

Wife v Husband

2007 NY Slip Op 31789(U)

March 22, 2007

Supreme Court, Broome County

Docket Number: 0001823/2006

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 4th day of January, 2007

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

WIFE,

Plaintiff,

DECISION AND ORDER

vs.

Index No. 2006-XXXX
RJI No. 2006-XXXX-M

HUSBAND,

Defendant.

APPEARANCES:

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

This matter is before the Court on the issue of the parties mutual claims that the other is responsible for attorneys' fees incurred in connection with an Order to Show Cause filed by plaintiff. The plaintiff, WIFE, asserts that she is entitled to \$2,000.00 from the defendant HUSBAND, for attorneys' fees she has incurred in seeking an order related to the separation agreement she and Mr. XXXX entered into, and for attorneys' fees she will incur to complete and finalize the parties' divorce. Mr. XXXX seeks an award requiring Mrs. XXXX to pay attorneys' fees he has incurred in this action¹ as a result of the Order to Show Cause and this claim for attorney fees.

The parties entered into a separation agreement on May 3, 2006, apparently resolving any disputes between them. Among other things, that agreement provided for a division of the net proceeds from the sale of the marital residence. The marital residence was titled only to Mr. XXXX, and as a result, he controlled the sale of it. Mrs. XXXX's signature was not needed to effect a transfer or sale. Consequently, it was not clear how she would or could get information about the sale.

Sometime in the latter half of 2006, Mrs. XXXX became concerned that Mr. XXXX was about to sell the marital residence and that she might not get her share of the proceeds. She telephoned and sent text messages to Mr. XXXX, which he subsequently did not answer. Failing to receive

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He was unrepresented when he signed the Separation Agreement and at the return date of the Order to Show Cause.

an answer from Mr. XXXX, Mrs. XXXX moved to protect her interest by filing an Order to Show Cause seeking to restrain the disposition of the proceeds of the sale of the marital residence.

That Order to Show Cause was signed on August 24, 2006, and was returnable on September 6, 2006. Mr. XXXX appeared at the return date and stated that he would honor the agreement and pay to Mrs. XXXX her share of the net proceeds upon closing of the sale. At that time, the sale had not yet occurred. As of the trial of this matter on January 4, 2007, the marital residence was sold and Mrs. XXXX had been paid.

Pursuant to Domestic Relations Law § 237, the court has the discretion to award counsel fees to either party after considering the circumstances of the case and of the respective parties (*see* DRL § 237 [a]). In considering an award of counsel fees, the court should take into account the financial circumstances of the parties, and all of the other circumstances of the case which may include the relative merit of the parties' positions (*see DeCabrera v. Cabrera-Rosete*, 70 NY2d 879 [1987]).

When considering the financial circumstances of the parties, for example, if one party's resources far exceed those of the other party, an award of counsel fees may be appropriate and the fact that the party seeking an award of fees is employed or has some financial resources will not be dispositive (*see MacMurray v. MacMurray*, 187 AD2d 840 [3d Dept 1992]).

Counsel fees may also be appropriate in circumstances where one party's conduct makes it appropriate to charge that party with payment of attorneys' fees incurred by the other party. For example, where the defendant husband engaged in "obstruction tactics" that led to unnecessary litigation expenses for plaintiff wife, the court awarded additional counsel fees (*see*

Markov v. Markov, 304 AD2d 879 [3d Dept 2003]). In addition, where a defendant engaged in conduct which included “attempts to wear down and/or financially punish [plaintiff] by prolonging litigation,” the court awarded counsel fees to the plaintiff (*see Harrington v. Harrington*, 300 AD2d 861, 865 [3d Dept 2002]).

In considering the circumstances involved here, it does not appear that the financial position of either of the parties warrant an award of attorneys’ fees. As both parties have similar incomes, with Mr. XXXX earning approximately \$50,000.00 and Mrs. XXXX earning approximately \$40,000.00, there is no evidence that the disparity in incomes leaves either party in a position where they are financially unable to prosecute or defend the action. As a result, the facts of this particular case must reveal some other circumstance, such as egregious conduct by either party, to justify an award of attorneys’ fees in favor of the other party.

The facts here indicate that Mrs. XXXX brought the Order to Show Cause because she became concerned about her receipt of the proceeds of the marital residence, the sale of which she did not control. Mr. XXXX ignored the messages seeking information about the sale. He testified that at the time he received her messages, he did not know when a closing would take place. In addition, he testified that a previously scheduled sale to another buyer had not occurred and the property had to be relisted for sale. It was also pointed out that he and Mrs. XXXX had not communicated with each other since February 2006, and all communications for the separation agreement were directly between Mr. XXXX and Mr. Meagher.²

Despite the fact that Mr. XXXX perhaps should have been more communicative, this

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Mrs. XXXX’s attorney.

failure on his part does not appear to warrant an award of attorneys' fees to Mrs. XXXX. The record here does not reveal a past history of Mr. XXXX repudiating or failing to honor his commitments. Mrs. XXXX was reasonably concerned about her receipt of her share of the proceeds from the sale of the marital residence, and she was entitled to request the assurances provided in a court order. Consequently, Mr. XXXX similarly does not appear entitled to an award of attorneys' fees.

The fact here is that Mr. XXXX might have saved himself some aggravation had he responded to Mrs. XXXX's messages, and Mrs. XXXX might have received her share of the proceeds without a court ordered restraint of the funds. Despite this, the evidence here does not justify an award of attorneys' fees from one party to the other.

For those reasons, neither party is entitled to any award of attorney fees from the other. As this is the only remaining matter for adjudication regarding this matrimonial action, Mrs. XXXX's counsel shall file the necessary documents to complete this divorce on notice to Mr. XXXX's counsel.

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


HON. JEFFREY A. TAIT
Supreme Court Justice