Expedited Challenges to and Enforcement of Settlement Agreements[1]

Elliott Scheinberg

A stipulation of settlement which is not merged into the final judgment is separately enforceable via a separate plenary action and not by way of postjudgment motion because it said to have survived the judgment as a separate contract.[2] A challenge to a surviving agreement which seeks reformation or vacatur may be had by plenary action, affirmative defense or counterclaim.[3] Notwithstanding black letter statute and long settled common law which confer upon matrimonial litigants the unequivocal right to seek an accelerated review or enforcement of agreements by moving within the action, during the pendency of the action, and prior to the entry of final judgment, these litigants are denied such expeditious procedural relief and are rerouted instead to proceed by way of protracted plenary proceeding. This article examines governing law and shows that it is error to deny matrimonial litigants this avenue of rapid relief.

Domestic Relations Law (DRL) § 236B(3) authorizes and encouraged the making of agreements "before [prenuptial agreements] or during the marriage [post-nuptial agreements and settlement/separation agreements]." The Legislature's intention to promote global settlements is supported by examples set forth in the statute of what agreements may include, in essence, almost anything: (1) testamentary matters and waivers of election rights; (2) property distribution; (3) spousal maintenance, subject to GOL § 5-311, provided that such terms were fair and reasonable at the time of the making of the agreement and not unconscionable at the time of entry of final judgment; and (4) custody, care, education and maintenance of any child of the parties, subject to DRL § 240.

Section 236B(3) imbues such agreements with unconditional enforceability within the context of the matrimonial action[4] provided they comply with three procedural formalities: they

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[1] N.Y.L.J., July 3, 2006; Cited in McKinney's Consolidated Laws of New York Annotated DRL §236.

[2] Sacks v. Sacks 220 A.D.2d 736, 633 N.Y.S.2d 193 (2nd Dept., 1995).

[3] Gaines v. Gaines 188 A.D.2d 1048, 592 N.Y.S.2d 204 (4th Dept., 1992); Spataro v. Spataro, 268 A.D.2d 467, 702 N.Y.S.2d 342 (2nd Dept., 2000); Gartley v. Gartley 15 A.D.3d 995, 789 N.Y.S.2d 559 (4th Dept., 2005); Bergen v. Bergen, 299 A.D.2d 308, 749 N.Y.S.2d 148 (2nd Dept. 2002); Zavaglia v. Zavaglia 234 A.D.2d 1010, 652 N.Y.S.2d 572 (4th Dept., 1996); Gottlieb v. Gottlieb, 294 A.D.2d 537, 742 N.Y.S.2d 873 (2nd Dept., 2002).

[4] DRL § 236B(2) defines what constitutes a matrimonial action:

> Except as provided in subdivision five of this part, the provisions of this part shall be applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a

must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.[5] The unequivocal language that such agreements "*shall be valid and enforceable in a matrimonial action*" unqualifiedly offers expeditious enforcement during the pendency of the action – prior to the entry of judgment of divorce – rather than relegation to temporal uncertainty customarily experienced in plenary actions. This legislative endowment is absolute and not subject to judicial scrutiny or review. The right to move within the action is not the exclusive procedural remedy, it is in addition to the common law right to proceed by plenary action.

Historical Perspective

Although DRL § 236B(3)'s authorization to proceed within the action may seem like a modern day legislative epiphany, the right to challenge or compel contractual compliance within an action rather than by plenary proceeding has its roots in a full body of common law that predates the 19th century.[6] This right is predicated on the reasoning that no final resolution of a case is achieved prior to the entry of the judgment and, therefore, all issues persist under the aegis of the court.

In 1873, in *Barry v. Mutual Life Insurance. Co. of New York*,[7] the Court of Appeals stated that "all the proceedings in an action are under the control and subject to the direction of the court, so long as the action is pending. It is not an unusual thing to *relieve* parties from stipulations made in the progress of the action; and courts have always regarded this as within their power." In 1901 the First Department stated that "there is no doubt that the court has power to relieve parties from stipulations made during the progress of an action."[8] Four years later, the First Department continued along that vein that courts have "always had the power to *enforce* in

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> declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, commenced on and after the effective date of this part.

DRL § 236B(5)(a) lists the matrimonial actions in which property distribution may be had.

[5] The First and Second Departments hold that oral stipulations dictated into the record satisfy this requirement under CPLR § 2104. The Third and Fourth Departments apply the statute strictly and do not permit oral stipulations on the record to substitute for the statutory directive.

[6] Wardell v. Eden 2 Johns.Cas. 121(Sup.Ct. NY Co. 1800); Becker v. Lamont 13 How. Pr. 23 (Sup.Ct. NY Co. 1855).

[7] Barry v. Mutual Life Ins. Co. of New York, 8 Sickels 536, 1873 WL 10403 (1873).

[8] Magnolia Metal Co. v. Pound, 60 A.D. 318, 70 N.Y.S. 230 (1st Dept., 1901).

a summary way, by motion, the observance of an undisputed and proper stipulation entered into by the parties to an action" made during the pendency of the action.[9] In 1928 the Court of Appeals commented that "the court unquestionably exercises a large control over all proceedings in an action so long as the action is pending and the parties can be restored to their original position. In the exercise of its discretion it relieves litigants from stipulations signed by counsel during the pendency of the case, on motion in the action ... Stipulations and agreements of settlement have, no doubt, been set aside on motion."

Teitelbaum Holdings, Limited.

Contemporary decisions emanating from the high court have reaffirmed this historically anchored line of thinking. In 1979, *Teitelbaum Holdings, Limited. v. Gold*[10] stated that settlement agreements do not terminate their underlying actions unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement. Accordingly, absent such finality, courts retain their supervisory power over all phases of actions and proceedings and may aid a party who has moved either to enforce a settlement or to be relieved from compliance with a stipulation effected during litigation.[11] The Court of Appeals observed that although such relief usually may be sought either by motion interposed in the underlying action or by a plenary action grounded upon the stipulation, the motion has proven to be the favored procedural mode because of its relative simplicity and lesser burden upon the litigants and the court.

Challenges and Enforcements

In the intervening years following the enactment of the Domestic Relations Law in 1980 not only have *Teitelbaum* and its progeny been repeatedly reratified but also nowhere has either the Legislature or the Court of Appeals acted to limit this principle to nonmatrimonial proceedings only.

Curiously, nevertheless, challenges to agreements brought within the action began receiving approval in the matrimonial domain about eight years before their counterpart motions seeking to enforce agreements within the action were allowed. In *Zeppelin v. Zeppelin*[12] the

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[9] Potter v. Rossiter 96 N.Y.S. 177 (1st Dept. 1905).

[10] Teitelbaum Holdings, Limited. v. Gold, 48 N.Y.2d 51, 396 N.E.2d 1029, 421 N.Y.S.2d 556 (1979); Malvin v. Schwartz, 48 N.Y.2d 693, 397 N.E.2d 748, 422 N.Y.S.2d 58 (1979).

[11] See, Zeppelin v. Zeppelin, 245 A.D.2d 504, 666 N.Y.S.2d 486 (2nd Dept., 1997); Bailey v. Assam, 269 A.D.2d 344, 702 N.Y.S.2d 639 (2nd Dept., 2000), a so-ordered stipulation does not terminate an action.; Isler v. Isler 260 A.D 1032, 24 N.Y.S.2d 401 (2nd Dept., 1940).

[12] Zeppelin v. Zeppelin, 245 A.D.2d 504, 666 N.Y.S.2d 486 (2nd Dept., 1997); see, Arguelles v. Arguelles, 251 A.D.2d 611, 675 N.Y.S.2d 551 (2nd Dept., 1998); Sippel v. Sippel, 241 A.D.2d 929, 661 N.Y.S.2d 366 (4th Dept., 1997).

motion court denied the wife's application, without prejudice, to vacate the settlement agreement by way of motion during the pendency of the action and directed her to proceed via plenary action. The Second Department, citing *Teitelbaum,* reversed because the "action ha[d] not been 'terminated', [and] a challenge to a stipulation entered into during the course of the litigation need not be made by a plenary action, but may be made by motion."

In *Bailey v. Assam,*[13] the Second Department, citing *Teitelbaum* and *Zeppelin*, ruled that a challenge to an agreement signed during an unterminated action could be made either by a plenary proceeding or by motion within the action.

It is a recent groundbreaking that enforcement of contractual child support was permitted within the context of the matrimonial action., prior to the entry of judgment. In *Murphy v. Murphy,*[14] the First Department held that "the defendant was not required to institute a separate plenary action to seek enforcement of the parties' separation agreement" during "the pendency of the matrimonial action in which no judgment of divorce had been entered." *Murphy*, cited: (1) DRL § 236B(3) (likely referring to the operative language that such agreements "shall be valid and enforceable in a matrimonial action"), and (2) *Shanon v. Patterson*[15] wherein the Second Department reversed the lower court's ruling that a stipulation of settlement before the entry of a judgment of divorce could only be challenged via a plenary action. By citing *Shanon* the First Department acknowledged the obvious, that a challenge is, in fact, the flip side of enforcement.

***Sua Sponte* Modifications**

Improper procedural steps have not been deemed fatal to the underlying relief sought. Notwithstanding factual questions not evident within the decisions, the Fourth Department has gone to some lengths, *sua sponte*, in the name of judicial economy to correct procedural infirmities. Notwithstanding significant errors by the lower court, *Didley v. Didley,*[16] nevertheless, upheld the court's conversion of a motion into a plenary action: "the interests of judicial economy should permit courts to cure procedural defects and reach the merits if they can do so without prejudice to either party."

Dunham v. Dunham,[17] another fact barren decision regarding the procedural history of the case, involved a *fait accompli* situation where the Fourth Department let a judgment stand in the name of judicial economy, notwithstanding procedural infirmity: "Although it is improper to modify the terms of a separation agreement on motion, where, as here, the determination is made

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[13] Bailey v. Assam, 269 A.D.2d 344, 702 N.Y.S.2d 639 (2nd Dept., 2000).

[14] Murphy v. Murphy, 24 A.D.3d 330, 807 N.Y.S.2d 28 (1st Dept., 2005).

[15] Shanon v. Patterson 14 A.D.3d 604, 787 N.Y.S.2d 904 (2nd Dept., 2005).

[16] Didley v. Didley, 194 A.D.2d 7, 605 N.Y.S.2d 685 (4th Dept., 1993).

[17] Dunham v. Dunham 214 A.D.2d 961, 626 N.Y.S.2d 932 (4th Dept., 1995).

after a 'full hearing tantamount to a plenary trial', it is appropriate to address the merits in the interest of judicial economy." Unwilling to impose upon the parties the onus of renewed litigation costs, the Appellate Division did a "presto change-o" to cure the procedural defect.

Conclusion

DRL § 236B(3)'s right to move within the action is unfettered as to which aspect of an agreement is sought to be enforced. Clearly, if child support is enforceable expeditiously within the action, as in *Murphy*, so must be true for the other categories set forth in the statute. Significantly, the statutory right is an additional right that does not exist in a vacuum; matrimonial litigants are also armed with centuries old common law.