

<b>Friedman v Blakeman</b>
2019 NY Slip Op 30630(U)
March 13, 2019
Supreme Court, New York County
Docket Number: 159542/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

INDEX NO. 159542/2018
MOTION DATE 03/13/2019
MOTION SEQ. NO. 001

MICHAEL JORDAN FRIEDMAN

Plaintiff,

- v -

JENNIFER MARIE BLAKEMAN,

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for SUMMARY JUDGMENT

And cross-motion to DISMISS THE COMPLAINT.

In this action seeking, inter alia, a declaration that a 2014 Family Court order is invalid and unenforceable, the plaintiff moves for summary judgment on the complaint and the defendant cross-moves to dismiss the complaint on the ground of lack of subject matter jurisdiction, and for sanctions. The motion is denied and the cross-motion is granted.

The parties were never married but were in romantic relationship which ended in 2009, and have one child in common, who was born later that year. By an order of the Family Court, New York County (Morgan, S.M.), dated June 4, 2014, and entered on consent, the defendant's petition for child support and other relief was granted and the plaintiff was directed, inter alia, to pay child support and expenses of \$2,902.76 per month, plus retroactive support of \$22,863.67.

In November of 2012, the defendant filed a petition in the Family Court alleging that the plaintiff, a law school graduate, failed to obey the court order of June 4, 2014. A hearing was held at which both parties were represented by counsel. That proceeding resulted in an Order of Disposition (Rosario, S.M.) dated December 1, 2017, in which the Support Magistrate found that the plaintiff willfully failed to obey the court's prior order, having stopped paying any support in July 2014. The order directed entry of a judgment against the plaintiff in the sum of \$104,250.71 plus interest and directed the plaintiff to pay 50% of the defendant's attorney's fees. The plaintiff

filed an objection to that order and the objection was denied by an order of the Family Court (Sweeting, J.) dated March 5, 2018. In that order, Judge Sweeting expressly rejected the plaintiff's contention that the June 4, 2014 order was unconscionable or invalid and unenforceable, finding that the plaintiff was fully allocuted and that his consent to the order was knowing, intelligent and voluntary. No appeal to the Appellate Division was taken from that order (see Family Court Act §§ 1111, 1112, 1113).

Rather, seven months later, in October 2018, the plaintiff hired new counsel and commenced the instant action in the Supreme Court, asking this court to review the June 4, 2014 Family Court order. In essence, the plaintiff maintains that the oral agreement of the parties' that gave rise to the Family Court's Order on Consent is unenforceable and that the order fails to meet the requirements of the Child Support Standards Act. By this motion, he seeks summary judgment on the complaint, asking this court to declare the parties' agreement unenforceable, vacate the Family Court orders and vacate any judgments entered against him. The defendant opposes the motion, cross-moves to dismiss the complaint for lack of subject matter jurisdiction, and seeks sanctions of costs and attorneys fees pursuant to 22 NYCRR 130-1.1(a).

The principle 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 evidence to eliminate any material issues of fact from the case (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). However, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], citing Winegrad, *supra* at 853). The plaintiff has failed to establish, *prima facie*, entitlement to any relief sought in his motion. See CPLR 3212.

The defendant has established entitlement to dismissal of the complaint on the ground of lack of subject matter jurisdiction. See CPLR 3211(a)(2); FCA §§ 114; 115; Domestic Relations Law § 240(1)(a). The defendant correctly argues that, having failed to appeal to the Appellate Division from the denial of his objection pursuant to FCA §1111, the plaintiff foreclosed his appellate remedies in regard to the underlying Family Court orders (see Matter of Yamoussa M., 220 AD3d 138 [1<sup>st</sup> Dept. 1996]), and now inexplicably and improperly asks this court to exercise

appellate review, an authority it does not have. In any event, the plaintiff may not challenge the terms of an order entered with his consent. It is well settled that “[n]o appeal lies from an order or judgment entered upon the consent of the appealing party, since a party who consents to an order or judgment is not aggrieved thereby.” Matter of Harry Y., 62 AD3d 892 (2<sup>nd</sup> Dept. 2009); see Matter of Forbus v Stolfi, 99 NY2d 642 (2003); Matter of Raven J., 105 AD3d 424 (1<sup>st</sup> Dept. 2013); Barry v Barry, 60 AD3d 882 (2<sup>nd</sup> Dept. 2009). The plaintiff is not aggrieved by and cannot object to the resulting Family Court order which granted the very relief he sought.

The court notes that the plaintiff’s opposition to the cross-motion was filed late. Moreover, the plaintiff’s contentions in opposition are without merit, and the cases he cites are inapposite. The plaintiff recognizes that the Family Court has exclusive original jurisdiction over support matters commenced pursuant to article 4 of the Family Court Act. See FCA §§114;115. It is also true that the Supreme Court has concurrent jurisdiction with the Family Court in some circumstances pursuant to Art. 6, §7(a) of the New York State Constitution (see Kagen v Kagen, 21 NY2d 532 [1968]) and, given its broad grant of original jurisdiction in matters of law and equity, it may and is often called upon to determine the validity or enforceability of agreements or contracts. However, the gravamen of the plaintiff’s complaint here is with the Family Court support orders, including one entered on consent, not any separate agreement or contract of the parties. His remedy was to appeal to the Appellate Division or, if so advised, to petition the Family Court for a modification of the prior support order if his circumstances changed. The plaintiff cites no decisional authority with comparable facts and certainly no appellate or other authority holding that the Supreme Court rather than the Appellate Division of the Supreme Court may review an order of support issued by a Family Court on the consent of the parties.

The defendant’s application for sanctions against the plaintiff for frivolous conduct pursuant to 22 NYCRR 130-1.1 is granted. Frivolous conduct is defined as that which “is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law,” is undertaken to delay or prolong the litigation, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c); Tornheim v Blue & White Food Products, Corp., 88 AD3d 869 (2<sup>nd</sup> Dept. 2011); Benishai v Benishai, 83 AD3d 420 (1<sup>st</sup> Dept. 2011); Tavella v Tavella, 25 AD3d 523 (1<sup>st</sup> Dept. 2006). The court finds that the plaintiff’s conduct falls squarely within this definition, and that the plaintiff has abused the judicial process and wasted judicial resources by commencing this action and making the instant motion.

Finally, it appears from the papers submitted on the motions that the plaintiff has continued to disobey the Family Court support order of June 4, 2014, requiring the defendant to petition the Family Court once again, in November 2018, for enforcement of the order.

Accordingly, and upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiff's motion is denied in its entirety, it is further,

ORDERED that the defendant's cross-motion to dismiss is granted, without opposition, and the complaint is dismissed in its entirety, and it is further,

ORDERED that the defendant's application for sanctions in the form of costs and attorney's fees is granted and the defendant shall submit an affirmation and documentation of costs and attorney's fees incurred in defense of this action, and a proposed judgment, within 30 days.

ORDERED that the Clerk shall enter judgment dismissing the complaint.

This constitutes the Decision and Order of the court.

3/13/2019

DATE



NANCY M. BANNON, J.S.C.

**HON. NANCY M. BANNON**

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: