Berger v Kaplow

2008 NY Slip Op 31014(U)

April 4, 2008

Supreme Court, Suffolk County

Docket Number: 0006452/2004

Judge: Martin J. Kerins

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Ind No. 64520-04

Supreme Court - State of New York
IAS PART 12 - SUFFOLK COUNTY

PRESENT:

DECISION AFTER TRIAL

Hon. MARTIN J. KERINS
J.C.C.

JANICE KAPLOW BERGER,

Plaintiff,

- against -

MICHAEL KAPLOW,

Defendants.

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This matter was tried before the Court. Plaintiff, Janice Kaplow Berger, commenced this action on March 2004. She seeks equitable distribution of marital assets. The defendant, Michael Kaplow, concedes that plaintiff is entitled to equitable distribution but asserts that she is only entitled to a limited amount of the assets she seeks.

Plaintiff and defendant both testified at trial. Christopher Record, a real estate appraiser testified on behalf of plaintiff as to the value of the marital home. Based upon the credible testimony at trial, the exhibits received in evidence, and the Memoranda of Law submitted, the Court makes the following findings and conclusions.

The plaintiff, Janice Kaplow Berger, and defendant, Michael Kaplow, were married on December 26, 1965. The parties had two children, Jennifer, who was born on December 5, 1973, and Sharon who was born on October 11, 1977. Plaintiff (Janice) testified that she moved out of the marital residence in 1997. Defendant (Michael) testified that it was March 1995. The parties do agree that once she left the marital residence, she never returned. In either event, Janice commenced a divorce action in New York in 1996. In fact, she commenced the New York divorce action in Suffolk County in July 1996. However, the action was dismissed in October 1998. She then filed a second divorce action in New Jersey in 2000. That action was similarly

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dismissed.

Janice commenced a third divorce action in Nevada in 2002 although she apparently did not establish residence there until the early part of 2003. In any event, she was granted a divorce in Nevada in April 2003. She continues to reside there.

Since the Nevada Court did not have personal jurisdiction over the defendant, Michael Kaplow, the issue of equitable distribution of the marital assets was not addressed in that court. In March 2004 plaintiff commenced this action seeking such distribution.

The assets in issue consist of 1) the martial residence located at 2 Rope Court, Huntington, NY; 2) parties' pensions; 3) joint bank account funds; and 5) legal fees. The parties each acknowledged certain assets that were non-marital assets.

The Marital Residence

The Court credits the defendant's testimony that plaintiff left the marital home in March 1995, and not 1997 as plaintiff contends. Further, this testimony by Michael was corroborated by the date of plaintiff's commencement of her first divorce action in New York in 1996. Also, the Court notes that plaintiff's statement of her net worth submitted in evidence at the trial notes that she left the marital residence in March 1995. The parties agree that they never reconciled after that date and their marital relationship ended.

Plaintiff asserts that she is entitled to share in the value of the house as of the date of trial. In that regard, plaintiff's expert real estate appraiser, Christopher Record, testified that the fair market value of the house was between $533,700 and $593,000. Mr. Record testified that his appraisal was based upon his inspection of the exterior of the home and comparable properties.

Defendant counters that plaintiff is only entitled to a 50% share of the value established by her appraisal in 1997, conceded to be $225,000. This appraisal was subsequent to the commencement of her first divorce action and after she had left the home. Defendant notes that plaintiff left the home when the children were in high school and college. After she left the marital home she did not contribute to maintaining it.

Defendant credibly testified that he tried to enlist plaintiff's help with the cost of various needed repairs. She always refused which effectively precluded him from obtaining financing in order to do have them done. These repairs amounted to approximately $28,000.00 and were paid from his funds. His payment of real estate taxes from 2001 through 2006 totaled $62,791. The Court wholly credits the defendant's testimony that all funds to pay these amounts came from his own resources and not from marital assets.

Where, as here, a prior matrimonial action seeking a divorce has been dismissed, and a new action for the same relief is subsequently commenced, the court must determine whether the date of commencement of the first action or of the present action should control as the date that marital property ceased to accrue. When the first action is discontinued and the parties either

reconcile or continue the marital relationship, and continue to receive the benefits of the relationship, the date of commencement of the subsequent action controls (*see* ***Mesholam v Mesholam,*** 25 AD3d 670; ***Miller v Miller,*** 304 AD2d 727; ***Lamba v Lamba,*** 266 AD2d 515; ***Thomas v Thomas***, 221 AD2d 621; ***Marcus v Marcus,*** 135 AD2d 216).

There is no evidence that the parties reconciled and continued to receive the benefits of the marital relationship after the prior action was commenced (*see* ***See v. See,*** 45 AD3d 832); ***Mesholam v Mesholam,*** 25 AD3d 670). In fact, the parties agree that they did not reconcile after the prior action was commenced.

This action seeking equitable distribution was commenced in March 2004, nine years after she left the house and the marital relationship ended. The trial was twelve years after she left. Based upon the credible evidence at trial, plaintiff here did not contribute in any way to the appreciation of the home. In fact, her actions thwarted defendant's efforts to maintain it. At a minimum, it made defendant's efforts more difficult.

In light of the foregoing, the Courts finds that plaintiff is entitled to a 50% share of t he residence based upon the appraisal of 1997 of $225,000.00.

The Pensions

Plaintiff seeks a share of the present value of defendant's pension or retirements funds. However, as defendant notes, plaintiff did not meet her burden to prove the value of those benefits. Accordingly, she and defendant are only entitled to so much of the pension benefits that accrued from the date of the marriage until July 1996, the date she commenced her first action for divorce.

Pension benefits earned by a spouse during a marriage are viewed as contractual rights of value received in lieu of higher compensation that would have enhanced either the parties' marital assets or their standard of living (*see*, ***Majauskas v Majauskas***, 61 NY2d 481). Whether vested or nonvested, pension benefits earned for services rendered during a marriage constitute marital property and are subject to equitable distribution upon dissolution of the marriage (*see*, ***Burns v Burns***, 84 NY2d 369; ***Olivo v Olivo***, 82 NY2d 202; ***Majauskas v Majauskas***, *supra*).

Pension rights awarded here shall be limited by the number of months the parties were married up to July 1996. The Court has determined that this period of time amounts to 355 months. Counsel for the parties have 60 days from the date of this decision to agree on and prepare or cause to be prepared a domestic relations order (DRO) for each party's respective retirement pension plan designating the other as the alternate payee and directing the plan's administrator to pay the agreed upon percentage. Benefit payments to plaintiff and defendant shall commence immediately after approval of the DRO, and the marital portion shall be calculated pursuant to the ***Majauskas*** formula.

The Con Ed and Unisource Stocks

Property acquired by a spouse as a gift or by inheritance and retained separately from marital assets is considered separate property (*see*, Domestic Relations Law §236 [B][1][d]; ***Rosenkranse v Rosenkranse***, 290 AD2d 685, 736 NYS2d 453 [3d Dept 2002]; ***Strang v Strang***, 222 AD2d 975, 635 NYS2d 786 [3d Dept 1995]; ***Raviv v Raviv***, 153 AD2d 932, 545 NYS2d 739 [2d Dept 1989]). However, separate property can be transmuted into marital property when the actions of the titled spouse demonstrate an intent to transform the property from separate to marital (*see*, ***Sherman v Sherman***, 304 AD2d 744, 758 NYS2d 667 [2d Dept 2003]; ***Imhof v Imhof***, 259 AD2d 666, 686 NYS2d 825 [2d Dept], *lv dismissed* 93 NY2d 999, 695 NYS2d 745 [1999], *lv denied* 94 NY2d 915, 708 NYS2d 50 [2000]). Thus, the transfer of separate property into a joint account bearing the names of both parties creates a presumption that the funds in such account are marital property (*see*, ***Kay v Kay***, 302 AD2d 711, 754 NYS2d 766 [3d Dept 2003]; ***Rosenkranse v Rosenkranse***, *supra*; ***Diener v Diener***, 281 AD2d 385, 721 NYS2d 667 [2d Dept 2001]; ***Giuffre v Giuffre***, 204 AD2d 684, 612 NYS2d 439 [2d Dept 1994]; *see also*, Banking Law §675 [b]; ***Matter of Kleinberg v Heller***, 38 NY2d 836, 382 NYS2d 49 [1976]). A party may rebut the presumption created by a joint account by establishing with clear and convincing proof that such account was created simply as a matter of convenience, without the intent of creating a beneficial interest, and when the funds in the account came solely from that party's separate property (*see*, ***Kosovsky v Zahl***, 275 AD2d 522, 684 NYS2d 524 [1st Dept 1999]; ***Lagnena v Lagnena***, 215 AD2d 445, 626 NYS2d 542 [2d Dept 1995]; ***McGarrity v McGarrity***, 211 AD2d 669, 622 NYS2d 521 [2d Dept 1995]; ***Giuffre v Giuffre***, *supra*).

Here, the parties agree that the inheritance she received from her relative totaled $275,000.00. It is also not in dispute that plaintiff placed these funds into a joint bank account with defendant to be used for the family. Plaintiff was aware that defendant was managing the account and making investments for the benefit of the family.

In 1993, plaintiff became aware that defendant had withdrawn funds from the joint account and used them to open Lebenthal and Smith Barney accounts. She claimed at trial that she learned for the first time during defendant's deposition in 1997, that some of the funds had been used to open a Smith Barney account for their daughters. Both of these accounts are now in UniSource stock.

This stock, as well as shares of stock in ConEd, were gifted by the defendant to the parties' daughters as UGMA accounts. As defendant asserts, these transactions constituted irrevocable gifts. Moreover, the credible evidence reveals that plaintiff was aware by 1997 that stocks purchased with marital funds had been gifted to the children. However, she did nothing to recover the funds.

Further, the wasteful dissipation of assets by either spouse must be considered by the court when fashioning an equitable distribution award (*see*, Domestic Relations Law §236[B][5][d][11]; ***Graziano v Graziano***, 285 AD2d 488, *lv dismissed* 97 NY2d 725; ***Grotsky v Grotsky***, 208 AD2d 676; ***Wilner v Wilner***, 192 AD2d 524). "Where the wasteful dissipation of assets can be traced to a party's poor judgment, unwillingness or inability to manage, that portion of the amount dissipated must be charged against said party's equitable share" (***Strang v Strang***, 222 AD2d 975, *supra*; *see*, ***Lenczycki v Lenczycki***, 152 AD2d 621). A party asserting such a

claim must establish by a preponderance of the evidence that the other party is guilty of dissipating assets (*see*, ***Reidy v Reidy***, 136 AD2d 614). Here, plaintiff has wholly failed in this regard.

Legal Fees

Pursuant to Domestic Relations Law §237(a), the court may award counsel fees to a spouse "to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and the respective parties." The court must consider both the relative merits of the parties' positions and their respective financial situations when determining whether to grant an application for counsel fees (*see*, ***DeCabrera v Cabrera-Rosete***, 70 NY2d 879; ***Gralnick v Bergier***, 286 AD2d 369; ***Morrissey v Morrissey***, 259 AD2d 472). "Indigency is not a prerequisite to an award of counsel fees" (***Cabrera v Cabrera-Rosete***, *supra.*), and the fact that a party would have sufficient funds to meet his or her legal fees after distribution of the marital assets does not preclude granting such an award (*see*, ***Schek v. Schek,*** 2008 N.Y. App. Div. LEXIS 2178; ***Krutyansky v Krutyansky***, 289 AD2d 299; ***Ferraro v Ferraro***, 257 AD2d 596, 684 NYS2d 274 [2d Dept], *lv denied* 93 NY2d 803; ***Hackett v Hackett***, 147 AD2d 611). Further, in fixing the amount of the award for counsel fees, the court must consider the skill, experience, and background of the movant's counsel, the nature of the services rendered, the difficulty of the issues involved, the time actually spent on the matter, and the results achieved (*see*, ***Matter of Freeman***, 34 NY2d 1; ***Pauk v Pauk***, 232 AD2d 386, *lv dismissed* 89 NY2d 982; ***Willis v Willis***, 149 AD2d 584). In light of the disparity in income between the parties, ***Levy v. Levy,*** 4 AD3d 398; ***Schek v. Schek,*** 2008 N.Y. App. Div. LEXIS 2178 [Second Dept. 2008], the award of a reasonable attorney's fee is a matter within the sound discretion of the trial court.

In light of the foregoing, the Court awards plaintiff legal fees in the amount of $24,848.64.

Settle judgment on fifteen days notice in accordance with this decision.

Dated: April 4, 2008

HON. MARTIN J. KERINS
J.S.C.

FINAL DISPOSITION______ NON-FINAL DISPOSITION ✓