ANALYSIS

Precatory Language in Agreements That Encourage Settlements Are Not Agreements to Agree

The ruling in Pinto erroneously converts enforceable unambiguous agreements into unenforceable ones in the event they contain otherwise benign language which says no more, in form or in substance, than the parties may attempt settlement of a dispute arising from the agreement, however, should settlement efforts either prove unproductive or even if there have been no settlement efforts at all then they may litigate their dispute.

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Analysis

By Elliott Scheinberg | March 17, 2023 at 01:10 PM

Although this column is dedicated to appellate practice it is, on occasion, necessary to call attention to a decision, which although arising in another practice area, has broad implications.

Agreements often include precatory language intended to promote settlements, even mandatory mediation, ahead of litigation, in the event of future disputes over money, the sum of which is unknowable at the time of the execution of the agreement. An instance of unknowable future amounts and their allocations routinely occurs in provisions related to college tuition and related expenses, the case in *Pinto v. Pinto*, 209 A.D.3d 778 [2d Dept 2022]. The ruling in *Pinto* erroneously converts enforceable unambiguous agreements into unenforceable ones in the event they contain otherwise benign language which says no more, in form or in substance, than the parties may attempt settlement of a dispute arising from the agreement, however, should settlement efforts either prove unproductive or even if there have been no settlement efforts at all then they may litigate their dispute.

To state the obvious, a principle enshrined in contract doctrine, parties do not need to enter into a contract in order to have the right to amicably resolve disputes arising therefrom; that the law favors settlement of controversies is a bedrock of public policy inherent in contract doctrine, “Indeed, there is a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements.” See *Bloomfield v. Bloomfield*, 97 NY2d 188, 193 [2001]. “While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences or preclude either from forgiving a wrong committed by the other.” See *Adams v. Adams*, 91 N.Y. 381 (1883). That said, dulcet innocuous language that adorns an agreement intended to remind the parties that settlement of future disputes merits consideration ahead of litigation certainly can’t have legal consequences one way or another, or can it? Until mid-October 2022 such pondering would have been unimaginable. However, *Pinto* created just this conundrum. Therein the Appellate Division puzzlingly held

that such benign language embedded in a settlement agreement followed by firm unambiguous language that specifically authorizes the initiation of litigation in the absence of a settlement rendered the agreement an unenforceable agreement to agree and that “defendant had no such obligation to pay.”

The parties, in *Pinto*, had two children. After the older child began attending college, and two years before the younger child began college, the parties entered into a stipulation of settlement that was incorporated, but not merged, into the judgment of divorce. The section styled “College Expenses” recited the parties’ intention for the children to attend college. The section further provided that the children, with both parties’ cooperation, would apply for “merit and need based financial aid” to cover the cost of college. The stipulation went on that “should there be necessary costs and expenses once financial aid, merit aid and scholarships are exhausted[,] the parties shall consult and try to reach an agreement on payment of these cost[s] and expenses at the time those cost[s] and expenses arise. If the parties cannot agree they can address the issue in a court of competent jurisdiction.” Settlement or litigation, plain as day. The parties opted to leave for another day when the itemized funds would run dry nor did they choose to predetermine the extent of their future respective contributions.

Although the agreement did not establish the pro rata contributions to each party, the plaintiff, in anticipation of the defendant’s contribution, advanced the full loan repayment. The defendant’s refusal to participate in the debt obligation sparked plaintiff’s motion for reimbursement of one-half of the total amount of the student loans he incurred for the payment of the college costs and expenses as “grants and/or financial aid” had been insufficient. The Supreme Court denied the plaintiff’s motion for any contribution by the other parent.

In light of the plain language in the agreement to the contrary, the Appellate Division’s affirmance is disconcerting: “the provision … required only that ‘the parties shall consult and try to reach an agreement on payment of [the children's college-related] cost[s] and expenses.’ This provision did not identify an amount or percentage of such costs or expenses to be paid by either party, and did not impose an obligation upon either party to make any such payment. Rather, ‘a material term [was] left for future negotiations’ (*Joseph Martin Jr., Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 417 N.E.2d 541). Thus, the subject provision constituted ‘a mere agreement to agree,’ and, as such, was unenforceable”—“it create[d] [no] enforceable contractual right, there was no available relief to be granted by a court of competent jurisdiction.”

Case law holds that “although ‘a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable’ (*Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 417 N.E.2d 541), ‘a price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula’ (*Cobble Hill Nursing Home*, supra at 483, 548 N.Y.S.2d 920, 548 N.E.2d 203). Instead, ‘a price term may be sufficiently definite’ if it may be determined without the need for new expressions by the parties, be found within the agreement, or be ascertained by reference to an extrinsic event, commercial practice or trade usage (at 483, 548 N.Y.S.2d 920, 548 N.E.2d 203). As this court held in *Conopco v. Wathne*, 190 A.D.2d 587, 588, 593 N.Y.S.2d 787, quoting Four Seasons Hotels v. Vinnik, 127 A.D.2d 310, 317, 515 N.Y.S.2d 1, ‘[a] contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement.’ See *Henri Association v. Saxony Carpe*t, 249 AD2d 63, 66 [1st Dept 1998]; see Aiello v. Burns International Security Services, 110 AD3d 234, 243 [1st Dept 2013]; *Lo Cascio v. James V. Aquavella, M.D.,* 206 AD2d 96, 100 [4th Dept 1994].

Equally troubling was the Appellate Division’s statement, “Even if, in support of his motion, the plaintiff had invoked Domestic Relations Law § 240(1–b)(c)(7), which authorizes an award of post-secondary educational expenses as part of an order of child support, that statutory provision applies only where a court determines that the ‘present or future’ provision of post-secondary education for the child is appropriate, and thus the plaintiff would not have been entitled to such an award under the circumstances of this case.” This conclusion is flawed as parties have always had the right to agree that college education is appropriate or necessary for their children; there is no authority stating that such a determination between parents requires prior judicial approval.

Other decisions involving future college expenses, including from the Second Department, disagree with *Pinto*.

In addition to *Henri Association v Saxony Carpet, Aiello v. Burns International Security Services* and *Lo Cascio v. James V. Aquavella, M.D.*, a sampling of case law involving future college expenses is instructive [see, E. Scheinberg, Contract Doctrine and Marital Agreements in New York [NYSBA, 5th ed., 2 vols, 2023].

The parties' settlement agreement, in *Tannenbaum v. Gilberg,* 134 AD3d 846 [2d Dept 2015], survived the judgment of divorce. The parties agreed to contribute to the cost of college education for their three children in accordance with their financial circumstances, amorphously nonspecific. The stipulation further provided that "[i]n the event the parties are unable to agree as to their respective contributions, any credits against child support … and/or any reductions in child support in accordance with the then prevailing law, either party could make an application for a determination by a court of competent jurisdiction." The mother commenced a proceeding for a determination as to the father's share of the college expenses of the two older children who were beginning college. The Second Department affirmed the determination by the Support Magistrate, which was thereafter affirmed by Family Court, that the father was responsible for 53% of the college costs of the two older children but was also entitled to a credit against his basic child support obligation for college room and board.

In *Curley v. Klausen*, 110 AD3d 1156 [3d Dept 2013]. the Third Department affirmed the determination by Family Court regarding the father's obligation to pay his proportionate share of the children's college expenses pursuant to the parties' stipulation of settlement. The stipulation provided: "[B]oth parties agree they shall pay for a college education for their children based upon their then existing respective incomes, after the children exhaust all loan, grant and scholarship opportunities … Should the parties not be able to agree on the college that the children shall attend, either party reserves the right to apply to a court of appropriate jurisdiction for the decision of the court and the amount of their respective payment."

In *Marshall v. Hobika*, 140 AD3d 1690 [4th Dept 2016]. a post-divorce proceeding, the parties each sought a determination of their respective obligations to contribute to the cost of their eldest daughter's college education. The agreement evidenced that the parties contemplated that their children would attend college and that the costs would be divided "between the[m] as they shall then agree or as shall then be determined by a court of competent jurisdiction. Inasmuch as the parties' respective contributions to those costs was but one factor to consider in determining their obligations to pay college expenses, the court also properly considered "the circumstances of the case, the circumstances of the respective parties, and the best interests of the child."

The appeals, in *Matter of Costa-Daley v. Daley*, 100 AD3d 1198 [3d Dept 2012]. concerned the parties' obligations to contribute to their child's college education expenses. Their 2005-separation agreement, which survived the judgment of divorce in November 2007, provided that "the mother and the father would each contribute toward the reasonable college education expenses of their children 'according to their relative means and abilities at the time of attendance.' "

In October 2008, the mother filed an enforcement petition to compel the father to reimburse her for his proportional share of the child's educational expenses for the fall 2008 semester. Following a hearing, a Support Magistrate found the father in violation of the judgment of divorce and directed him to pay arrears for college expenses. In July 2009, Family Court granted the father's objections to the order, concluding that the father could not be held in violation of the judgment of divorce with regard to 2008–2009 college expenses because, at the time that the mother's petition was filed, the parties' relative contributions had not yet been determined for that academic year. Family Court also calculated each parent's proportional share of the child's fall 2008 college expenses based upon their respective net incomes.

Conclusion

As the above cases prove, the absence of amounts and deferred allocation of college expenses in agreements is not fatal to seeking judicial relief. There is no authority that supports the proposition that the inclusion of dulcet precatory language that nudges parties towards settlement invalidates access to judicial determination.

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