

Malcolm v Malcolm
2012 NY Slip Op 30561(U)
March 8, 2012
Sup Ct, Albany County
Docket Number: 4976-11
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARY T. MALCOLM,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 4976-11
RJI NO. 01-11-105266

JAMES E. MALCOLM,

Defendant.

Supreme Court Albany County All Purposes Term February 9, 2012
assigned to Justice Joseph C. Teresi

APPEARANCES:

Law Offices of Geri Pomerantz
Attorney for Plaintiff
(Geri Pomerantz, Esq. of Counsel)
694 Columbia Turnpike
East Greenbush, New York 12061

James E. Malcolm, Esq.
Pro Se Defendant
27 Mayflower Drive
Schenectady, New York 12306

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 \$11,163 per year, directing the defendant to continue to provide the plaintiff health insurance, maintain the plaintiff as the beneficiary of his New York State retirement and death benefits until this matter is resolved, to

pay the monthly minimum payment on the joint VISA card and cease using the card for credit or cash advances, to comply with the Automatic Stay Order pursuant to Domestic Relations Law § 236(B)(2)(b) and directing the defendant to pay plaintiff's interim counsel fees in the amount of \$7,000.00. The defendant opposes plaintiff's motion.

The parties were married on March 31, 1990 and there are no minor children of the marriage. The husband is 47 years of age and the wife is 59 years of age. The plaintiff alleges she left the marital residence on July 20, 2008 when she learned the defendant was involved with another woman. The husband has a bachelors degree and a master degree and is an engineer with the State of New York. The wife has a high school degree and is currently employed full time at Joseph House, a shelter and transitional facility in Troy, New York. 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 receives health insurance from her husband as an incidence of his employment. The plaintiff requests the defendant to continue to pay for her health insurance until a Judgment of Divorce is attained.

The plaintiff admits the marriage was strained but maintains she left the marital residence on her own and choose to live with her son. 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 claims he provides health insurance for himself and plaintiff from his employer. The defendant claims he pays the household expenses and has been paying a VISA account for years which they used to pay their son's college education expenses. The husband claims he no longer uses the card. The wife does not contribute to any marital household or credit card 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 \$36,786.00 per year . The defendant claims he earns \$84,758.00 per year. 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 yearly income is \$34,708.00 and the defendant's net yearly income is \$79,969.00 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, \$23,991 (30% of \$79,969) less \$6,942 (20% of \$34,708) results in \$17,049 per year at \$329 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, \$45,871.00 (combined incomes of \$114,677.00 times 40%) minus the payee's income (\$34,708) results in \$11,163 per year at \$215 per week. Using the lower figure, this Court is required to award temporary maintenance in the amount of \$215.00 per week pursuant to Domestic Relations Law § 236(B)(5-a) retroactive to the date of January 19, 2012 when the *pendente lite* Notice of Motion was filed.

The plaintiff also seeks an order directing the defendant to continue to provide her health insurance until the parties are divorced. The defendant claims he obtained health insurance

through his employer and pays \$222.26 per month. Although demanded, the defendant has failed to disclose what portion is attributable to plaintiff's coverage and whether he covers any other individuals under his plan. This Court hereby directs the defendant to continue to provide health insurance for his spouse. 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 defendant alleges he has destroyed the VISA card and has not used it since August 2010. The balance on the account is approximately \$6,605.00. Pending the resolution of this action, the defendant is directed to continue to pay the minimal monthly payment on the credit card. The defendant shall be entitled to a credit for joint marital credit card debt he paid when this action is resolved. In addition, the defendant is hereby directed to maintain the plaintiff as the beneficiary for his New York State retirement and death benefits until this action is completed. The defendant is further directed to comply with the Automatic Stay Order in this proceeding pursuant to Domestic Relations Law § 236(B)(2)(b).

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 \$7,000.00. The plaintiff has made diligent efforts to resolve this matter which have been rejected by the defendant. The defendant now appears pro se after discharging his three prior attorneys. The plaintiff maintains she had to incur additional legal services by having to bring a motion to dismiss a prior action commenced by the defendant for his failure to serve a complaint. The plaintiff also alleges she has incurred additional legal costs when her attorney had to enter into negotiations with three different lawyers and now with the defendant as a pro se litigant in an effort to settle this action. When taking into consideration the nominal 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 \$5,000.00 to be paid by defendant. (Bush v. Bush, 46 AD3d 1140 [3rd Dept. 2007]). Defendant shall pay plaintiff's attorney fee within 30 days from the date of this Decision and Order.

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
March 8, 2012

JCT/pb



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated January 19, 2012;
2. Affidavit of Geri Pomerantz, Esq. dated January 19, 2012 with Exhibits 1-17;
3. Affidavit of Mary T. Malcolm dated January 19, 2012;
4. Affidavit of James E. Malcolm dated January 27, 2012 with Exhibits 1-11;
5. Defendant's Memorandum of Law dated January 27, 2012;
6. Affidavit of Geri Pomerantz, Esq. dated February 5, 2012 with Exhibits A-M;
7. Affidavit of Mary T. Malcolm dated February 5, 2012.