

The Finality of Judgments and Improperly Modifying Them

By Vesselin Mitev

You get a post-judgment order to show cause with multiple branches of relief, including a modification of the judgment of divorce, to incorporate some new, alleged change of circumstances that the parties (who settled their case 8 years ago) did not contemplate or include in their stipulation of settlement. It could be that one of the kids is going to college and mom wants a 50 percent contribution, or since the time of the stipulation the parties allegedly entered into side agreements on their own that essentially modified the settlement (but never bothered to have same so-ordered).

Something bugs you about the application, but you can't quite put your finger on it. How can, you wonder, a party seek to "modify" a judgment, which is a final order of a court disposing of an action, and most generally subject to vacatur or modification only by an appellate court (except for a default judgment). The short answer is: They can't (which makes sense in theory, as a judgment is rendered to give one finality in litigation).

The DRL provides only *two* grounds for even *applying for* a modification of a judgment. One is DRL 248, which requires that the court modify a prior judgment on "proof of the marriage of the payee" after

the judgment (in other words, terminating maintenance for a former spouse that has now been re-married, or in its discretion, if the person is "habitually living with another person and holding [themselves] out as [married]"). The other is DRL 236 (B)(9)(b), which, again, deals with maintenance, and provides in relevant part that the court may "annul or modify" a prior maintenance order or judgment *made after trial*, if the paying spouse shows a substantial change in circumstances or inability to support themselves.

Not one other word in the DRL deals with modifying judgments. In the majority of cases, the judgment that is sought to be (improperly) modified incorporated by reference but did not merge, a separate stipulation of settlement, which is a contract between the parties that is subject to a) a six-year statute of limitation (CPLR 213) and b) governed by ordinary principles of contract interpretation.

Moreover, the case law is overwhelming that *most* post-judgment applications that deal with changing a provision of a stipulation are required to be brought by separate, plenary action (and not under the guise of a post-judgment application for enforcement, as is done erroneously



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hundreds of times every day throughout the state).

The current, prevailing practice of making an application that seeks relief that was not contemplated in either the stipulation or the judgment by titling it a post-judgment motion, either on notice or by order to show cause, appears to have emanated out of judicial drift and the vestigial equitable powers of the court, both at

the trial and appellate levels; but it is certainly not allowed by statute, *supra*.

In the above-example, therefore, the proper remedy is denial and dismissal upon a motion to dismiss on two grounds: first, the judgment of divorce did not contemplate the relief requested and cannot be modified on any other basis other than maintenance; second, the application is beyond the statute of limitations applicable to contract actions (and improperly brought as a post-judgment application, rather than a separate plenary case).

Taken to its logical extreme, even where the parties consent to amend a judgment (on any other basis than the aforementioned), said amended judgment would still be technically statutorily deficient; for example, a judgment regarding maintenance reached after a settlement cannot be modified, even

on consent, according to the statute.

The other hoary problem becomes self-evident. Assume the court modifies the judgment over which it can be maybe said to have some control over, if we squint hard enough, as a prior order of the court. Yet the court is entirely without the power to retroactively modify the parties' agreement, which continues on its own, separate and apart from the judgment. So a party can have one set of obligations and benefits under the contract and an entirely different set under the now-modified judgment, causing a King Rat's nest of tangled problems that compound themselves in a chain reaction.

In sum, any post-judgment application, enforcement or otherwise, should be scrutinized carefully to determine that it is not an improper attempt to modify a judgment of the court, which, for all intents and purposes are immutable, subject to the two narrow exceptions listed above.

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