SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1133

CA 16-00021

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

PEGGYANN HART, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. HART, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MITCHELL LAW OFFICE, OSWEGO (RICHARD C. MITCHELL, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered April 1, 2015. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the decretal paragraphs directing equitable distribution of the marital property, and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant husband appeals from an order in which Supreme Court determined that he willfully failed to obey two prior orders of the court and that plaintiff wife willfully failed to obey the provisions of Domestic Relations Law § 236 (B) (2) (b). The court also suspended judgment against both parties. In appeal No. 2, defendant appeals from a judgment of divorce that, inter alia, directed equitable distribution of the marital property.

As a preliminary matter, we note that appeal No. 1 must be dismissed. Defendant does not challenge the finding against him of willful failure to obey the court's prior orders (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545), and he is not aggrieved by the finding against plaintiff with respect to her willful failure to obey the provisions of Domestic Relations Law § 236 (B) (2) (b) (*see* CPLR 5511; *see also Stewart v Dunkleman*, 128 AD3d 1338, 1341, *lv denied* 26 NY3d 902).

We agree with defendant in appeal No. 2 that the court erred in classifying as marital property a house he bought prior to the marriage (hereafter, Seneca Hill Property). It was undisputed that the Seneca Hill Property was purchased by defendant prior to the

marriage, and we conclude that it was not transmuted into marital property when the parties used it as the marital residence for approximately two years, or by virtue of defendant having used some of the sale proceeds therefrom to assist in funding the purchase of a new marital residence (*see* Domestic Relations Law § 236 [B] [1] [d] [1]; *Ahearn v Ahearn*, 137 AD3d 719, 720; *Rivera v Rivera*, 126 AD3d 1355, 1356). Defendant was therefore entitled to a credit for his separate property contributions to the marital estate (*see Judson v Judson*, 255 AD2d 656, 657; *see also Maczek v Maczek*, 248 AD2d 835, 836-837). We further conclude, however, that the appreciated value of the Seneca Hill Property that the court determined to be attributable to the contributions of plaintiff should have been classified as marital property (*see Robinson v Robinson*, 133 AD3d 1185, 1187; *Macaluso v Macaluso*, 124 AD3d 959, 961). We thus vacate the decretal paragraphs of the judgment directing equitable distribution of the marital property, and we remit the matter to Supreme Court for a redistribution thereof consistent with our decision.

We have reviewed defendant's other contentions in appeal No. 2 and conclude that they are without merit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court