Reasonable Expectations From And Conduct Following A Contract

The Court of Appeals has repeatedly underscored that marital agreements, pre and postnuptial agreements, are contracts governed under the ordinary principles of contract law.[1] It is well settled that, in the absence of any affront to public policy, parties have the right to chart their own litigation course. It is judicial policy to encourage the fashioning of stipulations, including marriage agreements, by which the parties agree in advance or during the marriage to the resolution of disputes that may arise after its termination,[2] as a means of expediting and simplifying the resolution of disputes[3] and such agreements will not be lightly cast aside.[4] (A discussion regarding how an even severely skewed agreement, standing alone, is insufficient to set aside an agreement is beyond the scope of this article.) Decisional history evidences that it is the rarest agreement that merits vacatur; the routine assembly line of transparently tired and hackneyed arguments have been tested and rejected. No less than two decisions have expressed "disdain" for ill begotten postjudgment applications to vacate agreements.[5]

Appellate courts do not always detail every reason for dismissal. Many decisions devolve about unstated principles of contract doctrine.

Van Kipnis

In *Van Kipnis v. Van Kipnis*[6] the parties lived and were married in France. At the specific request of the wife, the parties agreed to execute a "Contrat de Mariage" (Contrat), which is a form of prenuptial agreement under the French Civil Code. The Contrat's expressly stated purpose was to opt out of the "community property regime," which is the custom in France, in favor of a "separation of estates" property regime:

> The future spouses ... are adopting the marital property system of separation of estates, as established by the French Civil Code. Consequently, each spouse shall retain ownership and possession of the chattels and real property that he/she may own at this time or may come to own subsequently by any means whatsoever. They shall not be liable for each other's debts established before or during the marriage or encumbering the inheritances and gifts that they receive.

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[1] Rainbow v. Swisher 72 N.Y.2d 106 (1988); Bloomfield v. Bloomfield 97 N.Y.2d 188 (2001); Boden v. Boden, 42 N.Y.2d 210 (1977).

[2] Bronfman v. Bronfman 229 A.D.2d 314 (1st Dept.,1996).

[3] Bloomfield, supra; In re Estate of Greiff, 92 N.Y.2d 341 (1998).

[4] Galasso v. Galasso, 35 N.Y.2d 319 (1974).

[5] Kojovic v. Goldman, 35 A.D.3d 65 (1st Dept., 2006); Gottlieb v. Such, 293 A.D.2d 267 (1st Dept., 2002).

[6] Van Kipnis v. Van Kipnis 43 A.D.3d 71 (1st Dept., 2007).

The Contrat was silent as to property rights in the event of a divorce.

The husband acquired liquid assets of approximately $7 million and the wife of approximately $700,000 - $800,000. The parties jointly owned only two properties with a combined value of $2.4 million. The parties ratified the Contrat by their conduct which kept their assets completely separate throughout their 38-year marriage.

The wife opposed the Contrat contending that its sole purpose was a mutual insulation for the other's debts, and not as the dispositive determinator of property distribution in divorce proceedings. The husband agreed. The Referee upheld the Contrat as a prenuptial agreement which governed the economics of the marriage, and was likewise applicable in their divorce. (The First Department has upheld French prenuptial agreements in the past.[7])

The First Department affirmed based on settled rules of contract construction. The unambiguous language of the agreement precluded any extrinsic evidence since such evidence may not be utilized to create an ambiguity that would otherwise not exist; before looking to evidence of what was in the parties' minds, a court must give due weight to what was in their contract:

> ... [t]he best evidence of what parties to a written agreement intend is what they say in their writing ... Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion.

An omission or mistake in a contract, such as a failure to include a specific contingency, in this case, a divorce, did not by itself create an ambiguity.[8] Furthermore, their agreement to maintain separate property, without any reservation of rights or exceptions regarding divorce or death of a spouse, evidenced that the separate property system was unconditional, without any durational limitation, contingencies or exceptions as to all matters regarding their property.[9] The Appellate Division rejected the thesis that the Contrat was to be limited to their marriage only while thriving and to terminate upon the commencement of a divorce action. The parties' failure to have considered all of the ramifications at the time of its execution, did not serve as a ground to avoid the Contrat's clear terms.

Van Kipnis found further support from *Roos v. Roos*,[10] wherein the language of the

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[7] Housset v. Housset, 200 A.D.2d 508 (1st Dept., 1994).

[8] Reiss v. Financial Performance Corp. 97 N.Y.2d 195 (2001).

[9] See, Nichols v. Nichols, 306 N.Y. 490 (1954).

[10] Roos v. Roos, 206 A.D.2d 293 (1st Dept., 1994).

agreement clearly evinced “the parties intention that their property rights be governed according to title.” Analogizing to *Roos*, the wife’s unconditional agreement to have property rights determined by title notwithstanding the parties' marriage effectively constituted such a waiver.

This case should have been summarily dismissed. Questions at the trial level about the intent of the parties or the purpose of the Contrat should not have been permitted because they were immaterial. They impermissibly attempted to back into an ambiguity by first relying on extrinsic evidence to establish intent in contravention of the foundational principle that “extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.”[11] The “first step in the analysis” is “before looking to evidence of what was in the parties' minds, a court must give due weight to what was in their contract.”[12] When a written agreement is complete, clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence;[13] the words and phrases used in the agreement must be given their plain meaning so as to define the rights of the parties.[14]

The Unstated Principles

Although no fanfare surrounds this fact, the respective experts on French law agreed that the Contrat was binding under French law. Absent (a shift in public policy) or a contrary contractual provision, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein; it is presumed that the parties had such law in contemplation when the contract was made and the contract will be construed in the light of such law.[15] Furthermore, contract interpretation must render a practical interpretation of the expressions of the parties to the end that there be a ‘realization of (their) reasonable expectations.'[16] Reasonableness includes expectations that contractual partners expect their obligations to be construed in accordance with the law in existence at the time they executed the agreement.[17] It is presumed that an agreement that is prepared by attorneys is drawn

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[11] W.W.W. Associates, Inc. v. Giancontieri 77 N.Y.2d 157 (1990); Reiss, supra.

[12] W.W.W. Associates, supra.

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

[14] Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 (2002); Laba v. Carey, 29 N.Y.2d 302 (1971).

[15] Dolman v. U.S. Trust Co. of N.Y. 2 N.Y.2d 110 (1956).

[16] Brown Bros. Elec. Contractors, Inc. v. Beam Const. Corp. 41 N.Y.2d 397 (1977); Greenberg v. Greenberg 37 A.D.3d 410 (2nd Dept.,2007); Slatt v. Slatt 102 A.D.2d 475 (1st Dept., 1984).

[17] Madison Ave. Leasehold, LLC v. Madison Bentley Associates LLC 30 A.D.3d 1 (1st Dept., 2006), aff’d, 8 N.Y.3d 59 (2006).

with reference to applicable law[18] when it is made;[19] this is an application of the time honored and universally applied principle that existing laws at the place of contract become a part of its terms 'as if they had been set forth in its stipulations in the very words of the law. * * *' McCracken v. Hayward, 43 U. S. 608 (1844).[20] In *People ex rel. City of New York v. Nixon*,[21] Judge Benjamin Cardozo wrote: "Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is."

Stawski

In *Stawski v. Stawski*,[22] also out of the First Department, decided Sept. 27, 2007, plaintiff, an American, who married a German, sought to set aside a 1975 prenuptial agreement executed in Germany, which, in accordance with German law, provided for a "separation of property" regime, i.e., separate ownership of all property held at the time of the marriage or acquired thereafter. Plaintiff claimed that she was told that the agreement was for bankruptcy purposes. The agreement was signed in the presence of an official representative, a "notar", who was employed by defendant's law firm. In a dissenting opinion, Justice David Saxe explains the role of the notar: "... as an independent consultant for the parties to the transaction [] responsible for exploring and ensuring the parties' understanding of the transaction and its legal consequences ... The notar has an obligation under German law to safeguard the rights of both signatories [], ensuring that errors are avoided and that the inexperienced and unskilled are not disadvantaged"; notably, the notar's impartiality was compromised due to his allegiance to the defendant-client.

The majority applied principles of contract doctrine and noted that there was no sign of duress. A key finding deflated plaintiff's contentions of her lack of understanding or wrongdoing in the procurement of the agreement: "... despite her asserted lack of understanding, she acted in accordance with [] the agreement throughout the marriage, maintaining separate bank accounts in her own name in which she deposited income from properties she inherited from her family, which properties were themselves also retained by plaintiff solely in her name." It is unclear whether the separate bank accounts were limited towards the preservation of the pristine character of anticipated separate property or for all purposes.

The inescapable question is when did the plaintiff, a woman of notable academic achievement, first realize that she did not understand the agreement? Her having lived for approximately 30 years with separate bank accounts is a compelling factor that this had been her reasonable expectation of the prenup. We are not informed whether, somewhere during the marriage,

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[18] Nau v. Vulcan Rail & Construction Co. 286 N.Y. 188 (1941); Ott v. Ott, 266 A.D.2d 842 (4th Dept., 1999).

[19] People ex rel. City of New York v. Nixon 229 N.Y. 356 (1920).

[20] In re Cohen's Estate 149 Misc. 765 (Sur.Ct. 1933).

[21] City of New York v. Nixon, supra.

0.Stawski v. Stawski 2007 WL 2791698, *1, 2007 N.Y. Slip Op. 07057 (1st Dept.,2007).

plaintiff said to defendant: "Hey! When will your concerns over bankruptcy end? When do we begin pooling our assets?" Furthermore, having resided in the First Department, irrespective of any legal advice before 1986, from, at least, 1986 until the recent passage of Domestic Relations Law (DRL) § 250 in July, 2007, she would have been the beneficiary of an expanded statute of limitations,[23] wherein this Department tolled the enforcement of prenuptial agreements during the marriage as a matter of public policy.[24]

An unstated principle of contract doctrine in *Stawski* is that an agreement achieved by wrongdoing may, nevertheless, be ratified by conduct:

> Defendant's conduct over the years is significant, not only because it is indicative of whether in entering into the agreement he was operating under a misconception, but also because it demonstrates the existence of ratification. "The power of a party to avoid a contract for mistake or misrepresentation is lost if after he knows or has reason to know of the mistake or of the misrepresentation if it is non-fraudulent or knows of the misrepresentation if it is fraudulent, he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance."[25]

Justice Saxe cited *Matter of Greiff* 92 N.Y.2d 341 (1998) and *Gordon v. Bialystoker Ctr. & Bikur Cholim* 45 N.Y.2d 692 (1978). These cases provide the predicate authority in exceptional circumstances only to shift the burden of proof of establishing the agreement's validity to its proponent rather than the traditional rule that imposes the initial burden of proving its invalidity upon its challenger (see, E. Scheinberg, Shifting the Burden of Proof in Actions to Vacate Prenuptial Agreements, 4/2/04, NYLJ). Certain facts presented in the dissent can justify the imposition of *Greiff* to this case. Much more can be expounded upon about the majority and dissenting opinions.

Vendome

The prenup in *Vendome v. Vendome*[26] provided a mutual waiver of any right to "acquire by reason of the marriage in the other party's property," including "all rights under the DRL as they relate to Equitable Distribution to all property." The language as to the reasonable expectations was clear and sweeping and precluded any discordant distributions. The challenge to the prenup was properly quelled.

Conclusion

The inherent principle of reasonable expectations is a central theme that may not be

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[23] Zuch v. Zuch, 117 A.D.2d 397 (1st Dept.1986); Lieberman v. Lieberman 154 Misc.2d 749 (Sup.Ct. NY Co. 1992).

[24] See, E. Scheinberg, The Marriage Toll: Prenuptial Agreements and the Tolling of the Statute of Limitations, NY State Bar Association, Family Law Review, Vol. 39, No. 2 2007.

[25] Surlak v. Surlak 95 A.D.2d 371 (2nd Dept.,1983).

[26] Vendome v. Vendome 41 A.D.3d 837 (2nd Dept.,2007).

overlooked. L. Florescue, “Prenuptial Agreements: Claims and Defenses After 'Bloomfield'”, 7/24/04 NYLJ. 3, (col. 1), casts a floodlight on the subcutaneous issues implicated in every prenuptial agreement:

> It is fair to say that the wealthy people who enter into prenuptial agreements would not have married without the agreement having been signed. Otherwise, why would they bother with the agreements? The Courts of this state have regularly held that such agreements are fully enforceable as other contracts are. These people entered into a marriage contract in reliance on that law.
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> Now, take the poorer spouse. When the agreement is attacked it is not an academic exercise. He or she does not want to be put back where the parties would be without the agreement, i.e., unmarried and with no rights at all [rescission restores the parties to the original *status quo* before the agreement]. No, he or she wants all the rights of marriage without having to accept the obligations of the very document without which there would have been no marriage in the first place ... Also, why doesn't the enjoyment of the marriage itself (without the agreement, remember there is no marriage) constitute a ratification of the agreement?

Discussions will inevitably follow about a perceived toughening trend in the First Department following *Kojovic v. Goldman* 35 A.D.3d 65 (1st Dept., 2006)[27] and *Stawski*.

[27] See, E. Scheinberg, Kojovic v. Goldman: Scienter and Marital Agreements, 01/11/07, NYLJ.