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

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_____AD3d_____ Argued - September 27, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2010-02946 DECISION & ORDER

Mary Ann Caracciolo, respondent-appellant,
v Robert E. Chodkowski, appellant-respondent.

(Index No. 202040/07)

Law Offices of Sanford F. Young, P.C., New York, N.Y. (Russell Bloch of counsel), for appellant-respondent.

Glenn S. Koopersmith, Garden City, N.Y., for respondent-appellant.

In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from stated portions of a judgment of the Supreme Court, Nassau County (O'Connell, J.H.O.), entered March 2, 2010, as, upon a decision of the same court dated October 30, 2009, made after a nonjury trial, (1) awarded him only 50% of the marital property as his equitable share, (2) failed to credit him for allegedly satisfying a pre-marital debt of the plaintiff in the sum of $77,792.61 from his separate funds, (3) failed to credit him for allegedly expending the sum of $141,359.72 from his separate funds for the construction of a house upon certain property located in Montauk, (4) determined that the Aruba Surf Club time share purchased during the parties' honeymoon was marital property, and (5) failed to award him a credit for improvements to, and belongings left in, a house located in Roslyn Heights, and the plaintiff cross-appeals, as limited by her brief, from so much of the same judgment as (1), in effect, determined that only $372,207.38 of a home equity line of credit utilized during the marriage was marital debt, (2) awarded her only 50% of the appreciation in the value of the property located in Montauk, (3) failed to award her an equitable share of the assets the defendant allegedly secreted during the marriage, (4) failed to award her a credit in the sum of $15,128 for the outstanding loan on the BMW automobile she was awarded as part of the marital property distribution, (5) awarded the defendant a credit in the sum of $5,831.45 based upon a purported estimate of the cost to repair his 1994 Mitsubishi 3000 automobile that allegedly was

damaged while in her possession, and (6) failed to award her an attorney's fee.

ORDERED that the judgment is modified, on the law and in the exercise of discretion, (1) by deleting the provision thereof, in effect, determining that only $372,207.38 of a home equity line of credit utilized during the marriage was marital debt, and substituting therefor a provision determining that the outstanding balance of the home equity line of credit, a sum of $449,867.05, is marital debt, (2) by adding a provision thereto awarding the plaintiff a credit in the sum of $15,128 for the outstanding loan on the BMW automobile she was awarded as part of the marital property distribution, (3) by deleting the provision thereof awarding the defendant a credit in the sum of $5,831.45 based upon a purported estimate of the cost to repair his 1994 Mitsubishi 3000 automobile that allegedly was damaged while in the plaintiff's possession, and (4) by adding a provision thereto awarding the plaintiff an attorney's fee in the sum of $107,000; as so modified, the judgment is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The parties were married on March 19, 2004, and had no children before they separated less than three years later. Prior to the marriage, the plaintiff owned a house located in Roslyn Heights (hereinafter the Roslyn home), on which she owed $77,792.61 on a home equity line of credit. The parties resided in the Roslyn home during the marriage. Also prior to marriage, the defendant owned a vacant property located in Montauk (hereinafter the Montauk property). During the marriage, the plaintiff's home equity line of credit was satisfied, and the parties together obtained a new home equity line of credit (hereinafter the new HELOC) in the sum of $450,000 secured by the Roslyn home. The parties utilized the proceeds from the new HELOC to finance the construction of a home on the Montauk property.

Contrary to the parties' contentions, under the circumstances of this case, an award of 50% of the value of the marital property, including the appreciation, during the marriage, of the value of the Roslyn home and the Montauk property, to each of them constitutes an equitable distribution of that property (*see* Domestic Relations Law § 236[B][1][d][3]; [5][c]; *Johnson v Chapin*, 12 NY3d 461, 466; *McGrath v McGrath*, 261 AD2d 369; *Robertson v Robertson*, 186 AD2d 124; *Shahidi v Shahidi*, 129 AD2d 627). Further, the Supreme Court providently exercised its discretion in making such an award, rather than giving each party credit for separate expenditures used to finance the improvements to the properties. "The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected," and the "[c]ourts should not second-guess the economic decisions made during the course of a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 421).

However, the Supreme Court erred in determining that only $372,207.38 of the loan drawn on the new HELOC constituted marital debt. The burden of paying the outstanding balance of the new HELOC, a sum of $449,867.05, should be shared by the parties since it was incurred during the marriage (*see Mosso v Mosso*, 84 AD3d 757).

The Supreme Court also erred in failing to award the plaintiff a credit in the sum of $15,128 for the outstanding loan on the BMW automobile she was awarded as part of the marital

property distribution. The record does not support the court's finding that the parties stipulated that the net value of the vehicle after deducting the loan was $12,000. The court further erred in awarding the defendant a credit in the sum of $5,831.45 based upon a purported estimate of the cost that would be incurred to repair his 1994 Mitsubishi 3000 automobile, which allegedly was damaged while in the plaintiff's possession. The estimate offered into evidence by the defendant contained inadmissible hearsay, and he failed to lay a foundation for its admission as a business record (*see* CPLR 4518[a]; *Roldan v New York Univ.*, 81 AD3d 625).

The decision to award an attorney's fee lies, in the first instance, in the discretion of the trial court and then in the Appellate Division, whose discretionary authority is as broad as that of the trial court (*see* Domestic Relations Law § 237[a], [c]; *O'Brien v O'Brien*, 66 NY2d 576, 590). Under the circumstances of this case, the plaintiff should have been awarded the sum of $75,000 as an attorney's fee (*see* Domestic Relations Law § 237[a]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879; *Moccia v Moccia*, 82 AD3d 1064; *Burger v Holzberg*, 290 AD2d 469; *Sand v Lammers*, 150 AD2d 355).

The parties' remaining contentions are without merit.

RIVERA, J.P., FLORIO, AUSTIN and SGROI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court