

**Husband v Wife**

2007 NY Slip Op 31787(U)

March 22, 2007

Supreme Court, Broome County

Docket Number: 0001000/1988

Judge: Jeffrey A. Tait

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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 19<sup>th</sup> day of January, 2007

PRESENT: HONORABLE JEFFREY A. TAIT  
JUSTICE PRESIDING

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF BROOME

**HUSBAND,**

Plaintiff,

**DECISION AND ORDER**

vs.

Index No. 1988-XXXX  
RJI No. 1988-XXXX-U

**WIFE,**

Defendant.

**APPEARANCES:**

Albert Aaron, Esq.  
*Attorney for Plaintiff*  
89 Court Street  
Binghamton, NY 13901

Lauren S. Cohen, Esq.,  
*Attorney for Defendant*  
142 Front Street  
Binghamton, NY 13905

**HON. JEFFREY A. TAIT, J.S.C.**

Plaintiff, Mr. XXXX, and defendant, Ms. XXXX, are former spouses who divorced on XXXX, 1990. At issue in this proceeding is implementation of the agreed upon disposition of the plaintiff husband's pension. Defendant wife's motion seeks an amended Qualified Domestic Relations Order ("QDRO") to enforce the previously agreed upon disposition of the pension. At the January 19, 2007 return date of the motion, Ms. XXXX withdrew any request that she be designated beneficiary of any survivor benefits under the pension plan.

Mr. XXXX and Ms. XXXX entered into a written Stipulation settling their matrimonial action, which is attached to the moving papers as Exhibit "C." The Stipulation includes a disposition of Mr. XXXX's pension from the New York State Retirement System. At the time of the Stipulation, Mr. XXXX was still working, so his pension was not in pay status.

**THE PENSION**

Ms. XXXX states that she anticipated that Mr. XXXX's pension would not be in pay status until 2009, which was Mr. XXXX's anticipated normal retirement date. However, Mr. XXXX actually began receiving pension payments in 2002. The current situation is that Mr. XXXX has been receiving pension payments since 2002, but Ms. XXXX has not received any payments as provided by the Stipulation.

Mr. XXXX seeks to avoid the stipulated disposition of his pension, arguing that both laches and the statute of limitations bar any disposition of the pension at this time. He also asserts that due to his current financial situation, his available income will place him below the self support reserve if the Stipulation were enforced according to its terms.

Ms. XXXX counters that laches should not be a bar to her recovery, as she was not aware of Mr. XXXX's early retirement and was not anticipating any pension payments until the contemplated 2009 retirement date. She also asserts that the statute of limitations does not apply here. As to Mr. XXXX's claim that he will be placed below the self support reserve if the Stipulation is enforced, she points out that the disposition of the pension is the division of an asset and is not dependent upon or subject to modification based on such circumstances.<sup>1</sup>

The Stipulation, as far as it deals with the allocation or disposition of Mr. XXXX's pension, actually divides an asset of the marriage. It is clear that division of a pension is treated like division of any other asset of the marriage, such as a bank account, stock brokerage account, or hard asset like a boat or automobile. In other words, it is not subject to modification like child support or maintenance, where courts can take into consideration later events to warrant an upward or downward modification (*see* Domestic Relations Law §236[B][9][b]).

This pension accrued during the marriage and is in essence a marital bank account which is divided. Because it is a pension which will be paid out at a later date, it is subject to actual division sometime in the future.<sup>2</sup>

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It is worth noting that Mr. XXXX's current predicament (a limited pension) is due at least in significant part to the fact that the second Mrs. XXXX also receives a portion of the pension and the third and current Mrs. XXXX may receive some of the pension by virtue of a survivor benefit election Mr. XXXX made, should Mr. XXXX predecease her. She (the current Mrs. XXXX) also presumably shares in the current payment he receives, as that is available to pay household expenses.

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For example, if this were an IRA (Individual Retirement Account), it would likely have been divided at the time of the Stipulation. Since valuation of the pension at the time of the Stipulation would have been difficult, the parties simply waited until a future date to make the actual division.

The issues of laches and statute of limitations likewise do not provide any basis upon which to defeat or vacate Ms. XXXX's right to enforce the Stipulation.

Laches may apply to limit the relief available to a party where that party unreasonably or inexcusably delays in seeking relief to the prejudice of the opposing party (*see Matter of Tenace*, 234 AD2d 722, 723 [3d Dept 1996]). An essential element of the doctrine of laches is delay prejudicial to the opposing party and if the party seeking to invoke the doctrine is on notice that the opposition may seek the contested relief, laches will not apply (*see Kobre v. Camp Mogen Avraham*, 293 AD2d 893, 895 [3d Dept 2002]).

Mr. XXXX was well aware that the relief in question would be requested. He entered into the Stipulation, thereby agreeing that Ms. XXXX was entitled to a portion of his pension when it began to be paid at a future date. He was, simply put, well aware that Ms. XXXX would make a claim to receive a portion of his pension.

In many situations where the doctrine of laches is raised, the relief requested is contested. Here, it cannot really be said that the relief sought by Ms. XXXX is contested. She is merely seeking to enforce the Stipulation of settlement she and Mr. XXXX *agreed to*.

The statute of limitations defense raised by Mr. XXXX is equally unavailing. The *Duhamel* case cited by both parties is applicable here (*see Duhamel v. Duhamel*, 4 AD3d 739 [4th Dept 2004]). That decision explains that the submission of a QDRO is not the equivalent of the commencement of an action. The court there notes that a statute of limitations governs the time within which an action must be commenced. Here the action (the divorce action) was commenced in 1988 and the application for the QDRO seeks to implement relief granted by

Stipulation in that action.

**THE ARREARS**

In addition to an amendment of the QDRO to enforce the Stipulation, Ms. XXXX seeks an additional 15% directly from the New York State Retirement Fund to pay arrears. These arrears accrued when Mr. XXXX began receiving his pension in 2002 and Ms. XXXX did not receive any portion of those payments.

The propriety of awarding an additional portion of Mr. XXXX's pension to pay arrears requires a different analysis. While the 35% provided in the Stipulation of settlement is due as agreed, any additional award to pay arrears must take into account Mr. XXXX's current circumstances. In other words, the question is how much should be awarded from the pension to pay arrears. Here, Mr. XXXX claims that taking any portion of the pension to pay arrears would be burdensome, as he will be left with inadequate resources to support himself.<sup>3</sup>

Both the precise amount of the arrears and what portion of the pension or other resources might or should be available to pay the arrears are unclear.<sup>4</sup> For those reasons, a determination of the amount of arrears and the amount that should be ordered paid to satisfy the arrears requires

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He actually makes this claim with regard to the 35% portion of the pension that Ms. XXXX claims is due under the Stipulation also. The argument does not apply there, as that allocation of the pension is a distributive property award, not maintenance, support, or arrears.

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The actual amount of the arrears should not be difficult to calculate as it requires obtaining records from the New York State Retirement Fund which should readily establish the dates and amount of past payments to Mr. XXXX. From that it would appear that the portion due to Ms. XXXX is a mathematical calculation.

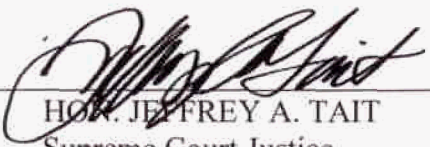
a hearing.<sup>5</sup>

**A hearing on the amount and rate of repayment of arrears will be held at the Broome County Courthouse, XXXX Floor, 92 Court Street, Binghamton, NY on XXXX, 2007 at XXXX.**

For the foregoing reasons, the motion seeking to amend the Qualified Domestic Relations Order signed by Hon. Stephen Smyk on July 26, 1990 is granted.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: March 22, 2007  
Binghamton, New York

  
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HON. JEFFREY A. TAIT  
Supreme Court Justice

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Case law addressing whether hardship of the paying spouse may be a factor in establishing the rate at which arrears for a property distribution (as opposed to maintenance and support, where such considerations are statutorily recognized) should be paid is limited. The court in *Long v. Paige* recognizes that hardship or burdensomeness may be a factor (*see id.*, 182 Misc2d 260, 261-262 [Sup Ct, Westchester County 1999]).