

Forman v. Forman

211 A.D.3d 698 (N.Y. App. Div. 2022) · 179 N.Y.S.3d 718 · 2022 N.Y. Slip Op. 6913
Decided Dec 7, 2022

2020–01378 Index No. 926/15

12-07-2022

Donna FORMAN, appellant, v. Dennis FORMAN, respondent.

The Edelsteins, Faegenburg & Brown LLP, New York, NY (Adam J. Edelstein of counsel), for appellant. Campagna Johnson Mady, P.C. (Thomas K. Campagna and Picarello & Saciolo, P.C., Islandia, NY [Nicholas E. Arazoza], of counsel), for respondent.

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The Edelsteins, Faegenburg & Brown LLP, New York, NY (Adam J. Edelstein of counsel), for appellant.

Campagna Johnson Mady, P.C. (Thomas K. Campagna and Picarello & Saciolo, P.C., Islandia, NY [Nicholas E. Arazoza], of counsel), for respondent.

BETSY BARROS, J.P., REINALDO E. RIVERA, LARA J. GENOVESI, JANICE A. TAYLOR, JJ.

699 DECISION & ORDER *699 In a matrimonial action in which the parties were divorced by judgment dated April 2, 2019, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Deborah Poulos, J.), dated September 12, 2019. The order, insofar as appealed from, denied the plaintiff's motion to vacate the judgment of divorce and to set aside the parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce, and granted

720 that branch of the defendant's cross motion *720 which was for an award of attorney's fees to the extent of awarding the defendant attorney's fees in the sum of \$6,987.50.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action for a divorce and ancillary relief in January 2015. On November 7, 2018, the parties entered into a stipulation of settlement (hereinafter the stipulation), whereby, among other things, the defendant agreed to pay certain maintenance to the plaintiff and to make equitable distribution payments to the plaintiff totaling approximately \$6,000,000 over a period of approximately eight years. The stipulation was incorporated but not merged into a judgment of divorce dated April 2, 2019. In June 2019, the plaintiff moved to vacate the judgment of divorce and to set aside the stipulation. The defendant opposed the motion and cross-moved, inter alia, for an award of attorney's fees. By order dated September 12, 2019, the Supreme Court, among other things, denied the plaintiff's motion and granted that branch of the defendant's cross motion to the extent of awarding the defendant attorney's fees in the sum of \$6,987.50. The plaintiff appeals.

The plaintiff's motion to vacate the judgment of divorce and to set aside the stipulation was properly denied. " 'Marital settlement agreements are judicially favored and are not to be easily set aside' " (*Barone v. Barone*, 199 A.D.3d 875, 876, 154 N.Y.S.3d 494 ; quoting *Glover v. Glover*, 137 A.D.3d 745, 746, 25 N.Y.S.3d 890). " 'A

stipulation of settlement entered into by parties to a divorce proceeding that is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability' " (*Barone v. Barone*, 199 A.D.3d at 876, 154 N.Y.S.3d 494, quoting *Cohen v. Cohen*, 170 A.D.3d 948, 949, 96 N.Y.S.3d 312 ; see *Sanfilippo v. Sanfilippo*, 137 A.D.3d 773, 774, 31 N.Y.S.3d 78). " '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' " (*700 *Barone v. Barone*, 199 A.D.3d at 876, 154 N.Y.S.3d 494, quoting *Ku v. Huey Min Lee*, 151 A.D.3d 1040, 1041, 54 N.Y.S.3d 595 ; see *Morad v. Morad*, 27 A.D.3d 626, 627, 812 N.Y.S.2d 126). "An agreement, however, is not unconscionable 'merely because, in retrospect, some of its provisions were improvident or one-sided' " (*Ku v. Huey Min Lee*, 151 A.D.3d at 1041, 54 N.Y.S.3d 595, quoting *O'Lear v. O'Lear*, 235 A.D.2d 466, 466, 652 N.Y.S.2d 1008). Here, the terms of the stipulation were not so unfair as to shock the conscience and confound the judgment of any person of common sense.

" 'A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his [or her] free will' " (*Shah v. Mitra*, 171 A.D.3d 971, 976, 98 N.Y.S.3d 197, quoting *Austin Instrument v. Loral Corp.*, 29 N.Y.2d 124, 130, 324 N.Y.S.2d 22, 272 N.E.2d 533). "To rescind an agreement on the ground of overreaching, a plaintiff must demonstrate both overreaching and unfairness" (*Barone v. Barone*, 199 A.D.3d at 876, 154 N.Y.S.3d 494 ; see *Levine v. Levine*, 56 N.Y.2d 42, 47, 451 N.Y.S.2d 26, 436 N.E.2d 476 ; *Jon v. Jon*, 123 A.D.3d 979, 979–980, 1 N.Y.S.3d 151). " 'Courts may examine the terms of the agreement as well as the surrounding circumstances to

ascertain whether there has been overreaching' " (*721 *Jon v. Jon*, 123 A.D.3d at 980, 1 N.Y.S.3d 151, quoting *Kerr v. Kerr*, 8 A.D.3d 626, 627, 779 N.Y.S.2d 246). "However, generally, if the execution of the agreement is fair, no further inquiry will be made" (*Jon v. Jon*, 123 A.D.3d at 980, 1 N.Y.S.3d 151). "No actual fraud needs to be shown in order to set aside an agreement, but 'the challenging party must show overreaching in the execution, such as the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception' " (*Marinakis v. Marinakis*, 196 A.D.3d 472, 474, 147 N.Y.S.3d 416, quoting *Gottlieb v. Gottlieb*, 138 A.D.3d 30, 37, 25 N.Y.S.3d 90). Applying these principles here, the plaintiff failed to meet her burden of demonstrating that the stipulation was the result of duress or overreaching.

The plaintiff's claim that she was of diminished capacity when she executed the stipulation is unsupported by evidentiary facts in admissible form (see *Valsamos v. Valsamos*, 136 A.D.3d 625, 626, 25 N.Y.S.3d 253 ; *Mohrmann v. Lynch–Mohrmann*, 24 A.D.3d 735, 736, 809 N.Y.S.2d 115 ; *Bergen v. Bergen*, 299 A.D.2d 308, 309, 749 N.Y.S.2d 148 ; *Torsiello v. Torsiello*, 188 A.D.2d 523, 524, 591 N.Y.S.2d 472).

Moreover, by accepting the benefits of the stipulation for a period of more than seven months, the plaintiff ratified the agreement (see *Korngold v. Korngold*, 26 A.D.3d 358, 359, 810 N.Y.S.2d 206). "A party who 'accepts the benefits provided under a[n] agreement for any considerable period of time' is deemed to have ratified the agreement and thus, 'relinquishes the right to challenge the agreement' " (*Rio v. Rio*, *701 110 A.D.3d 1051, 1054, 974 N.Y.S.2d 491, *701 quoting *Wasserman v. Wasserman*, 217 A.D.2d 544, 544, 629 N.Y.S.2d 69 ; see *Brennan v. Brennan*, 305 A.D.2d 524, 525, 759 N.Y.S.2d 744 ; *Torsiello v. Torsiello*, 188 A.D.2d at 524, 591 N.Y.S.2d 472).

Finally, the Supreme Court did not improvidently exercise its discretion in awarding the defendant attorney's fees. The award of reasonable attorney's fees is a matter in the court's sound discretion, and the court may consider, inter alia, a party's tactics that unnecessarily prolonged the litigation (see *Cravo v. Diegel*, 163 A.D.3d 920, 923, 83 N.Y.S.3d 91 ; *Meara v. Meara*, 104 A.D.3d 916, 917, 960 N.Y.S.2d 911 ; *Quinn v. Quinn*, 73 A.D.3d 887, 887, 899 N.Y.S.2d 859). While the plaintiff here is the less monied spouse, the court's award reflects consideration of the relevant factors, including that the plaintiff's conduct resulted in unnecessary litigation. Thus, the court did not improvidently exercise its discretion in granting that branch of the defendant's cross motion which was for an award of attorney's fees to the extent of awarding him attorney's fees in the sum of \$6,987.50.

The defendant's remaining contention is improperly raised for the first time on appeal (see *New York Brooklyn Wholesale Ctr., Inc. v. Xiaoli Sun*, 172 A.D.3d 1389, 1391, 98 N.Y.S.3d 910).

BARROS, J.P., RIVERA, GENOVESI and TAYLOR, JJ., concur.
