

Wife v Husband

2007 NY Slip Op 31791(U)

April 2, 2007

Supreme Court, Broome County

Docket Number: 0002197/2006

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 21st day of February, 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. 2007-XXXX-M

HUSBAND,

Defendant.

APPEARANCES:

Mark L. Rappaport, Esq.
Coughlin & Gerhart, LLP
Attorneys for Plaintiff
P.O. Box 2039
Binghamton, NY 13902-2039

Mr. XXXX, *Pro Se*
P.O. Box XXXX
XXXX, NY XXXXX

HON. JEFFREY A. TAIT, JSC

This matter is before the Court for an inquest on equitable distribution. The plaintiff WIFE commenced this matrimonial action on October 10, 2006 seeking a divorce from her husband, defendant HUSBAND. Since that time, Mr. XXXX has defaulted in appearance and thus it was necessary for Ms. XXXX to seek equitable distribution via an inquest hearing. Notice of the hearing was given by an Order to Show Cause served on Mr. XXXX by substituted service.

A hearing was held on February 21, 2007 at XXXX as scheduled in the Order to Show Cause. Ms. XXXX and her attorney appeared at the hearing. Mr. XXXX did not appear.

Custody of and child support for the parties' children have been established by a Family Court Order, which is continued. All future matters of child custody, visitation, and child are referred to the Broome County Family Court.

The parties owned a marital residence, which Mr. XXXX transferred to Ms. XXXX via a Quit-Claim Deed, whereby he released and relinquished any interest he had in the marital residence to Ms. XXXX. Ms. XXXX testified that there is little or no equity in the marital residence.

Among the items of which Ms. XXXX seeks equitable distribution is an IRA in her name. The IRA, which is held by American Funds and has a balance of approximately \$400.00, is awarded to her.

Ms. XXXX also indicates that she has a 2002 Saturn automobile, which is her means of transportation. She apparently pays all payments and expenses for this. Consequently, she is awarded possession and ownership of the 2002 Saturn.

Ms. XXXX testified that she seeks all personal property currently held in the marital

residence. As Mr. XXXX has abandoned the marital residence, she is awarded the personal property therein. To the extent that any of the personal property includes Mr. XXXX's personal clothing, he shall be entitled to that provided he makes a claim therefore within sixty (60) days of the date of this Decision.

Ms. XXXX testified that in 2006 the parties received a \$210.00 rebate on their school taxes, commonly known as a STAR rebate. She states that Mr. XXXX took all of this rebate and she feels entitled to one-half of it. Ms. XXXX is awarded one-half of the STAR rebate to be paid to her by Mr. XXXX, who received the entire STAR rebate check, within sixty (60) days of the date of this Decision.

Ms. XXXX also makes a claim for mortgage late fees. She testified that a late fee of \$100.00 is charged for every delinquent mortgage payment and that she has been charged 6 late fees. She attributed these late payments and resulting fees to the fact that Mr. XXXX voluntarily left his employment and has subsequently provided no means of support or contribution to the living expenses of Ms. XXXX or the children. Ms. XXXX is awarded \$600.00 from Mr. XXXX for the late fees she incurred by reason of his failure to make any contribution to the household living expenses, which he shall pay within sixty (60) days of the date of this Decision.

Ms. XXXX testified that she is not currently employed. She had been employed at XXXX in the XXXX department through December 22, 2006 and was laid off when XXXX decided to close that department. She testified that she realizes that any claim for maintenance is impractical at this point, given the fact that Mr. XXXX refuses to be gainfully employed. Therefore, she requests that the issue of maintenance be deferred and referred to the Broome County Family Court. Accordingly, the issue of maintenance is referred to the Broome County Family Court.

The last item that Ms. XXXX requests in the equitable distribution inquest is an award of attorneys' fees pursuant to DRL §237 that she incurred in connection with the divorce, equitable distribution, child support, family offense, and all related proceedings. She testified that up to this point she has incurred attorneys' fees of \$4,710.00 and disbursements in the amount of \$383.70 (see Attorney Affidavit in Support of Claim for Attorneys Fees submitted in connection with the inquest). The testimony established that Ms. XXXX paid \$2,000.00 toward these attorneys' fees, perhaps through borrowing from relatives.

In determining whether to award attorney's fees in a matrimonial action, the court must consider the financial circumstances of both parties together with all other circumstances of the case (see *Richards v. Richards*, 189 AD2d 1025, 1026 [3d Dept 1993]; see also DRL §237). As to the fees sought for the Family Court proceedings, those fees would only be appropriate under DRL §237 if incurred in connection with this Supreme Court matrimonial proceeding, such as if this Court referred those issues to Family Court after commencement of the divorce (see *id.*; see also *Murena v. Murena*, 75 AD2d 640 [2d Dept 1980]; *Zeitlin v. Zeitlin*, 250 AD2d 606 [2d Dept 1998]). Here, the Family Court proceedings were initiated separately from the divorce, and thus will not be considered by this Court as part of any attorneys' fee award (see *id.*).

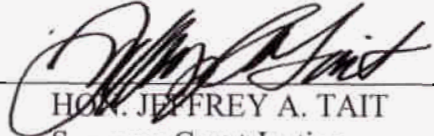
Here, neither party is currently employed. By Findings of Fact and Order dated December 12, 2006, the Broome County Family Court imputed income to Mr. XXXX of \$24,500.00 annually. In 2005, Ms. XXXX had wages of \$20,040.00. Thus, the parties' potential incomes are similar. Further, Mr. XXXX did not appear in this action or oppose the relief sought by Ms. XXXX or engage in behavior that protracted the litigation. While his default in the action arguably necessitated the inquest for distribution of marital property, this matter, insofar as it was

before this Court, is essentially a basic, uncontested divorce with minimal issues of equitable distribution. As the parties are similarly situated financially and after considering the particular circumstances of this case, Ms. XXXX's request for attorneys' fees is denied (*see Farrell v. Cleary-Farrell*, 306 AD2d 597, 600 [3d Dept 2003]).

Plaintiff's attorney shall submit proposed Findings of Fact and Conclusions of Law and a proposed Judgment of Divorce consistent with this Decision and Order.

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: April 2, 2007
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Order to Show Cause dated January 23, 2007 with annexed Verified Complaint, Affidavit of Plaintiff and Affidavit of Regularity
- Affidavit of Service of Theodore H. Oliver sworn to February 1, 2007
- Attorney Affidavit in Support of Claim for Attorneys Fees of Mark L. Rappaport, Esq., sworn to February 23, 2007