

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - October 12, 2006

ANITA R. FLORIO, J.P.
GABRIEL M. KRAUSMAN
STEVEN W. FISHER
JOSEPH COVELLO, JJ.

2004-10675

DECISION & ORDER

Galina Ross, respondent, v Eric Ross, appellant.

(Index No. 6989/01)

Stuart L. Melnick, LLC, New York, N.Y., for appellant.

Cassandra Bilotta, New City, N.Y., for respondent.

In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from so much of a judgment of the Supreme Court, Rockland County (Sherwood, J.), dated November 4, 2004, as, after a nonjury trial, awarded the plaintiff a 50% interest in two residential properties pursuant to the terms of a prenuptial agreement dated May 14, 1998.

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

In her complaint, the plaintiff sought, inter alia, the equitable distribution of marital property pursuant to Domestic Relations Law § 236(B)(5). At the outset of the trial, however, she announced that she intended instead to rely on a prenuptial agreement dated May 14, 1998, pursuant to Domestic Relations Law § 236(B)(3). The defendant, who had a copy of the agreement and admitted signing it, agreed to proceed on that basis, provided he would be permitted to raise annulment of the marriage as a defense to the enforcement of the agreement.

Contrary to the defendant's contention, under the circumstances presented, the Supreme Court properly admitted the subject prenuptial agreement into evidence and properly permitted the plaintiff to enforce its terms despite her failure to plead it in the complaint (*cf.* CPLR 3013; 3025[c]).

December 5, 2006

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The defendant's remaining contentions are either unpreserved for appellate review, based on matter dehors the record, or without merit.

FLORIO, J.P., KRAUSMAN, FISHER and COVELLO, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court