

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

D36130
C/kmb

_____AD3d_____

Submitted - September 14, 2012

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
ARIEL E. BELEN
ROBERT J. MILLER, JJ.

2011-01715

DECISION & ORDER

Anthony Terranova, appellant, v Kimberly Terranova,
respondent; Rosenthal & Markowitz, LLP, nonparty-
respondent.

(Index No. 16007/08)

Robert G. Smith, New York, N.Y., for appellant.

Annette G. Hasapidis, South Salem, N.Y., for nonparty-respondent.

In an action for a divorce and ancillary relief, the plaintiff appeals from so much of an order of the Supreme Court, Westchester County (Walker, J.), entered January 24, 2011, as granted the defendant's motion for an award of counsel fees to the extent of directing him to pay counsel fees in the total sum of \$69,132.91, and denied his cross motion for the imposition of sanctions.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the defendant's motion for an award of counsel fees to the extent of directing the plaintiff to pay counsel fees in the total sum of \$69,132.91; as so modified, the order is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings in accordance herewith.

Contrary to the plaintiff's contention, considering the disparity in the parties' incomes, the Supreme Court providently exercised its discretion in requiring the plaintiff to pay counsel fees the defendant incurred in litigating her child custody and relocation applications (*see* Domestic Relations Law § 237[a]; *O'Shea v O'Shea*, 93 NY2d 187; *Chesner v Chesner*, 95 AD3d 1252, 1253; *Prichep v Prichep*, 52 AD3d 61, 64-65).

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However, the Supreme Court erred in awarding counsel fees to the defendant without conducting an evidentiary hearing at which the court may test the claims of the defendant's counsel regarding the extent and value of its services (*see Nee v Nee*, 240 AD2d 478, 479). An award of counsel fees on the basis of affirmations alone was improper in the absence of a stipulation agreeing to that procedure (*see GAB Mgt. v Blumberg*, 226 AD2d 499, 501-502; *Fishkin v Fishkin*, 201 AD2d 202, 208; *Silverman v Silverman*, 193 AD2d 595; *cf. Brodsky v Brodsky*, 214 AD2d 599, 600). Accordingly, the matter must be remitted to the Supreme Court, Westchester County, for a hearing on that issue and thereafter a new determination of the defendant's motion.

To the extent that the plaintiff contends that the award of counsel fees by the Supreme Court included fees for time spent attempting to set aside the parties' prenuptial agreement, we note that the Supreme Court found that the defendant is not entitled to counsel fees incurred in attempting to set aside the parties' prenuptial agreement (*see Kessler v Kessler*, 33 AD3d 42, 49-50).

The Supreme Court did not improvidently exercise its discretion in denying the plaintiff's cross motion for the imposition of sanctions (*see* 22 NYCRR 130-1.1).

ANGIOLILLO, J.P., DICKERSON, BELEN and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court