Cohen v Cohen
2019 NY Slip Op 30951(U)
February 7, 2019
Supreme Court, Tompkins County
Docket Number: 2018-0010
Judge: Eugene D. Faughnan

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 7th day of February, 2019.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

TAL ORON COHEN,

Plaintiff,

-vs-

ROY COHEN,

Defendant.

DECISION AND ORDER

Index No. 2018-0010
RJI No. 2018-0508-M

APPEARANCES:

COUNSEL FOR PLAINTIFF:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon a motion for summary judgment pursuant to CPLR §3212 submitted by Tal Oron-Cohen ("Plaintiff") seeking enforcement of a *ketubah* entered into by the parties at the time of marriage. Roy Cohen ("Defendant") cross moves for an order dismissing the action pursuant to 3211(a)(2) arguing lack of jurisdiction[1]. In reaching its decision, the Court has reviewed all electronically filed submissions.

The Plaintiff and Defendant were married on September 9, 1998 in Kafar-Saba, Israel. Consistent with Jewish tradition and the custom in Israel, Defendant signed a *ketubah*. The *ketubah* is a document in which, in this instance, Defendant pledged to the Plaintiff, two hundred Zequqim and 180,000 New Israeli Shekels ("NIS"). The *ketubah* is rooted in Jewish tradition which historically, among other things, represented financial protection for a woman. The amount pledged, the *"main ketubah"*, is to provide for the future support of the woman in the instance of divorce or the death of her husband.

This action was commenced by the filing of a verified complaint on January 22, 2018. The issue was joined by the service of a verified answer with affirmative defenses including, but not limited to, lack of jurisdiction and an allegation that the Plaintiff failed to comply with her obligations under the agreement. In a separate action for divorce, a Judgment of Divorce was signed by this Court on September 14, 2018.

The Plaintiff now seeks a judgment for 180,000 NIS against Defendant consistent with the

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[1]"Although defendant framed [his] motion as a motion to dismiss under CPLR 3211(a)(2)..., as it was made post answer, 'it was a CPLR 3212 motion for summary judgment based upon CPLR 3211(a) grounds asserted in defendant's answer'" *Oppenheimer v. State of New York*, 152 AD3d 1006, 1009 n. 1 (3rd Dept. 2017), citing *Andrews v. State of New York*, 138 AD3d 1297, 1298 n 1 (3rd Dept. 2016), *lv. denied* 39 NY3d 912 (2016).

ketubah. Plaintiff argues that the *ketubah* is an enforceable contract, and that since the Defendant commenced the divorce action, the *main ketubah* is payable. Defendant argues that the *ketubah* is not enforceable in New York Courts as the Court lacks subject matter jurisdiction. The Defendant argues that the financial provisions of the *ketubah* are intertwined with religious doctrine and not subject to this Court's jurisdiction. Defendant also argues that there are issues of fact regarding the translation, meaning and effect of the *ketubah*.

As jurisdiction is a threshold issue, the Court will address the Defendant's motion first. When seeking summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3rd Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. DeVito*, 152 AD2d 896, 896 (3rd Dept. 1989); *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013).

The Court's ability to address religious matters is greatly circumscribed. It has been long held that "courts should not resolve such controversies in a manner requiring consideration of religious doctrine." *Avitzur v. Avitzur*, 58 NY2d 108, 114 (1983). However, the United States Supreme Court has held that "a State may adopt any approach to resolving religious disputes

which does not entail consideration of doctrinal matters, [and the Supreme Court has] specifically approved the use of the 'neutral principles of law' approach as consistent with constitutional limitations." *Id.*, *citing Jones v. Wolf*, 443 U.S. 595 (1979). "This approach contemplates the application of objective, well-established principles of secular law to the dispute (*Jones v. Wolf*, 443 U.S. at 603), thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms." *Avitzur* at 115.

With this framework in mind, the Court is tasked with determining whether the subject *ketubah* can be interpreted and enforced consistent with "neutral principals of law" and without regard to religious or doctrinal considerations. The Court concludes that it cannot.

Defendant asserts *inter alia*, that a spouse cannot receive the benefits of the *ketubah* if they do not uphold their "marital obligations". In fact, Defendant's sixth affirmative defense specifically alleges Plaintiff's failure to uphold her marital obligations. Defendant offered the opinion of an expert, Michael J. Broyde ("Broyde"), a Tenured Full Professor of Law and Projects Director of the Center for the Study of Law and Religion at Emory University School of Law. In his affidavit, Broyde notes that he has written more than 150 articles and many books on the issues of both Jewish Law and Law and Religion and specifically on the issue of enforcement of *ketubahs*. Broyde has served as a synagogue rabbi and a number of years as a member of Beth Din of America, a Jewish arbitration panel that resolves issues regarding claims under Jewish Law.

Of relevance to this matter, Broyde argues that in Israel, parties negotiate payments due in divorces through the provisions of the *ketubah*. He further asserts that if the a party sought to enforce the *ketubah* payment under Israeli Law and had received "alimony", such amounts would need to be refunded prior to consideration of enforcement of the *ketubah*. In other words, the *ketubah* is intertwined with the prosecution of a divorce either under either Israeli law or Jewish law and custom. Payment of a *ketubah* sum following a civil divorce in New York Courts would represent "double dipping".

In response, Plaintiff offers her expert, Dr. Chanan Goldschmidt ("Goldschmidt"), an Israeli attorney. Goldschmidt is an attorney in the field of family and inheritance law and a lecturer in an Israeli Academy in the field of family law. Goldschmidt opines that the *ketubah* is a valid contract under Israeli law. He states that the ketubah is not a pre-nuptial agreement but rather a special contract between the husband and the wife and is only signed by the husband. He concedes that claims can be raised by a husband to obtain a waiver of the financial obligations of the *ketubah*. Specifically, if there are claims that the wife "violated the laws of marriage" or betrayed the husband, the *ketubah* obligation may be waived.

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. A court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to. Accordingly, if an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract." *Carione v. Hickey*, 133 AD3d 811, 811 (2nd Dept. 2015) [internal quotation marks, brackets and citations omitted]). If the agreement is not clear, the Court can look at evidence beyond the four corners of the agreement. *Greenfield v. Philles Records, Inc.*, 98 NY2d 562 (2002). However' '[a]s a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement. *Schron v. Troutman Sanders LLP*, 20 NY3d 430, 436 (2013).

The *ketubah* is a creation of *Halakhah* or Jewish law, with ancient roots. *See Encyclopedia Judaica*, Berenbaum and Skolnik at 93 (2007). It is "an indispensable component of a religious (Jewish) wedding ceremony" *The New Encyclopedia of Judaism*, p. ____ (1989). The purpose of the *main ketubah* or *ketubah* amount was to protect women by ensuring that men did not view divorcing their wives as easy, and also to provide support to the woman after a divorce or the husband's death. *Encyclopedia Judaica* at 93. As the Plaintiff concedes, the payment of the main *ketubah* is not guaranteed and may be forfeited for failure of the woman to adhere to the laws of

marriage and betray her husband in any number of ways.

In the present matter, the *ketubah*, as translated, contains no promise to pay a certain sum of money upon divorce. The *ketubah* begins with "[b]e my wife according to the laws of Moses and Israel, and I shall willingly honor, cherish, sustain and support you in the way of the children of Israel, that honor, cherish, sustain and support their wives as fit." It further notes "[a]nd I will give your bride price a hundred *Zequqim* pure silver and he added one hundred *Zequqim* pure silver and he added one hundred *Zequqim* pure silver...". Additionally, added were "one hundred and eighty thousand new Israeli shekels, besides all her clothes, jewelry and belongings which belong to her body". The foregoing is noted as "undertook like all subject contracts and additions that are custom of Jewish girls..."

The Court concludes that it cannot interpret and give force to what is essentially a religious document imposing religious duties upon the parties. If the matter were to go forward, the Court would be forced to determine whether the Plaintiff faithfully upheld her obligations as a wife under Jewish law. The Plaintiff's expert asserts in conclusory fasshion that such factors are not present. However, in doing so, he recognizes that the Court would be required to reach a conclusion on the issue. Moreover, the Defendant specifically raised as an affirmative defense that Plaintiff failed to uphold her marital obligations, thereby further reinforcing the fact that the Court would be asked to decide these doctrinally related issues. This a question of religious doctrine which the Court is prohibited from evaluating. The Court is unable to assess the claim utilizing purely secular contract principles. The Law of Moses and *Halakhah* are beyond the Constitutional scope of this Court's jurisdiction.

The Plaintiff argues that the *ketubah* is enforceable under Israeli law. However, in addition to the fact that the *main ketubah* can be forfeited for various reasons under Israeli law (in conjunction with *Halakhah*), the *ketubah* payment is also a factor in determining issues of equitable distribution and spousal maintenance. Both equitable distribution and spousal maintenance were determined in the related divorce action.

Finally, even if the Court was not constitutionally prohibited from determining this matter, the *ketubah* lacks any of the hallmarks of a contractual agreement. It is only signed by the Defendant husband. There is no promise to pay, or conditions under which payment will be made. Nowhere in the subject *ketubah* is there reference to divorce as a triggering event for payment of the main *ketubah*. There is no apparent acceptance by the Plaintiff and there is no apparent consideration.

For the reasons set forth herein, the Defendant's motion for summary judgment is **GRANTED** and the Plaintiff's motion for summary judgment is **DENIED**.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this **DECISION AND ORDER** by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: April 18, 2019
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice