SHORT FORM ORDER

INDEX No. 11-3590

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 7-6-11
ADJ. DATE 7-28-11
Mot. Seq. # 001 - MG; CASEDISP

LAURA CAPONE,

Plaintiff,

- against -

MICHAEL CAPONE,

Defendant.

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Upon the following papers numbered 1 to 37 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 26 - 37 ; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the defendant's motion for an order granting summary judgment dismissing plaintiff's complaint is granted.

This is an action to rescind and declare null and void a Separation Agreement entered into by the parties on November 13, 2008. By order of the Hon. John Kelly, AJSC, dated June 17, 2011, this matter was consolidated "for the purposes of discovery and joint trial" with the action known as Michael Capone against Laura Capone under Index No. 10-03294 (" the 2010 Michael v Laura action"), which sought a conversion divorce. The parties to these actions were married on July 26, 1987 and have two issue of the marriage, to wit: Michael Capone (d.o.b. July 28, 1993) and Nicholas Capone (d.o.b. December 27, 1995). Plaintiff Laura had retained an attorney to represent her in a divorce action and asked defendant Michael for a divorce. Thereafter, on or about December 12, 2007 the parties entered into a written agreement with Divorce Mediation Professionals (specifically with Lenard Marlow, J.D.) for its assistance in concluding a separation agreement and then in reducing it to a formal, written agreement. In a writing dated February 8, 2008, the parties agreed to live separate and apart from each other, whereby defendant Michael would

remove himself from the marital premises prior to the conclusion of the separation agreement. After at least ten (10) conferences with Divorce Mediation Professionals, copious note taking by plaintiff Laura, letters between the parties and Lenard Marlow, revisions to the proposed agreement, a written suggestion by the mediator on August 11, 2008 that plaintiff Laura consult with her own attorney to discuss changes to the agreement, and a valuation of defendant Michael's pension, the parties entered into the November 13, 2008 Separation Agreement. Mr. Marlow indicated to the parties in a letter dated August 13, 2008, that "Mr. Capone has the right to request any changes that either he or his attorney wants to make. Nor is there any limit to the number of changes he can make. By the same token, Mrs. Capone can agree to anything that she wishes... As I said in my letter of August 11th, I am certainly not willing to incorporate changes into your agreement dictated by Mr. Capone's attorney unless Mrs. Capone first reviews them with her own attorney and he (or she) agree to them." Despite Mr. Marlow's admonitions and "ultimatums", the parties executed a Separation Agreement prepared and witnessed by him three months later.

Pertinent portions of the agreement at page 2 and at Articles "N" and "U" state as follows:

(Pg. 2)...Finally, the Husband and the Wife acknowledge that they have been advised and are aware that the agreement which they are entering into may well be materially different from the agreement which might have been negotiated for them had they retained separate attorneys for that purpose, or the agreement [decision] which might have been made for them [rendered] by a court of law in the State of New York had the matter proceeded to trial, and they are entering into this agreement with that knowledge and understanding.

(N) ... The parties acknowledge that this agreement has been prepared for them by Lenard Marlow, Esq., that he has represented neither of them individually, and that his services have been limited to assisting the two of them to conclude an agreement between themselves and in then reducing that agreement to writing. The parties further acknowledge that Lenard Marlow, Esq. has answered any and all questions which they have had concerning this agreement, concerning the law of the State of New York and concerning any other matters arising out of their marriage relationship. Finally, the parties acknowledge that they have been advised by Lenard Marlow, Esq. that they have the right to seek independent counsel of their own selection before signing this agreement and that they have had an adequate opportunity to do so.

(U) ... The parties acknowledge that they are entering into this agreement freely and voluntarily; that they have ascertained and weighed all the facts and circumstances likely to influence their judgment herein; that all the provisions hereof, as well as all questions pertaining thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions, and that they clearly understand and assent to all the provisions thereof, and that they have read this agreement in its entirety prior to the signing thereof.

The parties lived separate and apart from each other pursuant to the terms of the Separation Agreement, with defendant Michael paying child support and maintenance to plaintiff Laura, pursuant to its terms, without dispute until some time after February 2011. Pursuant to the terms of the Separation Agreement, defendant Michael is obligated to pay maintenance to plaintiff Laura in the sum of $2,917.00 per month until June 1, 2012 and thereafter the sum of $1,666.67 per month until January 31, 2015 (unless she sooner remarries). Thus, maintenance is to be paid for a period of at least six years. In addition, defendant Michael is obligated to pay child support in the sum of $1,814.00 per month until the emancipation of one child and, thereafter, the sum of $1,214.00 per month until the emancipation of the second son, the costs for sporting and "other" activities as well as summer camp and a percentage of college expenses. Based upon his income of approximately $126,070.00, at the time the agreement was made, the basic child support obligation, after deducting FICA and maintenance, was approximately $1,696.00 per month (this includes the upward deviation on his full income from the $80,000.00 basic support guideline in effect at that time). Therefore, defendant Michael agreed to pay more than he was obligated to do pursuant to the Child Support Guidelines. Additionally, the Separation Agreement provided for equitable distribution of the marital assets. It specifically provided, *inter alia*, that plaintiff Laura waived her rights to defendant Michael's pension, the marital portion had been valued at $621,365.00; she accepted title to the marital residence, in which the equity was approximately $215,000.00 and the 2004 Toyota Sequoia automobile; she received all the furniture, crystal, effects, etc. in the marital premises (except for defendant Michael's clothing and personal effects, his books and records, tools, bar table, bicycle, one half the family photos, and his mother's photos and property); she waived IRAs valued at approximately $36,600.00; she received a $5,000.00 payment and $50,000.00 of the $70,000.00 deferred compensation account; and, she agreed to pay $780.00 owed to Dr. McGloughlin while defendant Michael agreed to pay $30,000.00 owed to Nassau Federal Credit Union and $4,410.00 owed for the Toyota vehicle. Defendant Michael was responsible for the Mediators' fee of approximately $12,850.00.

Defendant Michael filed a summons with notice for a conversion divorce with the Suffolk County Clerk on or about January 28, 2010 in the 2010 Michael v Laura action and served it upon plaintiff Laura on or about February 3, 2010. Defendant Michael alleges that plaintiff Laura signed the necessary uncontested divorce documents in connection with his conversion action, which were then submitted to the County Clerk for processing of the divorce packet.[1] After receiving notice from the matrimonial clerk's office that a signed addendum to the Separation Agreement reflecting the change in Child Support Standards Act[2] was required in order to process the uncontested matter, defendant Michael requested that plaintiff Laura sign an addendum and affidavit necessary to obtain the divorce. Plaintiff Laura refused to sign same and instead commenced the within action, by filing on February 1, 2011, to rescind and set aside the November 13, 2008 Separation Agreement on the grounds that it was the result of overreaching, coercion,

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[1]The County Clerk's records reflect that the papers were filed on November 1, 2010 but that the proposed Findings of Fact, Conclusions of Law and proposed Judgment of Divorce were not signed.

[2]The act was amended to require that the combined parental income used for the calculation of child support be raised from $80,000.00 to $130,000.00.

and undue influence, and that it was manifestly unfair, unjust, inequitable and unconscionable.

In her complaint plaintiff Laura alleged, generally, that defendant Michael was verbally and emotionally abusive throughout the marriage, although in her Bill of Particulars she "specifically" cited several instances of his alleged misconduct which took place in August 2003, June and July 2006, November 2007, June, July, August, and September 2008. With the exception of her claims that in June 2008, defendant Michael blocked her car in the parking lot and berated her with "insults and threats"after he perceived that he was being ignored after a meeting with the mediator, and that in November 2008, defendant Michael "demanded [that she] sign a document stating that she waives all right to [his] pension", none of her allegations of abuse were related to or concerned the Separation Agreement or her signing of same. Plaintiff Laura maintains that defendant Michael "convinced" her that hiring her own attorney would cause a substantial financial hardship because he stated that she was "wasting money, 'causing trouble' and that 'he will pay'" if she used a mediator he chose.

Defendant Michael now seeks an order granting summary judgment dismissing plaintiff Laura's complaint on the grounds that she ratified the agreement by accepting maintenance, child support and health insurance pursuant to its terms for well over one year before commencing the action, that her conclusory statements are insufficient to establish duress, overreaching, coercion, undue influence, and unconscionability, and that in failing to plead her claim of undue influence with particularity, she has not complied with CPLR 3016 (b).

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It 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 proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

"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" (***Schultz v Schultz***, *supra* at 616; ***Cosh v Cosh***, *supra*; ***O'Lear v O'Lear***, 235 AD2d 466, 652 NYS2d 1008 [2d Dept 1997]); overreaching is not established by the fact that a party was not represented by counsel, especially when the party was fully informed of his/her right to retain counsel and proceeded without obtaining an attorney (***Wilson v Neppell***, 253 AD2d 493, 677 NYS2d 144 [2d Dept 1998] *appeal denied* 92 NY2d 816, 683 NYS2d 759 [1998]); unsubstantiated allegations of spousal abuse are insufficient to establish that an agreement was procured by duress (***Cosh v Cosh***, *supra*); and, a claim that an agreement was signed under duress 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]).

Here, plaintiff Laura has not demonstrated that the Separation Agreement was unfair when made or that there was overreaching in its execution. Three months elapsed from the August letter of the mediator "admonishing" the parties about the changes and conditions under which he would conclude the matter for them. This was certainly sufficient time for plaintiff Laura to have had the proposed agreement reviewed by an attorney and to have agreed to its terms. Despite the fact that defendant Michael may have received more in a distribution of assets[3], nothing has been proffered which would indicate that the agreement may be anything more than improvident or a bit one-sided. Plaintiff Laura did not provide allegations of spousal abuse which were substantiated or that were relevant to the signing of the agreement. Vague comments with regard to demands that she sign the Separation Agreement do not amount to duress (*see*, ***Cosh v Cosh,*** *supra*). There is no allegation made that she was unaware of any asset or that she did not know the value of the assets prior to, or at the time, she executed the agreement. Additionally, she ratified the agreement by complying with its terms, accepting payments pursuant to its terms, and failing to seek nullification until over two years after its execution (*see* ***Culp v Culp***, 117 AD2d 700, 498 NYS2d 846 [2d Dept 1986]; ***Barry v Barry***, 100 AD2d 920, 474 NYS2d 803 [2d Dept 1984]). Finally, by the terms of the agreement, plaintiff Laura acknowledged that she had the right to obtain counsel, that she knew and understood what she was signing, and that she entered into it "freely and voluntarily".

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[3]The court recognizes that the "present value" of the pension which may have been over $600,000.00 is somewhat of a "gamble" in that its value is contingent upon the lifespan of the pensioner, a fact which is not a certainty.

Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint seeking rescission of the November 13, 2008 Separation Agreement is granted to the extent that the complaint is dismissed and is otherwise denied.

Dated: 1/23/12

A.J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**