Kojovic v. Goldman: Scienter and Marital Agreements[1]

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Bench and bar are long weary of the surfeit of baseless proceedings to vacate pre and postnuptial agreements. Understandably, in *Kojovic v. Goldman,*[2] the First Department recently expressed "its disdain for post-divorce claims of concealment." In a well reasoned dissent in *Gottlieb v. Such,*[3] Justice David Saxe cogently bemoaned "the prevalence of excessive post-divorce litigation" and the necessity "to find ways to discourage baseless post-judgment proceedings and offer instead protection against the enormous financial burden they entail." Both *Kojovic* and *Gottlieb* sought to invalidate marital agreements.

I admit that when first reading *Kojovic* I joined the chorus of frustration at another challenge to a settlement agreement. After reading the record on appeal through an unpredisposed lens I recognized the established principles of contract doctrine that were implicated but nevertheless glossed over in the decision as well as *Kojovic*'s potential resculpting of the settlement landscape.

Facts

Kojovic was a six year childless marriage. At the time of the marriage, the wife was a 22 year old college graduate. The husband, then 27, held an MBA from Columbia University and was CEO of and a minority shareholder (7-8%) in a closely held corporation, Capital IQ (CIQ), an information technology company. In the first two years of the marriage the wife worked as a securities analyst/equity research assistant with a degree in finance at Morgan Stanley and then decided to become an actress.

It is undisputed that: (1) the husband disclosed his interest in CIQ, (2) the parties agreed to terminate further discovery, and (3) the wife waived her right to evaluate the husband's interest in CIQ and to take his deposition. Specifically, the waiver provided:

> Each party has made inquiry into the financial circumstances of the other and is sufficiently informed of the income, assets, and financial condition of the other···· The parties further acknowledge that *the Husband has provided the Wife with additional information concerning his business interests*, which information she has had independently reviewed by an accountant (emphasis provided).

Within three months a settlement was concluded via counsel. The wife received $1.15 million in cash, $350,000 in rehabilitative spousal support payable over four years, and other unspecified consideration. The husband retained, among other things, his shareholder interest in CIQ.

Shortly after the settlement, Standard & Poor (S&P) submitted a non-binding expression of

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[1] N.Y.L.J., Jan. 11, 2007; **Reprinted**: New York Family Law Monthly, August, 2007.

[2] Kojovic v. Goldman, 823 N.Y.S.2d 35 (1st Dept., 2006).

[3] Gottlieb v. Such, 293 A.D.2d 267 (1st Dept., 2002).

interest to purchase CIQ. Slightly more than one month after the agreement, S&P announced its acquisition of CIQ for approximately $225 million, of which the husband received $18 million.

The wife commenced an action on fraud, reformation, and rescission because, inter alia, the agreement was procured based on the husband's strong misrepresentations as to the non-liquidity of his CIQ shares and concealment of CIQ's imminent sale. Supreme Court denied the husband's motion to dismiss the complaint, finding that the wife had alleged an affirmative misrepresentation and brought her action promptly. The First Department reversed.

The Court's Reasoning

A spousal agreement is a contract subject to the principles of ordinary contract construction.[4] *Kojovic* cited the familiar refrains from the *Christian v. Christian*[5] legacy of caselaw applicable to marital agreements:

> "Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions." There is a "heavy presumption that the deliberately prepared and executed postnuptial agreement manifest[s] the true intention of the parties" necessitating "a high order of evidence ··· to overcome that presumption" ... "courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided."

The Court held the wife's stint with Morgan Stanley against her, albeit she was only 22, adding that her attorney and accountant "could have freely availed themselves of any number of valuation and discovery procedures during the divorce proceeding" but declined to do so, that they should have been aware of the distinct possibility that CIQ could be sold. The Court deemed her waivers as an end run to an "immediate and certain payout" instead of the uncertainty of an eventual sale.

The decision does not reflect that the record on appeal included a four page detailed letter from the husband's counsel outlining the various assets wherein the husband represented: the liquidation of CIQ was "not contemplated", and "the stock in the company is now completely non-liquid as it cannot be sold and will be subject to market competitive and execution risk for several years." In light of ensuing developments the letter was plainly deceptive. A $225 million acquisition does not occur within a handful of months; it entails painstaking back-and-forth negotiations based on time consuming research and multilevel internal approvals at each company. As CEO the husband was unquestionably the first to know about the S&P interest in CIQ. Absent a press release or rumored leaks, the wife could not possibly have learned of these clandestine talks. The husband thereby successfully derailed her ability to reach a fully informed settlement. *Kojovic* did not mention that *Christian* places spouses in a fiduciary relationship, and simultaneously requires that, to be enforceable, the contested agreement be free from any wrongdoing by its proponent.

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[4] Rainbow v. Swisher, 72 N.Y.2d 106 (1988).

[5] Christian v. Christian, 42 N.Y.2d 63 (1977).

Elements of Fraud

In order to sustain an action for actual fraud the plaintiff must prove: (1) the defendant made a representation, (2) as to a material fact, (3) which was false, (4) known to be false by the defendant, (5) the representation was made for the purpose of inducing the other party to rely upon it, (6) the other party rightfully did so rely, (7) in ignorance of its falsity, and (8) to his injury.[6]
Concealment and actual misrepresentation are deemed equal.[7]

Law of Waiver

The Court of Appeals holds that a waiver requires no more than the voluntary and intentional abandonment of a known right; it is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought.[8] A waiver "should not be lightly presumed" and must be based on "a clear manifestation of intent" to relinquish a contractual protection,[9] which intent is a question of fact.[10]

'Conscious Negligence'

A party may not seek to void an agreement by intentionally proceeding without further investigation of his or her rights but rather forges ahead with "conscious ignorance"[11] or "conscious negligence";[12] where the means of knowledge were "easily accessible"[13] a marked lack of diligence in determining one's rights defeats entitlement to equitable relief.[14]

Wife's Efforts

The retention of forensic accountants evidenced the wife's concerted effort to actively pursue her interests in CIQ, which efforts she would have never abandoned but for the husband's specifically targeted fraudulent misrepresentations. The decision highlights the relevant language

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[6] Abbate v. Abbate 82 A.D.2d 368 (2nd Dept., 1981).

[7] Dembeck v. 220 Cent. Park South, LLC 823 N.Y.S.2d 45 (1st Dept., 2006).

[8] Nassau Trust Co. v. Montrose Concrete Prod. Corp., 56 N.Y.2d 175 (1982).

[9] Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P. 7 N.Y.3d 96 (2006).

[10] See, Fundamental Portfolio Advisors, supra.

[11] Estate of Hatch, ex rel. Ruzow v. NYCO Minerals Inc. 270 A.D.2d 590 (3rd Dept., 2000).

[12] P.K. Development, Inc. v. Elvem Development Corp. 226 A.D.2d 200 (1st Dept.,1996).

[13] Da Silva v. Musso 53 N.Y.2d 543 (1981), where mistake was raised.

[14] Gimbel Bros., Inc. v. Brook Shopping Centers, Inc. 118 A.D.2d 532 (2nd Dept.,1986).

from the agreement that "the Husband has provided the Wife with *additional information* concerning his business interests." The wife had exhausted all avenues of inquiry to learn as much as she could about the company and no amount of due diligence would have lead her team to the husband's *sub rosa* negotiations. The *falsus in uno* doctrine has a parallel application, if he was prepared to be duplicitous informally, he would have likely been so during depositions as well.

Kojovic's reprimand that the wife should have conducted depositions rather than accept the husband's representations via counsel is hollow because no authority endorses deliberately deceptive representations during litigation provided they are not made under oath; the delivery system of the representation is irrelevant. The husband did more than simply "privately harbor[] a more optimistic assessment of the potential value of his minority interest in his company", he was the driving force behind it.

General Merger Clauses

An omnibus statement that the written instrument embodies the whole agreement, known as a general merger clause, e.g., "This agreement contains the entire agreement of the parties hereto with respect to the subject matter herein contained and there are no representations or warranties, except as set forth herein", is ineffectual to preclude proof of false or fraudulent misrepresentations offered to rescind the agreement."[15]

Cases in *Kojovic*

The cases cited in *Kojovic* are readily distinguishable and, therefore, not helpful towards this decision. Unlike *Kojovic*, the asset in *Martin v. Martin*[16] was the marital residence whose equity was "easily ascertainable." *Martin* is further irrelevant because the court specifically noted the absence of fraud and misrepresentation. This is vastly different from *Kojovic* where the wife was deliberately railroaded. Where a spouse refuses to declare an asset's value, the non-titled spouse has the option to forge ahead or buy the pig in the poke and settle, to wit, knowingly chance a questionable settlement. Critically, unlike *Kojovic*, where the wife brought an action immediately after discovering the fraud, *Martin* "inferred that she accepted the bargain freely because she complied with its terms for almost a year until her husband sued for divorce and she commenced her countersuit ..."

The same holds true for *Fishof v. Grajower*[17] which declined to vacate an agreement negotiated by counsel simply because one party had subsequent regrets over its improvidence. The improvidence followed a fully informed decision, it was not the product of another's wrongdoing.

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[15] Danann Realty Corp. v. Harris 5 N.Y.2d 317 (1959); See, Perl v. Perl 126 A.D.2d 91 (1st Dept.,1987): language that the stipulation was entered into "voluntarily without any duress, fraud or coercion" is not conclusive of an absence of wrongdoing; that "the very real possibility that this routine formulary was as much the product of coercion as any of the substantive provisions contained in the document."

[16] Martin v. Martin, 74 A.D.2d 419 (4th Dept., 1980).

[17] Fishof v. Grajower, 262 A.D.2d 118 (1st Dept., 1999).

McFarland v. McFarland[18] sought to void an agreement that was incorporated into and survived a bilateral Dominican divorce. *McFarland* was determined on principles of comity, the balance of the decision was *dictum.* Parenthetically, *McFarland* is fact bare and seemingly case specific offering no guidance regarding the circumstances behind the agreement.

Kojovic's distinction between itself and *Chapin v. Chapin*[19] and *DiSalvo v. Graff*[20] is troublesome. *Chapin* sustained a determination of fraudulent inducement against the husband who claimed to have had "virtually no assets" and a reported income of approximately $15,000, yet managed to buy hundreds of acres of waterfront property in Nova Scotia, Canada, contemporaneous with the agreement.

The facts in *DiSalvo*[21] may be gleaned from a combined reading of the Appellate Division and the lower court decisions. The wife, co-founder of the subject company and a business executive whose attorney drafted the settlement agreement,"specifically acknowledged that she had made her own independent investigation of former husband's business affairs and was waiving further disclosure." Each party was, therefore, held to have "implicitly" assumed the risk as to the future of the stocks they selected to trade off. Ms. Kojovic investigated as far as she could and stopped when the trail ended.

The inescapable conclusion from the language in *Kojovic* is that concealment of the existence of a physical asset is actionable whereas concealment of the valuation or possible sale of an asset is not. Remember, *Kojovic* went so far as to hold that "even [if he] had any additional information that he kept to himself, [it was] irrelevant." This is inconsistent with the principles of broad based disclosure and the unanimity that increased value is an asset, e.g., enhanced earning capacity.

The pertinent language from *McCaughey v. McCaughey,*[22] quoted in *Kojovic*, indicates that the "husband attempted to avoid a settlement, in part [because] he had become unemployed a year after the execution of the agreement"; he admitted having been "aware of the possibility that he might be unemployed the year after he made the agreement." There was absolutely no fraud perpetrated against him by his wife. *McCaughey* is, therefore, not relevant herein.

Conclusion

The cost of settling cases may have just become steeper. Settlements will, of necessity, be armored with ironclad safeguards to allow for contractually guaranteed vacatur upon discovery of material misrepresentations following the agreement.

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[18] McFarland v. McFarland 70 N.Y.2d 916 (1987).

[19] Chapin v. Chapin 12 A.D.3d 550 (2nd Dept.,2004).

[20] DiSalvo v. Graff, 227 A.D.2d 298 (1st Dept.,1996).

[21] The facts are set forth in 8/4/95 NYLJ 22 (col. 5).

[22] McCaughey v. McCaughey, 205 A.D.2d 330 (1st Dept., 1994).

To be clear, this article does not take a position regarding the wife's perceived entitlement to any benefits beyond those in the original agreement, it simply addresses *Kojovic*'s impact on contract doctrine and, ergo, future settlements.