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

D33521
N/prt

_____AD3d_____ Argued - October 31, 2011

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
SHERI S. ROMAN, JJ.

2010-07861 DECISION & ORDER

Jill Smulevitz, appellant, v
Marc Smulevitz, respondent.

(Index No. 200784/10)

Schiller Law Group, P.C., New York, N.Y. (Ben Kinzler and Allan Schiller of counsel), for appellant.

Louis S. Sroka, Jericho, N.Y., for respondent.

In an action, inter alia, to reform the parties' stipulation of settlement, which was incorporated but not merged into their judgment of divorce entered December 17, 2007, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Falanga, J.), dated July 16, 2010, as denied her motion to direct the defendant, during the pendency of this action, to name her as the beneficiary of any and all pre-retirement death benefits in a certain pension plan and to restrain the defendant from taking any action affecting the plaintiff's rights in the pension plan, and granted that branch of the defendant's cross motion which was for summary judgment dismissing the complaint.

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

The Supreme Court properly granted that branch of the defendant's cross motion which was for summary judgment dismissing the complaint in this action, in which the plaintiff seeks to reform a stipulation of settlement, entered into by the parties in connection with their divorce action, which did not provide for the equitable distribution of the defendant's pension plan. The defendant made a prima facie showing of entitlement to judgment as a matter of law and, in

opposition, the plaintiff failed to raise a triable issue of fact as to a mutual mistake relating to the value of the pension plan (*see Etzion v Etzion*, 62 AD3d 646, 652; *Hannigan v Hannigan*, 50 AD3d 957, 957-958; *Kojovic v Goldman*, 35 AD3d 65, 71).

The plaintiff's remaining contentions are without merit.

We decline to consider the defendant's request for an award of an attorney's fee incurred in connection with this appeal. This request should be addressed in the first instance to the Supreme Court (*see Kane v Rudansky*, 309 AD2d 785; *Contractors Cas. & Sur. Co. v 535 Broadhollow Realty*, 276 AD2d 738).

RIVERA, J.P., DICKERSON, ENG and ROMAN, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court