| **Kutzin v Katz** |
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| 2020 NY Slip Op 34791(U) |
| November 16, 2020 |
| Supreme Court, Ulster County |
| Docket Number: Index No. EF2019-301 |
| Judge: Stephan G. Schick |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF ULSTER**

---------------------------------------------------------------------X

Eric Kutzin, Plaintiff,

- against -

Jonathan D. Katz, Defendants,

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**AMENDED**
**DECISION & ORDER**
Index No. EF2019-301

Appearances: Phillip Wellner
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Hillsdale, NY 12529-0129
Attorney for Plaintiff

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Attorney for Defendant

Schick, J.

This matter comes before this Court by way of Defendant's motion for summary judgment. Plaintiff opposes.

> A legal malpractice claim requires that the plaintiff show that "the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence" (citations omitted.)[1]

Accordingly, to prevail on this motion, Defendant must prove that

1. He exercised the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession

or

2. If he did not exercise the reasonable skill and knowledge commonly possessed by a

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[1] *Mid-Hudson Val. Fed. Credit Union v. Quartararo & Lois, PLLC*, 155 A.D.3d 1218, 1219-1220 (3rd Dept. 2017)

> member of the legal profession, the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence.

The malpractice alleged in the complaint is that

> Defendant failed to exercise the care, skill, and diligence commonly possessed and exercised by a member of the legal profession practicing matrimonial law in several respects when his office drafted the MSA (¶ 65 of the complaint) by
>
> 1. He made a gross misstatement of fact concerning his role as "mediator" in the recitals of the document. (¶ 66 of complaint.)
>
> 2. He failed to abide by his client's instructions to include an automatic adjustment of child support and maintenance upon a loss of employment. (¶ 67 of complaint.)
>
> 3. He failed to explain that the provision that he did include would require the issue of downward modification to be litigated. (¶ 67 of complaint.)
>
> 4. He failed to include the required disclosures and presumptive amount calculations for the MSA to be enforceable pursuant to the Domestic Relations Law. (¶ 68 of the complaint)

> As the proponent of a motion for summary judgment dismissing the complaint, defendant was required to demonstrate with admissible evidence that plaintiff was unable to establish at least one of the elements of [his] claim (citations omitted.)[2]

Accordingly, each of the elements will be considered in turn.

**Automatic Adjustment**

Looking at this question in the light most favorable to the non-moving party, this Court asks, is it legal malpractice to not place the automatic adjustment language within the matrimonial settlement agreement?

> Where a stipulation of settlement is incorporated but not merged into a judgment of divorce, a court may modify a child support or maintenance order derived from the stipulation "upon a showing that there has been an unreasonable and unanticipated change in circumstances justifying the modification" ... The parties are free, however, to agree to different terms triggering a change in the obligations of the payor spouse, including the application of a standard other than substantial unanticipated and unreasonable change in circumstances as the basis for

[2] *Schrowang v Biscone*, 128 A.D.3d 1162, 1163 (3rd Dept. 2015).

> determining a modification application, provided that, in the case of child support, the children's personal right to receive adequate support is not adversely affected and public policy is not offended ... The parties may, in doing so, establish a threshold which the payor spouse must meet before seeking such a reduction (citations omitted.)[3]

The glaringly important detail in the above quotation is that the parties may "establish a threshold which the payor spouse must meet before seeking such a reduction." Threshold is the operative word. There can be no automatic reduction. There can be a change in the threshold that must be met in order to litigate a downward modification, but there can be no automatic downward modification. This is because the child has a right to adequate support that cannot be negotiated away by the parents.

As the Appellate Division, Second Department, explained in *Strenge v Bearman*, in which the Court affirmed the summary judgment dismissal of the father's complaint alleging damages for breach of an agreement regarding the custody and support of the father's child,

> ... summary judgment dismissing the complaint was appropriate because an action to enforce an agreement in which a parent purports to contract away his or her obligation to support his or her child contravenes public policy (citations omitted.)[4]

Accordingly, the language that was placed in the agreement is in line with New York State law, and Plaintiff acknowledges this on page five of the memorandum of law in opposition to the summary judgment motion. To include language that is outside the bounds of settled law and contravenes public policy would be the malpractice. Accordingly, Defendant's actions were not legal malpractice.

**Failure To Explain That The Automatic Adjustment Was Not Included In The MSA**

Although there are allegations back and forth regarding what each party said when, there are written emails that clearly illustrate Plaintiff's understanding that the downward modification needed to be ruled on by a court.

On May 22, 2017, Plaintiff emailed Defendant:

> Hi Jonathan,
> Below is the letter from Sheila's lawyer that I received in the mail today. Nothing

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[3] *Heller v. Heller*, 43 A.D.3d 999, 1000 (2nd Dept. 2007).

[4] *Strenge v. Bearman*, 228 A.D.2d 664, 665 (2d Dept. 1996). See also, *Lounsbury v Lounsbury*, 300 AD2d 812, 816 (3rd Dept. 2002).

> I see indicates anything more than that I need to keep paying the current amount until the Motion for a reduction is ruled upon. Not sure what exactly the point of this letter is as I wasn't going to choose an amount myself without going through the due process.[5]

On May 24, 2017, Plaintiff emailed Defendant:

> Hi Jonathan,
> Nothing urgent here. Just trying to understand the process here.
>
> I'm just curious what the timeline/process is once the motion for payment modification is filed?
>
> Do we just wait on a court date and present the judge with the details of Matrimonial Agreement?
>
> On top of everything I currently pay Sheila I'm now on the hook for $2200 a month for COBRA, so I just want to understand the steps here.[6]

Even looking at this in the light most favorable to the non-moving party, there is no other way to read these emails than to see an understanding on the part of Plaintiff that his downward modification must be ruled upon by a court.

**Presumptive Amount Calculations**

Within the MSA, under "Spousal and Child Support" is the following:

> Eric earned $218, 845.00 in 2015. Sheila earned $3,000.00. The parties have agreed that Eric shall pay to Sheila th sum of $2,260.00 per month for child support and $1,640.00 per month in maintenance for a total of $3,900 per month. Maintenance shall be paid for a period of two years commencing on June 1, 2016 and ending June 1, 2018. Of that, $27,127.00 per year is designated as child support, and $1,640.00 per month is designated as maintenance.
>
> Utilizing the $175,000.00 per year cap for maintenance, a guidelines maintenance order would be $34,250.00 per year. Utilizing the $141,000.00 cap for child support, subtracting the guidelines maintenance award and FICA, the guidelines child support award would be $24,645.00 per year.

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[5] Page 22 John W. Bailey's Affirmation in support of summary judgment motion.

[6] Page 23 John W. Bailey's Affirmation in support of summary judgment motion.

> The parties have agreed to deviate from those guidelines because Eric will not declare the maintenance paid on his tax returns and, therefore, maintenance shall be non-taxable to Sheila. In addition, Eric will pay for the family health insurance costs, including uninsured healthcare costs, the home telephone, cable, internet, cell phone and EZ Pass. Those additional expenses will be paid during the two-year period in which maintenance is being paid.
>
> At the end of maintenance, child support shall be recalculated. The parties have agreed that they shall remain married during the period of maintenance so that Sheila can continue to be insured under Eric's family health insurance plan.
>
> Eric's loss of employment shall constitute a change in circumstances entitling him to seek a modification of his child and spousal support obligation.
>
> Eric shall maintain term life insurance until the children are 21, naming Sheila as beneficiary.

There is nothing in this section which states that the unrepresented party had been provided with the child support guidelines act or maintenance guidelines, as required by FCA §413(1)(h) or DRL §240 (1-b). As "...the omission of these statutory catechisms renders the stipulation and resulting order unenforceable ...[7]" this is an act of malpractice.

**Mediator Language**

Defendant did not act as a mediator, and this was a mistake.

Accordingly, we are left with two acts of malpractice: Defendant denominating himself a mediator, instead of an attorney for a party, and failing to include the required language regarding child support standards and guideline maintenance. The next calculation is would the plaintiff have succeeded on the merits of the underlying action 'but for' the attorney's negligence?

Judge Cahill's April 5, 2018, decision did not find the mediator issue to be of any note:

> As for the role taken by Mr. Katz, there appears to be an acknowledgment that he always served in the capacity of being plaintiff's attorney who was tasked with the role of placing the parties' agreement into writing after the parties had agreed to the essential terms.

Nor did Judge Cahill find the failure to provide the notice of guideline maintenance or CSSA standards dispositive. On page two of the decision, he found the brief acknowledgment within the spousal and child support section to be sufficient.

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[7] *Matter of Usenza v. Swift*, 52 A.D.3d 876, 878 (3rd Dept. 2008).

As neither act was given any credence by the court in its final decision, it cannot be said that Plaintiff would have been successful, but for the acts of malpractice. Accordingly, it is hereby

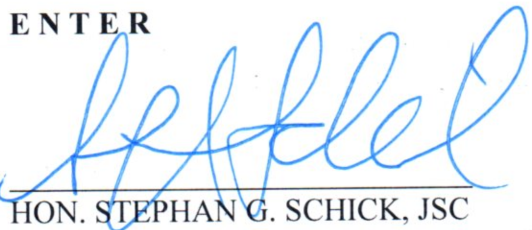
**ORDERED** that Defendant's motion for summary judgment is granted.

The Court has considered all other arguments and has found them to be unsupported by facts or law and without merit.

**SO ORDERED**

Dated: Monticello, NY
November 16, 2020

**ENTER**



HON. STEPHAN G. SCHICK, JSC

Papers considered:

Defendant's motion for summary judgment, filed August 21, 2020, and all associated submissions (#33 through #56)

Plaintiff's opposition to summary judgment motion, filed September 18, 2020, and all associated submissions (#58 through #80)

Defendant's affirmation in reply, filed September 29, 2020.