SHORT FORM ORDER

INDEX No. 15-7230

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 5-26-15 (#001)
MOTION DATE 6-30-15 (#002)
ADJ. DATE 8-25-15
Mot. Seq. #001 - MD
#002 - XMotD

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BENJAMIN T. MILLER,

Plaintiff,

- against -

AMANDA MILLER,

Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated May 11, 2015, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the defendant, dated June 15, 2015, supporting papers; (3) Affirmation in Opposition and in Reply by the plaintiff, dated July 20, 2015, and supporting papers; (4) Reply Affirmation by the defendant, dated August 18, 2015 and supporting papers; (5) 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 plaintiff for an order enjoining and restraining defendant and/or any other party or agent from enforcing the parties stipulation of settlement dated June 22, 2010, and the judgment of divorce granted on November 21, 2011, and entered on November 25, 2011, is denied; and it is further

ORDERED that the cross motion by defendant for an order dismissing the complaint pursuant to CPLR § 3211 (a) (1) and CPLR § 3211 (a) (7) is granted; and it is further

ORDERED that the branch of the motion by defendant for attorney fees is granted to the extent that a hearing shall be held on May 17, 2016 at 2:30 pm at Part 17 of the Supreme Court, 1 Court Street, Riverhead, New York to determine the amount of attorney fees plaintiff shall pay defendant.

The parties were married on September 28, 2007. On June 22, 2010, the parties, each represented by separate and privately retained counsel, executed a stipulation of settlement to resolve all outstanding issues of the marriage. On November 21, 2011, a judgment of divorce incorporated but did not merge the stipulation of settlement. On February 25, 2015, enforcement proceedings were brought by defendant against plaintiff in the Family Court. Those proceedings were resolved on consent. Plaintiff herein consented to a money judgment in the amount of $16,800.00 plus interest for maintenance arrears due to defendant herein from September 1, 2013 to May 1, 2015. Plaintiff also agreed to pay defendant $3,000.00 as attorney fees. On May 19, 2015, plaintiff moved this court (Tarantino, J.) for a temporary restraining order to bar enforcement of the stipulation of settlement pending resolution of this plenary action. That application was denied. By summons and complaint filed April 21, 2015, plaintiff alleges one cause of action to set aside the stipulation of settlement as unconscionable, grossly inequitable and a product of overreaching and duress.

Plaintiff submits, in his order to show cause in support of a permanent injunction, among other things, his own affidavit, the stipulation of settlement, the judgment of divorce, the enforcement petition, the summons and complaint, and correspondence between counsel. Defendant cross moves for an order dismissing the complaint and for attorney fees. In support of the cross motion, defendant submits, among other things, the Family Court enforcement order entered on consent, the stipulation of settlement, an affidavit of plaintiff, correspondence between counsel, and attorney fee time records.

As to plaintiff's claim for injunctive relief, a permanent injunction is an extraordinary remedy that will not be granted absent a clear showing by the party seeking such relief that irreparable injury is threatened and that no other adequate remedy at law exists (*see* ***Kane v Walsh***, 295 NY 198, 66 NE2d 53 [1946]; ***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]; ***McDermott v City of Albany***, 309 AD2d 1004, 765 NYS2d 903 [3d Dept 2003], *lv denied* 1 NY3d 509, 777 NYS2d 19 [2004]; ***Staver Co. v Skrobisch***, 144 AD2d 449, 533 NYS2d 967 [2d Dept 1988], *appeal dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]). Here, since the enforcement proceeding was settled in the Family Court, plaintiff is unable to show irreparable injury, and adequate remedies at law do exist. Accordingly, the application for a permanent injunction is denied.

On the cross motion, defendant moves to dismiss the complaint pursuant to CPLR § 3211 (a) (7) and CPLR 3211 (a) (1). Pursuant to CPLR §3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Dev. Corp. v 752 Pac., LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***International Oil Field Supply Servs. Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui***

Pak Hoi et al, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]). Here, plaintiff alleges that the stipulation of settlement is "unconscionable, grossly inequitable and the product of overreaching." Plaintiff requests that the stipulation of settlement be set aside, "in view of defendant's duress, undue influence and overreaching, and in the interest of justice and equity."

Viewing the pleadings, in the light most favorable to plaintiff, the complaint does not state a cause of action. An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense (*see* ***Christian v Christian***, 42 NY2d 63, 71, 396 NYS2d 817 [1977]). While the complaint alleges an unfair bargain it does not allege sufficient facts that demonstrate unconscionablity, such as being entered without the benefit of counsel. As discussed below, the agreement was not unconscionable, as it provided the husband with multiple and meaningful bargained-for benefits such as, *inter alia*, a waiver by the wife of any entitlement to any portion of the value of the husband's home including any improvements made during the marriage, and any interest in his business, Out East Electric, LLC. The defendant also waived any interest in plaintiff's electrical license and she accepted significant marital debt. The complaint fails to provide sufficient facts to state a cause of action that the separation agreement, viewed as a whole, was unconscionable.

Similarly, the husband's complaint fails to state a cause of action as to duress. The husband does not allege any facts that he was under "relentless pressure" from the wife, which is insufficient in and of itself to sustain the cause of action (*see* ***Beutel v Beutel***, 55 NY2d 957, 958, 449 NYS2d 180 [1982]). In any event, a motion to set aside a contract procured by duress must be made promptly lest the terms be deemed to have been ratified by the challenging party (*see* ***Beutel v Beutel***, 55 NY2d 957 at 957, 449 NYS2d 180 [1982]). The husband's nearly five-year delay in seeking to set the agreement aside bars him from raising the issue of duress (*see* ***Chalos v Chalos***, 128 AD2d 498, 499, 512 NYS2d 426 [2d Dept 1987] [three-year delay in challenging separation agreement based on duress sufficient basis to dismiss complaint under CPLR 3211(a)]).

Defendant also moves to dismiss the complaint pursuant to CPLR § 3211 (a) (1). Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Vitarelle v Vitarelle***, 65 AD3d 1034, 885 NYS2d 320 [2d Dept 2009]; ***Mazur Bros. Realty, LLC v State of New York***, 59 AD3d 401, 873 NYS2d 326 [2d Dept 2009]). The stipulation of settlement submitted here is just such documentary evidence.

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" (***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 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, defendant is entitled to relief based upon the documentary evidence submitted, that being the stipulation of settlement itself. First, the document indicates that plaintiff was represented by counsel, and understood the amount of money he was paying to defendant, relative to his income. Plaintiff's claim of non-compliance with proposed maintenance guidelines is not a ground for setting aside the agreement. The parties were free to settle the entire matrimonial matter using options that were best suited to their needs. The stipulation indicates that the parties agreed to an amount and duration of maintenance based upon ***Domestic Relations Law*** § 236, including the length of the marriage, the earning capacity of the parties, the income of the parties and the distribution of marital property, the ability of the party to become self-supporting, and equitable distribution including the allocation of marital debt. Accordingly, plaintiff having failed to enumerate and prove any justifiable ground to eliminate or modify the maintenance provision of the agreement, the complaint is dismissed.

DRL § 238 permits the court, in its discretion, to direct the payment of counsel fees to defend an action or proceeding to enforce or modify any provision of a divorce judgment. Moreover, the settlement agreement 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 the stipulation or declare any of its terms and conditions as invalid, void, or against public policy, by any reason, including but not limited to fraud, duress, incompetency, overreaching or unconscionability and is unsuccessful in that action. In such a proceeding, where a party neither objects to the reasonableness of the application for attorney 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, plaintiff, in opposition, "would reserve the right to challenge the amount requested, at a fact-finding hearing..." An award of attorney fees to the defendant is warranted. She requests the sum of $8,785.00 as and for attorney fees. Since plaintiff has challenged the reasonableness and amount of the fees requested, a determination as to the amount due defendant from plaintiff in connection herewith is referred to a hearing.

Accordingly, for the reasons stated above, plaintiff's complaint is dismissed in its entirety, defendant is awarded counsel fees in her favor and against plaintiff in an amount to be determined at a hearing.

Dated: March 3, 2016

PETER H. MAYER, J.S.C.

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