

**Menlikov v Owad**

2007 NY Slip Op 33195(U)

October 5, 2007

Supreme Court, Greene County

Docket Number: 0003244/2007

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

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PETR MENLIKOV,

Plaintiff,

-against-

MARIE OWAD, a/k/a CHRISTINE OWAD, a/k/a AHES OWAD,  
AMERIQUEST MORTGAGE COMPANY, ROBERT . PUGSLEY, JR.,  
HUDSON RIVER BANK AND TRUST CO., COMMISSIONER  
OF TAXATION AND FINANCE, STATE OF NEW YORK, &  
UNITED STATES DEPT. OF JUSTICE,

Defendants.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI: 19-03-0954 Index No. 03-244

Appearances: Mann Law Firm, P.C.  
Attorneys For Plaintiff  
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(Matthew J. Mann, Esq., of counsel)

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(Victor N. Okeke, Esq., of counsel)

**DECISION/ORDER**

George B. Ceresia, Jr., Justice

In the above-captioned action, defendant Maria Owad, a/k/a Christine A. Owad, a/k/a  
Ahes Owad (Owad) moves pursuant to CPLR 6314 to modify the temporary restraining

order dated October 13, 2006 (Stein, J.) to exclude property she owns located at 74 Conine Road, Prattsville, New York. Plaintiff Petr Menlikov (Menlikov) opposes the motion and cross-moves for an order (1) granting him a \$150,000 judgment as against Owad; (2) deeming Owad to be in default for failing to answer the amended complaint containing a cause of action for equitable distribution; (3) granting equitable distribution of marital assets and debts; and (4) directing a supervised sale of Owad's property. Owad opposes the cross motion.

As to Owad's motion, since the Court previously granted such relief in an order dated August 27, 2007, the motion is rendered moot (see e.g. Soles v Soles, 41 AD3d 904, 907 [3d Dept 2007]; Matter of Mayorca-Piccolo v Piccolo, 37 AD3d 913, 913 [3d Dept 2007]). Thus, the motion is dismissed on that ground.

As to the branch of the cross-motion seeking a \$150,000 judgment, previously the Court granted plaintiff summary judgment on his claim, inter alia, of fraud and self-dealing as against Owad (see Menlikov v Owad, Sup Ct., Greene County, April 14, 2006, Stein, J., Index No. 03-244). In a subsequent order, the Court noted that Menlikov failed to either submit a judgment or file a note of issue for an inquest since being granted summary judgment (see Menlikov v Owad, Sup Ct., Greene County, October 13, 2006, Stein, J., Index No. 03-244). Menlikov now seeks a judgment in the amount of \$150,000 as against Owad. In support of this application, Menlikov submits a letter showing a \$98,962 payoff amount for the mortgage on the property that has been subject of this action. In addition, Menlikov

seeks (1) \$5,000 for additional foreclosure costs, (2) \$33,000 for attorneys' fees; and (3) \$6,282.65 in costs and disbursements. In support of these requests, Menlikov solely submits the retainer agreement between himself and counsel.

As a threshold matter, to the extent that Owad argues that Menlikov has not suffered any damages since he had no interest in the subject property, this argument is barred by the law of the case doctrine (see People v Evans, 94 NY2d 499, 502 [2000]; Dukett v Wilson, 31 AD3d 865, 868 [3d Dept 2006]). In granting Menlikov summary judgment, the Court implicitly determined that Owad improperly transferred property owned by Menlikov to herself through her power as an attorney-of-fact.

Otherwise, the “measure of damages in an action predicated on fraud is the actual pecuniary loss” (Pope v Saget, 29 AD3d 437, 439 [1<sup>st</sup> Dept 2006], lv denied 8 NY3d 803 [2007]). Moreover, “[t]he prime standard for measuring the actual pecuniary loss sustained as a direct result of fraud is the ‘out of pocket rule.’ The defrauded party is entitled solely to recovery of the sum necessary for restoration to the position occupied before the commission of the fraud” (Winkler v Allvend Indus. Inc., 186 AD2d 732, 733 [2d Dept 1992], lv denied 89 NY2d 805, quoting Clearview Concrete Prods. Corp. v S. Charels Gherardi, Inc., 88 AD2d 461, 467 [2d Dept 1982]). Further, “attorneys’ fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule” (A.G. Management Corp. v Lezak, 69 NY2d 1, 5 [1986]). However, “[a]n

exception to that rule is found where, as a proximate and natural consequence of a tortious act, a party is required to defend or to bring an action against a third-party, he is entitled to recover reasonable attorney's fees necessarily incurred" (Matter of Estate of Davis, 84 Misc 2d 830, 887-888 [Surr Ct, New York County, 1975], mod on other grounds 56 AD2d 499 [1<sup>st</sup> Dept 1977], aff'd 43 NY2d 305; see Raymond Corp. v Cooper & Lybrand, 105 AD2d 926, 927 [3d Dept 1984]).

Here, Menlikov is entitled to the pay-off costs for the mortgage since such costs relate directly to his loss stemming from Owad's fraud or self-dealing at issue in this litigation. Further, Menlikov is entitled to an award of attorneys' fees stemming from the fraud and self-dealing to the extent that such fees were incurred in defending the mortgage foreclosure action (see Raymond Corp. v Cooper & Lybrand, supra at 927; Matter of Estate of Davis, supra at 887-888). Since the record before the Court only contains a retainer agreement in which Menlikov agreed to pay counsel fees in the amount of \$33,000 premised on a recovery of \$100,000, this Court is unable to determine the amount of actual attorneys' fees to which Menlikov may be entitled. In addition, Menlikov failed to submit any evidence to substantiate his request for costs and disbursements and further mortgage foreclosure costs.

Thus, at this juncture, the only judgment this Court could direct being entered would be for the payoff costs of \$98,962 plus costs and statutory interest. Therefore, this Court directs that Menlikov submit a proposed judgment to the Court, on notice, for that amount

within 30 days of the date of this decision and order. In addition, at that time, the Court will also consider adding reasonable attorneys' fees to the judgment if, upon notice, Menlikov submits an attorney's affidavit detailing fees incurred by Menlikov in the defense of the mortgage foreclosure action, along with a bill of costs.

As to the branch of Menlikov's cross motion effectively seeking a default judgment on the equitable distribution claim in the amended complaint, Owad contends that she was not served with the amended complaint and, thus, has not answered it. This contention is belied by the record in which an affidavit of service establishes that Menlikov served the amended complaint within the time directed by the Court's October 12, 2006 order (see Engel v Lichterman, 62 NY2d 943, 944 [1984]). Further, Owad's mere denial of receipt of the amended complaint is not enough to rebut the showing (see Kihl v Pfeffer, 94 NY2d 118, 122 [1999]).

Otherwise, Menlikov's submissions are sufficient to demonstrate that he has a right to the equitable division of the parties' marital assets and debts (see CPLR 3215) but insufficient to determine how such assets and debts should be equitably divided (see Domestic Relations Law § 236 [B]; Otto v Otto, 150 AD2d 52, 67 [2d Dept 1989]). Accordingly, this Court directs that a hearing be held, to be scheduled upon receipt of a duly filed Note of Issue by Menlikov.

In light of this Court's directives in this order and prior orders, there is no need to consider Menlikov's request for a sale of Owad's separate property. Moreover, this Court

has considered the parties remaining arguments and contentions and finds them to be without merit.

Accordingly, it is

**ORDERED** that defendant Marie Owad's motion is dismissed; and it is further

**ORDERED** that the branch of plaintiff Petr Menlikov's cross motion for a judgment as against Owad is granted to the extent that plaintiff Petr Menlikov shall be entitled to entry of a judgment in the sum of \$98,962.48 plus costs and statutory interest; and it is further

**ORDERED** that Menlikov is directed to submit the proposed judgement, on notice, to the Court within 30 days of the date of this decision and order; and it is further

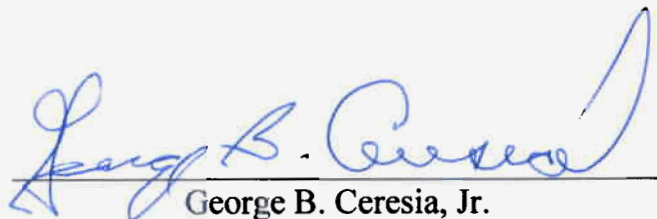
**ORDERED** that this Court will consider adding reasonable attorneys' fees to the aforementioned judgment in the event that, upon notice, Menlikov submits an attorney's affidavit detailing attorneys' fees he incurred in the defense of the mortgage foreclosure action, along with a bill of costs, at the same time the proposed judgment is submitted; and it is further

**ORDERED** that the branch of Menlikov's cross motion for, effectively, a default judgment on the equitable distribution claim in the amended complaint is granted; and it is further

**ORDERED** that, upon plaintiff Petr Menlikov's filing of a note of issue, the Court will schedule a date for a hearing regarding the equitable distribution of the parties' marital assets and debts upon defendant Marie Owad's default.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the plaintiff, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: October 5, 2007  
Troy, New York



George B. Ceresia, Jr.  
Supreme Court Justice

**Papers Considered:**

1. Notice of Motion dated May 16, 2007;
2. Affirmation of Victor Okeke, Esq., affirmed May 16, 2007, with accompanying Exhibits A-G;
3. Affidavit of Christine Owad sworn to May 16, 2007;
4. Notice of Cross Motion dated June 13, 2007;
5. Affirmation of Matthew J. Mann, Esq., affirmed June 13, 2007, with accompanying Exhibits A-L;
6. Affidavit of Christine Owad sworn to July 13, 2007, with accompanying Exhibits A-B;
7. Reply Affirmation of Matthew J. Mann, Esq., affirmed July 20, 2007, with accompanying Exhibits A-H.