2021 NY Slip Op 21236

MUHAMMAD AHMER KHAN, Plaintiff,
v.
AISHA ZIAUL HASAN, Defendant.

613261/2020.

Supreme Court, Nassau County.

Decided July 19, 2021.

PRELIMINARY STATEMENT

JEFFREY A. GOODSTEIN, J.

Plaintiff ("Husband") filed this motion for summary judgment seeking an order holding the parties' mahr term of their nikah agreement invalid and unenforceable and requesting counsel and expert fees.

Defendant ("Wife") opposes the motion in its entirety seeking an order upholding the validity of the mahr agreement, payment of $50,000 to enforce the agreement, and counsel fees.

BACKGROUND

A nikah agreement is a mutual agreement signed by spouses during their religious marriage ceremony that is typically verified by two male witnesses and includes a mahr provision. (Allison Gerli, Comment, Living Happily Ever After in a Land of Separate Church and State: Treatment of Islamic Marital Contracts, 26 J. Am. Acad. Matrimonial Law. 113 (2013).; Tracie Rogalin Siddiqui, 2007 Schwab Essay Contest Winners, Interpretation of Islamic Marriage Contracts by American Courts, 41 Fam. LQ. 639 (2007)). A mahr provision, or sadaq, is a term in the nikah agreement whereby the husband gives something of value to the wife. (Tracie Rogalin Siddiqui, 2007 Schwab Essay Contest Winners, Interpretation of Islamic Marriage Contracts by American Courts, 41 Fam. L.Q. 639 (2007)). The mahr provision functions to protect the bride's financial interests and independence and is typically only awarded in the case of divorce or upon the husband's death. (*Id*). The amount of the mahr is typically negotiated by the spouse's relatives prior to the wedding, rather than by the couple themselves. (*Id*). The mahr is usually paid in two parts, the first is paid immediately at the time of the religious ceremony and the second is deferred until one of the two previously stated occurrences. (Jay M. Zitter, Application, Recognition, or Consideration of Islamic Law by Courts in the United States, 82 A.L.R.6th 1).

At issue here is the enforceability of an unacknowledged deferred mahr that granted the Wife $50,000 upon some unspecified occasion. The parties were married in a civil ceremony on March 2, 2016, in Queens, New York. Following their civil ceremony, on September 12, 2016, the parties were married in a religious ceremony where the nikah containing the mahr provision now in question was signed, and recorded, by the parties in front of two male witnesses, Mufti Abdul Rahman, Imam of Al-Masjid Inc. who performed their Islamic ceremony, and all their guests. It is unclear, but not disputed, whether the Husband ever paid an initial mahr amount to the Wife in accordance with Islamic tradition. It is also unclear when the amount of the mahr was set and whether it was decided with or without the Husband's knowledge and consent.

DISCUSSION

The Husband argues that the parties' mahr agreement is invalid and unenforceable because it is not properly acknowledged in accordance with New York Domestic Relations Law §236(B)(3) which states:

> An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Domestic Relations Law §236(B)(3).

Alternatively, the Husband argues the agreement is invalid for a lack of consideration, for being manifestly unfair, and for impermissibly intertwining the court with religion. He asks that the certificate be declared null and void and is requesting counsel fees and expert fees.

The Wife argues that the parties' mahr agreement is valid and enforceable as a legal entity distinct from a prenuptial or postnuptial agreement. Additionally, if the agreement is held valid, she argues it had proper consideration or was ratified by the Husband despite a lack of consideration. Alternatively, she argues that even if the court considers their nikah a postnuptial agreement, it is enforceable because an acknowledgment is not required where there is alternative proof of signing through witnesses. Finally, she argues summary judgment is improper because there are genuine issues of material fact such as the presence of duress, the time, place, and manner of the mahr negotiation, the amount of the mahr, the expectation of the nikah, the benefits conferred in the marriage certificate, and the Husband's expert testimony.[1]

In reply, the Husband reiterates the mahr's invalidity and unenforceability arguing against the cases proffered by the Wife as controlling precedent.

Here, the Husband argues the mahr agreement is invalid and unenforceable due to the lack of an acknowledgment in violation of New York Domestic Relations Law 236(B)(3). The Husband argues that New York's Appellate Divisions in Matisoff and Galetta are controlling precedent as they collectively establish that a proper acknowledgment is an "essential prerequisite" to comply with the terms of DRL 236(B)(3) and that the document is signed by two witnesses, instead of being acknowledged, does not satisfy the requirements of DRL 236(B)(3). (*Matisoff v. Dobbi*, 90 NY2d 127 (1997).; *Galetta v. Galetta*, 21 NY3d 186 (2013)). The Husband concedes that there are four similar cases, *Badawi v. Alesawy, O.Y. v. A.G., Aziz v. Aziz,* and *Avitzur v. Avitzur,* that the Wife may try to use as ruling precedent to uphold the agreement. (*Badawi v. Alesawy*, 135 AD3d 792 (2d Dept. 2016).; *O.Y. v. A.G.,* 48 Misc 3d 1222(A) (Sup. Ct. Westchester Co. 2015).; *Aziz v. Aziz*, 127 Misc 2d 1013, 488 N.Y.S.2d 123 (Sup. Ct. Queens Co. 1985).; *Avitzur v. Avitzur*, 58 NY2d 108 (1983)). However, he contends that those cases are not controlling because: (1) the agreement in Badawi was upheld under the doctrine of comity which does not apply here as the parties' marriage and divorce took place in New York; (2) the agreement in O.Y. was never evaluated because the amount in question was de minimis; (3) and, Aziz and Avitzur were decided before Matisoff and Galetta established a rule of strict enforcement on the acknowledgment requirement for nuptial agreements. (Badawi, 135 AD3d 792.; O.Y., 48 Misc 3d 1222(A).; Aziz, 127 Misc 2d 1013, 488 N.Y.S.2d 123.; Avitzur, 58 NY2d 108). Therefore, the Husband advocates for a "bright-line rule requiring an acknowledgment in every case [that] is easy to apply and places couples and their legal advisors on clear notice of the prerequisites to a valid nuptial agreement" as established by Matisoff. (Matisoff, 90 NY2d at 135).

The Wife argues that the court has the authority to enforce the mahr agreement under the precedent of Aziz, Badawi, and In Re Application of Saperstein, using the neutral principles of law approach to resolve this religious dispute without consideration of doctrinal matters. (Aziz, 127 Misc 2d 1013, 488 N.Y.S.2d 123.; *Badawi*, 135 AD3d 792.; *Application of Saperstein*, 254 AD2d 88, 678 N.Y.S.2d 618 (1 Dept. 1998).; *Jones v. Wolf*, 443 U.S. 595, 603, 99 S. Ct. 3020, 3025, 61 L.Ed.2d 775 (defining the neutral principles of law approach as applying "objective, well-established" principles of secular law to resolve religious disputes without delving into religious doctrine itself)). Here, the Wife points to the factually similar case of Aziz in which the court upheld the parties' mahr agreement stating, "the court recognizes that the Mahr, or Islamic marriage contract, is an enforceable document in New York, notwithstanding it was executed pursuant to religious or civil law." (*Aziz*, 127 Misc 2d 1013, 488 N.Y.S.2d 123). The Wife then points to Badawi in which a court enforced an unacknowledged mahr agreement as its own distinct legal entity, separate from a prenuptial or postnuptial agreement because it violated no strong public policy of New York and was signed by the parties, two witnesses, and the Imam of the Islamic Cultural Center of New York. (*Badawi*, 135 AD3d 792). Lastly, she argues that even if the court treats the mahr as a postnuptial agreement, it would still be enforceable because an acknowledgment is not required for nuptial agreements when there is alternative proof provided by subscribed witnesses in accordance with Application of Saperstein. (*Application of Saperstein*, 254 AD2d 88, 678 N.Y.S.2d 618). There, the court held "proof of husband's execution prior to his wife's death of waiver of right to elect against spouse's estate, which was prepared after wife's death by an attorney who signed waiver as subscribing witness, was sufficient to establish validity of waiver, as proof complied with requirements governing recording of conveyance of real property." (*Application of Saperstein*, 254 AD2d 88, 678 N.Y.S.2d 618). The Wife goes on to posit that as long as the subscribing witness's proof, executed after the execution, complies with the requirements governing the conveyance of real property, the proof will be sufficient to establish validity. Here, the mahr agreement was signed by three subscribing witnesses contemporaneously with the Husband and Wife so the Wife argues either of the three witnesses may provide an alternative to the acknowledgment requirement of DRL 236(B)(3).

In his Reply, the Husband reiterates the Wife's improper citation of Badawi arguing the mahr agreement there was not upheld because it was excused from DRL 236(B)(3)'s acknowledgment requirement but because the court recognized the parties' Abu Dhabi divorce under the doctrine of comity which does not apply here. (*Badawi*, 135 AD3d 792). The Husband then echoes that the court in Matisoff recognized no exceptions to DRL 236(B)(3) and since the essential acknowledgment requirement is absent, he calls again for the mahr agreement to be invalidated. (*Matisoff v. Dobbi*, 90 NY2d 127.; *Galetta v. Galetta*, 21 NY3d 186). Lastly, the Husband emphasizes the specific consideration and rejection of Saperstein's holding in Galetta where the Court of Appeals found that Saperstein, which did not involve DRL 236(B)(3) nor an acknowledgment requirement, did not apply to marital agreements. (*Galetta v. Galetta*, 21 NY3d 186).

Courts in other jurisdictions have had conflicting views on the treatment and validity of mahr agreements, especially when faced with a constitutional challenge by one of the parties. The Free Exercise and Establishment Clauses of the first amendment are often used by litigants in these cases to dissuade courts from making the decision to uphold religious marriage agreements like the mahr or the Ketubah, a Jewish marriage contract, in "Get" and "Beit Din" cases. These challenges have tended to fail but make compelling dissenting arguments. (*See Avitzur*, 58 NY2d 108 (1983) (dissent arguing the enforcement of a ketubah would "necessarily violate the constitutional prohibition against entanglement of our secular courts in matters of religious and ecclesiastical content")). More successful litigants have argued the precedent set in *Jones v. Wolf* in which the Supreme Court approved the "neutral principles of law" approach. (*Jones v. Wolf*, 443 U.S. 595, 603, 99 S. Ct. 3020, 3025, 61 L.Ed.2d 775). This approach developed out of a series of cases involving property disputes with the church, but it has been applied in other areas of law relating to business contracts, torts, employment, and the type of private agreements at issue here. (*Tilsen v. Benson,* 2019 Con. Super. LEXIS 2475 (2019)). This approach was used by courts across the country to reach decisions in Odatalla[2] (New Jersey), *In Re Marriage of Obaidi*[3] (Washington), *Ravasizadeh v. Niakosari*[4] (Massachusetts), and Avitzur[5] (New York). The neutral principle of law approach prevents mahr agreements, and other private, religious marriage agreements, from being denied simply because they came about in a religious context allowing them to be enforced based solely on their ability to comply with the "objective, well-established," secular laws. (*Jones*, 443 U.S. 595, 603, 99 S. Ct. 3020, 3025, 61 L.Ed.2d 775.; *Odatalla,* N.J. Super. 305.; *Tilsen,* 2019 Con. Super. LEXIS 2475.; Tracie Rogalin Siddiqui, 2007 Schwab Essay Contest Winners, Interpretation of Islamic Marriage Contracts by American Courts, 41 Fam. L.Q. 639 (2007).; Comment, Living Happily Ever After in a Land of Separate Church and State: Treatment of Islamic Marital Contracts, 26 J. Am. Acad. Matrimonial Law. 113). While courts have struggled at times to apply the neutral principles of law approach to mahr agreement disputes, due to a lack of familiarity with such documents and their vague terms, this approach seems to provide litigants with the fairest outcomes as long as courts remain mindful of the mahr's religious significance and overall purpose. (Tracie Rogalin Siddiqui, 2007 Schwab Essay Contest Winners, Interpretation of Islamic Marriage Contracts by American Courts, 41 Fam. L.Q. 639 (2007)).

Though the constitutionality of enforcing these agreements has been mostly settled by jurisdictions using the neutral principles of law approach, some jurisdictions have run into other issues with the enforceability of mahr agreements. (*See Akileh v. Elchahal*, 66 So.2d 246, (1996).; *In re Marriage of Obaidi*, 154 Wn.App. 609, (2010); *Ahmed v. Ahmed*, 261 S.W.3d 190 (2008).; *Zawahiri v. Alwattar*, 2008 Ohio 3473 (2008); *In Re Marriage of Dajani*, 204 Cal.App.3d 1387, 251 Cal.Rptr.871 (4th Dist. 1988)). In those jurisdictions, courts have sometimes found the enforcement of mahr agreements to be against public policy due to a fear that enforcement would "facilitate divorce or separation by providing for settlement only in the event of such an occurrence." (*Application, Recognition, or Consideration of Islamic Law by Courts in the United States,* 82 A.L.R.6th 1; *See In Re Marriage of Dajani*, 204 Cal.App.3d 1387, 251 Cal.Rptr.871 (4th Dist. 1988)). While this is a valid concern, it fails to take into account the purpose of the mahr— to protect the wife's financial interests in case of divorce or her husband's death and to "discourage divorce by limiting a husband's otherwise unlimited right to divorce at will" within the Islamic culture. (Tracie Rogalin Siddiqui, 2007 Schwab Essay Contest Winners, Interpretation of Islamic Marriage Contracts by American Courts, 41 Fam. L.Q. at 654 (2007)).

Another issue discussed by some courts in the mahr case law has been the circumstances under which the mahr was signed. In at least one case, *Zawahiri v. Alwattar*, the husband was not presented with the nikah agreement until two hours prior to the start of the parties' religious wedding ceremony. (*Zawahiri*, 2008 Ohio 3473 (2008)). Upon dissolution of the marriage, the husband argued the mahr should not be upheld because he signed the agreement under duress as he was too embarrassed and stressed to decline the mahr with guests having already arrived and without having the opportunity to consult an attorney. (*Id*). The court agreed with the husband and held that the mahr was entered into as a result of "overreaching or coercion" and was therefore invalid. (*Zawahiri v. Alwattar*, 2008 Ohio 3473 (2008)); *See also Application, Recognition, or Consideration of Islamic Law by Courts in the United States,* 82 A.L.R.6th at 2 (explaining "proof that a party entered into the mahr under duress can be shown by evidence that the mahr was not discussed until the day of the wedding, that discussions were hurried and took place while guests were arriving, and that the parties did not have an opportunity to consult with counsel before signing, that the groom was not told of the mahr or its details until the time of signing or that he could not understand the negotiations or agreement because they were in a foreign language.").

Finally, a Texas court adjudicated the enforceability of a mahr agreement where the parties were already married in a civil ceremony prior to their religious ceremony when the mahr was signed. *Ahmed*, 261 S.W.3d 190. In Ahmed, the parties were married in a civil ceremony and had their religious ceremony six months later when they signed their nikah agreement containing a deferred mahr provision of $50,000. (*Id*). There the court examined the parties' nikah agreement as a premarital agreement and because the Texas Family Code defined premarital agreements as those made by the parties in anticipation of marriage and Texas does not distinguish between civil and religious marriage ceremonies, the parties were already married and the court would not uphold the nikah agreement as a premarital agreement and the case was ultimately remanded to determine the mahr's validity. (*Id*).

New York courts have not specifically addressed the validity and enforceability of unacknowledged mahr agreements when all the proceedings have taken place in New York. But, even if the New York courts had adopted the "neutral principles of law" approach and applied it to the parties' mahr agreement, it still could not be upheld due to the lack of an acknowledgment. The language, history, and subsequent New York statutory law of DRL 236(B)(3), including the case precedent of Matisoff and Galetta, have clearly created no exception to the acknowledgment requirement. Accordingly, it is hereby

ORDERED, that the Husband's motion for summary judgment is granted and the parties' mahr agreement is not enforceable and is deemed void.

Counsel Fees

Both parties are requesting reasonable counsel fees for having to file and prosecute this action. The Husband is seeking additional expert fees for having hired an expert to prove his claim.

However, as the counsel fee provisions of a matrimonial action do not apply to plenary actions, both parties' requests for counsel fees are DENIED.

All other requested relief, not specifically addressed herein, is hereby DENIED.

This constitutes the Decision and Order of this Court.

[1] The Husband provided an affidavit from Ahmadullah Kamal, who proclaims to be a "scholar of Islam".

[2] *Odatalla v. Odatalla*, N.J. Super. 305 (2002).

[3] *In re Marriage of Obaidi*, 154 Wn.App. 609, (2010).

[4] *Ravasizadeh v. Niakosari*, 94 Mass. App. Ct. 123 (2018).

[5] *Avitzur v. Avitzur*, 58 NY2d 108.