

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

D28927
O/prt

_____AD3d_____

Submitted - October 12, 2010

RUTH C. BALKIN, J.P.
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS
LEONARD B. AUSTIN, JJ.

2009-07841

DECISION & ORDER

Wendy Tso-Horiuchi, appellant, v
Kentaro Horiuchi, respondent.

(Index No. 201729/05)

Russell I. Marnell, P.C., East Meadow, N.Y. (Scott R. Schwartz of counsel), for appellant.

Patricia Latzman, Port Washington, N.Y., attorney for the children (no brief filed).

In an action for a divorce and ancillary relief, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Brown, J.), dated July 16, 2009, as denied those branches of her motion which were to impose sanctions against the defendant and the defendant's counsel and for an attorney's fee.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

Under the circumstances of this case, the conduct of the defendant and his counsel in serving a subpoena duces tecum on Steven Oteri and taking his testimony at trial did not constitute frivolous conduct sufficient to warrant the imposition of sanctions (*see 601 Realty Corp. v Conway, Farrell, Curtis & Kelly, P.C.*, 74 AD3d 1179; *Dank v Sears Holding Mgt. Corp.*, 69 AD3d 557, 558; *Matter of Wecker v D'Ambrosio*, 6 AD3d 452, 453). Accordingly, the Supreme Court providently exercised its discretion in denying those branches of the plaintiff's motion which were to impose sanctions against the defendant and his counsel and for an attorney's fee.

November 9, 2010

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The plaintiff's remaining contentions are without merit.

BALKIN, J.P., LEVENTHAL, CHAMBERS and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive style with a large, prominent initial "M".

Matthew G. Kiernan
Clerk of the Court