

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

D25678
Y/prt

_____AD3d_____

Argued - December 3, 2009

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

2008-11588

DECISION & ORDER

Marsha D. Morton, respondent, v
Richard A. Morton, appellant.

(Index No. 3605/07)

Blank Rome, LLP, New York, N.Y. (Donald Frank, Margaret L. Canby, Leonard G. Florescue, and Caroline Krauss-Browne of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman, LLP, New York, N.Y. (Eleanor B. Alter, Adam John Wolff, and Jennifer Lombardo of counsel), for respondent.

In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Westchester County (Tolbert, J.), entered October 27, 2008, as denied that branch of his cross motion which was to set the date of trial as the valuation date for certain marital assets, and set the valuation date for those assets as the date the action was commenced.

ORDERED that the order is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, and that branch of the defendant's cross motion which was to set the date of trial as the valuation date for certain marital assets is granted.

At issue on this appeal is the proper valuation date for marital assets consisting of multiple business entities which own commercial real estate properties and act as the landlord for industrial and manufacturing tenants, many of which are located in the Detroit, Michigan, area. The defendant proffered evidence that a decrease in the value of these assets since the date of commencement of this action was attributable to market forces and, thus, was passive in nature.

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There was no evidence that a decline in the value of these assets during this period of time was due to dissipation or wasteful conduct on the part of the defendant. Thus, the Supreme Court improvidently exercised its discretion in valuing these assets as of the date of commencement of the action rather than as of the date of trial (*see McSparron v McSparron*, 87 NY2d 275, 287-288; *Scharfman v Scharfman*, 19 AD3d 474, 475; *Breese v Breese*, 256 AD2d 433, 433-434; *Sagarin v Sagarin*, 251 AD2d 396, 396; *Smerling v Smerling*, 177 AD2d 429, 430).

This determination does not preclude either party from presenting evidence at trial for the purposes of equitable distribution of any efforts which he or she alleges affected the value of the subject assets (*see Breese v Breese*, 256 AD2d at 434).

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