

--- N.Y.S.2d ----, 2013 WL 6800922 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08595 (Cite as: 2013 WL 6800922 (N.Y.A.D. 2 Dept.))

Supreme Court, Appellate Division, Second Department, New York. Debra Ayer HARRIS, appellant, v. Kevin James HARRIS, respondent.

Dec. 26, 2013.

Frederic P. Schneider, New York, N.Y., for appellant.

Gerard A. Imperato, Brooklyn, N.Y., for respondent.

Elizabeth M. Niemi, Amityville, N.Y., attorney for the child Delilah Harris.

Dawn M. Shammas, Harrison, N.Y., attorney for the child Jamison Harris.

THOMAS A. DICKERSON, J.P., L. PRISCILLA HALL, JEFFREY A. COHEN, and ROBERT J. MILLER, JJ.

*1 In an action for a divorce and ancillary relief, the mother appeals, as limited by her brief, from stated portions of an interlocutory judgment of the Supreme Court, Kings County (Thomas, J.), dated March 13, 2012, which, upon a decision of the same court dated December 9, 2011, made after a nonjury trial, inter alia, awarded custody of the parties' children to the father.

ORDERED that the interlocutory judgment is affirmed insofar as appealed from, with costs.

Modification of an existing court-sanctioned custody arrangement is permissible only upon a showing that there has been a change in circumstances such that modification is necessary to ensure the best interests of the children (see Matter of Sidorowicz v. Sidorowicz, 101 AD3d 737,

738; Matter of Englese v. Strauss, 83 AD3d 705, 706; Matter of Said v. Said, 61 AD3d 879, 880). As custody determinations turn in large part on assessments of the credibility, character, temperament, and sincerity of the parties, the Supreme Court's determination should not be disturbed unless it lacks a sound and substantial basis in the record (see Eschbach v. Eschbach, 56 N.Y.2d 167, 173–174). Here, the Supreme Court's determinations that there had been a change in circumstances, and that a transfer of custody of the parties' children to the father would be in the children's best interests, have a sound and substantial basis in the record and, thus, should not be disturbed (see Matter of Bennett v. Schultz, 110 AD3d 792; Matter of Doroski v. Ashton, 99 AD3d 902; Matter of Tobar v. Velez-Molina, 95 AD3d 1224).

The mother's remaining contentions are without merit.

DECISION ON MOTION

Appeal by the plaintiff Debra Ayer Harris, as limited by her brief, from stated portions of an interlocutory judgment of the Supreme Court, Kings County, dated March 13, 2012. By order to show cause dated March 14, 2013, inter alia, the parties or their attorneys were directed to show cause before this Court why an order should or should not be made and entered dismissing the appeal from so much of the judgment as pertains to visitation on the ground that it has been rendered academic by a subsequent stipulation on the issue of visitation entered into between the parties on November 7, 2012. By decision and order on motion of this Court dated July 1, 2013, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the order to show cause and the papers filed in response thereto, and upon the argument of the appeal, it is ORDERED that the motion is denied.

N.Y.A.D. 2 Dept.,2013. Harris v. Harris --- N.Y.S.2d ----, 2013 WL 6800922 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08595

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--- N.Y.S.2d ----, 2013 WL 6801059 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08645 (Cite as: 2013 WL 6801059 (N.Y.A.D. 2 Dept.))

Supreme Court, Appellate Division, Second Department, New York. In the Matter of SIDNEY W. (Anonymous), appellant,

ν.

CHANTA J. (Anonymous), respondent.

Dec. 26, 2013.

Harold, Salant, Strassfield & Speilberg, White Plains, N.Y. (Jerold C. Rotbard of counsel), for appellant.

Goetz L. Vilsaint, Bronx, N.Y., for respondent.

Daniel D. Molinoff, Larchmont, N.Y., attorney for the child.

DANIEL D. ANGIOLILLO, J.P., L. PRISCILLA HALL, LEONARD B. AUSTIN, SHERI S. ROMAN and ROBERT J. MILLER, JJ.

*1 In a proceeding pursuant to Family Court Act § 516–a to vacate an acknowledgment of paternity, the petitioner appeals from an order of the Family Court, Westchester County (Malone, J.), entered December 7, 2012, which, after a hearing, inter alia, denied the petition.

ORDERED that the order is reversed, on the law and the facts, without costs or disbursements, the petition is reinstated, and the matter is remitted to the Family Court, Westchester County, for further proceedings in accordance herewith.

In the summer of 2007, the parties, while they were coworkers, became involved in a sexual relationship. They continued this relationship on an intermittent basis until the summer of 2010. In the interim, in December 2009, the respondent mother informed the petitioner that she was pregnant and that he was the father of the child.

The subject child was born in September, 2010. The petitioner was present in the delivery room when the child was born and returned to the hospital to bring the respondent and the child home to the respondent's residence. On that day, the respondent presented the petitioner with an Acknowledgment of Paternity (hereinafter AOP) and asked the petitioner to sign it, which he did.

In December 2011, the petitioner filed the subject petition to vacate his AOP based, inter alia, on a material mistake of fact, alleging that after the child was born, the respondent revealed that she had been involved in an intimate relationship with another man during the period in which the child was conceived, and that the other man was the father of the child. The respondent opposed the petition.

At the beginning of the hearing regarding the petition to vacate the AOP, the attorneys for the petitioner and the respondent informed the court that the parties had consented to a finding of a material mistake of fact when the petitioner signed the AOP. The court then directed that a voir dire of the respondent be conducted and, at the conclusion of the voir dire, the court found that the respondent did not admit that there was a mistake. Thus, rather than accepting the parties' stipulation, the court proceeded with the hearing.

The petitioner testified that the parties ended their relationship prior to August 2009, but resumed having sexual relations from November to December 2009, at which time the respondent informed him that she was pregnant and assured him that the child was his. The petitioner also testified that, when he went to drive the respondent and child to their home from the hospital, the respondent told him that the hospital would not release the baby without the AOP being signed and she handed him the AOP to sign. He further testified that, even though he expressed doubts about the paternity of the child, the respondent

stated that he would be able to have a paternity test whenever he wanted if he discovered any reason to doubt the child's paternity.

The petitioner testified that he was not sure whether he was the respondent's only sexual partner during the time that they were together, but did not believe that he was. He also testified that, in April 2011, coworkers, including one who was his current girlfriend, informed him that the respondent had been involved in a relationship with another man during the relevant time period and that this other man was the father of the subject child.

*2 The petitioner testified that he visited the child only five or six times prior to filing the petition, and that he last saw the child when she was six months old. The respondent testified that the petitioner had no relationship with the child.

In the order appealed from, entered December 7, 2012, the Family Court found that the petitioner did not meet his burden of proving that the AOP was executed under fraud, duress, or material mistake of fact, denied his request to vacate the AOP, determined that the petitioner was estopped from having a court-ordered genetic marker test, and reinstated a prior order of support. The petitioner appeals.

"A challenge party seeking to acknowledgment of paternity more than 60 days after its execution must prove that it was signed by reason of fraud, duress, or material mistake of fact" (Matter of Angelo A.R. v. Tenisha N.W., 108 AD3d 560, 560; see Family Ct Act § 516–a[b][ii]; Matter of Oscar X.F. v. Ileana R.H., 107 AD3d 795, 796; Matter of Derrick H. v. Martha J., 82 AD3d 1236, 1237). "If the petitioner satisfies this burden, 'the court is required to conduct a further inquiry to determine whether the petitioner should be estopped, in accordance with the child's best interest, from challenging paternity' " (Matter of Oscar X.F. v. Ileana R.H., 107 AD3d at 796, quoting Matter of Derrick H. v. Martha J., 82 AD3d at 1237; see Family Ct Act § 516-a[b][ii];

Matter of Angelo A.R. v. Tenisha N.W., 108 AD3d 560).

Contrary to the contention of the petitioner and the attorney for the child, the Family Court did not err in finding that a hearing on the issue of whether there was a material mistake of fact was necessary, since the court's questioning of the respondent demonstrated that she did not agree that the petitioner had signed the AOP under the mistaken belief that he was the subject child's biological father. Since the respondent's position throughout the proceedings was that the petitioner was the child's father, a hearing on that issue was proper despite the proposed stipulation with respect to that issue.

However, the petitioner met his initial burden of establishing that the AOP was signed by reason of material mistake of fact. "A party seeking paternity testing under the Family C[our]t Act need not provide factual support for the allegations of paternity or nonpaternity; he or she need only articulate some basis for them" (Matter of Gutierrez v. Gutierrez-Delgado, 33 AD3d 1133, 1134; see Prowda v. Wilner, 217 A.D.2d 287, 289). Although the dissent correctly notes that neither Gutierrez nor Prowda involved proceedings to vacate an AOP, there is no language in either case to suggest that the burden of proof requirements articulated in those cases would be inappropriate to apply with respect to this proceeding, which ultimately addresses the binding effect of the AOP on the petitioner and not, as suggested by our dissenting colleagues, the actual paternity of the child.

*3 Here, the petitioner testified that he signed the AOP because, during the relevant time period, he and the respondent were having sexual relations and the respondent represented that he was the biological father. He also testified that it was only after he executed the AOP that he learned from coworkers that another man may be the child's actual biological father, causing him to question his paternity. The petitioner's testimony was sufficient

pursuant to Family Court Act § 516–a(b)(ii) to establish a material mistake of fact (*see Matter of Derrick H. v. Martha J.*, 82 AD3d at 1237–1238).

Further, in light of the Family Court's finding that the petitioner did not meet his initial burden of proof, no hearing was held on the matter of the child's best interests. However, since it is undisputed that the parties were never married to each other and did not live together at any time during the child's life, the petitioner had only visited with the child approximately five or six times before visitation ceased altogether when the child was less than eight months old, and the respondent testified that the petitioner had no relationship with the child, it would not be appropriate to apply the doctrine of equitable estoppel to preclude the ordering of genetic marker or DNA tests for determination of the child's paternity. Under these circumstances, there is no evidence that the child "would suffer irreparable loss of status, destruction of her family image, or other harm to her physical or emotional well-being if this proceeding were permitted to go forward" (Matter of Derrick H. v. Martha J., 82 AD3d at 1239 [internal quotation marks omitted]; see Family Ct Act § 516-a[b][ii]; Matter of Juanita A. v. Kenneth Mark N., 15 NY3d 1, 5; Matter of Shondel J. v. Mark D., 7 NY3d 320, 326).

In light of our determination, we need not address the parties' remaining contentions.

Accordingly, we reverse the order appealed from and remit the matter to the Family Court, Westchester County, for a determination of the child's paternity in accordance with Family Court Act § 516–a(b)(ii).

AUSTIN, ROMAN and MILLER, JJ., concur. HALL, J., dissents, and votes to affirm the order appealed from, with the following memorandum, in which ANGIOLILLO, J.P., concurs:

I respectfully dissent, and vote to affirm the order appealed from.

Family Court Act § 516-a(b)(ii) provides, in relevant part, that "[a]fter the expiration of sixty days of the execution of the acknowledgment, either signator may challenge the acknowledgment of paternity [hereinafter AOP] in court by alleging and proving fraud, duress, or material mistake of fact." The statute further provides that "[i]f the petitioner proves to the court that the [AOP] was signed under fraud, duress, or due to a material mistake of fact, the court shall order genetic marker tests or DNA tests for the determination of the child's paternity" (Family Ct Act § 516-a[b][ii]). Thus, under the statute, fraud, duress, or material mistake of fact must be proven as a prerequisite to a request for a DNA or genetic marker test in a proceeding to vacate an AOP more than 60 days after its execution (see Family Ct Act § 516-a[b][ii]

*4 I agree with the majority's determination that the Family Court properly conducted a hearing in this matter. However, in my view, the Family Court also properly found that the petitioner failed to satisfy his burden of proving that he executed the AOP based upon a material mistake of fact. The petitioner testified that, during the relevant time period, he had a casual sexual relationship with the respondent, who told him that she was involved in sexual relationships with other people. When the petitioner learned of the respondent's pregnancy, he asked, "[i]s the child mine[?]," and the respondent assured him that the child was his. After signing the AOP, the petitioner heard from coworkers that another man may be the biological father of the child. In contrast, the respondent testified that, at the time the child was conceived, she was not having a sexual relationship with anyone but the petitioner (cf. Matter of Oscar X.F. v. Ileana R.H., 107 AD3d 795, 796; Matter of Derrick H. v. Martha J., 82 AD3d 1236, 1238). The Family Court found the petitioner to be "less than credible," but did not find the respondent to be "lacking any credibility." In addition, the Family Court did not credit the petitioner's testimony as to the information he received from his coworkers, one of whom was his current girlfriend. Since these credibility findings are not clearly unsupported by the record, they are entitled to considerable deference (*see Matter of Andrew B. [Deborah B.]*, 73 AD3d 1036, 1036; *cf. Matter of Derrick H. v. Martha J.*, 82 AD3d at 1238).

I do not read the decisions of the Appellate Division, Third Department, in Matter of Gutierrez v. Gutierrez-Delgado (33 AD3d 1133) and Prowda v. Wilner (217 A.D.2d 287) as standing for the proposition that a party seeking to vacate an AOP more than 60 days after its execution need only articulate some basis, or a nonfrivolous controversy, as to paternity in order to vacate the AOP and obtain DNA or genetic marker testing. Indeed, an AOP was not even at issue in those cases. In Gutierrez, the respondent sought an order directing the release of the results of private DNA testing that had already been conducted. No party was seeking to vacate an AOP more than 60 days after its execution and, thus, Family Court Act § 516-a(b)(ii) was not at issue in the case. In Prowda, a divorce action, the defendant moved for a blood-grouping test pursuant to Family Court Act § 418(a) to determine the subject child's paternity. The Third Department addressed the issue of whether the requested testing should be ordered in light of the presumption of legitimacy of a child born to a married woman. In its decision, the Third Department never mentioned Family Court Act § 516-a(b)(ii), or the standard of proof required to vacate an AOP more than 60 days after its execution. According to the plain language of Family Court Act § 516–a(b)(ii), the statute requires proof of fraud, duress, or material mistake of fact, not the mere articulation of some basis for nonpaternity. If the Legislature had intended the mere articulation of some basis for nonpaternity to be sufficient to vacate an AOP more than 60 days after its execution, it would not have required a petitioner to prove fraud, duress, or material mistake of fact in order to achieve that end.

*5 Here, the petitioner was required to prove

that he executed the AOP based on a material mistake of fact. This he failed to do. According to the petitioner's own testimony, prior to signing the AOP, he was told by the respondent that she had other sexual partners during the relevant time period. Thus, the petitioner failed to prove that he signed the AOP under the mistaken belief that he was the only possible biological father of the child (cf. Matter of Oscar X.F. v. Ileana R.H., 107 AD3d at 796; Matter of Derrick H. v. Martha J., 82 AD3d at 1237–1238). While the petitioner may have raised a nonfrivolous controversy as to paternity, this was insufficient to satisfy the petitioner's burden of proof under Family Court Act § 516–a(b)(ii).

Since the petitioner failed to prove that his execution of the AOP was based on "fraud, duress, or material mistake of fact" (Family Ct Act § 516–a[b] [ii]), the Family Court properly denied his request for DNA or genetic marker testing (see Matter of Miskiewicz v. Griffin, 41 AD3d 853, 854; Matter of Westchester County Dept. of Social Servs. v. Robert W.R., 25 AD3d 62, 70; see also Matter of Demetrius H. v. Mikhaila C.M., 35 AD3d 1215, 1216). Accordingly, in my view, the order appealed from should be affirmed.

N.Y.A.D. 2 Dept.,2013. Sidney W. v. Chanta J. --- N.Y.S.2d ----, 2013 WL 6801059 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08645

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--- N.Y.S.2d ----, 2013 WL 6641279 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08404

(Cite as: 2013 WL 6641279 (N.Y.A.D. 2 Dept.))

Supreme Court, Appellate Division, Second Department, New York. Jacqueline EL–DEHDAN, respondent,

Salim EL-DEHDAN, also known as Sam Reed, appellant.

Dec. 18, 2013.

Background: In a matrimonial action in which the parties were divorced, husband appealed from an order of the Supreme Court, Kings County, Eric I. Prus, J., which granted wife's motion to reject a report of Charmaine E. Henderson, Ct. Atty. Ref., and granted wife's motion to hold husband in civil contempt of court.

Holdings: The Supreme Court, Appellate Division, Angiolillo, J., held that:

- (1) wife met her burden to establish that husband was fully aware of court order and disobeyed it while having full knowledge of its terms;
- (2) husband failed to establish his defense of an inability to make payment required by court order;
- (3) husband's invocation of his privilege against self-incrimination did not relieve him of burden to support his defense with evidence;
- (4) statutory precondition of exhaustion of other, less drastic enforcement mechanisms applied; and
- (5) wife satisfied exhaustion precondition with evidence that less drastic enforcement measures would have been ineffectual.

Affirmed.

West Headnotes

[1] Contempt 93 🖘 0

93 Contempt

A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence.

[2] Contempt 93 @==0

93 Contempt

An order of civil contempt must include an express finding that the element that a right or remedy of a party to a civil action or special proceeding pending in the court may be defeated, impaired, impeded, or prejudiced has been satisfied, but an omission of the finding may be supplied on appeal where the record supports it. McKinney's Judiciary Law § 753(A).

[3] Contempt 93 @---0

93 Contempt

The element of prejudice to a party's rights is essential to civil contempt, which aims to vindicate the rights of a private party to litigation, but not criminal contempt, which aims to vindicate the authority of the court. McKinney's Judiciary Law § 753(A).

[4] Contempt 93 © 0

93 Contempt

For a plaintiff to prevail on her motion to hold a defendant in civil contempt, she must prove by clear and convincing evidence: (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms; and (3) that the movant was prejudiced by the offending conduct. McKinney's Judiciary Law § 753(A).

[5] Contempt 93 € → 0

93 Contempt

For civil contempt, it is not necessary that the disobedience of a court order be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes, or

prejudices the rights or remedies of a party. McKinney's Judiciary Law § 753(A).

[6] Contempt 93 🖘 0

93 Contempt

Civil contempt cannot be founded upon an inadvertent or mistaken failure to comply with a court order, since it is the movant's burden to establish that the court's mandate was clear and unequivocal. McKinney's Judiciary Law § 753(A).

[7] Contempt 93 🗫 0

93 Contempt

Due process requires that, in contempt proceedings, the contemnor be afforded an opportunity to be heard at a meaningful time and in a meaningful manner. U.S.C.A. Const.Amend. 14.

[8] Contempt 93 € → 0

93 Contempt

Once the movant for holding a party in civil contempt establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order; a hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense. McKinney's Judiciary Law § 753(A).

[9] Contempt 93 @== 0

93 Contempt

In matrimonial action in which the parties were divorced, wife was not required, in support of her motion to hold husband in civil contempt for disobeying court order that required him to deposit with wife's attorney the proceeds of a real estate transaction, to show that husband still possessed the proceeds from the real estate transaction, and instead, wife had only to establish by clear and convincing evidence that husband was fully aware of court order and disobeyed that order, while

having full knowledge of its terms, resulting in prejudice to wife, so as to shift the burden to husband to offer competent, credible evidence of his inability to pay the sum of money as ordered. McKinney's Judiciary Law § 753(A).

[10] Contempt 93 🗫 0

93 Contempt

In matrimonial action in which the parties were divorced, wife met her burden to support her motion to hold husband in civil contempt for disobeying court order that required him to deposit with wife's attorney the proceeds of a real estate transaction, by establishing, by clear convincing evidence, that husband was fully aware of court order and disobeyed that order, while having full knowledge of its terms, resulting in prejudice to wife, so as to shift the burden to husband to offer competent, credible evidence of his inability to pay the sum of money as ordered; husband conceded at contempt hearing that he received the court order and failed to deposit any money with wife's attorney pursuant to the order. McKinney's Judiciary Law § 753(A).

[11] Contempt 93 🗫 0

93 Contempt

In proceedings on wife's motion to hold husband in civil contempt for disobeying court order in matrimonial action that required him to deposit with wife's attorney the proceeds of a real estate transaction, after wife established that husband was aware of court order and disobeyed it with full knowledge of its terms, so as to shift burden to husband to offer evidence of a defense, husband failed to establish his defense of an inability to pay; husband submitted affidavit stating he no longer possessed the proceeds of the transaction, but he refused to answer questions regarding location of proceeds by invoking privilege against self-incrimination, and otherwise failed to present any evidence in support of his contention that he was unable to deposit the necessary sum of money. U.S.C.A. Const.Amend. 5

; McKinney's Judiciary Law § 753(A).

[12] Contempt 93 🖘 0

93 Contempt

Generally, conclusory, baseless, and self-serving allegations are insufficient to raise an issue of fact necessitating a hearing on a contempt motion. McKinney's Judiciary Law § 753(A).

[13] Contempt 93 🖘 0

93 Contempt

In proceedings on wife's motion to hold husband in civil contempt for disobeying court order in matrimonial action that required him to deposit with wife's attorney the proceeds of a real estate transaction, after wife established that husband was aware of court order and disobeyed it with full knowledge of its terms, so as to shift burden to husband to offer evidence of a defense, husband's invocation of his privilege against selfincrimination in response to questions regarding the location of the proceeds of the real estate transaction did not relieve him of the obligation of coming forward with evidence in support his defense of an inability to pay the sum required by the court order. U.S.C.A. Const.Amend. 5; McKinney's Judiciary Law § 753(A).

[14] Constitutional Law 92 © 0

92 Constitutional Law

The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. U.S.C.A. Const.Amend. 5.

[15] Constitutional Law 92 © 0

92 Constitutional Law

Unlike the rule in a criminal case, a party's invocation of the privilege against self-incrimination in a civil case may be considered by the finder of the facts in assessing the strength of the evidence offered by the opposing party on the issue which the witness was in a position to

controvert, U.S.C.A. Const. Amend. 5.

[16] Constitutional Law 92 © 0

92 Constitutional Law

Although a defendant in an ongoing criminal prosecution faces a dilemma whether to defend a civil proceeding involving the same subject matter or to assert the Fifth Amendment privilege, a court need not permit a defendant to avoid this difficulty by staying a civil action until a pending criminal prosecution has been terminated, and the fact that the witness may invoke the privilege against self-incrimination is not a basis for precluding civil discovery. U.S.C.A. Const.Amend. 5.

[17] Constitutional Law 92 © 0

92 Constitutional Law

In a federal civil contempt proceeding based on a defendant's failure to produce records or property, where the defendant validly invokes the privilege against self-incrimination in answer to questions concerning the whereabouts of the records or property allegedly in his possession, invocation of the privilege does not relieve him of his burden to demonstrate a present inability to comply with the court order. U.S.C.A. Const.Amend. 5.

[18] Constitutional Law 92 © 0

92 Constitutional Law

While a party to a civil action may not be compelled to answer questions that might adversely affect his or her criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence. U.S.C.A. Const.Amend. 5.

[19] Contempt 93 🗫 0

93 Contempt

In a criminal contempt proceeding, in which willful disobedience is an element, the court may not base a finding of willfulness solely upon the

defendant's justified invocation of the privilege against self-incrimination, absent any other evidence of willfulness. U.S.C.A. Const.Amend. 5.

[20] Contempt 93 © 0

93 Contempt

Where evidence in the record supports a civil contempt finding, which is not based solely upon the invocation of the privilege against self-incrimination, and the defendant has failed to meet his or her burden of proof, the order will be upheld. U.S.C.A. Const.Amend. 5; McKinney's Judiciary Law § 753(A).

[21] Contempt 93 @---0

93 Contempt

In proceedings on wife's motion to hold husband in civil contempt for disobeying court order in matrimonial action that required him to deposit with wife's attorney the proceeds of a real estate transaction, the statutory precondition of exhaustion of other, less drastic enforcement mechanisms before a party in a divorce action could seek a civil contempt order for nonpayment of "any sum of money" applied, even though the alleged contempt did not involve nonpayment of maintenance or child support, where wife moved to hold husband in civil contempt for failure to pay a sum of money in lieu of real property awarded to the plaintiff in an order of equitable distribution. McKinney's DRL § 245; McKinney's Judiciary Law § 753(A).

[22] Contempt 93 🖘 0

93 Contempt

In proceedings on wife's motion to hold husband in civil contempt for disobeying court order in matrimonial action that required him to deposit with wife's attorney the proceeds of a real estate transaction, wife satisfied the statutory precondition of exhaustion of other, less drastic enforcement mechanisms with evidence demonstrating that less drastic enforcement

measures would have been ineffectual; wife submitted extensive evidence demonstrating husband's pattern of divesting himself of his assets during the course of earlier divorce litigation and during the present litigation, as a result of which husband no longer held assets in his name against which execution could be obtained. McKinney's DRL § 245; McKinney's Judiciary Law § 753(A).

Appeal by the defendant, in a matrimonial action in which the parties were divorced by judgment dated March 8, 2011, from an order of the Supreme Court (Eric I. Prus, J.), dated September 12, 2011, and entered in Kings County, which granted the plaintiff's motion to reject a referee's report (Charmaine E. Henderson, Ct. Atty. Ref.), dated May 24, 2011, made after a hearing, and, in effect, granted that branch of the plaintiff's separate motion which was to hold the defendant in civil contempt of court for failing to comply with the terms of an order of the same court dated January 29, 2010.Barket Marion Epstein & Kearon, LLC, Garden City, N.Y. (Bruce A. Barket and Brad A. Schlossberg of counsel), for appellant.

Alomar & Associates, P.C., Ridgewood, N.Y. (Karina E. Alomar of counsel), for respondent.

PETER B. SKELOS, J.P., DANIEL D. ANGIOLILLO, JOHN M. LEVENTHAL, and CHERYL E. CHAMBERS, JJ.

ANGIOLILLO, J.

*1 In this matrimonial action, the Supreme Court held the defendant in contempt of court for disobeying a court order dated January 29, 2010, which required him to deposit with the plaintiff's attorney the proceeds of a certain real estate transaction and imposed a civil sanction which allowed him to purge the contempt to avoid incarceration. The defendant appeals, contending that the plaintiff failed to satisfy her burden of proof and that the Supreme Court improperly drew an adverse inference against him for invoking his

privilege against self-incrimination during the contempt hearing. In addressing these contentions, we take this opportunity to clarify the parties' relative burdens of proof where the alleged contemnor has invoked the constitutional privilege against self-incrimination, and to harmonize inconsistencies in the case law with respect to the elements of civil contempt. We conclude that the defendant's contentions are without merit and affirm the order holding him in contempt.

The parties were married in Lebanon in 1982 and have two adult children. Throughout their lengthy marriage, the parties acquired substantial marital property and had a dry cleaning business. Two parcels of real property are relevant to the issues in this appeal: a parcel on Ainslie Street in Brooklyn (hereinafter the Brooklyn property), and a parcel on 60th Road in Maspeth, Queens (hereinafter the Queens property).

In 2008, the plaintiff commenced this action and moved for pendente lite relief. The defendant cross-moved to dismiss the action on the ground of res judicata based on a judgment entered in Lebanon in 2000 and a Kings County divorce action allegedly dismissed with prejudice in 2001. At a hearing on February 4, 2009, the Supreme Court informed the defendant that, regardless of its ultimate determination on the validity of the Lebanese divorce, that judgment did not resolve issues of equitable distribution, which would be submitted to a referee for an evidentiary hearing. Shortly thereafter, unbeknownst to the court or the plaintiff, the defendant transferred ownership of the two subject parcels of real property. On February 24, 2009, the defendant entered into a contract to sell the Brooklyn property for \$950,000 to Zackmaxie, LLC (hereinafter Zackmaxie), and the transfer was completed by deed dated March 31, 2009 (hereinafter the March 2009 transfer). On April 6, 2009, he transferred the Queens property by deed to Mustafa Othman, apparently without consideration (hereinafter the April 2009 transfer).

Thereafter, when the defendant failed to appear

for further proceedings, the court denied his motion to dismiss and referred the matter to the referee for an inquest on the grounds for divorce and equitable distribution. Prior to the inquest, an Internet search conducted by the plaintiff's attorney failed to reveal either the March 2009 transfer or the April 2009 transfer. The defendant failed to appear at the inquest, which went forward without him.

*2 On December 4, 2009, the referee issued findings of fact and a determination which awarded the plaintiff a divorce on the ground of cruel and inhuman treatment and provided for equitable distribution, awarding her, among other things, the Brooklyn and Queens properties. Shortly thereafter, the plaintiff learned of the March 2009 transfer and the April 2009 transfer. On January 29, 2010, on the plaintiff's motion, the Supreme Court issued an order (hereinafter the January 2010 Order), which directed the defendant to "deposit immediately" with the plaintiff's attorney the net proceeds of the March 2009 transfer, that is, "the sum of nine hundred fifty thousand (\$950,000.00) dollars ..., minus the money paid for real estate broker, transfer taxes and payment of the underlying mortgage." It is undisputed that the defendant failed to deposit the proceeds of the March 2009 transfer with the plaintiff's attorney. In August 2010, the plaintiff moved to hold the defendant in civil and criminal contempt for violating the January 2010 Order.

In determining the contempt motion, the Supreme Court considered, among other things, the plaintiff's testimony at the inquest, documents, and exhibits which established the following. The parties initially acquired the Brooklyn property as tenants by the entirety in 1989; they satisfied the first mortgage in 1997; the defendant forged the plaintiff's signature and transferred the property to himself alone in 1998; the defendant transferred the property to his sister and nephew in 1999; the sister and nephew transferred it back to the defendant in 2002; the defendant executed a deed from himself, as "Salim Dahdan," to himself, as "Sam Reed," in

2003; he obtained a \$250,000 mortgage loan from Emigrant Mortgage Company, Inc., in 2007; and the final tax assessment roll for 2009 listed the defendant as the owner. The defendant acquired the Queens property in his name alone in 1999; he executed a deed from himself, as "Salim Dahdan," to himself, as "Sam Reed," in 2003; and the final tax assessment roll for 2009 listed Mustafa Othman as the owner.

With respect to the March 2009 transfer of the Brooklyn property, the closing statement of the purchaser's attorney, dated March 31, 2009, showed that the defendant received net proceeds in the sum of \$776,046.21, comprising the initial down payment of \$150,000, a subsequent down payment of \$110,000, and a wire transfer of \$516,046 .21, representing the balance due after other deductions and credits, including a mortgage payoff of \$247,590.79 to Emigrant Mortgage Company, Inc. A handwritten notation in the margin next to the wire transfer stated, "Sam Reed, To Account Washington Mutual, 4894318637, 3/31/09." The deed was recorded on June 3, 2009, but a computer printout from the New York City Automated City Register Information System (ACRIS) had no record of a satisfaction of mortgage. On June 16, 2009, the new owner, Zackmaxie, obtained a mortgage loan from Signature Bank for \$675,000, which was not recorded until October 29, 2009, 20 days after the inquest on the issue of equitable distribution was conducted. A representative of Zackmaxie informed the plaintiff's attorney that the balance due for the March 2009 transfer was not paid to the defendant until Zackmaxie obtained the new mortgage loan in June 2009.

*3 In opposition to the plaintiff's motion to hold him in contempt, the defendant submitted an affidavit, in which he averred that he no longer possessed the proceeds of the March 2009 transfer.

On February 4, 2011, at the contempt hearing before the referee who was appointed to hear the issue, the defendant conceded that he had received a copy of the January 2010 Order and that he had

not deposited any money with the plaintiff's attorney pursuant to that order. He stipulated to the admission into evidence of all relevant documents and evidence concerning the Brooklyn property and the March 2009 transfer, including the closing statement. The defendant invoked his constitutional privilege against self-incrimination in response to all questions relating to the proceeds of the March 2009 transfer, and whether he owned an account at Washington Mutual.

The referee made findings that the defendant had dissipated marital assets and may have transferred assets without fair consideration after plaintiff commenced this action. recommended denial of the motion on the ground that the plaintiff had failed to meet her burden of establishing either civil or criminal contempt. In an order dated September 12, 2011, the Supreme Court granted the plaintiff's motion to set aside the referee's report and recommendation, determining that the referee's findings were not supported by the record and that the defendant was in contempt of court by failing to abide by the terms of the January 2010 Order. The court found that the requirements to hold the defendant in civil contempt had been satisfied because the defendant was aware of the lawful and unequivocal requirements of the January 2010 Order, and disobeyed that order with full knowledge of its terms. The court also noted that while the defendant was entitled to rely upon his constitutional privilege against self-incrimination in response to questions relating to the proceeds of the March 2009 transfer, the privilege did not protect him from the consequences of his failure to submit competent proof that he had no access to the proceeds. The court directed that the defendant could purge his contempt and avoid imprisonment by complying with certain conditions, including the payment of the proceeds from the March 2009 transfer. The court did not impose the criminal sanction of a definite jail term without the opportunity to purge the contempt, thus granting, in effect, only that branch of the plaintiff's motion which was to find the defendant in civil contempt (see Matter of Rubackin v. Rubackin, 62 A.D.3d 11, 15–16, 875 N.Y.S.2d 90). Thus, we now turn to an analysis of the elements and burden of proof on a civil contempt motion to determine if the plaintiff met her burden with respect to that branch of her motion.

The Elements of Civil Contempt and the Burden of Proof

The defendant contends that the plaintiff failed to satisfy her burden of establishing civil contempt because the March 2009 transfer did not violate any court order and the plaintiff failed to adduce evidence that the defendant still possessed the proceeds of the March 2009 transfer when he received the January 2010 Order, such that he had the ability to comply. The plaintiff responds that she made a prima facie showing satisfying all elements of civil contempt, at which point the burden shifted to the defendant to show his inability to comply with the January 2010 Order, and that he failed to meet that burden.

*4 [1] "A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence" (Matter of Hughes v. Kameneva, 96 A.D.3d 845, 846, 946 N.Y.S.2d 211; see Educational Reading Aids Corp. v. Young, 175 A.D.2d 152, 572 N.Y.S.2d 39). In Matter of McCormick v. Axelrod (59 N.Y.2d 574, 466 N.Y.S.2d 279, 453 N.E.2d 508), the Court of Appeals held that the civil contempt must be proved "with reasonable certainty" (id. at 583, 466 N.Y.S.2d 279, 453 N.E.2d 508). The "reasonable certainty" standard requires "a quantum of proof ... greater than a preponderance of evidence but less than proof beyond a reasonable doubt ... akin to the clear and convincing evidence standard" (Kihl v. Pfeffer, 47 A.D.3d 154, 163–164, 848 N.Y.S.2d 200).

In addressing the elements of civil contempt which must be proved by clear and convincing evidence, we are guided by the statutory source of judicial authority to punish for contempt, set forth in Judiciary Law § § 750, et seq. The section applicable to civil contempt permits a court "to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court be defeated, impaired, impeded, prejudiced," in various circumstances including, as relevant here, "any other disobedience to a lawful mandate of the court" (Judiciary Law § 753[A][3]). By contrast, a court may impose punishment for criminal contempt where a person is guilty of "[w]ilful disobedience to [the court's] lawful mandate" or "[r]esistance wilfully offered to [the court's] lawful mandate" (Judiciary Law FN1 750[A][3], [4]).¹

[2][3] Notably, for civil but not criminal contempt, there must be a finding that a "right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced" (Judiciary Law § 753[A]). An order of civil contempt must include an express finding that this element has been satisfied (see Stempler v. Stempler, 200 A.D.2d 733, 734, 607 N.Y.S.2d 111), but an omission of the finding may be supplied on appeal where the record supports it (see Taylor v. Taylor, 83 A.D.3d 815, 817, 920 N.Y.S.2d 419; Biggio v. Biggio, 41 A.D.3d 753, 839 N.Y.S.2d 527; Lopez v. Ajose, 33 A.D.3d 976, 977, 824 N.Y.S.2d 113). The element of prejudice to a party's rights is essential to civil contempt, which aims to vindicate the rights of a private party to litigation, but not criminal contempt, which aims to vindicate the authority of the court (see McCain v. Dinkins, 84 N.Y.2d 216, 226, 616 N.Y.S.2d 335, 639 N.E.2d 1132; Town Bd. of Town of Southampton v. R.K.B. Realty, LLC, 91 A.D.3d 628, 629, 936 N.Y.S.2d 228; Dalessio v. Kressler, 6 A.D.3d 57, 65–66, 773 N.Y.S.2d 434).

Another notable distinction between the two kinds of contempt is that subdivision (3) of the civil contempt statute, at issue here, does not include the words "wilful" and "wilfully," which are included

in the criminal contempt statute (compare Judiciary Law § 753[A][3] with § 750[A][3], [4]). FN2 In 1983, in McCormick, the Court of Appeals opined that, "[a]lthough the line between the two types of contempt may be difficult to draw in a given case, and the same act may be punishable as both a civil and a criminal contempt, the element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out" (McCormick, 59 N.Y.2d at 583, 466 N.Y.S.2d 279, 453 N.E.2d 508 [emphasis added]). The wording of this formulation is subject to various interpretations. It might suggest that, while willfulness is an element of criminal contempt only, the willfulness must rise to a certain "level" in order to be punishable by a penal sanction. The language might also suggest that a lower "level" of willfulness is an element of civil contempt, while a higher "level" is an element of criminal contempt.

*5 In context, however, it appears that the Court was opining, consistent with statutory language, that willfulness was only an element of criminal contempt. First, in support of the statement, the Court cited Judiciary Law § 750(A)(3) and § 753(A)(3), as well as a decision of the Appellate Division, First Department, which held that, "without a finding of willful disobedience, the alleged contempt must be considered to have been civil in nature" (Matter of Sentry Armored Courier Corp. v. New York City Off-Track Betting Corp., 75 A.D.2d 344, 345, 429 N.Y.S.2d 902). Second, the Court noted that the record before it in McCormick did not support a finding of willfulness and that its further discussion would be limited to the elements of civil contempt (see McCormick, 59 N.Y.2d at 583, 466 N.Y.S.2d 279, 453 N.E.2d 508). And finally, the Court set forth the elements of civil contempt without including any element of willfulness:

"In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed. Moreover, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party. Finally, prejudice to the right of a party to the litigation must be demonstrated" (*id.* at 583, 466 N.Y.S.2d 279, 453 N.E.2d 508 [citations omitted]).

More than a decade later, in McCain v. Dinkins (84 N.Y.2d 216, 616 N.Y.S.2d 335, 639 N.E.2d 1132), the Court of Appeals again opined that "the element which escalates a contempt to criminal status is the level of willfulness associated with the conduct" (id. at 226, 616 N.Y.S.2d 335, 639 N.E.2d 1132 [emphasis added]; see also Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y., 70 N.Y.2d 233, 240, 519 N.Y.S.2d 539, 513 N.E.2d 706). However, the Court expressly noted in McCain that "criminal contempt was not sought and [was] not in issue," and again set forth the elements of civil contempt without including any reference to willfulness (McCain, 84 N.Y.2d at 226, 616 N.Y.S.2d 335, 639 N.E.2d 1132). Thus, taken in context, the language used in McCormick and McCain apparently was not intended to imply, contrary to the language of Judiciary Law § 753(A)(3), that some lower "level of willfulness" was an element of civil contempt.

Prior to *McCormick*, cases from this Court involving civil contempt consistently excluded any mention of willfulness. "Intent or willfulness is not required to hold a party in contempt for disobeying a court order or subpoena" (*Yalkowsky v. Yalkowsky*, 93 A.D.2d 834, 835, 461 N.Y.S.2d 54; see *McNulty v. McNulty*, 81 A.D.2d 581, 437 N.Y.S.2d 438; *Great Neck Pennysaver v. Central Nassau Publs.*, 65 A.D.2d 616, 409 N.Y.S.2d 544). These cases explained that " '[i]t is not necessary that such disobedience be deliberate; rather the mere act of disobedience, regardless of its motive, is sufficient to sustain a finding of civil contempt if

such disobedience defeats, impairs, impedes or prejudices the rights of a party' " (*Yalkowsky v. Yalkowsky*, 93 A.D.2d at 835, 461 N.Y.S.2d 54, quoting *Great Neck Pennysaver v. Central Nassau Publs.*, 65 A.D.2d at 616–617, 409 N.Y.S.2d 544; *see McNulty v. McNulty*, 81 A.D.2d at 582, 437 N.Y.S.2d 438).

*6 Subsequent to McCormick, one line of cases from this Court continued to hold that willfulness was not an element of civil contempt, using language similar to that employed in Yalkowsky (see e.g. Gomes v. Gomes, 106 A.D.3d 868, 869, 965 N.Y.S.2d 187; Matter of Philie v. Singer, 79 A.D.3d 1041, 1042, 913 N.Y.S.2d 745; Bais Yoel Ohel Feige v. Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc., 78 A.D.3d 626, 910 N.Y.S.2d 174; Incorporated Vil. of Plandome Manor v. Ioannou, 54 A.D.3d 365, 366, 862 N.Y.S.2d 592; Hinkson v. Daughtry-Hinkson, 31 A.D.3d 608, 819 N.Y.S.2d 535; Italian Am. Civic Assn. of Mineola, N.Y. v. Cataldo, 225 A.D.2d 733, 733-734, 639 N.Y.S.2d 944 ["willfulness is not an element of civil contempt"]; Jim Walter Doors v. Greenburg, 151 A.D.2d 550, 551, 542 N.Y.S.2d 324; Gordon v. Janover, 121 A.D.2d 599, 600, 503 N.Y.S.2d 860). Consistent with this line of cases, we have held that the three elements of civil contempt are "(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct" (Bernard-Cadet v. Gobin, 94 A.D.3d 1030, 1031, 943 N.Y.S.2d 164; see e.g. Rose v. Levine, 84 A.D.3d 1206, 1207, 923 N.Y.S.2d 689; Alderman v. Alderman, 78 A.D.3d 620, 909 N.Y.S.2d 916; Town of Riverhead v. T.S. Haulers, Inc. 68 A.D.3d 1103, 890 N.Y.S.2d 332; Coyle v. Coyle, 63 A.D.3d 657, 658, 882 N.Y.S.2d 423; Galanos v. Galanos, 46 A.D.3d 507, 846 N.Y.S.2d 654).

However, another line of cases developed after *McCormick*, which held: "To prevail on a motion to punish a party for civil contempt, the movant must

demonstrate that the party charged with contempt willfully violated a clear and unequivocal mandate of a court's order, with knowledge of that order's terms, thereby prejudicing the movant's rights" (Suiss v. Baron, 107 A.D.3d 690, 690-691, 966 N.Y.S.2d 481[emphasis added; internal quotation marks omitted]; see e.g. GMCK Realty, LLC v. Mihalatos, 95 A.D.3d 947, 949, 944 N.Y.S.2d 220; Collins v. Telcoa Intl. Corp., 86 A.D.3d 549, 549, 927 N.Y.S.2d 151 [the violation must be "willful and deliberate"]; McGrath v. McGrath, 85 A.D.3d 742, 924 N.Y.S.2d 805; Rubin v. Rubin, 78 A.D.3d 812, 813, 911 N.Y.S.2d 384; Katz v. Katz, 73 A.D.3d 1134, 1134, 900 N.Y.S.2d 891 ["the movant must establish that the alleged violation was willful"]; see also Town Bd. of Town of Southhampton v. R.K.B. Realty, LLC, 91 A.D.3d at 629, 936 N.Y.S.2d 228 [noting that the difference between civil and criminal contempt is "the degree of willfulness of the subject conduct" ([internal quotation marks omitted)]).

This development in the case law is apparently explained by the divergent interpretations of the language in McCormick and McCain, one of which ascribes an undefined "level of willfulness" to civil contempt. One critic of the language in McCormick has noted this interpretation and posed the rhetorical question, "How can one be more or less willful than willful?" (Lawrence N. Gray, Criminal and Civil Contempt Second Edition, § 1.21 at 94-95; [2012]). The answer might lie in the many ways in which the term is used in the law, leading to a perception that different "levels" of willfulness do, indeed, exist. The United States Supreme Court has noted that "[t]he word 'willfully' is sometimes said to be a word of many meanings whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct" (Bryan v. United States, 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 [internal quotation marks and citation omitted]). "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, [or] perversely" (*id.* at n. 12 [internal quotation marks and citations omitted]). Indeed, English language dictionaries usually show at least two meanings of the word "willful" similar to these: (1) deliberate and intentional, and (2) obstinately or perversely self-willed (*see, e.g.* merriam-webster.com; oxforddictionaries.com; dictionary.com).

*7 Moreover, neither the Judiciary Law nor the case law offers a definition of the term "willful." Black's Law Dictionary (9th ed 2009) defines "willful" as "[v]oluntary and intentional, but not necessarily malicious." A comparison of criminal contempt under the Judiciary Law and the analogous crime under the Penal Law would suggest that "willful" should be defined as "intentional," the mental state applicable to the Penal Law offense. Criminal contempt in the second degree is defined, inter alia, "[i]ntentional disobedience or resistance to the lawful process or other mandate of a court" (Penal Law § 215.50[3]). "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his [or her] conscious objective is to cause such result or to engage in such conduct" (Penal Law § 15.05[1]). Criminal contempt under the Judiciary Law and the Penal Law are both offenses against the authority of the court (cf. People v. Post Std. Co., 13 N.Y.2d 185, 245 N.Y.S.2d 377, 195 N.E.2d 48 [by analogy to the Judiciary Law, the Court implied an intent to defy the dignity and authority of the court in a criminal contempt prosecution under former Penal Law § 600(7), charging the publication of a false report of the proceedings]). By analogy, then, the term "wilful" in the criminal contempt statute, Judiciary Law § 750(A)(3), is best defined as "intentional."

The absence of the term "wilful" from paragraph (3) of the civil contempt statute, authorizing sanctions "for any other disobedience

to a lawful mandate of the court" (Judiciary Law § 753[A][3]), indicates that the legislature, by inference, intentionally omitted or excluded the requirement of willfulness (see Trotta v. Ollivier, 91 A.D.3d 8, 14, 933 N.Y.S.2d 66; McKinney's Cons Laws of NY, Book 1, Statutes § 240). This construction is buttressed when paragraph (3) is read together with its preamble, which authorizes the court "to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding ... may be defeated, impaired, impeded, or prejudiced" (Judiciary Law § 753[A]). A mere "neglect ... of duty" does not require willfulness. Nor does the term "disobedience" in paragraph (3) import an element of willfulness. "Disobedience" is not defined in the Judiciary Law, in Black's Law Dictionary, or in case law from this Court. While there are various definitions of this word in English language dictionaries, some of them, such as "lack obedience" of (merriam-webster.com; dictionary.com) "failure to obey" and (merriam-webster.com; oxforddictionaries.com), do not imply willfulness, and are consistent with the statutory language "neglect ... of duty" (Judiciary Law § 753[A]). Moreover, our cases have found "disobedience" to be established without regard to the motive of the contemnor, based upon both a volitional act (e.g. Goldsmith v. Goldsmith, 261 A.D.2d 576, 690 N.Y.S.2d 696 [contemnor executed a confession of judgment in favor of a friend in violation of a restraining order prohibiting the transfer of any assets]), and a failure to act (e.g. Hinkson v. Daughtry-Hinkson, 31 A.D.3d at 608, 819 N.Y.S.2d 535 [failure to transfer an interest in property "constituted disobedience"]; see also Riverside Capital Advisors, Inc. v. First Secured Capital Corp., 28 A.D.3d 455, 456, 811 N.Y.S.2d 592 ["inaction" violated an "explicit directive" in a court order]).

*8 [4][5] Accordingly, we conclude that, for the plaintiff to prevail on her motion to hold the defendant in civil contempt, she was required to prove by clear and convincing evidence "(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct" (Bernard-Cadet v. Gobin, 94 A.D.3d at 1031, 943 N.Y.S.2d 164; see Alderman v. Alderman, 78 A.D.3d at 620, 909 N.Y.S.2d 916; Galanos v. Galanos, 46 A.D.3d at 508, 846 N.Y.S.2d 654). The use of the words "willful" and "willfully" in some of our cases involving civil contempt (e.g. Suiss v. Baron, 107 AD3d at 690; GMCK Realty, LLC v. Mihalatos, 95 A.D.3d at 949, 944 N.Y.S.2d 220; Collins v. Telcoa Intl. Corp., 86 A.D.3d at 549, 927 N.Y.S.2d 151; McGrath v. McGrath, 85 A.D.3d at 742, 924 N.Y.S.2d 805; Rubin v. Rubin, 78 A.D.3d at 813, 911 N.Y.S.2d 384; Katz v. Katz, 73 A.D.3d at 1134, 900 N.Y.S.2d 891), should not be construed to import the element of willfulness into a civil contempt motion made pursuant to Judiciary Law § 753(A)(3). "It is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes, or prejudices the rights or remedies of a party" (Gomes v. Gomes, 106 A.D.3d at 869, 965 N.Y.S.2d 187 [citations and internal quotation marks omitted]).

[6][7][8] The absence of willfulness from this formulation does not result in strict liability, since the proponent of a civil contempt motion must establish the contemnor's failure to comply with a court order with knowledge of its terms. Nor can civil contempt be founded upon an inadvertent or mistaken failure to comply with a court order since it is the movant's burden to establish that the court's mandate was clear and unequivocal (see Bennet v. Liberty Lines Tr., Inc., 106 A.D.3d 1038, 1040, 967 N.Y.S.2d 390 [the movant failed to establish disobedience where there was a dispute as to the interpretation of the order]; Massimi v. Massimi, 56 A.D.3d 624, 625, 869 N.Y.S.2d 558 [movant failed to meet burden because the order was not clear and

unequivocal]). Moreover, the movant's preliminary evidentiary showing of the elements of civil contempt does not end the inquiry. "[D]ue process requires that, in contempt proceedings, the contemnor be afforded an opportunity to be heard at a meaningful time and in a meaningful manner" (Delijani v. Delijani, 73 A.D.3d 972, 973, 901 N.Y.S.2d 366 [internal quotation marks omitted]). Once the movant establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order (see Yeager v. Yeager, 38 A.D.3d 534, 831 N.Y.S.2d 496; Goldsmith v. Goldsmith, 261 A.D.2d at 577, 690 N.Y.S.2d 696). A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense (see Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc., 50 A.D.3d 1073, 1074, 857 N.Y.S.2d 229; Jaffe v. Jaffe, 44 A.D.3d 825, 844 N.Y.S.2d 97; Matter of Garbitelli v. Broyles, 257 A.D.2d 621, 622, 684 N.Y.S.2d 292; Bowie v. Bowie, 182 A.D.2d 1049, 1050, 583 N.Y.S.2d 54).

*9 [9][10] Here, the plaintiff met her burden of establishing, by clear and convincing evidence, that the defendant was fully aware of the January 2010 Order, which was a lawful and unequivocal mandate of the court, and that he disobeyed that mandate, while having full knowledge of its terms, resulting in prejudice to the plaintiff, who was denied the equitable distribution of marital property (see Bais Yoel Ohel Feige v. Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc., 78 A.D.3d 626, 910 N.Y.S.2d 174; Raphael v. Raphael, 20 A.D.3d 463, 464, 799 N.Y.S.2d 108; Goldsmith v. Goldsmith, 261 A.D.2d at 576, 690 N.Y.S.2d 696). Notably, at the contempt hearing, the defendant conceded that he received the January 2010 Order and failed to deposit any money with the plaintiff's attorney pursuant to the order; these concessions established his knowing disobedience of the order (see Bais Yoel Ohel Feige v. Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc., 78 A.D.3d at 626–627, 910 N.Y.S.2d 174; Hinkson v. Daughtry–Hinkson, 31 A.D.3d at 608, 819 N.Y.S.2d 535; Goldsmith v. Goldsmith, 261 A.D.2d at 577, 690 N.Y.S.2d 696).

Contrary to the defendant's contention, the fact that he did not disobey an express order of the court in March 2009 when he transferred the Brooklyn property is irrelevant to the issue of whether he disobeyed the clear mandate of the January 2010 Order to deposit the proceeds of that sale with the plaintiff's attorney. Nor did the plaintiff have the additional burden of establishing that the defendant still possessed or had control over the proceeds from the March 2009 transfer such that he had the ability to comply with the January 2010 order. Rather, once his failure to comply was established, the burden shifted to the defendant to offer competent, credible evidence of his inability to pay the sum of money as ordered (see Yeager v. Yeager, 38 A.D.3d at 534, 831 N.Y.S.2d 496; Popelaski v. Popelaski, 22 A.D.3d 735, 737, 803 N.Y.S.2d 108; Matter of Garbitelli v. Broyles, 257 A.D.2d at 622, 684 N.Y.S.2d 292).

[11][12] The defendant failed to meet his burden of establishing his defense of an inability to pay. The plaintiff had adduced evidence that the defendant received net proceeds of \$776,046.21 from the March 2009 transfer, less than a year prior to the January 2010 Order. In opposition to the contempt motion, the defendant submitted an affidavit in which he averred that he no longer possessed those proceeds, but he provided no evidence in support of that self-serving assertion. Generally, "conclusory, baseless, and self-serving allegations [are] insufficient to raise an issue of fact necessitating a hearing" on a contempt motion (Jaffe v. Jaffe, 44 A.D.3d at 826, 844 N.Y.S.2d 97), much less establish a defense to the motion. Nonetheless, here, the defendant was afforded a hearing and the opportunity to present evidence in support of this defense. He refused to answer certain questions regarding the location of the proceeds of the March 2009 transfer by invoking his constitutional privilege against self-incrimination, and otherwise failed to present any evidence in support of his contention that he was unable to deposit the necessary sum of money as required by the order. Thus, the record established all elements of civil contempt, and the defendant failed to meet his burden of rebutting that evidence (see Popelaski v. Popelaski, 22 A.D.3d at 737, 803 N.Y.S.2d 108; Goldsmith v. Goldsmith, 261 A.D.2d at 577, 690 N.Y.S.2d 696; Matter of Garbitelli v. Broyles, 257 A.D.2d at 622, 684 N.Y.S.2d 292).

The Privilege Against Self-Incrimination

*10 [13] The defendant contends that he invoked his constitutional Fifth properly Amendment privilege in response to certain questions, and that the Supreme Court improperly drew an adverse inference against him. Specifically, he contends that, since he was potentially facing both civil and criminal contempt sanctions, he was placed in the untenable position of having to make a choice between defending the civil branch of the motion or asserting his Fifth Amendment privilege with respect to the criminal branch of the motion. Therefore, he asserts, his invocation of the privilege against selfincrimination could not be used against him, as it was his right to invoke the privilege in defense of the criminal branch of the proceeding without adverse consequence.

The defendant has failed to cite any case precisely on point with respect to the instant situation, in which the subject motion was pursuant to both Judiciary Law § 750(A)(3) and § 753(A)(3), seeking civil and criminal contempt sanctions. However, the dilemma he asserts is not new to the courts and has arisen in various types of civil proceedings, including those involving a mere risk of incurring potential criminal liability, and those involving a separate, ongoing criminal prosecution for the same subject matter raised in the civil proceeding. We find the defendant's contentions to be without merit based on well-established

principles in analogous cases.

[14][15][16] "[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them" (Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 [holding that an adverse inference may be drawn from a prison inmate's silence at a disciplinary proceeding]). "In New York, unlike the rule in a criminal case, a party's invocation of the privilege against self-incrimination in a civil case may be considered by the finder of the facts in assessing the strength of the evidence offered by the opposing party on the issue which the witness was in a position to controvert" (Kuriansky v. Bed-Stuy Health Care Corp., 135 A.D.2d 160, 178-179, 525 N.Y.S.2d 225, affd 73 N.Y.2d 875, 538 N.Y.S.2d 233, 535 N.E.2d 286 [holding that a disclosure order in a civil forfeiture action premised upon alleged criminal conduct did not violate the Fifth Amendment]; see Marine Midland Bank v. Russo Produce Co., 50 N.Y.2d 31, 42, 427 N.Y.S.2d 961, 405 N.E.2d 205; Breen Belgium BVBA v. International Foreign Currency, Inc., 37 A.D.3d 633, 634, 831 N.Y.S.2d 450 [based, in part, on the adverse inference arising from invocation of the defendant's Fifth Amendment privilege, the defendant failed to establish entitlement to judgment as a matter of law dismissing a fraudulent misrepresentation cause of action]). Although a defendant in an ongoing criminal prosecution faces a dilemma whether to defend a civil proceeding involving the same subject matter or to assert the Fifth Amendment privilege, "a court need not permit a defendant to avoid this difficulty by staying a civil action until a pending criminal prosecution has been terminated," and the fact "that the witness may invoke the privilege against selfincrimination is not a basis for precluding civil discovery" (Matter of Astor, 62 A.D.3d 867, 869, 879 N.Y.S.2d 560 [internal quotation marks omitted] [motions to stay discovery and for a protective order in a probate proceeding properly denied, although the proponent of the will was the defendant in a criminal prosecution]; see State of New York v. Carey Resources, 97 A.D.2d 508, 509, 467 N.Y.S.2d 876 [motion to stay civil discovery was improperly granted on the ground that disclosure might incriminate the movant]; see generally Steinbrecher v. Wapnick, 24 N.Y.2d 354, 365, 300 N.Y.S.2d 555, 248 N.E.2d 419).

*11 [17][18] Further, a party to a civil action or proceeding is not relieved of his or her burden of proof simply by invoking the privilege against selfincrimination. In a federal civil contempt proceeding based on a defendant's failure to produce records or property, where the defendant validly invokes the privilege against selfincrimination in answer to questions concerning the whereabouts of the records or property allegedly in his possession, invocation of the privilege "does not relieve him of his burden to demonstrate a present inability to comply" with the court order (Armstrong v. Guccione, 470 F.3d 89, 100; see United States v. Rylander, 460 U.S. 752, 757-759, 103 S.Ct. 1548, 75 L.Ed.2d 521). The same rule has been applied in New York. Thus, "[w]hile a party may not be compelled to answer questions that might adversely affect his [or her] criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence" (Access Capital v. DeCicco, 302 A.D.2d 48, 51, 752 N.Y.S.2d 658; see Matter of Astor, 62 A.D.3d at 869, 879 N.Y.S.2d 560).

Here, the defendant had the burden of establishing his defense of an inability to pay the sum required by the January 2010 Order (see Yeager v. Yeager, 38 A.D.3d at 534, 831 N.Y.S.2d 496; Popelaski v. Popelaski, 22 A.D.3d at 737, 803 N.Y.S.2d 108); his invocation of his privilege against self-incrimination did not relieve him of the obligation of coming forward with evidence in support of that defense (see United States v. Rylander, 460 U.S. at 757–759; Armstrong v. Guccione, 470 F.3d at 100; Access Capital v.

DeCicco, 302 A.D.2d at 51, 752 N.Y.S.2d 658). Moreover, the Supreme Court was entitled to draw an adverse inference against him (see Marine Midland Bank v. Russo Produce Co.., 50 N.Y.2d at 42, 427 N.Y.S.2d 961, 405 N.E.2d 205; Kuriansky v. Bed-Stuy Health Care Corp., 135 A.D.2d at 178–179, 525 N.Y.S.2d 225; Breen Belgium BVBA v. International Foreign Currency, Inc., 37 A.D.3d at 634, 831 N.Y.S.2d 450).

[19] The defendant correctly contends that a party may not be held in criminal contempt solely for a justified assertion of the Fifth Amendment privilege. Thus, in a criminal contempt proceeding, in which willful disobedience is an element, the court may not base a finding of willfulness solely upon the defendant's justified invocation of the privilege, absent any other evidence of willfulness (see Matter of Solerwitz v. Signorelli, 183 A.D.2d 718, 719, 583 N.Y.S.2d 296 [criminal contempt sanction improper where attorney was directed to turn over estate assets to the Surrogate's Court, and the attorney asserted the privilege in response to the question of what had become of the assets]). Here, however, the Supreme Court did not hold the defendant in criminal contempt, and thus, did not impose a criminal sanction. Rather, the court held the defendant in civil contempt.

[20] Contrary to the defendant's contention, the Supreme Court did not hold him in contempt solely for having asserted his Fifth Amendment privilege. Rather, the Supreme Court held him in civil contempt for failing to comply with the January 2010 Order. There is a difference (compare United States v. Rylander, 460 U.S. at 760 [incarceration was properly ordered for failure to comply with court order to produce records and the failure to adduce any evidence of an inability to comply, not for defendant's refusal to testify] with United States v. Edgerton, 734 F.2d 913, 918, 922 [court improperly imposed the sanction of incarceration with the opportunity to purge contempt by answering questions to which the party validly invoked the privilege against self-incrimination]

and Matter of County of Orange v. Rodriguez, 283 A.D.2d 494, 724 N.Y.S.2d 477 [court's comments revealed that the court improperly imposed a civil contempt sanction based solely on the defendant's refusal to answer questions at the contempt hearing]; cf. Federal Deposit Ins. Corp. v. Salesman Unlimited Agency Corp., 101 A.D.2d 876, 475 N.Y.S.2d 1020 [court may sanction for refusal to answer questions where there is no showing of a good faith basis for invoking the privilege]). The civil penalty imposed was not a punishment for refusing to answer questions at the hearing. Rather, the civil sanction was properly imposed, based on evidence establishing the defendant's disobedience of the January 2010 Order, and his failure to adduce evidence refuting the elements of civil contempt or establishing his defense of an inability to pay. Where evidence in the record supports the civil contempt finding, which is not based solely upon the invocation of the privilege against self-incrimination, and the defendant has failed to meet his or her burden of proof, the order will be upheld (see Berliner v. Berliner, 33 A.D.3d 744, 823 N.Y.S.2d 192 [the defendant invoked the Fifth Amendment and also failed to adduce any other evidence in support of his defense]).

Exhaustion of Remedies

*12 [21] Finally, the defendant contends that the plaintiff failed to satisfy the mandatory precondition of Domestic Relations Law § 245 that she first exhaust other, less drastic enforcement mechanisms, such as settling a judgment from the eauitable distribution order and seeking enforcement of the judgment. The plaintiff responds that Section 245 applies only to maintenance and support orders, not an order requiring the deposit of sale proceeds to effect equitable distribution and, in any event, she satisfied the precondition with evidence establishing that other enforcement mechanisms would have been futile.

In an action for a divorce, Domestic Relations

Law § 245 grants the court authority to punish a party for civil contempt pursuant to Judiciary Law § 756 where the party defaults "in paying any sum of money" required by a judgment or order, "and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced" pursuant to the enforcement mechanisms provided in Domestic Relations Law §§ 243 and 244 and CPLR 5241 and 5242. A civil contempt motion in a divorce action should be denied where the movant fails to make a showing pursuant to Section 245 that "resort to other, less drastic enforcement mechanisms had been exhausted or would be ineffectual" (*Capurso v. Capurso*, 61 A.D.3d 913, 914, 878 N.Y.S.2d 754).

Although the exhaustion precondition is discussed most often in case law involving the nonpayment of maintenance or child support (see e.g., Tarone v. Tarone, 104 A.D.3d 760, 960 N.Y.S.2d 329; Jones v. Jones, 65 A.D.3d 1016, 885 N.Y.S.2d 323; Capurso v. Capurso, 61 A.D.3d at 913, 878 N.Y.S.2d 754; Murray v. Murray, 269 A.D.2d 433, 703 N.Y.S.2d 402; Snow v. Snow, 209 A.D.2d 399, 618 N.Y.S.2d 442), it has also been applied in cases involving the nonpayment of other sums (see Lopez v. Ajose, 33 A.D.3d 976, 824 N.Y.S.2d 113 [judgment requiring both child support and equitable distribution]; Rienzi v. Rienzi, 23 A.D.3d 447, 808 N.Y.S.2d 113 [judgment requiring reimbursement of spouse's tax refund]; Cooper v. Cooper, 21 A.D.3d 869, 800 N.Y.S.2d 618 [order requiring the plaintiff to return funds unilaterally withdrawn from the parties' joint account]; Feldman v. Juliano, 248 A.D.2d 430, 431, 668 N.Y.S.2d 944 [judgment requiring payments for medical insurance coverage]). This is so because the plain language of Domestic Relations Law § 245 unambiguously includes the nonpayment of "any sum of money." Nothing in this language restricts the meaning to maintenance and child support. Moreover, although CPLR 5241 and 5242 expressly provide enforcement mechanisms for support orders, Domestic Relations Law § 244 extends those enforcement mechanisms to a default in paying "any sum of money" required by an order or judgment in a divorce action. Thus, contrary to the plaintiff's contention, the exhaustion precondition of Section 245 does apply here, where the defendant failed to pay a sum of money in lieu of real property awarded to the plaintiff in an order of equitable distribution.

[22] However, the plaintiff correctly contends that the record establishes her satisfaction of the exhaustion precondition with evidence demonstrating that less drastic enforcement measures would have been ineffectual. The plaintiff submitted extensive evidence in support of her motion to hold the defendant in contempt, demonstrating his pattern of divesting himself of his assets during the course of the earlier divorce litigation in 2000 through 2002, and during the present litigation; as a result, the defendant no longer held assets in his name against which execution could be obtained. Moreover, the defendant's suggestion that the plaintiff should have first settled a judgment upon the order of equitable distribution, and thereafter executed on the judgment, is without merit. It is undisputed that the defendant had transferred the Brooklyn and Queens properties that had been awarded to the plaintiff in the equitable distribution order, and that the purpose of the January 2010 Order was to preserve the funds obtained from the sale of the real property. Therefore, the plaintiff satisfied the exhaustion precondition of Domestic Relations Law § 245 (see Lopez v. Ajose, 33 A.D.3d at 976, 824 N.Y.S.2d 113; Turk v. Turk, 226 A.D.2d 448, 640 N.Y.S.2d 802; cf. Snow v. Snow, 209 A.D.2d at 401, 618 N.Y.S.2d 442 [precondition not satisfied where the defaulter had assets within the jurisdiction sufficient to satisfy arrearages]).

*13 Accordingly, the record here fully supports the Supreme Court's order finding the defendant in civil contempt and imposing a civil sanction (*see Manning v. Manning*, 82 A.D.3d 1057, 1058, 920 N.Y.S.2d 126; *Alderman v. Alderman*, 78 A.D.3d at 620, 909 N.Y.S.2d 916; *Hinkson v.*

Daughtry–Hinkson, 31 A.D.3d at 608, 819 N.Y.S.2d 535).

The defendant's remaining contentions are either not properly before this Court or without merit.

Therefore, the order is affirmed.

ORDERED that the order is affirmed, with costs.

FN1. We are cognizant of the alternate spellings of "willful" and "wilful" and their derivations. In this opinion, where materials are quoted, the spelling is that used in the original. One commentator, noting the inconsistent meanings of this term in the case law, has remarked that, "[c]ourts do not even agree on how many " *l's* " are in the word" (Lawrence N. Gray, Criminal and Civil Contempt, Second Edition, § 1.21 at 96 [2012]).

FN2. Subdivision (A)(1) of the civil contempt statute, which is not at issue in this appeal, contains the only instance of the word "wilful" in that section (Judiciary Law § 753[A][1]).

FN3. In addressing the term "willful" here, we do not address the distinct provision in the Family Court Act, which provides certain enforcement mechanisms for a party's "failure to obey any lawful order of support" (Family Ct Act § 454[1]; see Family Ct Act § 454[2]) and additional sanctions, including a jail term, where the court finds that the party "has willfully failed to obey any lawful order of support" (Family Ct Act § 454[3]; see Matter of Powers v. Powers, 86 N.Y.2d 63, 629 N.Y.S.2d 984, 653 N.E.2d 1154). Where Family Ct Act § 454, or any other section of the Family Court Act does not apply, the Family Court has authority to punish

for civil or criminal contempt pursuant to the Judiciary Law (see Family Ct Act § 156).

N.Y.A.D. 2 Dept.,2013. El-Dehdan v. El-Dehdan --- N.Y.S.2d ----, 2013 WL 6641279 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08404

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--- N.Y.S.2d ----, 2013 WL 6641364 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08405 (Cite as: 2013 WL 6641364 (N.Y.A.D. 2 Dept.))

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Supreme Court, Appellate Division, Second Department, New York. Deborah ETZION, appellant,

v. Rafael ETZION, et al., respondents.

Dec. 18, 2013.

Background: In an action for the rescission or reformation of a stipulation of settlement that was incorporated, but not merged, into a judgment of divorce, the wife appealed from an order of the Supreme Court, Nassau County, Maron, J., which denied her motion for leave to serve a second amended complaint.

Holding: The Supreme Court, Appellate Division, held that the Supreme Court improvidently exercised its discretion in denying the wife's motion for leave to serve a second amended complaint.

Reversed.

West Headnotes

[1] Pleading 302 © - 0

302 Pleading

Leave to amend a pleading should be freely given absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit. McKinney's CPLR 3025(b).

[2] Pleading 302 © --- 0

302 Pleading

In determining a motion for leave to amend a pleading, a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt. McKinney's CPLR 3025(b).

[3] Pleading 302 € → 0

302 Pleading

In an action for the rescission or reformation of a stipulation of settlement that was incorporated, but not merged, into a judgment of divorce, the Supreme Court improvidently exercised its discretion in denying the wife's motion for leave to serve a second amended complaint asserting three new causes of action to recover damages for fraud and breach of fiduciary duty; the proposed new causes of action were not palpably insufficient or patently devoid of merit, and the husband did not demonstrate that he would be unfairly prejudiced or surprised by the proposed new causes of action. McKinney's CPLR 3025(b).

Samuelson, Hause & Samuelson LLP, Garden City, N.Y. (Glenn S. Koopersmith of counsel), for appellant.

Blank Rome LLP, New York, N.Y. (Harris N. Cogan and Kevin R. Doherty of counsel), for respondents.

RANDALL T. ENG, P.J., REINALDO E. RIVERA , L. PRISCILLA HALL, and PLUMMER E. LOTT, JJ.

*1 In an action, inter alia, for the rescission or reformation of a stipulation of settlement dated June 8, 2005, which was incorporated, but not merged, into a judgment of divorce referable to the plaintiff and the defendant Rafael Etzion dated August 16, 2005, the plaintiff appeals from an order of the Supreme Court, Nassau County (Maron, J.), entered March 6, 2012, which denied her motion for leave to serve a second amended complaint.

ORDERED that the order is reversed, on the law and in the exercise of discretion, with costs, the plaintiff's motion for leave to serve a second amended complaint is granted, and the proposed second amended complaint is deemed served.

[1][2] Leave to amend a pleading should be freely given absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025[b]; Faiella v. Tysens Park Apartments, LLC, 110 A.D.3d 1028, 975 N.Y.S.2d 71; Gotlin v. City of New York, 90 A.D.3d 605, 606-607, 936 N.Y.S.2d 208; Lucido v. Mancuso, 49 A.D.3d 220, 227, 851 N.Y.S.2d 238). In determining a motion for leave to amend a pleading, "a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt" (Faiella v. Tysens Park Apartments, LLC, 110 A.D.3d 1028, 975 N.Y.S.2d 71; Young v. Estate of Young, 84 A.D.3d 1359, 1360, 924 N.Y.S.2d 279; Lucido v. Mancuso, 49 A.D.3d at 227, 851 N.Y.S.2d 238).

[3] Applying this standard here, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion for leave to serve a second amended complaint asserting three new causes of action to recover damages for fraud and breach of fiduciary duty. The proposed new causes of action allege, inter alia, that, in light of the parties' marital relationship and status as coshareholders of the defendant Variety Accessories, Inc., the defendant Rafael Etzion (hereinafter Rafael) owed the plaintiff a duty to disclose a May 2005 offer to purchase a warehouse property owned by a related entity, which was made only to him and was not information freely available in the public domain (cf. Etzion v. Etzion, 62 A.D.3d 646, 654, 880 N.Y.S.2d 79). These proposed new causes of action were not palpably insufficient or patently devoid of merit. In addition, Rafael did not demonstrate that he would be unfairly prejudiced or surprised by the proposed new causes of action, which stem from his disclosure of the May 2005 offer during the course of discovery in this action (see Faiella v. Tysens Park Apartments, LLC, 110 A.D.3d 1028, 975 N.Y.S.2d 71; Young v. Estate of Young, 84 A.D.3d at 1360, 924 N.Y.S.2d 279; Lucido v. Mancuso, 49

A.D.3d at 232, 851 N.Y.S.2d 238; see also Jablonski v. Jakaitis, 85 A.D.3d 969, 971, 926 N.Y.S.2d 137). Accordingly, the Supreme Court should have granted the plaintiff's motion for leave to serve a second amended complaint.

N.Y.A.D. 2 Dept.,2013. Etzion v. Etzion --- N.Y.S.2d ----, 2013 WL 6641364 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08405

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--- N.Y.S.2d ----, 2013 WL 6483331 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08221 (Cite as: 2013 WL 6483331 (N.Y.A.D. 2 Dept.))

(Che ust 2010 112 0 locaet (lw11112) 2 2 cpu),

Supreme Court, Appellate Division, Second
Department, New York.
Wisly AUGUSTIN, appellant,
v.
Jeannine BULLEN, respondent.

Dec. 11, 2013.

Background: In action for divorce and ancillary relief, husband appealed from judgment of the Supreme Court, Suffolk County, Garguilo, J., made after a nonjury trial, directed him to pay child support retroactive to date of the verified answer, directed him to pay child support arrears in the sum of \$159,684.69, determined that he was not entitled to any portion of gains realized in sale of certain real property purchased by wife prior to the marriage, directed him to pay 61% of certain medical bills incurred as a result of wife's pregnancies, and directed him to pay wife an attorney's fee in the sum of \$55,000.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) trial court did not err in directing husband to pay child support arrears, and
- (2) apportioning medical bills equally between the parties was warranted.

Affirmed as modified.

West Headnotes

[1] Child Support 76E \$\infty\$ 454

76E Child Support

76EIX Enforcement

76Ek447 Arrearages; Retroactive

Modification

76Ek454 k. Credits for Amounts Paid or Property Transferred. Most Cited Cases

Trial court did not err in directing husband to pay child support arrears, where, in calculating amount of the arrears, the court gave husband appropriate credit for amount of temporary child support he already paid, and it properly directed him to pay child support retroactive to date of wife's verified answer, which contained her request for child support. McKinney's DRL § 236(B)(7)(a).

[2] Divorce 134 🗪 837

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)7 Debts and Liabilities in

General

134k834 Particular Debts and

Liabilities

134k837 k. Medical, Dental, and

Other Health-Related Expenses. Most Cited Cases

Medical bills incurred as result of wife's three pregnancies were not incurred primarily for husband's benefit, and, thus, apportioning the bills equally between the parties was warranted.

[3] Divorce 134 \$\infty\$653

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

 $\frac{134 V(D)}{Allocation} \ of \ Property \ and \\ Liabilities; Equitable Distribution$

134V(D)1 In General

134k653 k. Discretion of Court in

General. Most Cited Cases

Generally, expenses incurred prior to the commencement of an action for a divorce are marital debt to be equally shared by the parties upon an offer of proof that they represent marital expenses; nevertheless, the trial court is vested with broad discretion in making an equitable distribution of marital property, and unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed.

[4] Divorce 134 \$\infty\$ 728

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)3 Proportion or Share Given on Division

134k728 k. Equality. Most Cited Cases

Equitable distribution does not necessarily mean equal distribution; rather, the court may consider the entirety of the marital estate in apportioning responsibility for marital debt.

Naved Amed, New York, N.Y., for appellant.

Chas G. Cancellare, Hauppauge, N.Y., attorney for the child (no brief filed).

DANIEL D. ANGIOLILLO, J.P., L. PRISCILLA HALL, LEONARD B. AUSTIN, ROBERT J. MILLER, JJ.

*1 In an action for a divorce and ancillary relief, the plaintiff appeals, as limited by his brief, from so much of a judgment of the Supreme Court, Suffolk County (Garguilo, J.), entered June 1, 2011, as, upon a decision dated February 23, 2011, made after a nonjury trial, directed him to pay child support retroactive to the date of the verified answer, directed him to pay child support arrears in the sum of \$159,684.69, determined that he is not entitled to any portion of the gains realized in the sale of certain real property purchased by the defendant prior to the marriage, directed him to pay 61% of certain medical bills incurred as a result of the defendant's pregnancies, and directed him to pay the defendant an attorney's fee in the sum of \$55,000.

ORDERED that the judgment is modified, on the facts and in the exercise of discretion, by deleting the provision thereof directing the plaintiff to pay 61% of certain medical bills incurred as a result of the defendant's pregnancies, and substituting therefor a provision directing him to pay 50% of those bills; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements.

[1] Contrary to the plaintiff's contention, the Supreme Court did not err in directing him to pay child support arrears (see Frankel v. Frankel, 272 A.D.2d 515, 516, 709 N.Y.S.2d 97). In calculating the amount of child support arrears, the court gave the plaintiff an appropriate credit for the amount of temporary child support he already paid (see Domestic Relations Law § 236[B] [7][a]; Higgins v. Higgins, 50 A.D.3d 852, 854, 857 N.Y.S.2d 171). Furthermore, the court properly directed the plaintiff to pay child support retroactive to the date of the defendant's verified answer, which contained her request for child support (see Burns v. Burns, 84 N.Y.2d 369, 377, 618 N.Y.S.2d 761, 643 N.E.2d 80; Elimelech v. Elimelech, 58 A.D.3d 672, 674, 874 N.Y.S.2d 490).

[2][3][4] However, the Supreme Court improvidently exercised its discretion in directing the plaintiff to pay 61% of certain medical bills incurred as a result of the defendant's three pregnancies. Generally, expenses incurred prior to the commencement of an action for a divorce are marital debt to be equally shared by the parties upon an offer of proof that they represent marital expenses (see Epstein v. Messner, 73 A.D.3d 843, 900 N.Y.S.2d 454). Nevertheless, "[t]he trial court is vested with broad discretion in making an equitable distribution of marital property, and unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed" (Saleh v. Saleh, 40 A.D.3d 617, 617, 836 N.Y.S.2d 201 [internal quotation marks omitted]). Equitable distribution does not necessarily mean equal distribution (see Ashmore v. Ashmore, 92 A.D.3d 817, 939 N.Y.S.2d 504, cert. denied — U.S. —, 133 S.Ct. 1642, 185 L.Ed.2d 625 [2013]; Marcellus-Montrose v. Montrose, 84 A.D.3d 752, 754, 922 N.Y.S.2d 506). The court --- N.Y.S.2d ----, 2013 WL 6483331 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08221 (Cite as: 2013 WL 6483331 (N.Y.A.D. 2 Dept.))

may consider the entirety of the marital estate in apportioning responsibility for marital debt (*see Corless v. Corless*, 18 A.D.3d 493, 795 N.Y.S.2d 273).

*2 The evidence at trial did not establish a compelling reason why the plaintiff should be responsible for 61% of the subject medical bills, and those bills were not incurred primarily for the plaintiff's benefit (*cf. id.*). Moreover, in her posttrial memorandum of law the defendant contended that those medical bills should be apportioned equally between the parties. Under these circumstances, the Supreme Court should have directed the plaintiff to pay 50% of those medical bills.

The plaintiff's remaining contentions are without merit.

N.Y.A.D. 2 Dept.,2013. Augustin v. Bullen --- N.Y.S.2d ----, 2013 WL 6483331 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08221

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--- N.Y.S.2d ----, 2013 WL 6483629 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08225 (Cite as: 2013 WL 6483629 (N.Y.A.D. 2 Dept.))

Supreme Court, Appellate Division, Second
Department, New York.
Jamie DiPALMA, respondent-appellant,
v.
Mark DiPALMA, appellant-respondent.

Dec. 11, 2013.

Joseph Giaramita, Jr., Brooklyn, N.Y. for appellant-respondent.

Golden Hirschhorn LLP, Garden City, N.Y. (Alan K. Hirschhorn of counsel), for respondent-appellant.

REINALDO E. RIVERA, J.P., PETER B. SKELOS , CHERYL E. CHAMBERS, and L. PRISCILLA HALL, JJ.

*1 In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from (1) so much of an order of the Supreme Court, Richmond County (De Lizzo, Ct. Atty. Ref.), dated November 1, 2011, as, after a nonjury trial, granted the plaintiff's application for an award of nondurational maintenance and a separate property credit in the sum of \$65,000 from the proceeds of the sale of the marital home, and (2) so much of a judgment of the same court dated August 15, 2012, as, upon the order, directed the defendant to pay the plaintiff nondurational maintenance in the sum of \$1,500 per month, retroactive to the date of commencement of the action, and awarded the plaintiff a separate property credit in the sum of \$65,000 from the proceeds of the sale of the marital home, and the plaintiff cross-appeals from the order dated November 1, 2011.

ORDERED that the appeal and the cross appeal from the order are dismissed, without costs or disbursements; and it is further, ORDERED that the judgment is modified, on the law, by deleting the provision thereof awarding the plaintiff a separate property credit in the sum of \$65,000 from the proceeds of the sale of the marital home; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, and the order is modified accordingly.

The appeal and the cross appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (see Matter of Aho, 39 N.Y.2d 241, 248). The issues raised on the appeal from the intermediate order are brought up for review and have been considered on the appeal from the judgment (see CPLR 5501[a][1]). In addition, the cross appeal must be dismissed as abandoned since the plaintiff did not raise any argument in her brief with respect to her cross appeal (see Signorile v. Signorile, 102 AD3d 949, 950; Delijani v. Delijani, 100 AD3d 951, 952).

The Supreme Court providently exercised its discretion in awarding the plaintiff nondurational maintenance in the sum of \$1,500 per month. "[T]he amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its own unique facts" (Wortman v.. Wortman, 11 AD3d 604, 606; see Kaufman v. Kaufman, 102 AD3d 925, 925). The factors to be considered in awarding maintenance include "the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become selfsupporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance" (Kret v. Kret, 222 A.D.2d 412, 413; see Domestic Relations Law § 236[B][6][a]). Where a party's account of his or her finances is not believable, the court may

impute a true or potential income higher than that alleged (see Wesche v. Wesche, 77 AD3d 921, 923).

*2 Following an extended trial, the Supreme Court, finding that the defendant was not credible in his testimony with respect to his net worth, imputed an annual income of \$84,000 to the defendant based on evidence indicating that, among other things, the defendant received income from rental property. Based on the record before us, there is no basis to disturb the Supreme Court's credibility assessment, which is entitled to great weight on appeal given the trial court's opportunity to view the demeanor of the witnesses (see Levine v. Levine, 37 AD3d 550, 551-552; Lieberman v. Lieberman, 21 AD3d 1004, 1005). While the defendant argues that the Supreme Court failed to take into account, inter alia, the operating expenses of the rental property, he did not provide any evidentiary proof to the court as to these expenses. Rather, the defendant was continually evasive regarding his income and assets. Under these circumstances, the court providently exercised its discretion in imputing income to the defendant in the sum of \$84,000.

Furthermore, in considering the relevant factors for determining maintenance, including the length of the marriage, the plaintiff's limited employment history, her medical expenses, and the likelihood that she will not be self-supporting in the future due to her disabilities, the court providently exercised discretion in awarding the plaintiff nondurational maintenance (see Marino v. Marino, 52 AD3d 585, 585; Polizzano v. Polizzano, 2 AD3d 615). Under the circumstances of this case, we reject the defendant's contention that the plaintiff's maintenance should terminate once she reaches the age of eligibility for Social Security retirement benefits (see Rabinovich v. Shevchenko, 93 AD3d 774, 775; Rodriguez v. Rodriguez, 70 AD3d 799, 802).

However, in determining the equitable distribution of the proceeds from the foreclosure sale of the marital home, the Supreme Court erred

in awarding the plaintiff the sum of \$65,000 as reimbursement for allegedly separate property she contributed to pay the down payment on the marital property. Since the plaintiff had previously deposited her separate property into a bank account titled to the defendant and his mother, those funds lost their separate character (*see Golden v. Golden*, 98 AD3d 647, 650; *Loria v. Loria*, 46 AD3d 768, 770). Accordingly, we modify the judgment by deleting the provision that awarded the plaintiff a separate property credit from the proceeds of the marital home.

N.Y.A.D. 2 Dept.,2013. DiPalma v. DiPalma --- N.Y.S.2d ----, 2013 WL 6483629 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08225

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--- N.Y.S.2d ----, 2013 WL 6484143 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08229

(Cite as: 2013 WL 6484143 (N.Y.A.D. 2 Dept.))

Supreme Court, Appellate Division, Second Department, New York. Mihea KIM, respondent,

Bradford C. SCHILLER, appellant.

Dec. 11, 2013.

Background: In action for divorce and ancillary relief, husband appealed from an order of the Supreme Court, Rockland County, Alfieri, J., which awarded wife attorney fees and entered judgment.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) wife's share of husband's enhanced earning capacity would be reduced to reflect accommodations husband made for wife's career;
- (2) child support obligation would be decreased by the amount of any college room and board expenses husband incurred;
- (3) husband was entitled to claim one of the children as a dependent on his income tax returns;
- (4) pendente lite maintenance award was enforceable against husband; and
- (5) trial court improvidently exercised its discretion in awarding wife expert fees.

Affirmed as modified.

West Headnotes

[1] Divorce 134 @--0

134 Divorce

In action for divorce and ancillary relief, wife was entitled to a share of husband's enhanced earning capacity, even though she did not make direct financial contributions to the husband's attainment of his medical degree and license, where she made substantial indirect contributions, including being supportive of the husband's attainment of his degree and the advancement of his

career, working full-time throughout the marriage, contributing her earnings to the family, bearing two children for whom she had primary caretaking responsibility, cooking the family's meals, and participating in the housekeeping.

[2] Divorce 134 @==0

134 Divorce

In action for divorce and ancillary relief, award to wife of a share of husband's enhanced earning capacity would be reduced to reflect accommodations husband made for the sake of the wife's career and her desire to remain near her family, and husband's financial contributions to the marriage during his tenure at medical school.

[3] Divorce 134 © 0

134 Divorce

In action for divorce and ancillary relief, husband was entitled to a credit in the sum of \$20,000 with respect to funds from his separate property that he used during the marriage to repay wife's student loan debt.

[4] Divorce 134 @---0

134 Divorce

Wife's retirement accounts were to be equitably distributed to the parties pursuant to a Qualified Domestic Relations Order upon the earlier of parties' retirement or the liquidation of the accounts, even though judgment omitted mention of an award of any credit to the husband with respect to the wife's retirement accounts, where trial court had made such conclusion in decision on which judgment was based.

[5] Judgment 228 € → 0

228 Judgment

Where there is an inconsistency between a judgment and the decision upon which it is based, the decision controls.

[6] Divorce 134 🖘 0

134 Divorce

Inclusion of money market account in husband's net worth statement, alone, did not support award to wife of share of money market account.

[7] Divorce 134 🖘 0

134 Divorce

In action for divorce and ancillary relief, wife was entitled to an award of pendente lite relief retroactive date she moved for such relief through date that trial court issued an order awarding relief, subject to husband's credit for voluntary child support payments that were in addition to the court-ordered pendente lite child support payments.

[8] Child Support 76E 🗫 0

76E Child Support

In action for divorce and ancillary relief, husband's child support obligation would be decreased by the amount of any college room and board expenses he incurred while the parties' children attended college.

[9] Child Support 76E 🗫 0

76E Child Support

As a wage earner contributing to the support of his two children, father was entitled to claim one of the children as a dependent on his income tax returns.

[10] Child Support 76E € □ 0

76E Child Support

In action for divorce and ancillary relief, husband should not have been directed to contribute or to additionally contribute to discretionary expenses that wife incurred on behalf of the parties' children, including a sweet sixteen party for the parties' daughter, trips to South Korea, and new furniture.

[11] Divorce 134 © --- 0

134 Divorce

Trial court's decision in divorce action, that husband was obligated to pay pendente lite maintenance was enforceable against him, notwithstanding that it was never reduced to a written order. 22 NYCRR 202.8[g].

[12] Divorce 134 🗫 0

134 Divorce

A defendant's remedy for any perceived inequity resulting from a pendente lite award in a divorce action is to seek a speedy trial.

[13] Divorce 134 © 0

134 Divorce

Trial court in divorce action improvidently exercised its discretion in awarding wife expert fees, absent a showing of necessity or inability to pay such fees. McKinney's DRL § 237(a).

Joseph Martin Carasso, New York, N.Y., for appellant.

Rogers McCarron & Habas, P.C., Orangeburg, N.Y. (Lawrence B. McCarron and Gregg L. Verrilli of counsel), for respondent.

REINALDO E. RIVERA, J.P., L. PRISCILLA HALL, SHERI S. ROMAN, and ROBERT J. MILLER, JJ.

*1 In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from so much of (1) an order of the Supreme Court, Rockland County (Alfieri, Jr., J.), dated February 15, 2012, as granted that branch of the plaintiff's cross motion which was for an award of an attorney's fee in the sum of \$5,000, and (2) a judgment of the same court dated August 13, 2012, as, upon a decision of the same court dated June 25, 2012, made after a nonjury trial, (a) awarded the plaintiff the sum of \$247,000 as the plaintiffs

portion of the defendant's enhanced earning capacity, (b) failed to award the defendant a credit in the sum of \$20,000 with respect to funds from his separate property that he used to repay the plaintiff's student loan debt, (c) failed to award him a marital share of the plaintiff's Vanguard and Fidelity retirement accounts, (d) awarded the plaintiff possession and ownership of the former marital residence and awarded the defendant a credit in the sum of only \$60,000 as his share of the equity in the residence, (e) failed to equitably distribute the parties' household furnishings, (f) awarded the plaintiff the sum of \$662 as the plaintiff's share of the defendant's Charles Schwab account, (g) awarded the plaintiff child support for the parties' two children in the sum of \$3,774 per month, (h) failed to award the defendant a credit for voluntary payments he made to the plaintiff from September 13, 2010, the date that the action was commenced, until the issuance of an order dated June 24, 2011, awarding pendente lite relief to the plaintiff retroactive to May 5, 2011, (i) awarded the plaintiff, pendente lite, carrying costs on the former marital residence without modifying the child support awarded to the plaintiff, (j) failed to direct that the defendant is to receive a credit towards his child support obligation for any sum he contributes to room and board expenses for either or both of the parties' children during any time they attend college away from home, (k) failed to award the defendant dependent tax exemptions, allowances, and deductions for the parties' children, (l) awarded the plaintiff pendente lite maintenance arrears in the sum of \$30,594, (m) directed the defendant to pay 50% of certain additional expenses incurred on behalf of the children, (n) failed to award the defendant an attorney's fee, (o) awarded the plaintiff the sum of \$5,000 for an expert's fee, (p) directed the defendant to pay 50% of, inter alia, all health care expenses of the parties' children not covered by insurance, and (q) failed to sanction the plaintiffs attorney for violating Rules of Professional Conduct (22 NYCRR 1200.0) rules 3.3 and 4.1 and CPLR 3120(3).

ORDERED that the order dated February 15, 2012, is affirmed insofar as appealed from, without costs or disbursements; and it is further,

ORDERED that the judgment is modified, on the law, on the facts, and in the exercise of discretion, (1) by reducing the award to the plaintiff for her equitable share of the defendant's enhanced earning capacity from the sum of \$247,000 to the sum of \$148,200, (2) by adding a provision thereto awarding the defendant a credit in the sum of \$20,000 with respect to funds from his separate property that he used to repay the plaintiff's student loan debt, (3) by adding a provision thereto directing that the plaintiff's Vanguard and Fidelity retirement accounts be distributed pursuant to a Qualified Domestic Relations Order upon the earlier of the parties' retirement or the liquidation of the accounts, (4) by increasing the award to the defendant of the credit for his equitable interest in the former marital residence from the sum of \$60,000 to the sum of \$60,470, (5) by deleting the provision thereof awarding the plaintiff the sum of \$662 as her equitable share of the defendant's Charles Schwab account, (6) by adding a provision thereto awarding the defendant a credit in the sum of \$3,400 for voluntary child support payments he made from May 5, 2011, the date that the plaintiff moved for a pendente lite award of child support until the court issued the order dated June 24, 2011, (7) by adding a provision thereto directing that the defendant's child support obligation shall be decreased by the amount of any college room and board expenses he incurs while either of the parties' children attends college, (8) by adding a provision thereto directing that the defendant shall be permitted to claim dependent tax exemptions, allowances, and deductions for the parties' eldest child, that the plaintiff shall be permitted to claim dependent tax exemptions, allowances, deductions for the parties' youngest child, that upon the emancipation of the parties' eldest child, the parties shall alternate, on an annual basis, the right to claim dependent tax exemptions, allowances, and deductions for the parties' youngest child until that

child's emancipation, and directing the plaintiff to execute the appropriate Internal Revenue Service forms, (9) by deleting the provision thereof directing the defendant to pay 50% of certain additional expenses incurred on behalf of the children, including the cost of the children's furniture, trips to South Korea, and a sweet sixteen birthday party, as well as the cost of eyeglasses, contact lenses, summer camp, and therapy, and substituting therefor a provision awarding the plaintiff the sum of \$895.50, representing the defendant's 50% share of in-network and reasonable unreimbursed medical expenses and tutoring expenses incurred by the plaintiff on behalf of the parties' children during the pendency of the action, (10) by reducing the award to the plaintiff for the defendant's pendente lite "maintenance arrears" from the sum of \$30,594 to the sum of \$19,800, representing \$13,200 in pendente lite maintenance arrears and \$6,600 in pendente lite arrears for the carrying charges for the former marital residence, (11) by deleting the provision thereof awarding the plaintiff the sum of \$5,000 for an expert's fee, and (12) by adding to the provision thereof directing the defendant to pay 50% of, inter alia, all health care expenses of the parties' children not covered by insurance, the word "reasonable" before the words "health care expenses not covered by insurance"; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Rockland County, for the entry of an amended judgment.

*2 [1][2] In this matrimonial action, the Supreme Court properly determined that the plaintiff was entitled to a share of the defendant's enhanced earning capacity. Although the plaintiff did not make direct financial contributions to the defendant's attainment of his medical degree and license, she made substantial indirect contributions, as the plaintiff was supportive of the defendant's attainment of his degree and the advancement of his career. Moreover, the plaintiff worked full-time throughout the marriage, except for those periods of

time when she was on maternity leave or collecting disability benefits due to her chronic lupus disease. In addition, the plaintiff contributed her earnings to the family, bore two children for whom she had primary caretaking responsibility, cooked the and family's meals, participated the housekeeping (see Holterman v. Holterman, 3 N.Y.3d 1, 8-9, 781 N.Y.S.2d 458, 814 N.E.2d 765; McSparron v. McSparron, 87 N.Y.2d 275, 639 N.Y.S.2d 265, 662 N.E.2d 745; Huffman v. Huffman, 84 A.D.3d 875, 877, 923 N.Y.S.2d 583; Jayaram v. Jayaram, 62 A.D.3d 951, 953, 880 N.Y.S.2d 305; Cozza v. Colangelo, 298 A.D.2d 914, 747 N.Y.S.2d 641). However, under the circumstances of this case, where the defendant made accommodations for the sake of the plaintiffs career and her desire to remain near her family, as well as in light of the defendant's financial contributions during his tenure at medical school, we reduce the award to the plaintiff of the marital portion of the defendant's enhanced earning capacity from 50% to 30%, thereby reducing the plaintiff's award from \$247,000 to \$148,200.

[3] We agree with the defendant that he is entitled to a credit in the sum of \$20,000 with respect to funds from his separate property that he used during the marriage to repay the plaintiff's student loan debt (see Sotnik v. Zavilyansky, 101 A.D.3d 1102, 1104, 956 N.Y.S.2d 514; Khan v. Ahmed, 98 A.D.3d 471, 472–473, 949 N.Y.S.2d 428; cf. Zaretsky v. Zaretsky, 66 A.D.3d 885, 887, 888 N.Y.S.2d 84; DiBlasi v. DiBlasi, 48 A.D.3d 403, 405, 852 N.Y.S.2d 195).

[4][5] In the decision on which the judgment was based, the Supreme Court concluded that the plaintiff's retirement accounts were to be equitably distributed to the parties pursuant to a Qualified Domestic Relations Order upon the earlier of parties' retirement or the liquidation of the accounts. However, the judgment omitted mention of an award of any credit to the defendant with respect to the plaintiff's retirement accounts. "Where there is an inconsistency between a

judgment and the decision upon which it is based, the decision controls" (Verdrager v. Verdrager, 230 A.D.2d 786, 787, 646 N.Y.S.2d 185; see Berry v. Williams, 87 A.D.3d 958, 961, 929 N.Y.S.2d 281; Matter of Jimmy D., 63 A.D.3d 737, 738, 880 N.Y.S.2d 334, affd 15 N.Y.3d 417, 912 N.Y.S.2d 537, 938 N.E.2d 970). "Further, such an inconsistency may be corrected either by way of a motion for resettlement or on appeal" (Verdrager v. Verdrager, 230 A.D.2d at 788, 646 N.Y.S.2d 185; see CPLR 2221, 5019[a]; Matter of Jimmy D., 63 A.D.3d at 738, 880 N.Y.S.2d 334). Accordingly, we modify the judgment to direct that the plaintiff's retirement accounts shall be distributed to the parties pursuant to a Qualified Domestic Relations Order, pursuant to the terms and conditions described by the Supreme Court in its decision.

*3 This Court is empowered to "cure any 'mistake, defect or irregularity' in a judgment, including mathematical errors in calculation" (Berry v. Williams, 87 A.D.3d at 961, 929 N.Y.S.2d 281 quoting CPLR 5019[a]). Here, although the parties stipulated that the former marital residence had a value of \$340,000, and the evidence established that the principal balance remaining on the mortgage loan referable to the former marital residence was \$219,060, the court awarded a credit to the defendant in the sum of \$60,000, rather than \$60,470, as his share of the equity in the former marital residence, Since \$340,000 minus \$219,060 is equal to \$120,940, and 50% of \$120,940 is \$60,470, we modify the judgment to award the defendant a credit in the sum of \$60,470 as his equitable share of the value of the former marital residence.

[6] The Supreme Court erred in awarding the plaintiff the sum of \$662 as her share of a money market account held by the defendant with Charles Schwab, since no evidence regarding the provenance of this account was adduced at the trial. The only evidence that was before the Supreme Court with respect to this account was its inclusion in the defendant's net worth statement.

[7] The plaintiff was entitled to an award of pendente lite relief retroactive to May 5, 2011, the date that she moved for pendente lite relief (see Fredericks v. Fredericks, 85 A.D.3d 1107, 1109, 927 N.Y.S.2d 109), through June 24, 2011, the date that the Supreme Court issued an order awarding pendente lite relief to her. The defendant, however, is entitled to a credit for the voluntary child support payments he made from May 5, 2011, through June 24, 2011, that were in addition to the court-ordered pendente lite child support payments, but only to the extent of the pendente lite award actually made to the plaintiff (see Heiny v. Heiny, 74 A.D.3d 1284, 1288, 904 N.Y.S.2d 191; Verdrager v. Verdrager, 230 A.D.2d at 788-789, 646 N.Y.S.2d 185; Ferraro v. Ferraro, 257 A.D.2d 598, 599, 684 N.Y.S.2d 276). Since the parties agree that the defendant was voluntarily paying the plaintiff the sum of \$2,600 in child support each month at the time that the plaintiff's motion for pendente lite relief was determined, the defendant expended the total sum of \$5,200 pursuant to two payments made between May 5, 2011, and June 24, 2011. For the seven-week period between May 5, 2011, and June 24, 2011, the defendant made four additional biweekly payments of \$850, totaling \$3,400. Since the pendente lite award actually made to the plaintiff was less than the \$5,200 that the defendant made in voluntary child support payments from May 5, 2011, to June 24, 2011, the defendant is not entitled to a credit for the entire sum of \$5,200, but, in light of foregoing, he is entitled to a credit in the sum of \$3,400 for those payments.

[8] As the defendant correctly contends, the Supreme Court should have directed that his child support obligation be decreased by "the amount of any college room and board expenses he incurs while the parties' child[ren] attend [] college" (Sotnik v. Zavilyansky, 101 A.D.3d at 1104, 956 N.Y.S.2d 514; see Ayers v. Ayers, 92 A.D.3d 623, 625, 938 N.Y.S.2d 572; Matter of Levy v. Levy, 52 A.D.3d 717, 718, 860 N.Y.S.2d 617; Rohrs v. Rohrs, 297 A.D.2d 317, 318, 746 N.Y.S.2d 305).

*4 [9] We agree with the defendant that, as a wage earner contributing to the support of his children, he is entitled to claim one of the children as a dependent on his income tax returns (see Lueker v. Lueker, 72 A.D.3d 655, 658, 898

Lueker v. Lueker, 72 A.D.3d 655, 658, 898 N.Y.S.2d 605). Thus, the parties are to equally share the dependent tax exemptions, allowances, and deductions derived from claiming their children as dependents on their respective income tax returns, as directed herein.

[10] As the defendant correctly contends, the Supreme Court erred in directing him to contribute or to additionally contribute to certain discretionary expenses that the plaintiff incurred on behalf of the children, including a sweet sixteen party for the parties' daughter, trips to South Korea, and new furniture (see Silbowitz v. Silbowitz, 226 A.D.2d 699, 700, 641 N.Y.S.2d 866). Although the defendant also correctly argues that the court lacked authority to compel him to contribute to certain "add-on" child care expenses incurred prior to the commencement of this action (see Domestic Relations Law 236[B][7][a]), the defendant acknowledges his responsibility for certain postcommencement medical expenses and tutoring expenses related to the parties' children, totaling \$1,082. The plaintiff additionally established that she incurred post-commencement expenses totaling \$709, consisting of \$600 for therapy for the parties' son between November 2, 2011, and December 1, 2011, and \$109 for eyeglasses for the parties' daughter on June 30, 2011. Thus, the defendant is responsible for 50% of the total sum of \$1,791, or \$895.50. Additionally, we modify the judgment to correct the Supreme Court's omission of the word "reasonable" to describe the unreimbursed health care expenses to be paid by the defendant (see Domestic Relations Law § 240[1-b][c][5]; Lueker v. Lueker, 72 A.D.3d at 659, 898 N.Y.S.2d 605).

[11] Contrary to the defendant's assertions, the Supreme Court's decision concluding that he is obligated to pay, inter alia, pendente lite maintenance, is enforceable against him,

notwithstanding that it was never reduced to a written order (see 22 NYCRR 202.8[g]). The defendant challenges the court's award of pendente lite maintenance arrears to the plaintiff, as set forth in the judgment, as well as its failure to award him a credit for the pendente lite maintenance payments he made during the pendency of the action. The defendant asserts that the pendente lite maintenance award improperly resulted in a double counting of the income derived from his medical license.

[12] Courts recognize that pendente lite awards are temporary, and some degree of inequity with respect to such awards is accepted in the interests of judicial economy. The defendant's remedy for any perceived inequity was to seek a speedy trial (see Iwanow v. Iwanow, 39 A.D.3d 471, 472, 834 N.Y.S.2d 247; Brooks v. Brooks, 30 A.D.3d 363, 364, 816 N.Y.S.2d 545; Taylor v. Taylor, 306 A.D.2d 401, 760 N.Y.S.2d 884). Nonetheless, exercising our discretion pursuant to CPLR 5019(a) , we note that the Supreme Court mistakenly awarded the plaintiff the sum of \$30,594 as pendente lite "maintenance arrears." We recalculate the defendant's total pendente lite arrears as the sum of \$19,800, comprising maintenance arrears in the sum of \$13,200, representing the arrears for December 2011, January 2012, February 2012, March 2012, April 2012, and May 2012, and the sum of \$6,600, representing arrears of pendente lite carrying charges on the former marital residence.

*5 [13] We agree with the defendant that the Supreme Court improvidently exercised its discretion in awarding the plaintiff expert fees (see Domestic Relations Law 237[a]). Absent a showing of necessity or inability to pay, an award of such fees is generally unjustified (see Gilliam v. Gilliam, 109 A.D.3d 871, 971 N.Y.S.2d 541; see also Steinmetz v. Steinmetz, 98 A.D.2d 657, 469 N.Y.S.2d 405). Here, the Supreme Court awarded the plaintiff a pendente lite attorney's fee in the sum of \$5,000. At that time, it found that the wife was financially capable of retaining her own expert. Subsequently, the court determined that the

--- N.Y.S.2d ----, 2013 WL 6484143 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08229 (Cite as: 2013 WL 6484143 (N.Y.A.D. 2 Dept.))

plaintiff was thereafter capable of paying her own attorney's fee. Therefore, it was inappropriate for the court to award the plaintiff expert fees under these circumstances.

The defendant's remaining contentions are without merit.

N.Y.A.D. 2 Dept.,2013. Kim v. Schiller --- N.Y.S.2d ----, 2013 WL 6484143 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08229

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 $976~\rm N.Y.S.2d~218,~2013~\rm N.Y.~Slip~Op.~08246$

(Cite as: 976 N.Y.S.2d 218)

Supreme Court, Appellate Division, Second Department, New York. In the Matter of Nicole S. HAMILTON, respondent,

v.

Gerald N. HAMILTON, appellant.

Dec. 11, 2013.

Background: Mother filed petition to modify a prior child support order so as to require father to pay private school tuition of the parties' child. The Family Court, Nassau County, Cahn, S.M., directed father to pay 64% of child's private school tuition and expenses, and father objected. The Family Court, Nassau County, Kent, J., granted father's objections, vacated order, and dismissed petition. Mother moved to vacate order. The Family Court granted mother's motion and reinstated order. Father appealed.

Holding: The Supreme Court, Appellate Division, held that father failed to exhaust family court procedure for review of his objections to magistrate's order.

Affirmed.

West Headnotes

Child Support 76E € 539

76E Child Support

76EXII Appeal or Judicial Review

76Ek539 k. Presentation and reservation of grounds of review. Most Cited Cases

Father failed to fulfill condition precedent to filing timely written objections to Support Magistrate's order requiring him to pay private school tuition for parties' child, as required to exhaust family court procedure for review of his objections, and thus family court lacked jurisdiction to consider merits of objections, and father waived his right to appellate review; mother provided evidence that she did not live at address to which

father had mailed the objections, and father conceded failure to mail objections to correct address, and no rebuttal to objections had been filed by mother. McKinney's Family Court Act § 439.

*218 Gerald N. Hamilton, Cambria Heights, N.Y., appellant pro se.

Picciano & Scahill, P.C., Westbury, N.Y. (Francis J. Scahill and Andrea E. Ferrucci of counsel), for respondent.

REINALDO E. RIVERA, J.P., MARK C. DILLON , CHERYL E. CHAMBERS, and SYLVIA O. HINDS-RADIX, JJ.

In a child support proceeding pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Nassau County (Kent, J.), dated January 31, 2013, which granted the mother's motion to vacate an order of the same court dated November 15, 2012, granting the father's objections to an order of the same court dated July 31, 2012 (Cahn, S.M.), and thereupon reinstated the order dated July 31, 2012.

ORDERED that the order dated January 31, 2013, is affirmed, without costs or disbursements.

In her petition, the mother sought to modify a prior child support order so as to require the father to pay the private school tuition of the parties' child. Following a hearing at which both parties were present, the Support Magistrate, in an order dated July 31, 2012 (hereinafter the Support Magistrate's order), directed the father to pay 64% of the child's private *219 school tuition and expenses, commencing with the 2012–2013 school year.

The father filed objections to the order. The affidavit of service indicates that the objections were mailed to the mother at a specified address.

(Cite as: 976 N.Y.S.2d 218)

The mother did not file a rebuttal to the father's objections. In an order dated November 15, 2012, the Family Court granted the father's objections, vacated the Support Magistrate's order, and dismissed the petition.

The mother then moved to vacate the order dated November 15, 2012, and, thereupon, to dismiss the father's objections as untimely. The mother averred in an affidavit that she never received the father's objections, and only became aware of them when the Family Court served her with the order dated November 15, 2012. The mother asserted that the address to which the father mailed his objections was not her address, and she had resided at a different address on the same street for the past five years. Her petition and driver license, as well as the stipulation of settlement entered in the parties' divorce action, all stated an address different from the one to which the father had mailed the objections. In an unsworn affidavit in opposition, the father acknowledged that "Petitioner did not receive Objections to Support Order due to server mailing to wrong address in error."

In the order appealed from, the Family Court granted the mother's motion to vacate the order dated November 12, 2012, and thereupon reinstated the Support Magistrate's order.

Family Court Act § 439 provides, in pertinent part, that "[a] party filing objections shall serve a copy of such objections upon the opposing party," and that "[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal." Here, given the mother's evidence that she did not live at the address to which the father had mailed the objections, coupled with the father's conceded failure to mail the objections to the correct address, and where "no rebuttal to the objections had been filed by the mother" (*Matter of Burger v. Brennan*, 77 A.D.3d 828, 828, 909 N.Y.S.2d 370), "the father failed to fulfill a condition precedent to filing timely written objections to the Support

Magistrate's order and, thus, failed to exhaust the Family Court procedure for review of [his] objections" (Matter of Lawrence v. Bernier, 100 A.D.3d 634, 635, 953 N.Y.S.2d 270 [internal quotation marks omitted]). Consequently, "the Family Court lacked jurisdiction to consider the merits of the objections, and the father waived his right to appellate review" (Matter of Girgenti v. Gress, 85 A.D.3d 1166, 1166, 925 N.Y.S.2d 886 [citation omitted]; see Matter of DiFede v. DiFede, 99 A.D.3d 1003, 952 N.Y.S.2d 455; Matter of Lusardi v. Giovinazzi, 81 A.D.3d 958, 959, 917 N.Y.S.2d 889; Matter of Hidary v. Hidary, 79 A.D.3d 880, 881, 912 N.Y.S.2d 435; Matter of Simpson v. Gelin, 48 A.D.3d 693, 693-694, 850 N.Y.S.2d 913; Matter of Chukwuogo v. Chukwuogo, 46 A.D.3d 558, 558-559, 846 N.Y.S.2d 639; Matter of Rinaldi v. Rinaldi, 239 A.D.2d 506, 506–507, 657 N.Y.S.2d 443).

The father's remaining contentions are without merit. Accordingly, the Family Court properly granted the mother's motion to vacate the order dated November 12, 2012, and thereupon properly reinstated the Support Magistrate's order.

N.Y.A.D. 2 Dept.,2013. Hamilton v. Hamilton 976 N.Y.S.2d 218, 2013 N.Y. Slip Op. 08246



975 N.Y.S.2d 891, 2013 N.Y. Slip Op. 08035

(Cite as: 975 N.Y.S.2d 891)

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Supreme Court, Appellate Division, Second Department, New York. Richard E. AEBLY, respondent, v. Regan LALLY, appellant.

Dec. 4, 2013.

Regan Lally, Locust Valley, N.Y. (Jeffrey Horn of counsel), appellant pro se.

Howard B. Leff, P.C., Garden City, N.Y., for respondent.

In an action for a divorce and ancillary relief, the defendant appeals, by permission, from an order of the Supreme Court, Nassau County (Palmieri, J.), dated October 13, 2011, which, sua sponte, appointed a temporary receiver.

ORDERED that the appeal is dismissed, without costs or disbursements.

*892 The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action on May 16, 2012 (see Matter of Aho, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from that judgment (see CPLR 5501[a][1]; Aebly v. Lally, — A.D.3d —, —N.Y.S.2d —, 2013 WL 6246231 [Appellate Division Docket No. 2012–06307; decided herewith]).

SKELOS, J.P., HALL, COHEN and HINDS-RADIX, JJ., concur.

N.Y.A.D. 2 Dept. 2013. Aebly v. Lally 975 N.Y.S.2d 891, 2013 N.Y. Slip Op. 08035



--- N.Y.S.2d ----, 2013 WL 6246231 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08036 (Cite as: 2013 WL 6246231 (N.Y.A.D. 2 Dept.))

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Supreme Court, Appellate Division, Second Department, New York. Richard E. AEBLY, respondent, v.

Regan LALLY, appellant.

Dec. 4, 2013.

Background: Husband brought action for divorce and ancillary relief. Following nonjury trial, the Supreme Court, Nassau County, Palmieri, J., directed sale of marital residence, awarded husband \$36,227.50 as distributive award, and awarded husband one-half of appreciation in value of wife's separate property. Wife appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) husband's contributions to wife's separate property during their marriage entitled him to share equally in appreciation in value of that property during marriage;
- (2) wife was entitled to credit in sum of one-half of retainer fee paid by husband using marital funds; and
- (3) wife had to be given option to retain marital residence by purchasing husband's interest therein.

Affirmed as modified and remitted.

West Headnotes

[1] Divorce 134 @==0

134 Divorce

Husband's contributions to wife's separate property during their marriage entitled husband to share equally in appreciation in value of that property during marriage in parties' divorce proceeding.

[2] Divorce 134 @---0

134 Divorce

Husband's use of \$7,500 of marital funds to pay retainer fee to his first attorney in connection with action for divorce and ancillary relief entitled wife to credit in sum of one-half of retainer fee.

[3] Divorce 134 © 0

134 Divorce

Trial court could not direct immediate sale of marital residence in divorce action, since parties' financial circumstances did not dictate immediate sale, and they were to receive substantial income from sale of other properties by receiver, even though continued joint ownership for extended period of time was inappropriate in light of parties' acrimonious relationship, and, instead, wife had to be given option of retaining exclusive occupancy of marital residence by purchasing husband's interest therein, provided that, if she opted to do so, she had to pay off remaining balance of mortgage within six months, following which court would be required to recalculate equitable distribution award and make appropriate adjustments.

Horn & Horn, Huntington, N.Y. (Jeffrey S. Horn of counsel), for appellant.

Howard B. Leff, P.C., Garden City, N.Y. (Alexander S. Leff of counsel), for respondent.

PETER B. SKELOS, J.P., L. PRISCILLA HALL, JEFFREY A. COHEN and SYLVIA O. HINDS-RADIX, JJ.

*1 In an action for a divorce and ancillary relief, the defendant appeals, as limited by her brief, from stated portions of a judgment of the Supreme Court, Nassau County (Palmieri, J.), entered May 16, 2012, which, upon a decision of the same court dated October 13, 2011, made after a nonjury trial, inter alia, directed the sale of the marital residence, awarded the plaintiff the sum of

(Cite as: 2013 WL 6246231 (N.Y.A.D. 2 Dept.))

\$36,227.50 as a distributive award, and awarded the plaintiff one half of the appreciation in value of the defendant's separate property located on Sound Beach Avenue in Bayville.

ORDERED that the judgment is modified, on the facts and in the exercise of discretion, (1) by deleting the provision thereof awarding the plaintiff the sum of \$36,227.50 as a distributive award, and substituting therefor a provision awarding the plaintiff the sum of \$32,477.50 as a distributive award, and (2) by deleting the provision thereof directing the sale of the marital residence; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings in accordance herewith, and thereafter, the entry of an appropriate amended judgment.

In a companion appeal (see Aebly v. Lally, — AD3d — [Appellate Division Docket No. 2012–00067; decided herewith]), this Court is dismissing an appeal taken, by permission, from an intermediate order of the Supreme Court, Nassau County, dated October 13, 2011, because the right of direct appeal therefrom terminated with the entry of the judgment in the action (see Matter of Aho, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from that order are brought up for review and are now considered on the appeal from the judgment (see CPLR 5501[a] [1]).

[1] At the time of the parties' marriage in 1997, the defendant owned real property on Sound Beach Avenue in Bayville (hereinafter the Sound Beach property), which she purchased in 1995. Based on the plaintiff's contributions to the Sound Beach property during the marriage, the Supreme Court properly determined that the plaintiff was entitled to share equally in the appreciation in the value of that property during the parties' marriage (see Johnson v. Johnson, 99 A.D.3d 765, 952 N.Y.S.2d 243; Jones v. Jones, 92 A.D.3d 845, 939 N.Y.S.2d 510; Bernholc v. Bornstein, 72 A.D.3d 625, 898

N.Y.S.2d 228; *Kilkenny v. Kilkenny*, 54 A.D.3d 816, 863 N.Y.S.2d 807).

- [2] However, since, as the plaintiff concedes, he used \$7,500 of marital funds to pay a retainer fee to his first attorney in connection with this litigation, the defendant was entitled to a credit in the sum of one half of this retainer fee (see Khan v. Ahmed, 98 A.D.3d 471, 949 N.Y.S.2d 428; Bernholc v. Bornstein, 72 A.D.3d at 628–629, 898 N.Y.S.2d 228; Chiotti v. Chiotti, 12 A.D.3d 995, 998, 785 N.Y.S.2d 157; see also Decker v. Decker, 91 A.D.3d 1291, 1292, 938 N.Y.S.2d 690).
- [3] Under the particular circumstances of this case, the Supreme Court improvidently exercised its discretion in directing the immediate sale of the marital residence without first offering the defendant the option of retaining exclusive occupancy of the marital residence by purchasing the plaintiff's interest therein (see Skinner v. Skinner, 241 A.D.2d 544, 545, 661 N.Y.S.2d 648; Hillmann v. Hillmann, 109 A.D.2d 777, 778, 486 N.Y.S.2d 87; Patti v. Patti, 99 A.D.2d 772, 472 N.Y.S.2d 20). The financial circumstances of the parties did not dictate the immediate sale of the marital residence (see Skinner v. Skinner, 241 A.D.2d at 545, 661 N.Y.S.2d 648; Hillmann v. Hillmann, 109 A.D.2d at 778, 486 N.Y.S.2d 87; cf. Blackman v. Blackman, 131 A.D.2d 801, 804, 517 N.Y.S.2d 167). However, in light of the acrimonious relationship between the parties, the marital residence should not continue to be jointly owned by the parties for an extended period of time. Under these circumstances, and considering that the parties will receive substantial income from the sale of other marital properties by an appointed receiver, it is appropriate to give the defendant the option of retaining exclusive occupancy of the marital residence, provided that, in the event she exercises the option, she must, within six months after service upon her of a copy of this decision and order with notice of entry, pay off the remaining balance of the mortgage on that property and, upon receipt of a satisfaction of the mortgage, the

--- N.Y.S.2d ----, 2013 WL 6246231 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08036 (Cite as: 2013 WL 6246231 (N.Y.A.D. 2 Dept.))

plaintiff must convey by deed to the defendant, his interest in the property. Further, in the event that the defendant exercises the option and satisfies the mortgage, and the plaintiff conveys his interest in the property to the defendant, the Supreme Court must recalculate the equitable distribution award and make appropriate adjustments, taking into account the exercise of the option and satisfaction of the mortgage and conveyance of title. In the event that the option is not exercised, or the option is exercised but the mortgage is not satisfied within the time period allotted, the marital residence must be sold by the appointed receiver, following an appraisal, in accordance with the terms of the judgment entered May 16, 2012. Within 60 days after service upon her of a copy of this decision and order with notice of entry, the defendant must notify the Supreme Court and plaintiff's counsel, in writing, whether she intends to exercise the option. In the event that the defendant fails to so communicate her intent to the Supreme Court and plaintiff's counsel, then she will be deemed to have waived the option. Further, in the event that the defendant exercises the option for exclusive occupancy, she will be solely responsible for, and must pay, all carrying charges on the marital residence that are incurred on or after the date of this decision and order, and the plaintiff will be entitled to a credit for any such carrying charges paid by him on or after the date of this decision and order.

*2 The defendant's remaining contentions either are without merit or do not warrant reversal.

N.Y.A.D. 2 Dept.,2013. Aebly v. Lally --- N.Y.S.2d ----, 2013 WL 6246231 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08036



--- N.Y.S.2d ----, 2013 WL 6246236 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08038

(Cite as: 2013 WL 6246236 (N.Y.A.D. 2 Dept.))

Supreme Court, Appellate Division, Second
Department, New York.
Debra ALLEVA, respondent-appellant,
v.
Robert ALLEVA, appellant-respondent.

Dec. 4, 2013.

Background: Wife brought action for a divorce and ancillary relief. After a nonjury trial, the Supreme Court, Suffolk County, LaSalle, J., awarded wife maintenance and awarded additional relief. The parties cross-appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) court should have awarded maintenance only until wife became eligible for full Social Security retirement benefits or remarried;
- (2) it was appropriate to require husband to maintain life insurance on wife's behalf to secure his maintenance obligation;
- (3) court properly declined to award wife a share of any pre-retirement or joint and survivor pension benefits:
- (4) court properly allocated equally responsibility for credit card debt incurred by wife during pendency of divorce action; and
- (5) there was no basis for disturbing order that net proceeds of sale of marital home be divided equally.

Affirmed as modified.

West Headnotes

[1] Divorce 134 @==0

134 Divorce

Court providently exercised its discretion in awarding wife maintenance in the sum of \$750 per week, but it should have awarded maintenance only until she became eligible for full Social Security

retirement benefits or remarried, instead of awarding maintenance for a period of 15 years.

[2] Divorce 134 © 0

134 Divorce

The amount and duration of spousal maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its own unique facts.

[3] Divorce 134 © --- 0

134 Divorce

The factors to be considered in awarding spousal maintenance include the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become self-supporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance.

[4] Divorce 134 © - 0

134 Divorce

It was appropriate to require husband to maintain life insurance on wife's behalf to secure his maintenance obligation.

[5] Divorce 134 🗫 0

134 Divorce

Court providently exercised its discretion in declining to award wife a share of any preretirement or joint and survivor pension benefits, since there was no specific evidence regarding preretirement death benefits available under husband's pension plans or any option for joint and survivor benefits.

[6] Divorce 134 © == 0

(Cite as: 2013 WL 6246236 (N.Y.A.D. 2 Dept.))

134 Divorce

Court providently exercised its discretion in equally allocating responsibility for marital debt, including certain credit card debt incurred by wife during pendency of divorce action for, inter alia, the support of herself and the parties' two emancipated children; although wife argued that husband should be solely responsible for the credit card debt, she did not assert that husband failed to comply with a pendente lite order directing him to pay maintenance and expenses of the children.

[7] Divorce 134 🖘 0

134 Divorce

In general, financial obligations incurred during the marriage which are not solely the responsibility of one party should be shared equally by the parties.

[8] Divorce 134 @==0

134 Divorce

There was no evidence that husband was responsible for a diminution in the value of the marital home, and thus, there was no basis for disturbing the equitable distribution award ordering the net proceeds of the sale of the marital home to be divided equally.

[9] Divorce 134 @---0

134 Divorce

In a matrimonial action, an award of attorney fees should be based, inter alia, on the relative financial circumstances of the parties, the relative merit of their positions, and the tactics of a party in unnecessarily prolonging the litigation. McKinney's DRL § 237(a).

Sari M. Friedman, P.C., Garden City, N.Y. (Stacia J. Ury of counsel), for appellant-respondent.

Wand, Powers & Goody, LLP, Huntington, N.Y. (Chad M. Powers of counsel), for respondent-appellant.

WILLIAM F. MASTRO, J.P., JOHN M. LEVENTHAL, PLUMMER E. LOTT and SHERI S. ROMAN, JJ.

*1 In an action for a divorce and ancillary relief, the plaintiff appeals, as limited by her brief, from so much of a judgment of the Supreme Court, Suffolk County (LaSalle, J.), dated December 14, 2011, as, upon a decision of the same court dated August 1, 2011, made after a nonjury trial, awarded her maintenance in the sum of only \$750 per week, failed to require the defendant to maintain health insurance for her, failed to require the defendant to maintain a policy of life insurance to secure his maintenance obligations, failed to require the defendant to elect a pre-retirement death benefit and/or joint survivor option with respect to certain pension plans, allocated certain marital credit card debt equally between the parties, allocated the marital assets equally between the parties, awarded her an attorney's fee in the sum of only \$10,000 and directed the payment of that fee within 18 months after the date of service of the decision, and failed to direct the release to her of certain monies from an escrow account held by the defendant's former attorney, and the defendant cross-appeals, as limited by his brief, from so much of the same judgment as awarded the plaintiff maintenance for a period of 15 years.

ORDERED that the judgment is modified, on the facts and in the exercise of discretion, (1) by deleting the provision thereof awarding the plaintiff maintenance for a period of 15 years, and substituting therefor a provision awarding the plaintiff maintenance until she is eligible for full Social Security benefits or remarries, and (2) by adding a provision thereto directing the defendant to maintain a life insurance policy for the benefit of the plaintiff until payment of maintenance is completed in an amount sufficient to secure the maintenance obligation; as so modified, the judgment is affirmed insofar as appealed and crossappealed from, with costs to the defendant, and the matter is remitted to the Supreme Court, Suffolk

County, for a determination as to the distribution of the funds in the escrow account held by the defendant's former attorney, and for the entry of an appropriate amended judgment thereafter.

[1][2][3] The "amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its own unique facts" (Wortman v. Wortman, 11 A.D.3d 604, 606, 783 N.Y.S.2d 631; see Morales v. Inzerra, 98 A.D.3d 484, 949 N.Y.S.2d 433; Farag v. Farag, 4 A.D.3d 502, 772 N.Y.S.2d 368). The factors to be considered in awarding maintenance include "the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become selfsupporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance" (Kret v. Kret, 222 A.D.2d 412, 413, 634 N.Y.S.2d 719; see Farag v. Farag, 4 A.D.3d at 503, 772 N.Y.S.2d 368; Wilson v. Wilson, 308 A.D.2d 583, 764 N.Y.S.2d 828). Contrary to the plaintiff's contention, under the circumstances of this case, the Supreme Court providently exercised its discretion in awarding her maintenance in the sum of \$750 per week. However, as the defendant correctly contends, the Supreme Court should have awarded the plaintiff maintenance only until she becomes eligible for full Social Security retirement benefits or remarries (see Penna v. Penna, 29 A.D.3d 970, 972, 817 N.Y.S.2d 313; see also Lorenz v. Lorenz, 63 A.D.3d 1361, 1363-1364, 881 N.Y.S.2d 208; Taylor v. Taylor, 300 A.D.2d 298, 751 N.Y.S.2d 282).

- *2 Under the circumstances of this case, the Supreme Court providently exercised its discretion in declining to direct the defendant to maintain health insurance for the plaintiff (see Domestic Relations Law § 236[B][8] [a]).
 - [4] As the plaintiff correctly contends, it is

- appropriate in this case to require the defendant to maintain life insurance on her behalf to secure his maintenance obligation (*see id.; Hartog v. Hartog,* 85 N.Y.2d 36, 50, 623 N.Y.S.2d 537, 647 N.E.2d 749; *Miceli v. Miceli,* 78 A.D.3d 1023, 1026, 911 N.Y.S.2d 473; *Baron v. Baron,* 71 A.D.3d 807, 810, 897 N.Y.S.2d 456).
- [5] Contrary to the plaintiff's contention, since the record contains no specific evidence regarding pre-retirement death benefits available under the defendant's pension plans or any option for joint and survivor benefits, the Supreme Court providently exercised its discretion in declining to award her a share of any pre-retirement or joint and survivor pension benefits (see Leichtner v. Leichtner, 18 A.D.3d 446, 447, 794 N.Y.S.2d 440; LeVigne v. LeVigne, 220 A.D.2d 561, 562, 632 N.Y.S.2d 610).
- Supreme Court providently [6][7] The exercised its discretion in equally allocating responsibility for marital debt, including certain credit card debt incurred during the pendency of this action. In general, financial obligations incurred during the marriage which are not solely the responsibility of one party should be shared equally by the parties (see Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 421, 881 N.Y.S.2d 369, 909 N.E.2d 62; Bogdan v. Bogdan, 260 A.D.2d 521, 522, 688 N.Y.S.2d 255). Here, the plaintiff argues that the defendant should be solely responsible for certain credit card debt that the plaintiff incurred during the pendency of this action for, inter alia, the support of herself and the parties' two emancipated children. However, the plaintiff does not assert that the defendant failed to comply with a pendente lite order directing him to pay maintenance and expenses of the children. Under these circumstances, the plaintiff failed to show that the debt should be borne solely by the defendant (see Mosso v. Mosso, 84 A.D.3d 757, 760, 924 N.Y.S.2d 394; see also Caracciolo v. Chodkowski, 90 A.D.3d 801, 803, 937 N.Y.S.2d 60).
 - [8] The plaintiff contends that the Supreme

Court erred in ordering the net proceeds of the sale of the marital home to be divided equally in light of the allegedly wasteful dissipation of assets by the defendant, who allegedly failed to maintain the marital home during the pendency of this action. However, the record does not show that the defendant was responsible for a diminution in the value of the marital home. Thus, there is no basis for disturbing the equitable distribution award in this regard (*see Scher v. Scher*, 91 A.D.3d 842, 844, 938 N.Y.S.2d 317; *Graves v. Graves*, 307 A.D.2d 1022, 1023, 763 N.Y.S.2d 774).

[9] In a matrimonial action, an award of an attorney's fee should be based, inter alia, on the relative financial circumstances of the parties, the relative merit of their positions, and the tactics of a party in unnecessarily prolonging the litigation (see Domestic Relations Law § 237[a]; DeCabrera v. Cabrera-Rosete, 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176, 518 N.E.2d 1168; Levy v. Levy, 4 A.D.3d 398, 398-399, 771 N.Y.S.2d 386; Gallousis v. Gallousis, 303 A.D.2d 363, 364, 755 N.Y.S.2d 659; Krutyansky v. Krutyansky, 289 A.D.2d 299, 300, 733 N.Y.S.2d 920). Contrary to the plaintiff's contention, under the circumstances of this case, the Supreme Court providently exercised its discretion in awarding the plaintiff the sum of \$10,000 as an attorney's fee, payable within 18 months after the date of service of the decision (see Armstrong v. Armstrong, 72 A.D.3d 1409, 1416, 900 N.Y.S.2d 476; Griggs v. Griggs, 44 A.D.3d 710, 714, 844 N.Y.S.2d 351).

*3 The plaintiff correctly asserts that the Supreme Court failed to direct the distribution of certain monies held in an escrow account held by the defendant's former attorney. As the record is not sufficient for this Court to make a determination as to the proper disposition of those funds, the matter must be remitted to the Supreme Court, Suffolk County, for a determination in this regard and the entry of an appropriate amended judgment thereafter.

N.Y.A.D. 2 Dept.,2013. Alleva v. Alleva --- N.Y.S.2d ----, 2013 WL 6246236 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08038



975 N.Y.S.2d 911, 2013 N.Y. Slip Op. 08079 (Cite as: 975 N.Y.S.2d 911)

Supreme Court, Appellate Division, Second

Department, New York.
In the Matter of Richard A. CORBISIERO, appellant,

v.
Loretta A. CORBISIERO, respondent.

Dec. 4, 2013.

Richard A. Corbisiero, Bay Shore, N.Y., appellant pro se.

Loretta A. Corbisiero, Islip Terrace, N.Y., respondent pro se.

In a child support proceeding pursuant to Family Court Act article 4, the father appeals (1), as limited by his brief, from so much of an order of the Family Court, Suffolk County (Fields, S.M.), dated October 3, 2012, as, after a hearing, denied those branches of his petition which were for a downward modification of his weekly child support obligation and his obligation to pay certain college expenses of the parties' children, and (2) an order of the same court (Hoffmann, J.) dated December 10, 2012, which denied his objections to so much of the order dated October 3, 2012, *912 as denied those branches of his petition which were for a downward modification of his weekly child support obligation and his obligation to pay certain college expenses of the parties' children.

ORDERED that the appeal from the order dated October 3, 2012, is dismissed, as the portions of that order appealed from were superseded by the order dated December 10, 2012; and it is further,

ORDERED that the order dated December 10, 2012, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

A party seeking to modify the support provisions contained in a stipulation of settlement incorporated but not merged into a judgment of divorce, where, as here, the stipulation was executed prior to the effective date of the 2010 amendments to Family Court Act § 451, has the burden of establishing a substantial, unanticipated, and unreasonable change in circumstances resulting in a concomitant need (see Family Court Act § 451[2][a]; L. 2010, ch. 182, § 13; Merl v. Merl, 67 N.Y.2d 359, 502 N.Y.S.2d 712, 493 N.E.2d 936; Matter of Neuhauser v. Eisenberger, 77 A.D.3d 951, 910 N.Y.S.2d 119; Matter of Schlakman v. Schlakman, 66 A.D.3d 786, 787, 886 N.Y.S.2d 758; Matter of Ripa v. Ripa, 61 A.D.3d 766, 877 N.Y.S.2d 383; Matter of Kerner v. Kerner, 46 A.D.3d 683, 847 N.Y.S.2d 614). Here, the father failed to establish that an increase in the mother's income was an unanticipated change circumstances sufficient to warrant a downward modification of his weekly child support obligation and his obligation to pay certain college expenses of the parties' children.

Accordingly, the Family Court correctly denied the father's objections to so much of the Support Magistrate's order as denied those branches of his petition which were for a downward modification of those obligations.

SKELOS, J.P., BALKIN, LEVENTHAL and SGROI, JJ., concur.

N.Y.A.D. 2 Dept. 2013. Corbisiero v. Corbisiero 975 N.Y.S.2d 911, 2013 N.Y. Slip Op. 08079



975 N.Y.S.2d 774, 2013 N.Y. Slip Op. 08082

(Cite as: 975 N.Y.S.2d 774)

Supreme Court, Appellate Division, Second
Department, New York.
In the Matter of Leyla LECEI, respondent,
v.
Robert LECEI, appelant.

Dec. 4, 2013.

Background: In a support proceeding, the father appealed from an order of commitment of the Family Court, Orange County, Bivona, J., which adjudged him to be in willful violation of his support obligations set forth in the parties' judgment of divorce, and committed him to the County Jail for a term of 90 days.

Holding: The Supreme Court, Appellate Division, held that father met his burden of establishing his inability to meet his support obligations.

Reversed.

West Headnotes

[1] Child Support 76E \$\infty\$=552

76E Child Support 76EXII Appeal or Judicial Review 76Ek548 Review

76Ek552 k. Mootness of issues. Most

Cited Cases

Although the father had completed his sentence, his appeal from an order of commitment of the Family Court, which adjudged him to be in willful violation of his support obligations set forth in the parties' judgment of divorce, and committed him to the county jail for a term of 90 days, was not academic, in light of the enduring consequences that might flow from the finding that he willfully violated his support obligation.

[2] Child Support 76E € 3458

76E Child Support

76EIX Enforcement

76Ek447 Arrearages; Retroactive

Modification

76Ek458 k. Circumstances of obligor. Most Cited Cases

In a support proceeding, after the mother established, prima facie, that the father owed approximately \$147,000 in child support and maintenance, the father met his burden of establishing his inability to meet his support obligations set forth in the parties' judgment of divorce; the father's uncontroverted testimony demonstrated that he had been unemployed for at least two years, had repeatedly searched for employment, had no savings or appreciable assets, and relied upon his family and friends for support. McKinney's Family Court Act § 454(3)(a).

*774 Richard L. Herzfeld, P.C., New York, N.Y., for appellant.

PETER B. SKELOS, J.P., RUTH C. BALKIN, JOHN M. LEVENTHAL, and SANDRA L. SGROI, JJ.

In a support proceeding pursuant to Family Court Act article 4, the father appeals from an order of commitment of the Family Court, Orange County (Bivona, J.), dated January 24, 2013, which, after a hearing, in effect, adjudged him to be in willful violation of his support obligations set forth in the parties' judgment of divorce entered March 6, 2012, and committed him to the Orange County Jail for a term of 90 days.

ORDERED that the appeal from so much of the order of commitment as committed the father to the Orange County Jail for a term of 90 days is dismissed as academic, without costs or disbursements, as the period of incarceration has expired (see Matter of Westchester County Commr. of Social Servs. v. Perez, 71 A.D.3d 906, 907, 897 N.Y.S.2d 192); and it is further,

(Cite as: 975 N.Y.S.2d 774)

ORDERED that the order of commitment is reversed insofar as reviewed, on the facts, without costs or disbursements, and the petition to adjudicate the father in willful violation of his support obligations set forth in the parties' judgment of divorce entered March 6, 2012, is denied.

[1] Although the father has completed his sentence, the appeal from so much of the order of commitment as, in effect, adjudged him to be in willful violation of his support obligation set forth in the parties' *775 judgment of divorce entered March 6, 2012, is not academic in light of the enduring consequences which might flow from the finding that he willfully violated his support obligation (see Matter of Bickwid v. Deutsch, 87 N.Y.2d 862, 638 N.Y.S.2d 932, 662 N.E.2d 250).

[2] The Family Court erred when it, in effect, adjudicated the father in willful violation of his support obligations set forth in the parties' judgment of divorce entered March 6, 2012. Proof of the failure to pay child support constitutes prima facie evidence of a willful violation, and shifts the burden to the obligor to come forward with competent, credible evidence of his or her inability to pay (see Family Ct. Act § 454[3][a]; Matter of Powers v. Powers, 86 N.Y.2d 63, 69, 629 N.Y.S.2d 984, 653 N.E.2d 1154).

Here, the mother established, prima facie, that the father owed approximately \$147,000 in child support and maintenance, and the burden then shifted to the father to come forward with competent, credible evidence that his failure to pay his support obligation was not willful (see Matter of Powers v. Powers, 86 N.Y.2d at 69, 629 N.Y.S.2d 984, 653 N.E.2d 1154). The father's uncontroverted testimony demonstrated that he had been unemployed for at least two years, had repeatedly searched for employment, had no savings or appreciable assets, and relied upon his family and friends for support. "In the absence of proof of an ability to pay, an order of commitment for willful violation of a support order may not stand" (Matter

of Grasso v. LaRocca, 54 A.D.3d 760, 760, 864 N.Y.S.2d 88). Based upon the evidence in this record, the father met his burden of establishing his inability to meet his support obligations set forth in the parties' judgment of divorce (see Matter of Ceballos v. Castillo, 85 A.D.3d 1161, 1164, 926 N.Y.S.2d 142; Matter of Westchester County Commr. of Social Servs. v. Perez, 71 A.D.3d at 907, 897 N.Y.S.2d 192).

Accordingly, the order of commitment is reversed insofar as reviewed.

N.Y.A.D. 2 Dept.,2013. Lecei v. Lecei 975 N.Y.S.2d 774, 2013 N.Y. Slip Op. 08082



975 N.Y.S.2d 900, 2013 N.Y. Slip Op. 08066 (Cite as: 975 N.Y.S.2d 900)

Supreme Court, Appellate Division, Second
Department, New York.
Christine REESE, respondent,
v.
Walter REESE, appellant.

Dec. 4, 2013.

Breiter and Gura, LLP, Garden City, N.Y. (Rona L. Gura of counsel), for appellant.

Christine Reese, Oceanside, N.Y., respondent pro se.

In a matrimonial action in which the parties were divorced by judgment entered December 18, 2007, the defendant appeals from an order of the Supreme Court, Nassau County (J. Murphy, J.), entered April 5, 2012, which granted, without a hearing, those branches of the plaintiff's cross motion which were for an upward modification of the defendant's child support obligation set forth in a stipulation of settlement, which was incorporated but not merged into the judgment of divorce, and for an award of an attorney's fee.

ORDERED that the order is reversed, on the facts and in the exercise of discretion, with costs, and those branches of the plaintiff's cross motion which were for an upward modification of the defendant's child support obligation and for an award of an attorney's fee are denied.

A child support agreement based on a stipulation of settlement which is incorporated but not merged into the divorce judgment should not be disturbed absent a showing that the agreement was unfair or inequitable, that there was an unanticipated change in circumstances (see Matter of Boden v. Boden, 42 N.Y.2d 210, 213, 397 N.Y.S.2d 701, 366 N.E.2d 791; Nelson v. Nelson, 75 A.D.3d 593, 593–594, 904 N.Y.S.2d 663; Matter of Mason v. Papol, 63 A.D.3d 942, 883

N.Y.S.2d 56), or that the children's needs were no longer being met (*see Matter of Gravlin v. Ruppert*, 98 N.Y.2d 1, 5, 743 N.Y.S.2d 773, 770 N.E.2d 561; *Matter of Imperato v. Imperato*, 54 A.D.3d 375, 376, 862 N.Y.S.2d 585). Here, the plaintiff failed to make the requisite showing to warrant an upward modification of child support. Accordingly, the Supreme Court should not have granted that branch of the plaintiff's cross motion which was for an upward modification of the defendant's child support obligation (*see Matter of Alexander v. Strathairn*, 69 A.D.3d 930, 931, 892 N.Y.S.2d 861; *Friedman v. Friedman*, 65 A.D.3d 1081, 1082, 885 N.Y.S.2d 720).

Further, under the circumstances of this case, the Supreme Court should not have granted that branch of the plaintiff's cross motion which was for an award of an attorney's fee (see Domestic Relations Law § 237[b]; *Matter of Alexander v. Strathairn*, 69 A.D.3d at 931, 892 N.Y.S.2d 861).

In light of our determination, the defendant's remaining contentions need not be considered.

RIVERA, J.P., SKELOS, CHAMBERS and HALL, JJ., concur.

N.Y.A.D. 2 Dept. 2013. Reese v. Reese 975 N.Y.S.2d 900, 2013 N.Y. Slip Op. 08066



--- N.Y.S.2d ----, 2013 WL 6246465 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08071 (Cite as: 2013 WL 6246465 (N.Y.A.D. 2 Dept.))

Supreme Court, Appellate Division, Second Department, New York. Geraldine VITALE, appellant,

John Anthony VITALE, respondent.

Dec. 4, 2013.

Background: In matrimonial action, wife moved for award of an attorney's fee and an expert fee. The Supreme Court, Nassau County, Schellace, Ct. Atty Ref., denied motion. Wife appealed.

Holding: The Supreme Court, Appellate Division, held that it was within trial court's discretion to deny wife's motion for an award of an attorney's fee and an expert fee.

Affirmed.

West Headnotes

[1] Divorce 134 @--0

134 Divorce

In a matrimonial action, an award of an attorney's fee or an expert fee is a matter committed to the sound discretion of the trial court.

[2] Divorce 134 © 0

134 Divorce

An award of attorney's and expert fees will generally be warranted where there is a significant disparity in the financial circumstances of the parties. McKinney's DRL § 237(a).

[3] Divorce 134 © - 0

134 Divorce

An award of an attorney's fee in a divorce proceeding ensures that the nonmonied spouse will be able to litigate the action and do so on equal footing with the monied spouse. McKinney's DRL

§ 237(a).

[4] Divorce 134 @==0

134 Divorce

In determining whether to award fees in a divorce proceeding, the court should review the financial circumstances of both parties, together with all of the other circumstances of the case, which may include the relative merit of the parties' positions. McKinney's DRL § 237(a).

[5] Divorce 134 @--0

134 Divorce

When determining whether to award fees in a divorce proceeding, a court may consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation. McKinney's DRL § 237(a).

[6] Divorce 134 € □ 0

134 Divorce

It was within trial court's discretion in divorce proceeding to deny wife's motion for an award of an attorney's fee and an expert fee, since there was no significant disparity in the parties' financial circumstances, and wife's conduct unnecessarily prolonged litigation. McKinney's DRL § 237(a).

[7] Divorce 134 © - 0

134 Divorce

Failure of wife's former attorney in divorce proceeding to substantially comply with rules governing retainer agreements and statements of client's rights precluded him from seeking unpaid fees from wife and, therefore, husband could not be compelled to pay such fees. N.Y.Ct.Rules, §§ 1400.2, 1400.3; McKinney's DRL § 237(a).

[8] Divorce 134 @---0

134 Divorce

Failure of wife's attorney in divorce proceeding to substantially comply with rules governing affidavits attached to motions for fees precluded him from seeking award of attorney's fees. 22 NYCRR 202.16(k)(3); McKinney's DRL § 237(a).

Galasso, Langione, Catterson & LoFrumento, LLP, Garden City, N.Y. (Peter J. Galasso of counsel), for appellant.

Kenneth J. Weinstein, P.C., Garden City, N.Y. (Michael J. Langer of counsel), for respondent.

MARK C. DILLON, J.P., DANIEL D. ANGIOLILLO, THOMAS A. DICKERSON and JEFFREY A. COHEN, JJ.

*1 In a matrimonial action in which the parties were divorced by judgment dated April 2, 2008, the plaintiff appeals from an order of the Supreme Court, Nassau County (Schellace, Ct. Atty Ref.), dated March 16, 2012, which denied her motion for an award of an attorney's fee and an expert fee.

ORDERED that the order is affirmed, with costs.

[1][2][3][4][5] In a matrimonial action, an award of an attorney's fee or an expert fee is a matter committed to the sound discretion of the trial court (see Cusumano v. Cusumano, 96 A.D.3d 988, 947 N.Y.S.2d 175). An award of attorney's and expert fees pursuant to Domestic Relations Law § 237(a) will generally be warranted where there is a significant disparity in the financial circumstances of the parties (see Chesner v. Chesner, 95 A.D.3d 1252, 945 N.Y.S.2d 409; Palmeri v. Palmeri, 87 A.D.3d 572, 929 N.Y.S.2d 153; Fredericks v. Fredericks, 85 A.D.3d 1107, 927 N.Y.S.2d 109). An award of an attorney's fee pursuant to Domestic Relations Law § 237(a) ensures that the nonmonied spouse will be able to litigate the action and do so on equal footing with the monied spouse (see Finnan v. Finnan, 95 A.D.3d 821, 943 N.Y.S.2d 559; Many v. Many, 84 A.D.3d 1036, 925 N.Y.S.2d

87; Coven v. Coven, 82 A.D.3d 1144, 919 N.Y.S.2d 866). In determining whether to award fees, the court should review the financial circumstances of both parties, together with all of the other circumstances of the case, which may include the relative merit of the parties' positions (see Chesner v. Chesner, 95 A.D.3d 1252, 945 N.Y.S.2d 409; Chaudry v. Chaudry, 95 A.D.3d 1058, 945 N.Y.S.2d 110; Perry v. Perry, 88 A.D.3d 861, 931 N.Y.S.2d 516). A court may consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (see Brantly v. Brantly, 89 A.D.3d 881, 933 N.Y.S.2d 300; Fredericks v. Fredericks, 85 A.D.3d 1107, 927 N.Y.S.2d 109; Aloi v. Simoni, 82 A.D.3d 683, 918 N.Y.S.2d 506).

[6] Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in denying that branch of the plaintiff's motion which was for an award of an attorney's fee and an expert fee pursuant to Domestic Relations Law § 237(a), since there was no significant disparity in the parties' financial circumstances (see Kaminash v. Levi, 102 A.D.3d 837, 958 N.Y.S.2d 725). Furthermore, the plaintiff's conduct unnecessarily prolonged this litigation (see Beth M. v. Joseph M., 12 Misc.3d 1188[A] [Sup.Ct. Nassau County 2006]).

[7][8] In addition, the failure of the plaintiff's former attorney to substantially comply with 22 NYCRR 1400.2 and 1400.3 precluded him from seeking unpaid fees from the plaintiff and, therefore, the defendant may not be compelled to pay such fees (*see Rosado v. Rosado*, 100 A.D.3d 856, 955 N.Y.S.2d 119). Furthermore, the plaintiff's current attorney failed to comply with 22 NYCRR 202.16(k)(3), precluding an award of fees to him (*see Mimran v. Mimran*, 83 A.D.3d 550, 922 N.Y.S.2d 27; *Covington v. Covington*, 249 A.D.2d 735, 673 N.Y.S.2d 746).

N.Y.A.D. 2 Dept.,2013. Vitale v. Vitale --- N.Y.S.2d ----, 2013 WL 6246465 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08071 (Cite as: 2013 WL 6246465 (N.Y.A.D. 2 Dept.))

--- N.Y.S.2d ----, 2013 WL 6246465 (N.Y.A.D. 2 Dept.), 2013 N.Y. Slip Op. 08071