

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

211

CA 06-03351

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

CATHERINE JOHNNER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PERCY D. MIMS, DEFENDANT-APPELLANT.

OFFERMANN, CASSANO, GRECO, SLISZ & ADAMS, LLP, BUFFALO (JOAN CASILIO ADAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Stephen W. Cass, A.J.), entered November 1, 2006 in a matrimonial action. The order awarded plaintiff counsel fees of \$60,425.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs.

Memorandum: Supreme Court did not abuse its discretion in granting in part plaintiff's application for counsel fees in this matrimonial action (see Domestic Relations Law § 237 [a]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881; see also *Matter of Grald v Grald*, 33 AD3d 922). The award of counsel fees was based upon evidence presented at the hearing on plaintiff's application for those fees, as well as upon evidence presented during the 26-day trial (see *Matter of Buono v Fantacone*, 252 AD2d 917, 919; see also *McArthur v Bell* [appeal No. 2], 201 AD2d 974, 975, *lv dismissed* 83 NY2d 906, *lv denied* 85 NY2d 809).

Defendant contends that the court erred in awarding plaintiff counsel fees because plaintiff's attorney failed to provide plaintiff with written, itemized bills at least every 60 days (see 22 NYCRR 1400.2, 1400.3). We reject that contention. "[Plaintiff's] attorney complied with 22 NYCRR part 1400 by providing [plaintiff] with the requisite statement of rights and responsibilities and by executing the requisite written retainer agreement with her" (*Matter of Winkelman v Furey*, 281 AD2d 908, 908, *affd* 97 NY2d 711; see also *Mulcahy v Mulcahy*, 285 AD2d 587, 588, *lv denied* 97 NY2d 605; *cf. Hunt v Hunt*, 273 AD2d 875, 876). Although plaintiff's attorney waited until December 2005 to bill plaintiff for services rendered between August 2004 and December 2005, the right to be billed at least every 60 days is a right afforded to plaintiff, not defendant, and plaintiff waived that right by failing

to object to the December 2005 bill (*see Winkelman*, 281 AD2d at 908; *Webbe v Webbe*, 267 AD2d 764, 765, *lv denied* 95 NY2d 753). Denial of plaintiff's application on that ground would result in a windfall to defendant (*see Webbe*, 267 AD2d at 765).

We have considered defendant's remaining contention and conclude that it is without merit.

Entered: February 1, 2008

JoAnn M. Wahl
Clerk of the Court