

Friedman v Fenyn

2011 NY Slip Op 30480(U)

March 1, 2011

Supreme Court, New York County

Docket Number: 116899/09

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JEFFREY K. OING
J.S.C.

PART 48

Justin

Index Number : 116899/2009
FRIEDMAN, PHILIP L.
vs.
FENYN, JOCELYN
SEQUENCE NUMBER : 002
MONEY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance w/ the annexed decision and judgment of the Court.

FILED

MAR 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/1/11



JEFFREY K. OING J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

PHILIP L. FRIEDMAN,

Petitioner,

-against-

JOCELYN FENYN f/k/a JOCELYN GRUNNER-
TURNER,

Respondent.

-----x

Index No.: 116899/09

Mtn Seq. No. 002

DECISION AND ORDER

FILED

MAR 03 2011

JEFFREY K. OING, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This proceeding is at least the fourth, one commenced by petitioner to recover attorney's fees from respondent's former husband, Mitchell Turner ("Turner"), arising out of petitioner's representation of the former husband in the couple's 1998 matrimonial action. What is not disputed is the former husband's indebtedness, which has been reduced to a judgment in the amount of \$52,638.45, entered on March 22, 2001 (Petition, Ex. 1). Also not disputed is the fact that the decision and order in the matrimonial action, entered June 28, 1999, awarded Mr. Turner fifty percent of respondent's interest in G.E. S&S Plan, G.E. Pension Plan, and a 401K (the "retirement plans") (Id., Ex. 3). Further, the judgment of divorce, entered June 28, 1999, incorporated the decision and order (Id., Ex. 4). It specifically provides that:

ORDERED and ADJUDGED that pursuant to the Order of November 20, 1998 and the Order of April 27, 1999, the Defendant is awarded the sum of \$50,741.95 as part of

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Mtn Seq. No. 002

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equitable distribution, from the Plaintiff's [respondent] Retirement Plans to the Defendant's 401K Plan, which sum shall be set aside and paid over to from said Plans in accordance with an appropriate Qualified Domestic Relations Order [QDRO] to be signed, upon submission of same, on notice, by Defendant or by an attorney on his behalf.

(Id. at p. 4).

Petitioner alleges that respondent no longer works for G.E. He also alleges that respondent "maintains the monies she owes to the judgment debtor [Turner] in a savings account." As a judgment creditor, petitioner asserts that he is entitled to recover from respondent Turner's interest in her G.E. retirement plans.

Discussion

To begin, respondent's argument that she was not served with the notice of petition and petition is unavailing. Here, the affidavit of service indicates personal delivery on respondent herself at 458 West Main Street, Amston, Connecticut on August 7, 2010 at 2:27 p.m. Rather than proffering specific denials of the process server's statements, respondent merely asserts that the petition "was improperly served and incomplete." As such, respondent's denial is insufficient to rebut the presumption of proper service supported by a properly executed affidavit of service (NYCTL 1998-1 Trust v Rabinowitz, 7 AD3d 459 [1st Dept 2004]; De La Barrer v Handler, 290 AD2d 476 [2nd Dept 2002]).

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Respondent next argues that the petition must be dismissed based on the principles of res judicata and collateral estoppel. Again, that argument is unavailing. The record demonstrates that in this proceeding petitioner seeks to recover Turner's share of the G.E. retirement plans. Although petitioner has commenced multiple proceedings to satisfy his judgment against Turner, those proceedings did not concern the G.E. retirement plans. As such, res judicata and collateral estoppel is inapplicable.

Petitioner's argument that respondent has violated a restraining notice that he served on her is unpersuasive given the absence from the record any proof of respondent's disregard of a contemporaneous restraining notice.

The question that remains is has there been a distribution to respondent from the G.E. retirement plans. The judgment of divorce requires Turner or his attorney to execute a QDRO to complete the transfer of Turner's equitable share in respondent's retirement plans. Petitioner fails to allege that a QDRO was ever executed. In the absence of such documentation, petitioner failed to demonstrate that a distribution has been made from respondent's retirement plans such that petitioner would be entitled to seize from Turner an amount sufficient to satisfy his judgment.

Even if a QDRO had been executed, a close reading of the petition demonstrates that petitioner fails to allege any

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distribution. Indeed, petitioner merely alleges that respondent is no longer a G.E. employee. He does not allege that there has been a distribution from the G.E. retirement plans, but merely states, upon information and belief, that respondent "maintains the monies she owes to the judgment debtor in a savings account". Petitioner would have this Court perform a leap of faith to find that the savings account contains such retirement funds. Although understanding and aware of petitioner's frustrations to recover on a debt owed to him as an attorney, I, nevertheless, decline the invitation.

Accordingly, it is

ORDERED that respondent's cross-motion to dismiss is granted, and the petition is hereby dismissed.

ORDERED that the Clerk is directed to enter judgment accordingly.

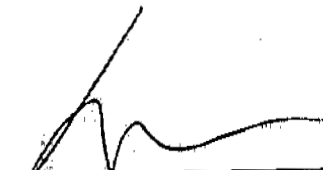
This memorandum opinion constitutes the decision and judgment of the Court.

Dated: 3/1/11

FILED

MAR 03 2011

NEW YORK
COUNTY CLERK'S OFFICE


HON. JEFFREY K. OING, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JEFFREY K. OING
J.S.C.

PRESENT.

PART 48

Index Number : 112060/2007

ELFANT, HOWARD

vs
RIVER PARK

Sequence Number : 004

REARGUMENT/ RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____


Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| _____ |
| _____ |
| _____ |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to reargue is denied. Justice Diamond has retired. Thus refusal of the motion is not possible. The proper procedure is for movant to appeal Justice Diamond's decision/order (Wright v County of Monroe, 45 AD2d 932 (4th Dept 1974); People v Schaefferman, 136 Misc2d 396 (Dist Ct, Nassau Cty 1987)).

Dated: 3/1/11



 JEFFREY K. OING J.S.C.
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):