

Fraterrigo v Fraterrigo

2011 NY Slip Op 32887(U)

November 1, 2011

Sup Ct, Albany County

Docket Number: 6127-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARIA L. FRATERRIGO,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 6127-11
RJI NO. 01-11-104970

DAVID B. FRATERRIGO,

Defendant.

Supreme Court Albany County All Purposes Term October 14, 2011
assigned to Justice Joseph C. Teresi

APPEARANCES:

McNamee, Lochner, Titus & Williams, P.C.
Attorneys for Plaintiff
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Albany, New York 12201

Jean M. Mahserjian, Esq.
Attorneys for Defendant
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Clifton Park, New York 12065

TERESI, J.:

The plaintiff moves for *pendente lite* relief seeking temporary maintenance pursuant to Domestic Relations Law § 236(B)(5-a) in the amount of \$1,687.00 per month, an order directing the defendant to provide or reimburse plaintiff for the cost of health insurance and directing the

defendant to pay plaintiff's interim counsel fees in the amount of \$7,500.00. The defendant opposes plaintiff's motion.

The parties were married on July 2, 2005 and there are no children of the marriage. The husband is 38 years of age and the wife is 28 years of age. The plaintiff alleges she left the marital residence on July 2, 2011 when she learned the defendant was involved with another woman. The parties own a home and a single family dwelling which they rent. The husband has a bachelors degree and is the office manager of a family optical business. The wife has a bachelors and masters degrees and is currently employed full time as a daycare employee. The plaintiff is also a tutor and anticipates she will earn \$100 per month. The plaintiff alleges she is in need of temporary maintenance as she is unable to support herself as her income is less than her expenses. The plaintiff claims she worked as a teacher's aide for several years at Guilderland Central School District and she received health insurance for her and her husband as an incidence of her employment. The plaintiff quit her job at the school district to obtain full time employment and now claims she has to pay \$583.86 per month for COBRA benefits. The plaintiff requests the defendant to pay for her health insurance or obtain health insurance for her from his employer.

The plaintiff admits the marriage was strained but maintains the defendant left the marital residence on her own and choose to live with her parents. The defendant alleges the plaintiff took almost all of the household furnishings. The defendant alleges the plaintiff is in a financial position to support herself. The defendant contends the plaintiff should have known that when she quit her job at the Guilderland School District she would be without health insurance. The defendant claims he had to obtain health insurance after their policy was cancelled and he now

pays \$431.80 per month. The defendant claims he pays the household expenses and his Net Worth Statement indicates he pays the mortgage, insurance and taxes on the marital home. The wife does not contribute to any marital household expenses.

Plaintiff seeks temporary maintenance pursuant to Domestic Relations Law § 236(B)(5-a). The purpose of maintenance is to give the recipient spouse a sufficient period of time to become self supporting. (Santana v. Santana, 51 AD3d 542 [1st Dept. 2008]). The proper remedy for any perceived inequity in a *pendente lite* award is a speedy trial. (Frates v. Frates, 68 AD3d 891 [2nd 2009]). The plaintiff earns \$510 per week for \$26,520.00 per year . The plaintiff is also a tutor and anticipates she will earn \$100 per month for \$1,200 per year for a total yearly income of \$27,720.00. The defendant claims he earns \$3,741 per month as a business manager for a total of \$44,892.00 per year. The defendant also receives self-employment income in the amount of \$1,680 per month for a total of \$20,160.00 per year for total income of \$65,052.00 . In calculating spousal support, the parties are entitled to reduce their gross income by their respective FICA obligations. For the calculation of temporary spousal support, the plaintiff's net income is \$26,514.00 and the defendant's net income is \$60,072.00 after FICA deductions.

The statute requires that temporary spousal maintenance be calculated by two formulas and the lowest figure is used for temporary maintenance. The first formula requires that 30% of the payor's income minus 20 % of the payee's income less statutory deductions be used to calculate spousal maintenance. In this situation, \$18,022 (30% of \$60,072) less \$5,303 (20% of \$26,514) results in \$12,719 per year at \$245 per week. The second formula requires that 40% of the combined incomes of the parties less the payee's income less statutory deductions be used to calculate spousal maintenance. In this situation, \$34,634 (combined incomes of \$86,586 times

40%) minus the payee's income (\$26,514) results in \$8,120 per year at \$156 per week. Using the lower figure, this Court is required to award temporary maintenance in the amount of \$156.00 per week pursuant to Domestic Relations Law § 236(B)(5-a).

The plaintiff also seeks an order directing the defendant to provide her health insurance or reimburse her for the cost of the COBRA premiums. The defendant claims he obtained health insurance through his employer and pays \$431.80 per month. This Court hereby directs the defendant to obtain health insurance for his spouse with the health care programs offered by his employer. This Court has the statutory authority to direct that health and hospital insurance be maintained for the benefit of a spouse and children. (see, Domestic Relations Law § 236[B][8][a]; Hartog v. Hartog, 85 NY2d [1993]).

The award of reasonable counsel fees is a matter within the sound discretion of the court. (see, Domestic Relations Law § 237 (a) DeCabreta v. Cabrera-Rosete, 70 NY2d 879 [1987]). The factors to be considered include the parties ability to pay, nature and extent of the services rendered, complexity of issues involved and the attorney's experience, ability and reputation. (Grald v. Grald, 33 AD3d 922 [2nd Dept. 2006]). The trial court is in the best position to judge the factors integral to determining counsel fees. (Lodovico v. Lodovico, 51 AD3d 731 [2nd Dept. 2008]). "A court must consider the equities and circumstances of each particular case and respective financial positions in determining a counsel fee application." (Palumbo v. Palumbo, 10 AD3d 680 [2nd Dept. 2004]). Attorney fees in divorce actions are permissible but such awards should not be routinely expected or freely granted. (O'Shea v. O'Shea, 93 NY2d 187 [1999]).

The issue of counsel fees in a divorce action is controlled by the equities and circumstances of each particular case and the court must consider the relative merits of the

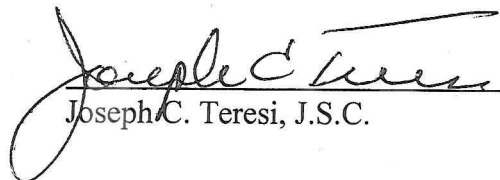
parties' positions and their respective financial positions in determining whether an award of legal fees is appropriate. (Dellafiora v. Dellafiora, 54 AD3d 715 [2nd Dept. 2008]; Silver v. Silver, 46 AD3d 667 [2nd Dept. 2007]). This Court is mindful that "there shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse." (see, Domestic Relations Law § 237(a)).

Plaintiff seeks the payment of her attorney fees and costs by the defendant in the amount of \$7,500.00. At first, the plaintiff failed to acknowledge the defendant paid \$2,000.00 to plaintiff's attorney in September 2011. Subsequently, plaintiff's attorney did confirm her firm received payment from the defendant on behalf of the plaintiff. When taking into consideration the martial expenses and marital debt along with the expenses of the individual parties and the payment of temporary spousal support, this Court, utilizing its discretion, awards the plaintiff counsel fees in the amount of \$3,500.00 to be paid by defendant. (Bush v. Bush, 46 AD3d 1140 [3rd Dept. 2007]). The defendant shall be given a credit for \$2,000.00 already paid leaving a balance due of \$1,500.00 for plaintiff's counsel fees.

This Decision and Order is returned to the attorney for the plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
November / , 2011



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated September 27, 2011;
2. Affidavit of Maria L. Fraterrigo dated September 27, 2011 with Exhibits A-E;
3. Affidavit of Michelle L. Haskin, Esq. dated September 27, 2011;
4. Affidavit of David B. Fraterrigo dated October 7, 2011 with Exhibits A-G;
5. Affidavit of Brian B. Selchick dated October 7, 2011 with Exhibit A;
6. Affidavit of Maria L. Fraterrigo dated October 13, 2011 with Exhibits F-I..