

The separation agreement consisted of 66 pages. It was drawn by the wife's attorney. Any ambiguities therein must therefore be construed against her (Houlor v American Life Ins. Co., 111 US 335; Comey v United Surety Co., 217 NY 268).

Notwithstanding the court's direction ordering immediate sale of the former marital domicile, the only movement since then has been an endless exchange of letters between counsel.

The husband now moves by order to show cause for relief seeking to break the stalemate on two issues impacting on the various credits and debits to be allocated between the parties. First, the wife who has paid the mortgage at all times relevant to this application seeks credit for doing so. Additionally, she seeks reimbursement for certain repairs made at her expense subsequent to the order of the undersigned directing immediate sale.

It is settled law that a party remaining in the marital domicile is responsible for all reasonable day-to-day expenses with the exception of that portion of mortgage payments allocated to amortization of the underlying principal debt (Hapeman v Hapeman, 229 AD2d 817; Gundlach v Gundlach, 223 AD2d 942). All amounts so credited inure to the benefit of both mortgage obligors and are thus properly reimbursable to the party whose payments enriched the other.

Notwithstanding that the stare decisis in this Department would ordinarily entitle the wife to reimbursement for the amount she enriched the husband by amortizing the mortgage, the parties were always free to agree to a different arrangement (cf. Roth v Roth, 115 AD2d 975). In this connection, paragraph 8.04 of their agreement provides that payment of the mortgage was to be the wife's responsibility. If an ambiguity exists with reference to construction of this clause, it must be resolved against her since her attorney drafted this agreement. This is further bolstered by paragraph 8.09 which provides that after sale, the "net proceeds of sale" which are to be divided between the parties in an agreed ratio would be arrived at by deducting from the proceeds the "principal balance of any outstanding mortgage at the time of closing...." No provision exists crediting the wife in any way for amounts advanced by her to amortize the mortgage on her husband's behalf (cf. Oliva v Oliva, 136 AD2d 611). This reading is in perfect harmony with that of paragraph 8.04 heretofore referenced.

The procedure for buy-out of the husband's share (paragraph 8.09) calls for a purchase price to be arrived at by averaging valuations submitted by two licensed real estate brokers each representing one of the parties to be determined as of the date the buy-out would have taken place pursuant to the agreement.

While the Second Department discourages averaging conflicting appraisals (Gainey v Gainey, 489 NYS2d 297), this

caveat only applies to a court at a contested trial. The parties themselves, on the other hand, are free to agree to any superseding arrangement they may choose. The formula negotiated by the parties is not illegal or otherwise against public policy. It must be given effect (Roth v Roth, supra).

The parties cannot agree even on the most basic issues. Accordingly, the court will fill the void created by them. Each of them shall commission and/or procure an appraisal consistent with the requirements of the agreement. Appraisals shall be exchanged no later than August 1, 2004 and a purchase price arrived at no later than 10 days thereafter. If the buy-out is not completed by September 1, 2004, an immediate sale on the open market shall take place.

A question of fact exists concerning repairs and whether or not they antedated the time when the buy-out should have occurred. The proceeds of sale shall therefore be held in escrow subject to further order of the court after hearing on the contested issues pertaining thereto. This hearing shall be set on a date convenient to counsel and the court.

A decision on the motion for counsel fees is deferred pending completion of sale and submission of an updated affidavit of services. A hearing on the issue of counsel fees is required unless the parties stipulate that a decision may be rendered on

affidavits (Olsen v Olsen, 100 AD2d 776; Sadofsky v Sadofsky, 78 AD2d 520).

The parties and counsel are admonished that this matter has been over-litigated. They are urged to intensify their efforts toward settling these issues before the expense of further litigation further dissipates their limited resources.

The foregoing constitutes the decision and order of this court.

Dated: July 7, 2004

STANLEY GARTENSTEIN
Judicial Hearing Officer