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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART J.H.O.

FRANK RAMUNNI,

Plaintiff,

- against -

ROSALIE RAMUNNI,

Defendant.

INDEX NO. 19786/84

MEMORANDUM

DECISION

STANLEY GARTENSTEIN, JUDICIAL HEARING OFFICER:

Defendant wife moves by order to show cause for an order directing her former husband to pay "arrears for spousal support, household costs, medical costs and expenses of Rosalie Ramunni . . . as required by the court's prior order"; for modification of the final judgment to provide for additional spousal support, etc. The husband cross-moves to dismiss all proceedings. These motions were originally referred to the Hon. Pearl B. Corrado to hear and determine. Upon Justice Corrado's unavailability, the parties stipulated on record to refer these issues to the undersigned to hear and determine.

The parties were married on October 26, 1959. On November 28, 1984, they entered a separation agreement which was duly executed and acknowledged. The formal divorce was entered on June 27, 1986. The formal terms of the judgment provide for survival of the separation agreement but make no reference to its incorporation therein. Indeed, the judgment is at variance with

the separation agreement at least to the extent that a partial bare-bones recitation of the provisions for maintenance serve as the sole financial award to the wife despite the fact that the agreement provides for medical expenses among other emoluments.

Subsequent to entry of the divorce, it is uncontested that the parties orally "agreed" to increase the provisions for recurring maintenance payments. This increased amount was, it is alleged, to cover medical insurance and payments.

The wife was unrepresented by counsel at the time of execution of the agreement. She did acknowledge specifically that she was fully aware of her right to counsel and that she was entitled to reimbursement of any reasonable counsel fees incurred or to be incurred. She has received the benefits of the agreement for almost 17 years and of the divorce itself for upward of 15 years, including the increased periodic recurring payments "agreed" to orally. She has accepted these benefits without once legally expressing dissatisfaction until this proceeding was brought.

As a threshold holding, it is first necessary to rule that the purported oral modification of either the judgment or the agreement which survived entry thereof was of no effect. Accordingly, the terms of these two documents constitute the parameters of whatever rights and obligations exist between the parties.

The Court further rules in accordance with established principles (cf., Rainbow v Swisher, 72 NY2d 106) that where the

final judgment and an agreement and/or stipulation underlying it are inconsistent, the terms of the judgment must prevail. (Greschler v Greschler, 51 NY2d 368.) We find nothing in the wording of the judgment which may in any way be construed to incorporate the terms of the agreement by reference as defendant must claim if she relies upon the terms of the judgment. Indeed, the very fact that the judgment sets forth one and only one term of the agreement with regard to the wife's financial entitlements, must be held to indicate that incorporation of all the terms of the agreement by reference was not intended either by the parties or by the Court. Accordingly, any financial entitlement claimed by the wife to exist outside the terms of the judgment must be found in the agreement and must be enforceable solely as a contractual right in a separate plenary lawsuit subject to all existing affirmative defenses, including but not limited to the Statute of Limitations. (Baratta v Baratta, 122 AD2d 3.) Where there is no pre-existing Court mandate, either by judgment or order, a plenary lawsuit for enforcement of an agreement is an indispensable threshold requirement. (Baker v Baker, 66 NY2d 649.)

The motion to enforce what the wife claims to be accrued arrears on the recurring maintenance payment is accordingly granted to the extent of ordering that hearing which is required by law in the face of the conflicting claims. Since it appears that the husband has made payments in excess of those required by the judgment under the invalid oral "agreement" between the parties, it would appear that any disposition of this aspect of her application

would be predictable. Under these circumstances, we respectfully believe it essential that the Court call to her attention the obligations imposed upon it by the Rules of the Chief Judge when, as and if a hearing commences on this issue.

The motion with respect to medical insurance, unpaid medical bills, and all other rights claimed to exist under the agreement is denied without prejudice to a plenary lawsuit in which all appropriate defenses may be interposed.

That branch of the motion seeking upward modification of the husband's recurring maintenance payments under the judgment is denied without prejudice to a motion to be brought upon a showing of substantially changed circumstances as that term is defined by existing stare decisis.

The claim of fraud, duress and the absence of counsel with reference to execution of the original agreement must be taken with at least a grain of salt. The wife has accepted its benefits for almost 17 years without taking even a semblance of the legal action which would have been warranted had the outrageous conduct she now attributes to her ex-husband actually taken place. As a matter of law, the acceptance of benefits thereunder and under the judgment fatally undermines this claim. (Luftig v Luftig, 239 AD2d 225; Grubman v Grubman, 191 AD2d 194, lv denied 82 NY2d 651.) The law holds her to have ratified the agreement by accepting payments thereunder. (Wasserman v Wasserman, 217 AD2d 544; Luce v Luce, 213 AD2d 978.) Nevertheless, we deem it appropriate to point out that the specific recitations in the

agreement effectively neutered this issue even had subsequent ratifying events never taken place. (Luftig v Luftig, supra.)

Finally, in view of the holding herein that the separation agreement was not incorporated by reference although it survived entry of the final decree, the appropriate standard for granting upward modification is extreme hardship. (Sheridan v Sheridan, 225 AD2d 604; Young v Young, 223 AD2d 358.) This branch of the motion is denied without prejudice to renewal upon a specific threshold showing sufficient to trigger the ordering of a hearing.

The application for counsel fees is reluctantly denied inasmuch as any award thereof must be predicated upon an enforceable claim to arrears and only to the extent said claim is actually enforceable. (Petritis v Petritis, 131 AD2d 651.)

The foregoing constitutes the decision and order of this Court.

Dated: July 19, 2001

STANLEY GARTENSTEIN
Judicial Hearing Officer

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