of action for fraud (see *Paolino v Paolino*, 51 AD3d 886, 859 NYS2d 463 [2d Dept 2008]).

Here, where defendant submits his own affidavit in support of the motion to dismiss for failure to state a cause of action, and plaintiff's opposition includes her affidavit, the court may determine if plaintiff has a cause of action, not whether the complaint states one (*Morad v Morad*, *supra*; *Basile v Wiggs*, *supra*; *Chalos v Chalos*, *supra*). As the stipulation clearly states in more than one instance, the parties understood what they were doing, had been advised of the law, and agreed without coercion or undue influence to its terms. Plaintiff had consulted an attorney on at least two occasions prior to the settlement of the matter and stated that she was advised of her rights in connection with the matrimonial proceeding. She commenced the action to set aside the Stipulation approximately 20 months after its execution and asserts, in her affidavit that "[she] commenced this litigation for the purpose of calling the Court's attention to, and requesting that this Court remedy substantial inequity and injustice arising from the resolution of a prior action for divorce." Plaintiff admits that she was aware, at the time she signed the stipulation, that the property she received as her share of equitable distribution was worth less than the property the defendant received. She claims that she agreed to this "because [she] felt like she had no other choice ... [and that] the settlement agreement simply cannot be construed to reflect a fair and reasonable division of the marital assets existing at the time of the agreement." However, her assertions are conclusory at best, with no evidence supporting her claims of fraud, duress, overreaching or unconscionability. The fact that the equitable distribution portions of the agreement appear to favor defendant is not enough to overturn the Stipulation (*Label v Label*, *supra*; *Schultz v Schultz*, *supra* at 616; *Cosh v Cosh*, *supra*; *O'Lear v O'Lear*, *supra*). Similarly, the acknowledgment within the affidavit at the end of the Stipulation wherein plaintiff attests that the use of duress, coercion or undue influence was not practiced, brought or exercised upon her in any manner by defendant, rebuts her claim that the stipulation was signed under duress (see *Gaton v Gaton*, *supra*; *Carosella v Carosella*, *supra*).

Defendant claims that the parties reached an agreement they both deemed fair and executed the stipulation both being fully familiar with their assets. He maintains that plaintiff was fully familiar with and aware of their finances, having "managed" the books of their businesses. He alleges that the values they agreed upon for their assets were consistent with their net worth statements and that they both decided not to appraise them. Defendant asserts that he paid more of the mortgage on the Southold property than was required of him by the terms of the stipulation and that plaintiff commenced this proceeding after selling the Southold property at a low price, despite his offer to pay her more for it.

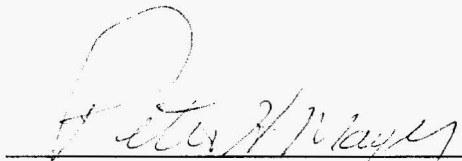
Defendant has come forth with evidence showing that plaintiff ratified the stipulation (*i.e.* she has accepted child support, and sold the Southold property she received from the settlement, upon which she had run a horse boarding business and a playschool), that the stipulation was fair when made and freely entered into by the parties, and that there was no fraud, duress, overreaching, or unconscionability

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exerted which would render the agreement unenforceable. Accordingly, since plaintiff has failed to show that the Stipulation should be set aside as unconscionable and the judgment of divorce vacated, defendant's motion to dismiss the complaint is granted.

In a matrimonial proceeding, where a party neither objects to the resolution of the application for attorney's fees on the papers submitted, nor requests an evidentiary hearing on that issue, he/she has waived his/her right to a hearing on that matter (*see Rubio v Rubio*, 92 AD3d 859, 938 NYS2d 807 [2d Dept 2012]; *Pascarella v Pascarella*, 66 AD3d 909, 886 NYS2d 636 [2d Dept 2009]; *Sieratzki v Sieratzki*, 8 AD3d 552, 779 NYS2d 507 [2d Dept 2004]; *Bengard v Bengard*, 5 AD3d 340, 772 NYS2d 526 [2d Dept 2004]). Here, the stipulation which was incorporated but not merged into the judgment of divorce provides for an award of counsel fees in the event that either party brings an action to vacate or set aside this stipulation or declare any of its terms and conditions as invalid, void, or against public policy, by any reason, and is unsuccessful in that action. Thus, counsel fees are awarded to defendant and payable by plaintiff in connection with the defense of this matter. However, since plaintiff challenged the defendant's request for fees, a hearing with regard to the value and extent of the services provided is necessary (*compare, Rubio v Rubio, supra; Pascarella v Pascarella, supra; Sieratzki v Sieratzki, supra; Bengard v Bengard, supra*).

Dated: 7-11-14



PETER H. MAYER, J.S.C.