

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

D25644  
O/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - December 3, 2009

JOSEPH COVELLO, J.P.  
DANIEL D. ANGIOLILLO  
PLUMMER E. LOTT  
SHERI S. ROMAN, JJ.

---

2008-05389

DECISION & ORDER

Silvia O. McCaffrey, appellant, v Dennis McCaffrey,  
respondent.

(Index No. 06-2760)

---

Kevin T. Mulhearn, P.C., Orangeburg, N.Y. (Joseph J. Artrip of counsel), for  
appellant.

Paul T. Gentile, P.C., New York, N.Y. (Lisa Solomon of counsel), for respondent.

In an action for a divorce and ancillary relief, the plaintiff appeals, as limited by her brief, from stated portions of a judgment of the Supreme Court, Westchester County (Tolbert, J.), dated March 19, 2008, which, upon a decision of the same court dated September 28, 2007, made after a nonjury trial, inter alia, awarded her a share of only one of the defendant's pensions.

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

The plaintiff's argument that the court failed to adequately advise her of her right to counsel, and that she did not knowingly and intelligently waive her right to counsel in this action, is without merit since she had no right to counsel in the action (*see Matter of Smiley*, 36 NY2d 433; *Merkle v Merkle*, 186 AD2d 67, 68).

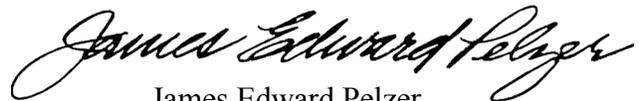
The plaintiff alleged that the defendant has two pensions and contends that the trial court erred in awarding her a share of only one of the two pensions. We disagree. "In a nonjury trial, evaluating the credibility of the respective witnesses and determining which of the proffered items of evidence are most credible are matters committed to the trial court's sound discretion" (*Wasserman*

*v Wasserman*, 66 AD3d 880, 882). Here, the defendant testified that he had one pension. The plaintiff claimed, without any documentary proof, that the defendant had two pensions. The plaintiff's statement was insufficient to prove that the defendant had more than one pension, and the court was not required to accept her statement as conclusive proof that the defendant had more than one pension.

The plaintiff's remaining contention is without merit.

COVELLO, J.P., ANGIOLILLO, LOTT and ROMAN, 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