

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

D31635
Y/ct

_____AD3d_____

Argued - May 19, 2011

A. GAIL PRUDENTI, P.J.
DANIEL D. ANGIOLILLO
ANITA R. FLORIO
JEFFREY A. COHEN, JJ.

2010-05147

DECISION & ORDER

Audrey Frischknecht, respondent, v Marco Nogueira
Novaes, appellant.

(Index No. 5099/09)

Naved Amed, New York, N.Y., for appellant.

Michael D. Kranis, Poughkeepsie, N.Y. (Steven A. Nosonowitz of counsel), for
respondent.

In an action, inter alia, for the equitable distribution of marital property, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Dutchess County (Dolan, J.), dated April 26, 2010, as denied that branch of his motion which was to dismiss the cause of action for the distribution of property other than the marital residence on the ground that the cause of action is barred by the doctrines of res judicata and collateral estoppel.

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

The plaintiff former wife and the defendant former husband, both Brazilian citizens, were married in 1991. In 2006, they commenced an action for “amicable legal separation” in Brazil by entering into an agreement, which provided, inter alia, that their former marital residence in the State of New York would be distributed at the time of the divorce. After the requisite one-year period of legal separation, the defendant commenced a proceeding in a Brazilian court to convert the judicial separation into a final divorce and for the distribution of the marital residence. The plaintiff responded with a counterclaim, alleging that the parties owned additional marital property to be distributed. The Brazilian court ordered the dissolution of the marriage, but found that “since there

[was] no agreement between the parties about the collection of assets purchased during the marriage, the partition of the couple's property shall be discussed in another action.”

Subsequently, the plaintiff commenced this action in New York, inter alia, seeking equitable distribution of the marital residence and other assets located in New York. The defendant did not object to the distribution of the marital residence, but moved to dismiss the remainder of the plaintiff's complaint on the ground that it was barred by the doctrines of res judicata and collateral estoppel. The Supreme Court denied that branch of the defendant's motion which was to dismiss the plaintiff's claim for the distribution of property other than the marital residence. We affirm the order insofar as appealed from.

The plaintiff's claim for the distribution of the marital residence and other assets is not barred by the doctrines of res judicata and collateral estoppel, since the Brazilian court expressly declined to adjudicate the issue after it was raised by the parties (*see Mahoney v Mahoney*, 131 AD2d 822, 822-823; *cf. O'Connell v Corcoran*, 1 NY3d 179, 183-186).

The defendant's remaining contention is without merit.

PRUDENTI, P.J., ANGIOLILLO, FLORIO and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court