

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART J.H.O.

SOON OK KIM, X
INDEX NO. 25154/01
Plaintiff, MEMORANDUM DECISION

- against -

CHONG HO KIM,
Defendant. X

STANLEY GARTENSTEIN, JUDICIAL HEARING OFFICER:

Defendant moves during trial for leave to retain an expert to set the valuation of a laundromat operated exclusively by his wife for a significant period prior to commencement of this action and subsequent thereto up to the present day. Defendant has been excluded from its operation by an order of protection. It has been stipulated that an equal division of this asset will ultimately take place. The manner in which this distribution shall be effectuated, whether by sale on the open market or a buy-out by one spouse of the other, is an open issue.

Prior to trial the IAS Court designated Heidi Muckler, a certified public accountant, as impartial evaluator. Ms. Muckler has submitted a report which reaches three different conclusions:

(a) the first based upon plaintiff-wife's raw data, receipts and reports of income for a period subsequent to commencement of this action and contemporaneous with Ms. Muckler's

request. This valuation is substantially less than the husband claims;

(b) a second valuation based upon defendant-husband's raw data for a period prior to and including the date of commencement. This figure is substantially higher than the wife claims;

(c) a third valuation arrived at by averaging the previous figures, obviously a compromise which cuts the difference in half.

The husband's application manifests dissatisfaction with the equivocation of the Muckler report and is an effort to bolster his claim to the higher valuation which he urges. He claims that his prior counsel was derelict in representing him in that his present counsel would have retained his own expert had he been on the scene earlier.

Were any court to allow successor counsel to disown the acts or omissions of his/her predecessor, the litigation process would deteriorate into total chaos. Nevertheless, were we to entertain this application, it would be denied as academic.

The CPLR has effectuated a realistic balance between calendar practice and the conduct of discovery proceedings by requiring the filing of a certificate of readiness with a note of issue. This certificate must represent that discovery has been or will be completed within a suitable period. (Cf., CPLR 3402 et. seq.). Discovery proceedings in matrimonial actions are regulated

by two statutory schemes which complement each other. CPLR Article 31 contains provisions applicable to all actions while the Rules of the Chief Judge (cf., 22 NYCRR 202.16) apply specifically to matrimonial actions.

CPLR 3101(d)(1)(i) allows for late retention of expert testimony upon demonstrable good cause. The more specific provisions of 22 NYCRR 202.16(g) require the filing of expert's reports in advance of trial. They also address situations in which the court is called upon to remedy a default in meeting its time-table.

A court may, in a matrimonial action, designate a neutral expert to conduct an impartial appraisal (Rule 202.16[f][3]). The report of this expert under oath, when filed, may substitute for direct testimony on condition that the witness is present at the trial and available for questioning.

It is clear that two of the three alternate conclusions of the Muckler report must be disregarded. The compromise valuation arrived at by averaging divergent valuations derived from the respective raw data of the husband and wife violates the spirit of Gainer v Gainer, 111 AD2d 308, in which the Appellate Division Second Department expressed clear disapproval of this practice.

The Muckler report's valuation based upon raw data submitted by the wife, must also be rejected. An asset which appreciates (or depreciates) because of active participation of the

titled spouse in its operation is properly valued as of commencement (Kallins v Kallins, 170 AD2d 436 [2d Dept]; Smerling v Smerling, 177 AD2d 429; Heine v Heine, 176 AD2d 77 [both 1st Dept]). Any post-commencement appreciation (or depreciation) is separate property (Tallering v Tallering, Sup. Ct. Nassau County, NYLJ, Dec. 6, 1989). The wife is in total default in meeting her burden of establishing valuation as of commencement. Thus, only one of the three alternate conclusions reached by the Muckler report is legally viable. Unless otherwise impeached, the Muckler report setting valuation as urged by the husband which is supported by his raw data and which focuses on the date of commencement in stark contrast to the wife's disregard of it would be conclusive.

Inasmuch as the raw data submitted by the wife establishes a predicate for a far lower present value than that prevailing as of commencement and given the undisputed fact that she actively managed this asset totally excluding the husband, these realities now translate out to a legal requirement that she be charged with any loss occasioned by its decline in value.

Counsel shall produce Ms. Muckler on the adjourned date of the trial if so advised (22 NYCRR 202.16). The fact that she is an impartial evaluator appointed by the court does not mandate that her report be adopted as conclusive (Rosenberg v Rosenberg, 155 AD2d 428 [2d Dept]).

Dated: March 28, 2003

STANLEY GARTENSTEIN
Judicial Hearing Officer