Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS Part 6**
**Justice**

RACHEL BLAKE STRAX-HABER,
Plaintiff,

-against-

GEORGE HABER,
Defendant.

Index
Number 1231 2011

Motion
Date September 4, 2012

Motion
Cal. Number 45

Motion
Seq. No. 3

The following papers numbered 1 to 5 read on this motion by defendant George Haber for, inter alia, an order dismissing the complaint against him pursuant to CPLR 3211(a)(1) and (7) and on this cross motion by plaintiff Rachel Blake Strax-Haber for, inter alia, summary judgment on her third cause of action.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affidavits-Exhibits.. | 1 |
| Cross Motion-Affidavits-Exhibits..... | 2 |
| Reply Affidavits..... | 3-4 |
| Memoranda of Law..... | 5 |

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

The plaintiff alleges the following: Defendant George Haber is an attorney and also the general partner of almost two dozen real estate partnerships throughout the United States. The plaintiff is his daughter, a student at Brandeis University in Waltham, Massachusetts, and she is represented here by her mother, Lisa Strax-Haber, also an attorney. The defendant's paternity of the plaintiff was established by a test conducted in 1994. After the mother refused the defendant father's demand

that the fetus be aborted, he began a matrimonial action in the New York State Supreme Court, County of New York (*Haber v. Strax-Haber*, Index No. 408277/95). The defendant father continues to deny his paternity of the plaintiff daughter.

The defendant father and the mother entered into a stipulation of settlement regarding their matrimonial issues dated September 9, 1997 which stipulation provided in relevant part: "E. College Education [:] The Father shall pay two-thirds of the cost of each Child's undergraduate college education directly to the undergraduate college, which shall be deemed to include tuition, student activity fees, laboratory fees, entrance examinations and applications and room and board ***. The mother shall pay one third of the cost provided in this paragraph E".

A Judgment based upon the stipulation of settlement was rendered in the matrimonial action, and the stipulation of settlement was incorporated, but not merged, into the Judgment.

On or about July 25, 2010, the father filed a petition in the Family Court of the State of New York, County of Queens against the mother seeking to compel her to pay one-third of their son Matthew's college expenses. The parties litigated the issues of whether the father alone had to pay Matthew's college expenses or whether the mother had to contribute toward one-third of the expenses. After a hearing held on October 5, 2011, Support Magistrate David A. Kirschblum of Queens County Family Court held that the mother was obligated to pay one-third of Matthew's college expenses.

The instant action involves both tort claims against the defendant father and a claim for college expenses. According to the plaintiff, "the gravamen of this action presents a singularly uncommon circumstance in which a parent engaged in an unrelenting campaign to completely, utterly, and literally shun one child and disavow paternity to other family members all the while engaging in a full blown conspicuous and involved relationship with the other child. *** My father deliberately went out of his way to humiliate me. *** My very existence was denied when he would regularly take my brother on trips and visitation, picking him up at the house without saying a word to me ***".

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action is granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the

plaintiff the benefit of every possible favorable inference***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see*, *Stukuls v. State of New York*, 42 NY2d 272; *Jacobs v. Macy's East Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see*, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). As a general rule, where a CPLR 3211(a)(7) motion is not converted into one for summary judgment, the court may only "consider affidavits for the limited purpose of remedying any defects in the complaint ***" (*One Acre, Inc. v. Town of Hempstead* 215 AD2d 359; *see*, *Nonnon v. City of New York*, 9 NY3d 825). The first cause of action, which purports to be for the intentional infliction of emotional distress based on allegations that, inter alia, the father has "shunned" his daughter fails to state claim. The tort of the intentional infliction of emotional distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v. New York Post Co., Inc.*, 81 NY2d 115, 120). The threshold of "outrageousness" is very difficult to reach (*see*, *Howell v. New York Post Co., Inc.*, *supra*; *Seltzer v. Bayer*, 272 AD2d 263). The threshold was not crossed here (*see*, *LaRussa v. LaRussa*, 232 AD2d 297 [father's refusal to resume relationship with daughters]).

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the second cause of action is granted. The plaintiff failed to adequately state a cause of action for negligent infliction of emotional distress (*see*, *LaRussa v. LaRussa*, *supra* [stating "the cause of action for negligent infliction of emotional distress was also properly dismissed since plaintiffs failed to establish that defendant owed them a special duty or to allege that his conduct unreasonably endangered their physical safety"]).

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third cause of action is denied. The third cause of action alleges that the plaintiff is presently enrolled at Brandeis University, an accredited four year college. She has allegedly already incurred college expenses amounting to $59,336.81, and the defendant father has allegedly paid nothing toward those expenses. The third cause of action adequately states a cause of action for breach of the stipulation of settlement and for enforcement of the Judgment of

Divorce which incorporated, but did not merge with, the stipulation of settlement. Moreover, the documentary evidence in this case does not resolve all of the issues raised under the third cause of action in the defendant's favor. In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248). The documentary evidence in this case establishes that the mother is obligated to pay one-third of the plaintiff's college expenses and the father is obligated to pay two-thirds of the plaintiff's college expenses.

That branch of the cross motion which is for summary judgment on the third cause of action is granted on the issue of liability to the extent that the court finds that the defendant father must pay two-thirds of the college costs of the plaintiff. If the parties cannot agree on the amount presently owed by the defendant father, they shall contact the clerk of Part 6 and a hearing date shall be assigned. Summary judgment is warranted where there is no issue of fact that must be tried (*see*, *Alvarez v. Prospect Hospital*, 68 NY2d 320). In the case at bar, the stipulation of settlement incorporated into the judgment of divorce clearly apportions the responsibility for the payment of the costs of the child's college education one-third for the mother and two-thirds for the father. The court notes that the plaintiff has standing to sue as a third-party beneficiary of the stipulation of settlement, an instrument which is contractual in nature. The court also notes that the defendant father correctly argues that he has a valid collateral estoppel defense to the payment of more than two-thirds of the plaintiff's college expense based on the recent Family Court order, the mother and daughter being in privity (*see*, *Ryan v. New York Telephone Co.*, 62 NY2d 494). The term "privity" for collateral estoppel and res judicata purposes includes "those who control an action although not formal parties to it [and] those whose interests are represented by a party to the action ***" (*Watts v. Swiss Bank Corp.*, 27 NY2d 270, 277; *see*, *Juan C. v. Cortines*, 89 NY2d 659; *All Terrain Properties, Inc. v. Hoy*, 265 AD2d 87).

That branch of the cross motion which is for an order permitting the plaintiff to amend the ad damnum clause to increase the amount of college costs incurred is granted (*see*, *Zoizack v. Holland Hitch Co.*, 58 AD2d 980 [4th Dept 1977]).

That branch of the cross motion which is for an order

permitting the plaintiff to amend her complaint to add a cause of action asserting a cause of action for prima facie tort is denied. In determining whether to permit a party to amend a complaint to add a cause of action, the court must examine the merits of the proposed cause of action (*see*, *Morgan v. Prospect Park Associates Holdings, LP*, 251 AD2d 306; *McKiernan v. McKiernan*, 207 AD2d 825). The amendment will not be permitted where, as here, the proposed cause of action is patently lacking in merit (*see*, *McKiernan v. McKiernan, supra*).

That branch of the cross motion which is for an order permitting the plaintiff to amend her complaint to add a cause of action for punitive damages is denied. New York State does not recognize such a claim as a separate cause of action (*see, Green v. Fischbein, Olivieri, Rozenholc & Badillo*, 119 AD2d 345 [1st Dept 1986]).

That branch of the cross motion which is for an order imposing sanctions on the defendant and his attorney is denied (*see, Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662 [2d Dept 1994]).

That branch of the motion which is for an order imposing sanctions on the plaintiff's mother, who is also the plaintiff's attorney, is denied. (Id.)

That branch of the motion which is for an order disqualifying the plaintiff's attorney is denied. Rule 3.7(a) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that, unless certain exceptions apply, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact". One of the exceptions is that "(3) disqualification of the lawyer would work substantial hardship on the client". This exception is applicable here because the plaintiff is a college student without funds of her own. Moreover, the only remaining issue in this case concerns damages under the third cause of action, and the defendant did not show that the mother's testimony is necessary on that issue (*see*, *Magnus v. Sklover*, 95 AD3d 837.) Since the only remaining issue concerns the amount of damages owed under the third cause of action, there is no basis for disqualifying the plaintiff's attorney pursuant to Rule 1.7 because of her own personal interest in this action.

Dated: December 12, 2012

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**Howard G. Lane, J.S.C.**