

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**PRESENT: HON. JEFFREY S. BROWN
JUSTICE**

-----X
A. K. H,

TRIAL/IAS PART 28

Plaintiff,

INDEX # 200306/07

- against -

B. H.,

ORDER

Defendant.

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Before this court is a matrimonial action which was commenced by the plaintiff/husband by the filing of a summons and verified complaint in the office of the Clerk of Nassau County on or about February 1, 2007. The complaint contains a single cause of action for a divorce on the ground that the parties have lived separate and apart pursuant to the provisions of a written separation agreement executed on July 8, 2002. A verified answer was served by the defendant/wife upon the attorneys for the plaintiff on June 12, 2007, and an amended verified answer was served on June 26, 2007. By order dated May 1, 2008, defendant's application to serve a second amended verified answer containing a counterclaim based on the plaintiff's alleged breach of the maintenance provisions of the parties' separation agreement, was granted (Brown, J. 5/1/08).

On June 23, 2008, the matter came before this court regarding the issues pertaining to the viability of two separate versions of the separation agreement propounded by each of the parties.

It is undisputed that the parties executed the agreement on July 8, 2002. The crux of the dispute involved the cohabitation clause of the agreement. Defendant contends that prior to the execution, there was a handwritten change to the agreement that eliminated the cohabitation provision that terminated plaintiff's obligation to pay the defendant if she cohabited with an unrelated male. The plaintiff contends that no such handwritten change was made prior to the execution of the agreement. However, the plaintiff acknowledges that subsequent to the execution of the agreement, the cohabitation clause was crossed out of one of the copies of the agreement on October 27, 2003. Plaintiff contends that the "cross out" was done without legal formality or legal significance. Thus, the "cross out" is unenforceable.

At trial this court was required to evaluate the credibility of the parties regarding the content and execution of the agreement in order to determine what constitutes the terms and conditions of the agreement. Testimony and documentary evidence was heard and presented to the court during the three-day trial. Both parties testified as well as one non-party witness, Michael Permut, Esq.

The parties entered into a stipulation that the names of the parties in this action shall be redacted from the caption and in any decision to be rendered by the court.

The first witness was the plaintiff, A.K.H.. Mr. H. testified that he married the defendant on August 31, 1975. There is one child of this union, a daughter who is 26 years of age and emancipated. Both plaintiff and defendant were residents of New York State for a continuous period of two years prior to the commencement of this action. Both litigants were over the age of 18 at the time this action was commenced. Plaintiff testified that there are no other actions pending for divorce in this state or any other state. Further, no decree of separation or divorce

has been entered in this state or any other state. He also testified that he would remove any and all barriers to defendant's remarriage which are within his power to remove.

Plaintiff testified that he removed himself from the marital residence in or about October 1998. From that time forward, he did not live with his wife. Plaintiff is an attorney and has been practicing law for approximately 36 years. Commencing in 1999, negotiations began with the objective of entering into a separation agreement. Plaintiff represented himself and defendant retained the services of Alex Kaplan, Esq. Numerous discussions were held between plaintiff and Mr. Kaplan. Correspondence was exchanged. Drafts of numerous proposed separation agreements were drawn up by plaintiff and forwarded to Mr. Kaplan. All of the drafts contained a "cohabitation clause." This clause provided that if a spouse who receives maintenance should reside on a continuous or non-continuous basis with an unrelated person of the other sex, such conduct would provide a foundation for the termination of maintenance.

Some time in the end of 2001, plaintiff and defendant had a telephone conversation. Defendant indicated that she no longer wanted Mr. Kaplan to represent her in these negotiations. She thought they could work out the agreement themselves. Defendant stated she was dissatisfied in that it was costing her a lot of money for legal fees; and as a result, defendant wanted to discharge her attorney. Later, plaintiff confirmed by telephone with Mr. Kaplan that he was no longer representing the defendant.

Plaintiff subsequently continued negotiations with defendant. Proposed drafts were sent directly to her. Each one contained minor changes which were reached as a result of conversations between plaintiff and defendant. Plaintiff testified that he would address every concern that defendant had.

On September 6, 2001, the latest draft was sent to the defendant together with a cover letter. Another draft was sent on October 8, 2001 together with a cover letter. A proposed agreement was again sent to the defendant with a cover letter on February 12, 2002. In or about March 2002, plaintiff and defendant set a date to meet to execute the agreement. The meeting was postponed, and a new meeting was set for July 8, 2002. The parties arranged to meet at a Japanese restaurant named "Hokkaido" on Willis Avenue in Albertson. They met around 7:00 or 7:30 PM. Plaintiff brought five copies of the agreement with him.

The parties had dinner at the restaurant. Defendant glanced at the agreement and asked for some clarification about health insurance and health expenses. As a result of her concerns in that area, plaintiff modified the agreement by inserting in handwriting the words "medical, dental and pharmaceutical." Plaintiff testified that he initialed the change on all of the agreements. The parties then signed all five copies of the agreements. Defendant signed in plaintiff's presence. Plaintiff took all of the agreements with him when they left the restaurant.

On July 9, 2002 defendant came to plaintiff's office. Both plaintiff and defendant acknowledged their signatures before Michael Permut, Esq., a notary and partner of the plaintiff. He affixed his notary stamp to all five of the copies. Plaintiff then either mailed or gave two executed copies to the defendant. Additionally, a letter was generated dated July 9, 2008 which accompanied the agreements.

On October 15, 2003, one of the duplicate original separation agreements was filed in the office of the Clerk of Nassau County. Plaintiff testified that other than the modification on page 10 with respect to health benefits, there were no other handwritten modifications or alterations. The agreement was filed at that time because defendant needed money to purchase a

condominium. Upon request of the defendant, plaintiff agreed to represent the defendant at the closing. There was a fund of approximately \$400,000 from the previous sale of the marital residence. The money was put in a tax free bond and split by the parties equally. Each of the parties was to receive about \$200,000. In order for defendant to purchase the condominium, defendant asked plaintiff for permission to use the entire \$400,000. Plaintiff agreed to liquidate the account in order to permit defendant to purchase the condominium. A modification agreement was executed by both parties on October 27, 2003 which permitted defendant to withdraw and use the Oppenheimer Funds. It also took into effect the tax impact of the early withdrawal of the funds. Mr. Permut notarized both plaintiff's and defendant's signatures. The modification agreement was executed before the closing at plaintiff's office.

The contract of sale was executed on September 11, 2003. Thereafter, the closing took place on October 27, 2003 at an attorney's office in Syosset. Plaintiff and defendant traveled to the closing separately. Prior to leaving for the closing, while still at plaintiff's office, defendant made a request of plaintiff. Defendant told plaintiff that she had no money. She was working seven days a week, and her boyfriend was having financial trouble. Defendant told the plaintiff that she wanted her boyfriend, Jerry, to move into the condominium with her so he could help her maintain it. Therefore, she asked plaintiff to strike the cohabitation clause from the agreement. Plaintiff testified that defendant continued to ask him to strike the clause. She presented him with a copy of the agreement opened to page 17. Defendant said that she needed that clause stricken, and she needed him to continue paying the maintenance. She complained that his life was better than hers; and therefore, as a result, she needed her boyfriend's help in maintaining the condominium. Plaintiff then took out a pen, struck the cohabitation clause and initialed it. This

was done on one occasion. He then left for the closing.

Plaintiff testified that he practiced matrimonial law for 33 years. It was his opinion that the modification was absolutely unenforceable.

The agreement provided that plaintiff pay \$26,000 per year for maintenance and \$26,000 per year for child support until the daughter was emancipated. After emancipation, maintenance payments to the defendant were \$52,000 per year. Plaintiff has paid all sums as required by the agreement. He also testified that he has substantially complied with all of the terms and provisions of the separation agreement.

In addition, plaintiff continued to voluntarily pay numerous expenses that were not required pursuant to the agreement. Such expenses included charges at a local pharmacy, dental expenses, money needed to lease a car, and automobile insurance. Despite the terms of the agreement, he allowed his wife to claim their daughter as a dependent for tax purposes. Plaintiff allowed her to use a house account at a local Japanese restaurant. The plaintiff also represented her as an attorney with respect to numerous legal problems. A tag sale was held with respect to the contents of the marital residence which generated about \$28,000 to which plaintiff made no claim.

On or about December 2, 2005, plaintiff wrote a letter to defendant indicating that he had confirmed that defendant was cohabiting with a person named Gerald Feldman. As a result, pursuant to the terms of the agreement, he could terminate maintenance payments. However, plaintiff in the same letter made defendant an offer of continuing to pay her one-half of the maintenance payment. Enclosed with the letter was a proposed modification agreement. In response to the letter, the parties' daughter called the plaintiff. Plaintiff then telephoned the

defendant. Defendant relayed to plaintiff that she was frightened and scared of the possibility that the maintenance was to be cut in half. Defendant also told plaintiff that she had a document with the cohabitation clause crossed out. Plaintiff asked the defendant to bring the document to him the next day because he had no recollection of it. Subsequently, on or about December 6, 2005, plaintiff received a handwritten note from the defendant which enclosed a copy of page 17 of the purported agreement where the cohabitation clause was crossed out. Once the plaintiff saw the page of the document and his initials, he realized that he had stricken that clause on October 27, 2003. Later that day, the parties spoke on the telephone. He told her in his opinion the cross out did not matter because it did not comport with the law. However, plaintiff stated he would continue to make the payments to her as a result of the conversation he had with their daughter. He did not want to upset his daughter, nor did he want to affect the relationship both parties had with their daughter. An e-mail was then sent by plaintiff to the parties' daughter. Plaintiff told her that he would continue making the full maintenance payment out of his love and respect for his daughter.

Plaintiff continued to make the \$52,000 per year maintenance payment to the defendant. On or about February 1, 2007, plaintiff commenced an action for divorce pursuant to DRL Section 170(6). The action alleged that the parties had lived separate and apart pursuant to the filed agreement. The parties spoke on the telephone, and the defendant requested that plaintiff not serve her on her birthday and continue the health insurance until the end of the year. Defendant asked plaintiff whether, in his opinion, she would need a lawyer. Plaintiff acceded to the first two requests. He also responded that he could not answer the question of whether defendant would need an attorney. However, he could not see why she would need an attorney.

Thereafter, plaintiff continued to make the full maintenance payments.

In or about May 2007, defendant was served with a summons and complaint. An answer was received by the plaintiff. Once plaintiff received the answer, he retained counsel. Based upon an allegation in the answer that the agreement that was filed with the County Clerk was not the same agreement that was executed on July 8, 2002, plaintiff stopped paying defendant maintenance. Plaintiff was upset by these allegations and felt that defendant was ungrateful for all the previous payments that were made by him despite the cohabitation clause. As a result, maintenance was discontinued by plaintiff due to the fact that defendant was cohabitating with an unrelated male.

The next witness was the defendant B.H. She testified that she and the plaintiff separated in the fall of 1998. In the fall of 1999 she retained Alex Kaplan, Esq. to represent her. In June 2001 she stopped calling Mr. Kaplan. Defendant testified that she did not continue to discuss a proposed separation agreement with her husband after June 2001. She did not recall receiving copies of proposed separation agreements in either September or October of 2001.

On July 8, 2002 defendant met the plaintiff at the Hoikado Restaurant on Willis Avenue in Albertson. No one else was present. The meeting was arranged by plaintiff. Plaintiff handed defendant the separation agreement. She testified that she was not thrilled with it. She looked at it and went over some pages. On page 10 she asked him to include medical, dental and pharmaceuticals. Plaintiff agreed and initialed the changes. Then she asked him to cross out the cohabitation clause on Page 17. Her reasoning was that if she was lucky enough to meet someone, she would want to live with him. Plaintiff then crossed out the clause and initialed it. Upon leaving the restaurant, defendant did not take any of the copies with her.

Defendant testified that she did not go to plaintiff's office the next day. She stated that she received one copy of the agreement in the mail. The agreement she signed on the evening of July 8, 2002 was not identical to the one she received in the mail. Mr. Permut's signature was not on the initial agreement but was on the agreement she received in the mail. Defendant testified that Defendant's Exhibit "A" was the one she received in the mail. Defendant testified the other agreement, Plaintiff's Exhibit "3", which did not have plaintiff's initials (page 10) or the crossed out cohabitation clause (page 17) was not the one signed at the restaurant.

At the time the agreement was signed, in July 2002, defendant lived in Great Neck. Thereafter, or about Thanksgiving of 2003, she moved to The Hamlet. In August 2003 she spoke to her husband and told him she found a condominium to live in. Her husband came up with the idea of lending her money from the sale of the marital residence. It was about \$400,000. She was to get half of that money, and her father was going to put up the balance. The plaintiff agreed to represent her at both the contract of sale and the closing

Defendant was shown a three-page modification agreement. She acknowledged that her signature appears on page three. However, that was the only page she saw as she alleges that the other pages were not attached. She said that page was one of many she signed at the closing. Defendant did not go to plaintiff's office on October 27, 2003. She met the plaintiff at the closing. Defendant also denies that the cohabitation clause was stricken on October 27, 2003. There are also handwritten changes on page two of the modification agreement. Defendant alleges that the first time she saw the handwritten changes was in June of 2007 when plaintiff handed the divorce papers to her. Defendant also states that the initials on the document are not hers. Subsequent to the closing, she moved into the condominium.

On or about December 5, 2005, defendant received a letter from plaintiff with respect to continued payment of maintenance. She was very upset. Defendant called the plaintiff and asked him why he was stopping the maintenance payments. Plaintiff said that it was because she was cohabitating with an unrelated male. Defendant said that she had an agreement permitting her to do so. Plaintiff stated that he did not recall that. Defendant made a copy of page 17 of Exhibit "A" and brought it to plaintiff's office. He subsequently said that he would abide by it. Then in June of 2007, he sent her papers "applying for a divorce."

During cross-examination, defendant conceded that she paid money to Mr. Kaplan for services rendered, that she met with him from time to time and that she spoke with him from time to time. However, she has no recollection of ever seeing any draft of the proposed agreement. The first time she saw any proposed agreement was the evening of July 8, 2002. That evening the defendant glanced at some pages and read some pages. She glanced at the ones that were financial. When defendant could not recall what pages she read and which ones she glanced at, counsel for plaintiff went through the agreement page by page. She testified, after looking at the document she glanced at page one; could not remember with respect to page two; glanced at page three, and then stated she did not recall; probably glanced at and read some of page four, did not recall; did not recall with respect to page five; thinks that she glanced at page six; and probably glanced at page seven. However, when questioned at a previous deposition, defendant testified that she read a lot, most of the financial information. She testified at the deposition that she read page one, and read page two. When counsel attempted to clarify defendant's answer as to whether she read page two, she responded, "I'm saying that back in July of 2002, I don't remember whether I read it after I glanced at it. But when you kept asking me over and over again, first, I

said to you I read it, I glanced at it. I looked at financial sections which are important to me.”

Defendant also testified that even though she did not see the agreement prior to July 8th, she did not think about those issues since she trusted the plaintiff.

Defendant does not recall how many agreements plaintiff brought to the restaurant. She testified that she spent one-half hour or so reading the agreement. However, she stated at this point she did not look at every page of the agreement. She did concede that she read the page that contained the cohabitation language. She never saw an agreement nor spoke to plaintiff about this issue prior to July 8th. At that time she stated to plaintiff, “If I was lucky enough to meet somebody, could I live with them?” Plaintiff then responded yes, crossed out the clause and initialed it. Defendant, however, asserts that maintenance would not end, pursuant to the agreement, at the time the cohabitation commenced. Rather, the cohabitation had to last for 12 out of 24 months. Defendant testified that there was no negotiation between her husband and herself. He just crossed out the clause and initialed it. She also testified that she had no one in mind when she brought up the cohabitation clause. She did not have an exclusive boyfriend.

The conversation about the cohabitation clause lasted one minute. Defendant testified “I read the paragraph, I asked him nicely, and he struck it out and we went on”.

Defendant was next questioned about the cover letters that accompanied the draft. She acknowledged that they were addressed correctly. However, she had no recollection of receiving a cover letter that letter dated September 6, 2001 which referenced the latest draft of the agreement. Defendant was asked at the deposition about the possibility of receiving that letter as follows: “Again, you are saying you might have, you might not have. You just don’t remember?” Defendant responded “That’s correct.”

When questioned about the October 6, 2001 cover letter, again, defendant responded that she had no recollection of receiving this letter. Again, she acknowledged that the address is correct. However, she testified at a previous deposition that she might or might not have received that letter, she just did not remember.

Defendant was next questioned about the February 12, 2002 cover letter and proposed agreement. She did not recall receiving the letter or documents. However, at the deposition when questioned about the cover letter, she responded, "I did not receive any of them. I do not have them. I may have lost them. I do not have them."

Defendant stated that in the summer of 2003 she was living in a Great Neck rental apartment. It was expensive, about \$3,000 per month. The plaintiff had negotiated the lease free of charge. Thereafter, defendant began to look for a condominium. She found the one at the Hamlet which she purchased for \$625,000.00. Plaintiff represented her free of charge. She closed on October 27, 2003. By October of 2003, her relationship with Jerome Feldman became exclusive. She was in a committed, monogamous relationship. However, at the time the separation agreement was signed, in July 2002, she was not in a committed, monogamous relationship. In October 2003, she considered cohabitation with Mr. Feldman. Defendant testified that Jerome Feldman moved into the Hamlet condominium in or about November of 2003. Mr. Feldman pays the realty tax for the condominium of about \$13,000 per year. He also pays the common charges of \$900. Plaintiff not only represented defendant legally, but also financially in the purchase of the condominium.

Defendant testified that she had worked as a travel agent for approximately 30 years. She earned about \$30,000.00 in commissions for the calendar year 2003. Defendant testified she also

had Jerome Feldman's promise to pay the taxes and the maintenance of the condominium. She also stated that she did not recall having a conversation with her husband in October of 2003 as to whether she could afford the condominium. She stated that she knew maintenance would continue since plaintiff crossed out the cohabitation clause in 2002. However, when questioned at her earlier deposition, defendant stated that she might have told plaintiff she would be unable to afford the condominium if he stopped paying the maintenance. Later, also at the deposition, counsel asked defendant why she told plaintiff that if he stopped paying maintenance she would not be able to afford the condominium. Defendant answered, "I don't know. Maybe I wanted him to feel sorry for me." She then stated that her answer was a silly response. Defendant stated at the deposition that she does not remember that conversation. It was stipulated at the trial that the deposition answers were neither corrected, amended or changed in any way upon receipt of the transcript.

The defendant testified on cross-examination that she heard the plaintiff's testimony in which he stated she asked him to strike the cohabitation clause on the date of the closing. Defendant testified that plaintiff was not telling the truth. Defendant stated that her travel office was in the same building as defendant's office, but she did not see him that day until the closing as they traveled there separately. While at the closing she signed many papers. She signed one sheet of paper unrelated to the closing at the request of the plaintiff. Defendant alleges plaintiff only presented her with page 3 of the modification agreement. She acknowledged that she readily signed page three. Defendant testified that she signed the modification agreement without knowledge of the substance of the agreement, because she relied on him and trusted him.

The defendant testified that she reimbursed her father \$600.00 per month every month,

until March 2006, for his loan to her with respect to the purchase of the condominium. She stopped making those payments in March 2006. Defendant testified that she drives a Mercedes C280; that she has traveled extensively since signing the separation agreement; and that she has also accumulated about \$50,000 in savings. She also conceded that the plaintiff paid numerous additional sums that were not required under the agreement. Defendant was also permitted to keep \$28,000.00 of tag sale proceeds as well as the remaining contents of the marital residence. Additionally, plaintiff helped defendant in numerous legal matters.

Plaintiff then introduced into evidence a 12-page letter dated June 11, 2001 from defendant's counsel to plaintiff. Defendant was copied the letter. Defendant's then-counsel, Mr. Kaplan, stated that he had an opportunity to review the proposed separation agreement with his client. There were 30 referenced changes with numerous subdivisions. Defendant testified that she had no recollection of receiving that letter. She also stated that she had no recollection of ever discussing the proposed agreement with Mr. Kaplan. She also did not remember receiving the time sheets where an entry for a review of the proposed separation agreement was made. When questioned about her lack of memory, defendant responded, "I remember the important things."

Defendant conceded on cross-examination that plaintiff had only missed one maintenance payment as of the time she signed the amended answer. The amended answer alleges that plaintiff had not substantially complied with the terms of the separation agreement.

Defendant stated that prior to July 8, 2002, the parties had a conversation about how much money the plaintiff was going to pay her. He stated that he would pay \$26,000.00 per year for their daughter and \$26,000.00 per year for her. Once their daughter was emancipated, plaintiff was to pay \$52,000.00 per year in maintenance. Defendant called the offer ridiculous, too little.

At an earlier deposition, defendant testified that plaintiff told her the amount of maintenance before July 8, 2002. Then when asked later at the deposition whether there was a discussion about maintenance before July 8, 2002, defendant responded, "Yes, I guess. I don't recall." Then when confronted by counsel at the deposition about the inconsistency, defendant responded, "I don't recall discussing it beforehand. I don't recall the maintenance. You're trying to confuse me." When asked again specifically at the deposition as to whether the amount of \$52,000.00 as maintenance first came up on July 8, 2002, defendant again responded, "I don't recall." However, at another time during the deposition, defendant responded that maintenance might have been discussed prior to July 8, 2002.

On redirect, defendant testified that she is sure that two changes were made at the Japanese restaurant on July 8, 2002. She testified that she signed the modification agreement before the closing on her condominium at the office of the seller's attorney on October 27, 2003. Mr. Permut was not present. There was no notary stamp on the agreement, and she did not receive a copy of the agreement that day. She received a copy of the modification agreement attached to the divorce papers in June 2007.

Defendant also testified that she travels for both pleasure and business in her capacity as a travel agent. On many occasions she received discounted and free airfare. She was also "comped" at hotels and received discounts on tours.

Defendant testified on redirect examination that during the evening of July 8, 2002, at the Japanese restaurant, at no time did the plaintiff suggest to her that she should have the agreement reviewed by an attorney; nor did the plaintiff suggest that the modification agreement be reviewed by an attorney. Defendant testified that she did not have the separation agreement reviewed by an

attorney at the time she signed it in July of 2002, nor did she have the modification agreement reviewed by attorney because she “trusted” her husband. He told defendant that he would take care of her and not hurt her, so she never consulted with an attorney before signing.

The last witness was Michael Permut who was called by the defendant. Mr. Permut is an attorney and a partner of the plaintiff. He knows both the plaintiff and defendant for at least 20 years. Mr. Permut, when shown Defendant’s Exhibit “A”, testified that the signatures were acknowledged before him on July 8, 2002. He does not know when the agreement was signed. He does not remember back to 2002, but he states that if he took the acknowledgment, then the people acknowledged that they signed it before him on that date. Again, after looking at Plaintiff’s Exhibit “4”, Mr. Permut testified that he took the parties’ acknowledgment. It was probably done in his office, although he has no particular recollection about the events of October 27, 2003. Mr Permut then testified “ I do not take anybody’s acknowledgment unless they are right in front of me telling me that they acknowledged that this is their signature.” It is very rare that he would “notarize things.” He would only do it when he knows the people.

Upon the foregoing the decision of the court is as follows:

A review of the separation agreement reveals the following pertinent sections:

ARTICLE VII

MAINTENANCE

3. The maintenance payment shall continue until . . . (iii) the remarriage of the Wife or the Wife’s cohabitation with an unrelated male person for an aggregate period of twelve (12) months out of any 24 month period.

Additionally, Article XIV General Provisions 2 provides that

This agreement may not be cancelled, altered, modified, amended or waived except by an instrument in writing under seal signed by both parties hereto.

Plaintiff commenced an action for a conversion divorce pursuant to DRL Section 170(6) based upon a separation agreement signed on July 8, 2002. The law is quite clear that if the parties lived separate and apart for more than one year following the execution of the properly acknowledged separation agreement, and the plaintiff substantially complied with the provisions of the agreement, plaintiff would be entitled to a conversion divorce. (*Fackelman v Fackelman*, 50 AD3d 732) The credible evidence reveals that the separation agreement was signed on July 8, 2002 and later acknowledged before a notary public. The agreement was filed with the Nassau County Clerk on October 15, 2003. This action was commenced on February 1, 2007.

Defendant argues that two modifications were made to the agreement on July 8, 2002. Both plaintiff and defendant agree that page 10 paragraph 7 was modified and the language of “medical, dental and pharmaceutical” was added to require the plaintiff to be responsible for these “reasonable and necessary” uninsured expenses under this agreement. However, defendant alleges that plaintiff also eliminated the cohabitation clause that same evening. Her reasoning was that if she was lucky enough to meet someone, she wanted to be able to live with him. However, at that time she had no one in mind nor did she have an “exclusive boyfriend.”

Plaintiff alleges that the issue of the cohabitation clause first came up in conversation on October 27, 2003. This was the date that defendant was to close on the condominium and obligate herself to pay additional expenses associated with it. Plaintiff alleges that defendant told

him that she had no money and her boyfriend was also having financial troubles. Plaintiff alleges that defendant continually asked him to strike the cohabitation clause on that date so that he would be obligated to continue to make the maintenance payments. Plaintiff testified that he just took out a pen and struck the clause on the copy she held out to him knowing that it would have no effect. The evidence shows that the agreement was filed with the County Clerk on October 15, 2003.

The question that must be determined by this court is one of credibility of the parties. Was the language encompassing the cohabitation clause stricken on July 8, 2002 or October 27, 2003? Of the five alleged duplicate originals, only defendant's Exhibit "A", submitted into evidence, has the language stricken on page 17. There are no modifications noted with respect to the cohabitation clause on any of the other copies of separation agreements produced in court. Query: If the clause was struck on July 8, 2002 as alleged by defendant, why wasn't the cohabitation clause struck on the other duplicate originals at that time as was the modification that was made on page 10?

When faced with contradictory testimony in matrimonial actions, as here, "[e]valuating the credibility of the respective witnesses is primarily a matter committed to the sound discretion of the Supreme Court" (*Varga v Varga*, 288 AD2d 210, 211; *Diacio v Diaco*, 278 AD2d 358; *Ferraro v Ferraro*, 257 AD2d 596; *Beth M v Joseph M*, 12 Misc3d 188[A]). A review of defendant's testimony reveals numerous inconsistencies between her trial testimony and deposition testimony. Even though defendant was confronted with letters evidencing that proposed separation agreements were mailed to her home, she had no recollection of receiving them. Nor did she have any recollection of receiving a letter written by Mr. Kaplan that was sent

to plaintiff and copied to her. In this letter Mr. Kaplan stated that he had an opportunity to review the proposed separation agreement with his client. She also said that she had no recollection of ever discussing the proposed agreement with Mr. Kaplan. However, at a prior deposition she testified that she might have received the proposed agreement. A review of the billing statements in evidence reveals numerous conferences and telephone calls between defendant and Mr. Kaplan (November 4, 1999 to April 28, 2001). One of the entries made reference to a review of the proposed separation agreement. However, defendant had no recollection of receiving that billing statement. Also telling is the testimony of defendant where she states that she only remembers the “important things.” She had no problem remembering the twenty-something vacations and business-related trips she took. However, she had difficulties remembering the events leading up to the execution of the separation agreement as well as the modification agreement.

It is interesting to note that defendant claims to have not acknowledged her signature before a notary public . However, her witness, Mr. Perlmutter, the notary, whom the court finds to be credible, testified that although he had no recollection of acknowledging the parties’ signature on those two dates, he would not take anyone’s acknowledgment unless they were standing right in front of him.

When questioned about the events of July 8, 2002 she stated that she had not seen the proposed agreement until that date. She stated she glanced at some pages and read other pages. These answers at trial were different from the answers she gave at her deposition. Even answers given at the trial were inconsistent with the answers previously given at the trial. Plaintiff’s version of the events leading up to the striking of the cohabitation clause on July 8, 2002 are not

believable. Based upon the testimony at this trial, plaintiff's testimony is more credible as to when the cohabitation clause was stricken.

The court must note that the striking of the cohabitation clause subsequent to the execution of the separation agreement is not legally binding. In the case of *Keck v Keck* (282 AD2d 436), the Supreme Court declined to enforce the purported modification of the parties' separation agreement. The separation agreement provided that it could be modified only "by an agreement in writing, identifying each particular provision . . . modified and duly subscribed and acknowledged by both parties with the same formality as this Agreement." The alleged modification did not comply with the requirements of the separation agreement and, therefore, was not enforceable. (See, also *LoGatto v LoGatto*, 130 AD2d 556, 515 NYS2d 290; cf., *Lotz v. Lotz*, 135 AD2d 1007, 522 NYS2d 730.) Similar to the facts in *Keck, supra*, the separation agreement provided: "This agreement may not be cancelled, altered, modified, amended, or waived except by an instrument in writing under seal signed by both parties." (Article XIV Section 2) An examination of Defendant's Exhibit "A" fails to reveal any compliance with the requirement of the separation agreement with respect to modification. Furthermore, the modification agreement subsequently executed on October 27, 2003 is silent as to any modification concerning the cohabitation clause.

Defendant argues that plaintiff is equitably estopped from asserting that the elimination of the cohabitation clause is unenforceable in view of the defendant's detrimental reliance on the elimination of the cohabitation clause from the agreement. Defendant argues that she purchased her condominium relying on the fact that the plaintiff would continue to make maintenance payments to her under the terms of the separation agreement notwithstanding her cohabitation

with an unrelated male. Since the court finds that the credible evidence indicates that the elimination of the cohabitation clause occurred on the date of the closing, October 27, 2003, this argument fails. (*See Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516.)

Estoppel is an equitable remedy that is to be employed on a case-by-case basis according to the dictates of good faith, conscience and justice. (*Restatement [Second] of Contracts §90, comment b*) In order to succeed on an estoppel theory, defendant must establish that she changed her position in light of the act she claims to have relied on, specifically the elimination of the cohabitation clause. Defendant fails to meet her burden. Although the defendant asserts that she would never have purchased the condominium but for the cross out, the court finds that the defendant did not change her position based upon the cross out, nor did she rely on the elimination of the cohabitation clause in taking any action. The record supports the fact that the defendant negotiated the purchase of her condominium, entered into a binding contract to purchase same, and tendered a down payment in August, 2003. Prior to the elimination of the cohabitation clause on October 27, 2003, defendant also secured a promise from her boyfriend that he would move into the condominium and pay the maintenance and taxes thereon. Additionally, defendant also caused the liquidation of the parties' joint account before the elimination of the cohabitation clause occurred on October 27, 2003. The Court finds that the defendant did not suffer any damages and did not rely to her detriment due to the elimination of the cohabitation clause. She was obligated to close on the condominium regardless of whether plaintiff agreed to eliminate the cohabitation clause and she intended to live with her boyfriend who agreed to pay certain expenses.

Additionally, the estoppel theory fails because the cross out of the cohabitation clause

was not executed in accordance to Article XIV of the Separation Agreement. Said section provides that the agreement “may not be canceled, altered, modified, amended, or waived except by an instrument in writing under seal signed by both parties hereto.” (*See Plaintiff’s Exhibit “3”*.) The court notes the parties properly executed the separation agreement on July 8, 2002 and the subsequent modification agreement.

The defendant argues that the plaintiff, a practicing matrimonial attorney for more than thirty years, had a fiduciary obligation to his wife, who was unrepresented in the execution and negotiation of the separation agreement. Defendant also argues the plaintiff had a fiduciary duty to his wife when acting in his capacity as her attorney in the real estate transaction. Given the fact that plaintiff himself testified that he crossed out the cohabitation clause on the day he was representing his wife at her closing, defendant avers a breach of fiduciary duty when plaintiff failed to inform her that the elimination of the clause was unenforceable. Defendant asserts that this conduct should not be countenanced by the court.

The issue of whether the plaintiff breached a fiduciary duty is not before this Court because defendant failed to plead a counterclaim to dismiss the complaint on the basis of overreaching. Generally, separation agreements which are regular on their face are binding on the parties, unless and until they are put aside (*See Christian v. Christian*, 42 NY2d 63, 71; 2 Foster & Freed, *Law and the Family*, p 476; see, also, *Schmelzel v Schmelzel*, 287 NY 21, 26; 2 Lindey, *Separation Agreements and Ante-Nuptial Contracts* [rev ed], § 36, subd 1, p 36-3). If voidable, a separation agreement may be set aside under principles of equity in an action in which such relief is sought in a cause of action or by way of affirmative defense (*See Christian Id.* at 72; *Susquehanna S.S. Co. v Andersen & Co.*, 239 NY 285, 292-294; 16 NY Jur, Domestic

Relations, §715). In the case at bar, defendant does not seek to set aside the separation agreement. Her testimony reveals that she, in fact, wants a divorce but also wants continued maintenance.

Defendant's argument that the handwritten changes to the separation agreement are enforceable under principles of contract law is without merit. The agreement provides that voluntary payments made in excess of the obligations contained in the agreement will not create an obligation to continue such voluntary payments and that the failure to strictly enforce the terms of the agreement shall not operate as a waiver. (See *Plaintiff's Exhibit "3" Articles XIV and XX.*) Thus, plaintiff is not bound to continue to pay maintenance despite his partial performance of paying maintenance after the defendant cohabited with her boyfriend.

Therefore, based upon the aforesaid, plaintiff's cause of action for divorce pursuant to DRL Section 170(6) is **GRANTED**.

Settle Findings of Fact, Conclusions of Law and Judgment on Notice.

Dated: Mineola, NY

October 28, 2008

HON. JEFFREY S. BROWN

J. S. C.