

Zelem v Orol

2007 NY Slip Op 33711(U)

October 29, 2007

Supreme Court, Suffolk County

Docket Number: 0000190/2003

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 1997-31598 - Action #1
2003-00190 - Action #2SUPREME COURT - STATE OF NEW YORK
POST NOTE MOTION PART - SUFFOLK COUNTY**P R E S E N T :**Hon. ROBERT W. DOYLE
Justice of the Supreme CourtMOTION DATE 3-19-07
ADJ. DATE 3-26-07
Mot. Seq. #008 (Action 1) – RRRR – MG
#005 (Action 2) – RRRR – MG

X
SAUNDRA L. ZELEM,Plaintiff,
-against-ANDRE OROL a/k/a ANDRE OROL
DELAVINA,

Defendant.

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and Defendant Tarnow in Action #2*
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X
ANDRE OROL and URSULA OROL
BERLINGER,Plaintiffs,
-against-SAUNDRA L. ZELEM and HERMAN H.
TARNOW.

Defendants.

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Upon the following papers numbered 1 to 4 read on these motions to reargue; Notice of Motion/Order to Show Cause and supporting papers 1-2; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 3-4; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant in Action No. 1 and plaintiffs in Action No. 2 for an order granting them reargument of certain prior motions for summary judgment is granted to the extent that the Court will reconsider the prior applications and its decisions with respect thereto. Upon reargument, the Court vacates its prior determination and the orders with respect thereto and instead, substitutes this order.

Initially, it should be noted that by order of this Court dated February 13, 2007, this Court extended the time within which the motion to reargue could be made.

By order of this Court (Henry, J.) dated December 11, 2001, this Court granted the motion by defendant in Action No. 1 (Andre Orol) for summary judgment dismissing

plaintiff's complaint. That action was brought by plaintiff, who is defendant's former wife, to determine a claim to certain real property owned by defendant and another person in Westhampton, New York. At the same time that the action was commenced, a *lis pendens* was filed against the property. It was plaintiff's contention in that action that the property was marital property and thus subject to equitable distribution in the parties' then-pending matrimonial action in New York County. In granting defendant summary judgment dismissing the complaint, this Court found that:

the defendant establishes, and the plaintiff does not deny, that the subject conveyance was in 1986, five years after the commencement of the divorce action, and the property was not, as a matter of law, marital property.

Thus, the Court granted defendant's motion for summary judgment dismissing the complaint and ordered that the two counterclaims, for abuse of process and prima facie tort, be severed and continued. In these counterclaims it was contended by defendant that plaintiff improperly commenced this action and filed a notice of pendency with the intent to harm defendant and without excuse or justification.

By separate orders, both dated October 2, 2006, this Court had granted summary judgment dismissing the counterclaims in Action No. 1 and dismissing the complaint in Action No. 2.

In support of the present motion to reargue those motions for summary judgment, defendant in action no. 1, contends that the Court overlooked existing law when it failed to give effect to Justice Henry's order as the law of the case. Defendant further argues that this Court misapprehended the existing law when it stated that "the presumption created by statute (is) that marital property exists when an asset is purchased during a marriage and prior to divorce." Defendant argues that the proper statement of the law is that an asset is presumed to be marital property when it is purchased during the marriage but prior to the commencement of a matrimonial action.

Defendant also asserts that the Court misapprehended existing law when it found in its earlier decision that an abuse of process cause of action cannot be based on the improper filing of a notice of pendency. Defendant further argues that the Court improperly concluded that the abuse of process claim, as asserted by defendant in his counterclaim, was deficient since plaintiff had established in her papers that she had an adequate justification for commencing this action and the filing of the notice of pendency. Defendant further asserts that the Court erred in dismissing the second counterclaim and in concluding that defendant had not suffered any damages that would have been recoverable had the counterclaims continued. Finally, defendant asserts that the Court overlooked pertinent facts and controlling law in deciding that the malicious prosecution action (Orol, et al. v. Zelem, et al., Action No. 2 herein) should

be dismissed as a matter of law.

In opposition to defendant's motion, plaintiff raises several arguments. Plaintiff notes that while Justice Henry's prior order did deny her cross motion for summary judgment dismissing the counterclaims on the basis that questions of fact were raised, further discovery in the action with respect to the counterclaims produced evidence sufficient to allow the subsequent granting of summary judgment by this Court. Thus, plaintiff asserts, the Court properly granted her summary judgment dismissing the counterclaims. Plaintiff raises, as she did in the prior motion, a similar argument with respect to the issue of whether the Westhampton property could be considered marital property. Plaintiff contends that only after discovery was allowed to occur was she able to obtain sufficient evidence to establish that the Westhampton property was, indeed, marital property.

After a careful and thorough review of the papers submitted in support of and in opposition to this motion, as well as a review of the papers submitted with respect to the prior motions for summary judgment, the Court concludes that there still remain questions of fact regarding the defendant's counterclaims in action no. 1 which preclude the granting of summary judgment. Similarly, the Court finds that issues of fact exist as to plaintiffs' cause of action in action no. 2 which also preclude the granting of summary judgment.

In so ruling, the Court must first point out that Justice Henry's determination that the Westhampton property was not marital property was and remains the law of the case. For this Court to reach a different conclusion with respect to the status of that property would violate that rule. "The doctrine of law of the case 'is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned' (Messinger v. Messinger, 16 AD3d 562, 792 NYS2d 162 *citing* Martin v. City of Cohoes, 37 NY2d 162, 165). As the Court in Messinger noted, "the decision of the judge who first rules in a case binds all courts of coordinate jurisdiction." While plaintiff may have disagreed with Justice Henry's determination at that time, her remedy was to move to reargue his decision or to take an interlocutory appeal of his decision. From the record before the Court, plaintiff pursued neither of those avenues and is thus, bound by Justice Henry's determination.

Thus, for this Court to determine in its prior decisions that Justice Henry's order was "entitled to law of the case deference pending review of final judgment in Action Nos. 1 and 2 or the judgment rendered in equitable distribution" was clearly not in keeping with established law. Justice Henry's order was entitled to law of the case deference within Action No. 1 for all time and not just pending any final judgment in this action.

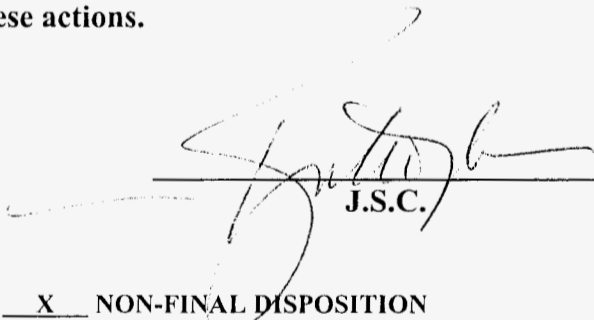
Having reached the conclusion that the Westhampton property was not marital property for the purposes of this action, the Court can only conclude, as did Justice Henry in his earlier decision, that there exist factual issues regarding defendant's counterclaims which

preclude the granting of summary judgment dismissing those counterclaims. In so ruling the Court must point out that issues regarding the filing of the lis pendens against the Westhampton property remain issues of fact which preclude this Court from granting summary judgment. While the lis pendens was cancelled by Justice Henry in his order dated December 11, 2001, it was cancelled because it had expired after three years duration and had not been renewed (*see* CPLR 6513). The issue of plaintiff's intent in filing the lis pendens and whether it was used in a perverted manner to obtain a collateral objective (*see, Board of Education v. Farmingdale Classroom Teachers Assn.*, 38NY2d 397, 380 NYS2d 635) still remains an issue of fact, as Justice Henry concluded at the time of his order. While the Court understands that since the time of that order, discovery has taken place, this Court does not find that anything offered by plaintiff in the nature of admissible proof to establish her position in this action, compels the Court to reach a different result.

The law is well-settled that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see, Andre v. Pomeroy*, 35 NY2d 361, 362 NYS2d 131; *Benincasa v. Garrubo*, 141 AD2d 636, 529 NYS2d 797). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v. Schefman*, 121 AD2d 295, 503 NYS2d 58). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*Gilbert Frank Corp. v. Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793 *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2 1065, 416 NYS2d 790). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact upon which the opposing claim rests (*Gilbert Frank Corp. v. Federal Insurance Co.*, *supra*). Furthermore, the evidence submitted in connection with a motion for summary judgment should be reviewed in the light most favorable to the party opposing the motion (*Robinson v. Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239).

In this instance, viewing the evidence in a light most favorable to the party opposing these motions, the Court can only conclude that there remain factual issues regarding the commencement of this action by plaintiff and the filing of the lis pendens which preclude the granting of summary judgment in both of these actions.

Dated: OCTOBER 29, 2007



 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION