

Mead v Mead

2007 NY Slip Op 31713(U)

May 18, 2007

Supreme Court, Albany County

Docket Number: 0045201/9931

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CHARLES ALLEN MEAD,

Plaintiff,

-against-

DIANNE MEAD,

Defendant.

DECISION and ORDER
RJI NO.: 0193035445
INDEX NO.: 4520-93

Albany County Supreme County All Purpose Term May 2, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Michael P. Friedman, Esq.
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Carolyn A. D'Agostino, Esq.
Attorney for Defendants
22 First Street
Troy, NY 12181

TERESI, J.:

Plaintiff, Charles Allen Mead, brings this motion to amend the Domestic Relations Order (hereinafter DRO) signed by this Court (Justice Teresi) on September 28, 2006, to eliminate Defendant's survivorship interest in Plaintiff's pension which Plaintiff alleges to be inconsistent with the Judgment of Divorce and Settlement Agreement which was incorporated into the Judgment of divorce signed by Justice Keegan on August 16, 2004. Defendant, Dianne Mead, opposes the motion, but in the event that this Court opens the DRO to Amendment, Defendant

brings a cross motion to: (1) vacate the DRO relating to her own NYNEX/Verizon pension, (2) order Plaintiff to propose a new DRO regarding the NYNEX/Verizon pension that limits Plaintiff's share to a monthly distribution based upon Defendant's life expectancy, her election on commencement of benefits and terminating upon her death, and (3) amend the subject DRO so that defendant's share of plaintiff's pension is calculated based upon the maximum monthly share prior to any reduction made to favor another party. Defendant also brings a motion for this Court to grant attorneys fees and costs. In reply, Plaintiff alleges that Defendant's attorney should be disqualified from representing Defendant pursuant to 22 NYCRR § 1200.45(1) and (2). Defendant's attorney requests this Court's consent to withdraw without prejudice to this motion.

After fully reviewing the record, this Court denies Plaintiff's motion to amend the DRO and, accordingly, does not reach Defendant's cross-motion in the alternative. This Court also denies Defendant's motion for a grant of attorney's fees. As a final matter, this Court grants Defendant's attorney consent to withdraw from representation of Defendant.

As a threshold matter, Plaintiff contends that Defendant's counsel, Carolyn A. D'Agostino, Esq., must withdraw from her representation of Defendant due to a conflict created by her former position as Bureau Director of the Matrimonial Unit of the New York State Retirement System pursuant to 22 NYCRR § 1200.45(b)(1) and (2). While Ms. D'agostino was not serving as Bureau Chief when the parties' final DRO was accepted for filing, she was serving in that capacity when the Matrimonial Unit of the New York State Retirement System reviewed the parties' proposed order in 2005 and, accordingly, asks for this Court's consent to withdraw as counsel for Defendant based on the appearance of impropriety. Ms. D'Agostino further notes that she had no personal memory of the parties' proposed DRO when she agreed to represent

Defendant in this matter. The Matrimonial Unit handles approximately 200-400 such orders a month and the lack of Ms. D'Agostino's original signature strongly suggests that she was not personally involved in reviewing the subject DRO. This Court finds no merit to Plaintiff's claim that he has actually been prejudiced by Ms. D'Agostino's employment history. To the contrary, Defendant's counsel held off alerting Ms. D'Agostino to the potential conflict until all work on this motion had been completed despite numerous phone calls between opposing counsel prior to motion practice. Accordingly, this Court grants Ms. D'Agostino consent to withdraw from representing Defendant, but declines to disqualify her representation during this motion finding no merit to Plaintiff's claim of actual prejudice and that Plaintiff's claims regarding the conflict are purely tactical (*Jamaica Public Service Co. Ltd. v. AIU Ins. Co.*, 92 N.Y.2d 631 [1998]). Accordingly, this Court will determine the motion on the merits.

The parties were divorced on August 16, 2004 pursuant to a Judgment of Divorce signed by Justice Keegan. As part of the Judgment of Divorce and Settlement Agreement, the parties were each awarded one half portion of the other's pensions according to a Majauskas formula (*Majauskas v. Majauskas*, 61 N.Y.2d 481 [1984]). No reference was made regarding a survivorship interest in either party's pension. In February 2005 a DRO was drafted that granted Plaintiff his one half interest in Defendant's NYNEX/Verizon pension and included survivorship benefits for Plaintiff.

On March 24, 2005, during negotiations to prepare a DRO for Defendant's interest in Plaintiff's pensions, Plaintiff's attorneys advised Defendant that her survivorship interests in Plaintiff's pension were limited to post-retirement benefits. Plaintiff's attorneys now claim this letter was a mistake, in that they should have advised Defendant that she had no survivorship

interest in Plaintiff's pensions.

On August 6, 2006, Defendant's counsel sent this Court a proposed DRO, to which Plaintiff's counsel objected due to the inclusion of a pre-retirement survivorship interest in Plaintiff's pension. Defendant's counsel removed the objectionable language and Plaintiff's counsel consented to the revised DRO on September 25, 2006. The revised DRO was signed by Justice Teresi on September 28, 2006 and filed in the Albany County Clerk's Office on October 6, 2006. Plaintiff's counsel now claims that their September 25, 2006 letter of consent was in error and asks this Court to amend the DRO.

In an exercise of discretion, this Court declines to amend the DRO. The sequence of events strongly suggests that Plaintiff consented to giving Defendant a post-retirement survivorship interest in his pensions to mirror his survivorship interest in her NYNEX/Verizon pension. Moreover, in the context of equitable distribution of assets from a twenty-five year long marriage, Defendant's survivorship benefits in Plaintiff's pensions hardly constitutes an obviously unintended windfall.

Accordingly, this Court denies Plaintiff's motion and declines to modify the DRO making it unnecessary to reach the merits of Defendant's cross-motion in the alternative. Additionally, this Court consents to Ms. D'Agostino withdrawing from her representation of Defendant.

All papers, including this Decision and Order, are being returned to the attorney for the Defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: May 18, 2007

Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Plaintiff's Notice of Motion, dated March 15, 2007 with Attached Exhibits A-L.
2. Defendant's Notice of Cross-Motion, date April 28, 2007 with Attached Exhibits A-R.
3. Plaintiff's Opposition, dated April 30, 2007 with Attached Exhibits A-C
4. Defendant's Reply, dated May 1, 2007 with Exhibit A.