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159 A.D.3d 1074
Supreme Court,
Appellate Division, Third Department, New York.

[Brian W. **MATULA**, Appellant,

v.

[Annemarie R. **MATULA**, Respondent.

524093
Calendar Date: January 8, 2018
Decided and Entered: March 1, 2018

Synopsis

Background: Husband brought action against wife seeking divorce. Following entry of stipulated settlement agreement and a judgment of divorce, the Supreme Court, Albany County, O'Connor, J., denied husband's request to enjoin wife from enforcing and challenging validity of provisions of settlement agreement and his request for sanctions, and granted wife's application for counsel fees. Husband appealed.

Holdings: The Supreme Court, Appellate Division, Clark, J., held that:
1 proper vehicle for husband's challenge to settlement agreement was a plenary action separate from divorce action;
2 Supreme Court did not abuse its discretion in awarding wife her requested attorney fees; and
3 sanctions were not warranted against wife's counsel.

Affirmed.

West Headnotes (6)

Change View

1 **Divorce** Contract principles; intent of parties
Divorce Effect of merger or incorporation
The terms of a separation agreement incorporated, but not merged, into a judgment of divorce are contractually binding on the parties.

2 **Divorce** Agreements not merged or incorporated in judgment
Divorce Actions and Proceedings in General
In cases where a settlement agreement is not merged into a judgment of divorce, a postjudgment motion within the matrimonial action is not the proper vehicle for challenging or annulling the settlement agreement or the support obligations included therein.

3 **Divorce** Agreements not merged or incorporated in judgment
Divorce Actions and Proceedings in General
Proper vehicle for husband's challenge to settlement agreement with wife, which was incorporated, but not merged, into judgment of divorce, was a plenary action separate from divorce action, rather than a postjudgment motion to invalidate settlement agreement, notwithstanding existence of related proceedings in Family Court.

4 **Divorce** Evidence in general
In determining the reasonableness of purported counsel fees in a divorce action, the court is required to consider whether there was an evidentiary basis to establish the value of the legal services performed.

5 **Divorce** Stipulations and agreements
Divorce Evidence in general
Supreme Court did not abuse its discretion in awarding wife her requested attorney fees incurred in defending against husband's challenge to their stipulated settlement agreement of divorce, which resulted in court's refusal to entertain husband's motion, where settlement agreement in question directed an award of any and all counsel fees incurred by a party that successfully defended the validity of the settlement agreement, Court examined retainer agreements between wife and her counsel, which reflected hourly rates that had remained substantially the same between original divorce filing and husband's postjudgment motion two years later, and Court examined a billing statement itemizing 10.55 hours of work performed by two attorneys and a paralegal in response to husband's motion.

6 **Attorney and Client** Liability for costs; sanctions
Sanctions were not warranted against wife's counsel for making allegedly misleading statements to Supreme Court in their divorce action, where challenged statements in counsel's letter did not amount to frivolous conduct, but rather, were more properly characterized as good-faith efforts to oppose husband's postjudgment motion challenging stipulated settlement agreement. N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1.

Attorneys and Law Firms

[Brian W. **Matula**, Albany, appellant pro se.

Mack & Associates, PLLC, Albany (Barrett D. Mack of counsel), for respondent.

Paige E. Crable, Albany, attorney for the children.

Before: Egan Jr., J.P., Lynch, Clark, Mulvey and Rumsey, JJ.

MEMORANDUM AND ORDER

Clark, J.

*1 Appeal from an order of the Supreme Court (O'Connor, J.), entered February 4, 2016 in Albany County, which, among other things, denied plaintiff's motion to, among other things, set aside the parties' settlement agreement.

In August 2014, plaintiff (hereinafter the husband) commenced this action in Supreme Court seeking a divorce from defendant (hereinafter the wife). In March 2015, the parties entered into a stipulated settlement agreement, and, in September 2015, a judgment of divorce was entered, which incorporated, but did not merge with, the settlement agreement. In January 2016, the husband, an attorney admitted to practice in this state, moved pro se by order to show cause in this action to enjoin the wife from enforcing, and challenging the validity of, certain provisions of the settlement agreement and for sanctions against the wife's counsel for making allegedly misleading statements to Supreme Court (*see* 22 NYCRR 130–1.1). The wife cross-moved to dismiss the husband's motion and requested counsel fees in the amount of $3,028.75, which reflected the amount of fees incurred as a result of defending the husband's motion. Supreme Court denied the husband's requested relief and granted the wife's application for counsel fees in the requested amount. The husband now appeals.

1 2 We affirm. We first address the husband's contention that Supreme Court erred in determining that he was required to commence a separate plenary action in order to challenge the enforceability of the settlement agreement. "It is well established that the terms of a separation agreement incorporated, but not merged, into a judgment of divorce are contractually binding on the parties" (*Matter of McCauley v.*

New York State & Local Employees' Retirement Sys., 146 A.D.3d 1066, 1068, 46 N.Y.S.3d 262 [2017] [internal quotation marks and citations omitted], *lv denied* 29 N.Y.3d 906, 80 N.E.3d 403 [2017]; *see Holsberger v. Holsberger*, 154 A.D.3d 1208, 1210, 63 N.Y.S.3d 559 [2017]; *Bell v. Bell*, 151 A.D.3d 1529, 1529, 54 N.Y.S.3d 776 [2017]). In cases where a settlement agreement is not merged into a judgment of divorce, a postjudgment motion within the matrimonial action is not the proper vehicle for challenging or annulling the settlement agreement or the support obligations included therein (*see Marshall v. Marshall*, 124 A.D.3d 1314, 1317, 1 N.Y.S.3d 622 [2015]; *Brody v. Brody*, 82 A.D.3d 812, 812, 918 N.Y.S.2d 383 [2011]; *Dudla v. Dudla*, 304 A.D.2d 1009, 1010, 759 N.Y.S.2d 212 [2003]; *Frieland v. Frieland*, 200 A.D.2d 484, 484, 606 N.Y.S.2d 654 [1994]).

3 Here, the record reflects that, although the settlement agreement was incorporated, but not merged, into the judgment of divorce, the husband nevertheless moved postjudgment to invalidate that agreement. Inasmuch as the proper vehicle for challenging the propriety of the support provisions contained in that agreement was a separate plenary action, Supreme Court properly denied the husband's postjudgment motion (*see Anderson v. Anderson*, 153 A.D.3d 1627, 1628, 61 N.Y.S.3d 405 [2017]; *Marshall v. Marshall*, 124 A.D.3d at 1317, 1 N.Y.S.3d 622; *Darragh v. Darragh*, 163 A.D.2d 648, 649, 558 N.Y.S.2d 695 [1990]). The existence of related proceedings in Family Court did not provide Supreme Court with a proper basis to entertain the husband's attempt to invalidate the settlement agreement by postjudgment motion in Supreme Court (*cf. Campello v. Alexandre*, 155 A.D.3d 1381, 1382, 65 N.Y.S.3d 348 [2017]; *Holsberger v. Holsberger*, 154 A.D.3d at 1210, 63 N.Y.S.3d 559; *Barany v. Barany*, 71 A.D.3d 613, 614, 898 N.Y.S.2d 146 [2010]; *Gusler v. Gusler*, 183 A.D.2d 1070, 1070–1071, 583 N.Y.S.2d 609 [1992]).

4 5 ***2** The husband also contends that Supreme Court abused its discretion by awarding the wife excessive counsel fees. Although the settlement agreement in question directs an award of "any and all" counsel fees incurred by a party that successfully defends the validity of the settlement agreement, Supreme Court "retained its inherent authority to determine" the reasonableness of the wife's purported fees (*Fermon v. Fermon*, 135 A.D.3d 1045, 1049 n., 24 N.Y.S.3d 226 [2016] [internal quotation marks and citation omitted]; *see Orix Credit Alliance v. Grace Indus.*, 261 A.D.2d 521, 521–522, 690 N.Y.S.2d 651 [1999], *lv denied* 93 N.Y.2d 818, 697 N.Y.S.2d 566, 719 N.E.2d 927 [1999]; *see generally Matter of Stortecky v. Mazzone*, 85 N.Y.2d 518, 525–526, 626 N.Y.S.2d 733, 650 N.E.2d 391 [1995]). To that end, the court was required to consider whether there was an evidentiary basis to establish the value of the legal services performed in responding to the husband's order to show cause (*see Fermon v. Fermon*, 135 A.D.3d at 1049, 24 N.Y.S.3d 226; *Fackelman v. Fackelman*, 71 A.D.3d 724, 726–727, 896 N.Y.S.2d 426 [2010]). Here, the parties submitted retainer agreements between the wife and her counsel from 2014 and 2016, which reflected that the hourly rates for the wife's counsel remained substantially the same, and a billing statement itemizing 10.55 hours of work performed by two attorneys and a paralegal in response to the husband's postjudgment motion. Supreme Court found that the amount of fees incurred was appropriate and awarded the wife $3,028.75, and we perceive no abuse of discretion in its decision to do so given the evidentiary support in the record for those fees (*see Kimberly C. v. Christopher C.*, 155 A.D.3d 1329, 1336, 65 N.Y.S.3d 260 [2017]; *Fermon v. Fermon*, 135 A.D.3d at 1049, 24 N.Y.S.3d 226; *compare Curley v. Curley*, 125 A.D.3d 1227, 1231, 4 N.Y.S.3d 676 [2015]; *Yarinsky v. Yarinsky*, 2 A.D.3d 1108, 1110, 770 N.Y.S.2d 440 [2003]).

6 Finally, we have examined the husband's contention that Supreme Court should have sanctioned the wife's counsel and find it to be without merit. In our view, the challenged statements contained in a January 2016 letter prepared by the wife's counsel do not amount to frivolous conduct, but are instead more properly characterized as good-faith efforts to oppose the husband's postjudgment motion. We therefore discern no basis upon which to disturb Supreme Court's exercise of its discretion to deny the husband's request for sanctions pursuant to 22 NYCRR 130–1.1 (*see Wells v. Hodgkins*, 150 A.D.3d 1449, 1452, 54 N.Y.S.3d 740 [2017]; *compare*

Matter of Tina X. v. John X., 156 A.D.3d 1152, 1153–1154, 67 N.Y.S.3d 695 [2017]; *Matter of Flanigan v. Smyth*, 148 A.D.3d 1249, 1251, 50 N.Y.S.3d 572 [2017], *lv dismissed* 29 N.Y.3d 1046, 78 N.E.3d 1192 [2017]).

ORDERED that the order is affirmed, without costs.

Egan Jr., J.P., Lynch, Mulvey and Rumsey, JJ., concur.

All Citations

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