[Edited for Publication]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 31

----------x

A K.,

Plaintiff,

Index No.

- against -

DECISION AND ORDER

A K.,

Motion Seq. 4

Defendant.

----------x

Laura E. Drager, J.:

Defendant (the "Wife") by order to show cause seeks additional interim attorney fees in the amount of $300,000.00 without prejudice to further applications for additional counsel fees. Plaintiff (the "Husband") opposes the application arguing that defendant's own actions have created the excessive litigation in this case. He further relies on this court's decision of May 16, 2006 awarding the wife $30,000 in attorney fees, notwithstanding her request for $150,000. In reaching that decision, the court was aware of fees already received by counsel as a result of "so ordered" stipulations entered prior to the May 16th decision.[1] On the record, the court noted its concern about awarding additional attorney fees, but also expressed concern that it would not allow the husband, the moneyed spouse, to use his financial position to cause additional attorney expenses.

As this court has previously noted:

> The decision to award counsel and expert fees is left to the sound discretion of the court. Indigence is not a requirement. *DeCabrera v. DeCabrera-Rosete,* 70 N.Y.2d 879 (1987). "The issue of counsel fees is controlled by the equities and circumstances of each particular case and the Court must consider the relative merits of the parties and their respective financial positions in determining whether an award is appropriate. (citations omitted)" *Hackett v.Hackett,* 147 A.D.2d 611 (2d Dept. 1989). An award of counsel fees is appropriate where there is a disparity of income and earnings capacity. *Merzon v. Merzon,* 210 A.D.2d 462 (2d Dept. 1994); *Denholz v. Denholz,* 147 A.D.2d 522 (2d Dept. 1989). A party with limited assets and modest income should not be

---

[1]By stipulation so ordered on February 7, 2006, the parties released from marital funds $40,000 to each of their attorneys and by stipulation so ordered on April 13, 2006, the parties released from marital funds $150,000 to each of their attorneys.

> required to expend a significant portion of her assets to qualify for an award of attorney fees. *Melnitzky v. Melnitzky*, 284 A.D.2d 240 (1st Dept. 2001); *Atweh v. Hashem*, 284 A.D.2d 216 (1st Dept. 2001); *Denholz, supra*.
>
> (A)n award of attorney fees should be 'reasonable in light of the skill, experience and background of ...counsel, the nature of the services rendered, the difficulty and complexity of the issues of fact and law involved in the case, as well as the time actually spent on [the case].'' (*Silver v. Silver*, 63 AD2d 1017, 1018).'' *Willis v. Willis*, 149 A.D.2d 584 (2d Dept 1989); *Krigsman v. Krigsman*, 6/14/99 NYLJ 34, (col. 6); New York State Professional Disciplinary Rules, Code of Professional Responsibility, §§ 1200.11(b)(1)-(8).'' *J.C. v. S.C.*, 10/31/2003 NYLJ 20, (col. 1).

The court is satisfied that an additional award of interim attorney fees is warranted. The court is intimately familiar with the circumstances of this case. The litigation has been intense and significant time has been spent by the court and attorneys on seemingly mundane issues that the parties themselves should have been able to resolve. Issues involving custody have taken up a great deal of time. Both children of the marriage suffer from psychological issues that have been exacerbated by the divorce action. The son has been attending a special school and serious thought had been given to his attending a boarding school because of his problems. The parents have had serious disagreements over how to address those issues. A great deal of litigation time has been spent assessing what school the son should attend. Similarly, much time has been devoted to addressing the children's therapeutic needs and living arrangements. The court has been involved with counsel in the planning of the bar mitzvah and bat mitzvah of the children.

In addition, the parties themselves have presented difficult issues requiring court intervention, including an application for an order of protection. The court was also involved in negotiations resolving prior interim attorney fee applications, as well as having to decide a *pendente lite* support application.

Thankfully, the court has been less involved in the financial discovery aspects of this case. However, the court notes that the husband runs a successful business, apparently involving several corporate entities, and an analysis of that business has undoubtedly taken attorney time. Similarly, evaluating the parties' living expenses would necessarily involve additional time.

The husband argues that he has made a genuine effort to settle the case and it is his belief that the wife's attorneys have prevented a settlement to increase their fees. He has also expressed concern that his business fortunes are not as great as his wife would believe. Contrary to the husband's belief, the court cannot at this time conclude that the wife or her attorneys alone have been the cause of the intensity of the conflict; the court has itself observed questionable behavior by both parties during this litigation. Moreover, the court notes that the husband, who now has two firms representing him, has paid his own attorneys and accountants over $515,000 for his representation in this action ($434,000 has been for attorney fees alone). Of this amount, only $215,000 was from marital funds released to counsel upon agreement of both parties. The wife accrued approximately $475,000 in attorney fees. At present, she owes her attorneys approximately $204,000 for services already rendered (Her attorneys have been paid almost

$259,000 primarily from the funds released or ordered to be given by the court). Clearly, the wife's attorney fees are not disproportionate to the fees paid by the husband to his attorneys (the husband's accountants, who have received approximately $80,000 have provided him litigation support services. The wife's attorneys claim they provide these services to the wife themselves). Moreover, the court had warned the wife that, in light of the significant *pendente lite* award she received, she was expected to contribute some of her own money towards payment of counsel and she has done so. In addition, further work is necessary as it can be anticipated that depositions still must be completed and a trial is a distinct possibility. The court is, however, mindful of the fact that the wife may ultimately receive a significant distribution of assets that may need to be considered should any further request for fees be made.

Prior to this action, both parties worked for the husband's business. The husband has now excluded the wife from that business and she is dependent on him for money. Moreover, from the tenor of the litigation this court has directly observed, it cannot be said that one side or the other has been more at fault for the heat of this action.

The First Department concluded: "when considering an application for interim counsel fees, the court must consider the relative financial circumstances of *both* parties (Domestic relations Law § 237[a]). This direction is intended not only to permit determination of one side's need and the other's ability to pay; it is also to ensure that a spouse with substantially greater financial resources cannot use those resources to obtain the outcome he desires. 'The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet.' (Citation omitted)." *Charpie v. Charpie*, 271 AD2d 169. 171-2 (1st Dept. 2000).

Accordingly, the husband shall pay to plaintiff's counsel an additional $260,000 for attorney fees and costs, $100,000 of said amount to be paid 30 days from the date of this decision and order, $100,000 to be paid 90 days from the date of this decision and order, and $60,000 to be paid 120 days from the date of this decision and order. This award is subject to reallocation at trial.

It is hereby

ORDERED, that the husband shall pay to the wife's counsel $260,000 for attorney fees and costs, $100,000 of said amount to be paid with 30 days from the date of this decision and

order, $100,000 to be paid within 90 day from the date of this decision and order, and $60,000 to be paid 120 days from this decision and order without further notice, subject to reallocation at trial.

This opinion constitutes the decision and order of the court.

Dated: February 15, 2006

_____

Hon. Laura E. Drager