2024 WL 2307453
Supreme Court, Appellate Division,
Second Department, New York.

Angelo RIGAS, respondent,

v.

Georgia RIGAS, appellant.

2019–14592
|
(Index No. 51220/11)
|
Argued—October 24, 2023
|
May 22, 2024

Attorneys and Law Firms

Law Offices of **Eyal Talassazan**, P.C., Garden City, NY, for appellant.

Chemtob Moss Forman & Beyda, LLP, New York, NY (Joshua Forman and Thomas M. Kretchmar of counsel), for respondent.

VALERIE BRATHWAITE NELSON, J.P., JOSEPH J. MALTESE, WILLIAM G. FORD, CARL J. LANDICINO, JJ.

DECISION & ORDER

***1** In an action for a divorce and ancillary relief, the defendant appeals from stated portions of a judgment of divorce of the Supreme Court, Kings County (Delores J. Thomas, J.), dated October 23, 2019. The judgment of divorce, upon a decision of the same court dated December 19, 2018, made after a nonjury trial, inter alia, (1) awarded the defendant 20% of the appreciation in value of the plaintiff's business from the date of marriage to the date of commencement of the action, (2) directed the plaintiff to pay basic child support in the sum of only $8,307.31 per month, and (3) awarded the defendant no maintenance or attorneys' fees.

ORDERED that the judgment of divorce is modified, on the facts and in the exercise of discretion, by deleting the provision thereof awarding the defendant no maintenance, and substituting therefor a provision awarding the defendant maintenance in the sum of $8,000 per month for a period of 24 months from the date of the judgment of divorce, or, if earlier, until her remarriage or the death of either party; as so modified, the judgment of divorce is affirmed insofar as appealed from, without costs or disbursements.

The parties married in 1999 and subsequently had three children together. The plaintiff commenced this action for a divorce and ancillary relief in 2011. Following a nonjury trial, in a judgment of divorce dated October 23, 2019, the Supreme Court, inter alia, awarded the defendant 20% of the appreciation in value of the plaintiff's business, ARC Electrical & Mechanical Contractors Corp. (hereinafter ARC), from the date of marriage to the date of commencement of the action. The court directed the plaintiff to pay basic child support in the sum of $8,307.31 per month and 100% of the children's add-on expenses, and awarded the defendant no maintenance or attorneys' fees. The defendant appeals from stated portions of the judgment of divorce.

"Domestic Relations Law § 236 mandates that the equitable distribution of marital assets be based on the circumstances of the particular case and directs the courts to consider a number of statutory factors" (*Shvalb v. Rubinshtein,* 204 A.D.3d 1059, 1061, 167 N.Y.S.3d 163 [internal quotation marks omitted]). "A trial court considering the factors set forth in the Domestic Relations Law has broad discretion in deciding what is equitable under all of the circumstances[,] and unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed" (*id.* [citations and internal quotation marks omitted]). Nonetheless, "[i]n reviewing a determination made after a nonjury trial, the power of this Court is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, bearing in mind in a close case that the trial court had the advantage of seeing the witnesses and hearing the testimony" (*Kattan v. Kattan,* 202 A.D.3d 771, 773, 163 N.Y.S.3d 170). "Under the equitable distribution statute, separate property is defined to include an increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse" (*Shvalb v. Rubinshtein,* 204 A.D.3d at 1061, 167 N.Y.S.3d 163 [internal quotation marks omitted]; *see* Domestic Relations Law § 236[B][1][d][3]). "Thus, any appreciation in the value of separate property due to the contributions or efforts of the nontitled spouse will be considered marital property" (*Shvalb v. Rubinshtein,* 204 A.D.3d at 1061–1062, 167 N.Y.S.3d 163 [internal

quotation marks omitted]). "Valuation is an exercise properly within the fact-finding power of the trial court, guided by expert testimony" (*Lieberman–Massoni v. Massoni,* 215 A.D.3d 656, 659, 186 N.Y.S.3d 336 [internal quotation marks omitted]). "The determination of the factfinder as to the value of a business, if within the range of the testimony presented, will be accorded deference on appeal if it rests primarily on the credibility of expert witnesses and their valuation techniques" (*id.* [internal quotation marks omitted]).

***2** Here, the Supreme Court providently exercised its discretion in crediting the court-appointed business appraiser's valuation of ARC and awarding the defendant 20% of the appreciation in ARC's value from the date of marriage to the date of commencement of the action (*see Shvalb v. Rubinshtein,* 204 A.D.3d at 1061, 167 N.Y.S.3d 163). The court's valuation of ARC rested primarily on its determination to credit the court-appointed business appraiser rather than the appraiser retained by the defendant. This determination is entitled to deference on appeal (*see Lieberman–Massoni v. Massoni,* 215 A.D.3d at 659, 186 N.Y.S.3d 336). Furthermore, the court's determination, in effect, that the defendant did not establish that the plaintiff wastefully dissipated marital assets was supported by the record (*see Rosen v. Rosen,* 192 A.D.3d 710, 712, 142 N.Y.S.3d 609). The court's distribution to the defendant of 20% of the appreciation in ARC's value from the date of marriage to the date of commencement was a provident exercise of discretion in light of the length of the parties' marriage, the defendant's lack of direct contributions to ARC, and the indirect contributions that the defendant provided in her role as a stay-at-home mother and homemaker (*see Lieberman–Massoni v. Massoni,* 215 A.D.3d at 660, 186 N.Y.S.3d 336; *Shvalb v. Rubinshtein,* 204 A.D.3d at 1061–1062, 167 N.Y.S.3d 163). Accordingly, the Supreme Court providently exercised its discretion in determining the value of ARC's appreciation and in distributing that appreciation.

"The Child Support Standards Act provides for a three-step method for determining child support" (*Kaufman v. Kaufman,* 189 A.D.3d 31, 71, 133 N.Y.S.3d 54). "First, the court determines and calculates the parties' combined parental income; second, the court multiplies that figure, up to a baseline amount ..., by a specified percentage based on the number of children ... and allocates that amount between the parents according to their share of the total income; and third, where the combined parental income exceeds the baseline, the court must determine the child support to be calculated on the amount in excess of the baseline either through the use of the child support percentage or by consideration of a number of statutory factors" (*id.* at 71–72, 133 N.Y.S.3d 54). Where "the combined parental income exceeds the statutory baseline, the court may apply the statutory percentage to all or part of the income over the baseline or it may consider the statutory factors to determine what, if any, additional child support should be awarded" (*id.* at 72, 133 N.Y.S.3d 54; *see* Domestic Relations Law § 240[1–b][f]). "[T]he Supreme Court is afforded considerable discretion in determining whether to impute income to a parent" (*Lieberman–Massoni v. Massoni,* 215 A.D.3d at 661, 186 N.Y.S.3d 336 [internal quotation marks omitted]).

Here, the Supreme Court did not err when, in computing the parties' combined parental income, it began its calculations with a gross income of $371,000 for the plaintiff rather than the much higher sum that the defendant proposed. Moreover, although the defendant contends that the court should have imputed income to the plaintiff in an amount equal to the children's tuition expenses and other expenses allegedly paid by the plaintiff's corporation, the court separately ordered the plaintiff to pay the full cost of the children's schooling, healthcare, and childcare expenses pursuant to Domestic Relations Law § 240(1–b)(c)(4), (5), (6), and (7), obviating the need to further impute income to the plaintiff for those costs. The plaintiff also testified that certain other expenses alleged by the defendant were for business purposes rather than personal purposes (*see Lieberman–Massoni v. Massoni,* 215 A.D.3d at 661, 186 N.Y.S.3d 336). The court appropriately considered the financial resources of the custodial and noncustodial parent and the standard of living the children would have enjoyed if the parties had remained together when using the plaintiff's entire income, which was well in excess of the applicable statutory cap, to calculate the plaintiff's child support obligation (*see Matter of Spano v. Spano,* 168 A.D.3d 857, 860, 92 N.Y.S.3d 300; *Matter of Keith v. Lawrence,* 113 A.D.3d 615, 616, 978 N.Y.S.2d 316). We thus decline to disturb the award of child support.

"The amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its unique facts" (*Kaufman v. Kaufman,* 189 A.D.3d at 69, 133 N.Y.S.3d 54 [internal quotation marks omitted]). "The overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become self-supporting" (*Castello v. Castello,* 144 A.D.3d 723, 726, 41 N.Y.S.3d 250). For cases "commenced prior to amendments

to the Domestic Relations Law effective January 23, 2016 (*see* L 2015, ch 269, § 4), factors to be considered include the standard of living of the parties, the income and property of the parties, the distribution of property, the duration of the marriage, the health of the parties, the present and future earning capacity of the parties, the ability of the party seeking maintenance to be self-supporting, the reduced or lost earning capacity of the party seeking maintenance, and the presence of children of the marriage in the respective homes of the parties" (*Kaufman v. Kaufman,* 189 A.D.3d at 69–70, 133 N.Y.S.3d 54 [internal quotation marks omitted]; *see* Domestic Relations Law former § 236[B][6][a]). "Another factor, which this Court has considered in a marriage of long duration, is whether the party seeking maintenance was the primary homemaker and caregiver for the parties' children during the marriage" (*Castello v. Castello,* 144 A.D.3d at 726, 41 N.Y.S.3d 250).

***3** Here, the Supreme Court improvidently exercised its discretion in declining to award the defendant postjudgment maintenance (*see Kaufman v. Kaufman,* 189 A.D.3d at 69, 133 N.Y.S.3d 54). The defendant had no work experience, as she and the plaintiff jointly decided that she would not work but would instead be a stay-at-home mother and homemaker. The defendant, however, has a college degree. Taking into consideration, inter alia, the length of the parties' marriage (*see* Domestic Relations Law former § 236[B][6][a][2]), their standard of living during their marriage (*see id.* § 236[B][6][a]), the defendant's lost earning capacity resulting from the parties' decision that she stay at home with the children rather than work (*see id.* § 236[B][6][a][9]), and the defendant's good health and ability to become self-supporting in the future (*see id.* § 236[B][6][a][3], [8]), the court should have awarded the defendant maintenance for a period of 24 months from the date of the judgment of divorce to allow her to become self-supporting (*see Kattan v. Kattan,* 202 A.D.3d at 776, 163 N.Y.S.3d 170; *Pierre–Paul v. Boursiquot,* 74 A.D.3d 935, 937, 903 N.Y.S.2d 94). Accordingly, we modify the judgment of divorce by awarding the defendant maintenance in the sum of $8,000 per month for a period of 24 months from the date of the judgment of divorce, or, if earlier, until her remarriage or the death of either party.

"In a matrimonial action, an award of an attorney's fee ... is a matter committed to the sound discretion of the trial court" (*Montoya v. Montoya,* 143 A.D.3d 865, 865, 40 N.Y.S.3d 151 [internal quotation marks omitted]). "There is a statutory rebuttable presumption that counsel fees shall be awarded to the less monied spouse" (*Lieberman–Massoni v. Massoni,* 215 A.D.3d at 662, 186 N.Y.S.3d 336 [internal quotation marks omitted]). "However, court rules impose certain requirements upon attorneys who represent clients in domestic relations matters (*see* 22 NYCRR part 1400)" (*Montoya v. Montoya,* 143 A.D.3d at 865, 40 N.Y.S.3d 151). "These rules were designed to address abuses in the practice of matrimonial law and to protect the public, and the failure to substantially comply with them will preclude an attorney's recovery of a legal fee from his or her client" (*id.*). "A showing of substantial compliance must be made on a prima facie basis as part of the moving party's papers" (*id.* at 866, 40 N.Y.S.3d 151).

Here, the Supreme Court did not improvidently exercise its discretion in declining to award the defendant attorneys' fees. The court correctly, in effect, found that the defendant had not demonstrated compliance with 22 NYCRR 1400.3 (*see Montoya v. Montoya,* 143 A.D.3d at 865, 40 N.Y.S.3d 151). The papers submitted in support of the defendant's request for an award of attorneys' fees revealed that her trial counsel charged rates that exceeded those set forth in the retainer agreement, with no evidence that the defendant had signed a written amendment to the retainer agreement setting forth those higher rates (*see* 22 NYCRR 1400.3[7]). Trial counsel also billed the defendant for appellate work, which the retainer agreement expressly excluded from the "[n]ature of the services" to be provided (*id.* § 1400.3[2]; *see Hyman & Gilbert v. Withers,* 151 A.D.3d 945, 946–947, 58 N.Y.S.3d 90). Moreover, because the invoices were heavily redacted and provided only vague descriptions of the work performed, there is no way to determine from the defendant's submissions whether other line items were for appellate work (*see Yakobowicz v. Yakobowicz,* 217 A.D.3d 733, 737, 190 N.Y.S.3d 457). Finally, trial counsel did not provide itemized bills "at least every 60 days" on numerous occasions (22 NYCRR 1400.3[9]; *see Greco v. Greco,* 161 A.D.3d 950, 952, 77 N.Y.S.3d 160). Accordingly, the defendant did not demonstrate, prima facie, "substantial compliance" with 22 NYCRR 1400.3, and as such, the court correctly declined to award her attorneys' fees (*Montoya v. Montoya,* 143 A.D.3d at 866, 40 N.Y.S.3d 151; *see Bauman v. Bauman,* 208 A.D.3d 624, 626–627, 173 N.Y.S.3d 604).

The defendant's remaining contention is not reviewable since the appendix is inadequate to enable this Court to render an informed decision on the merits (*see Matter of McLeod v. City of New York,* 105 A.D.3d 744, 746, 962 N.Y.S.2d 641; *Milowski v. Michael,* 69 A.D.3d 909, 892 N.Y.S.2d 862).

BRATHWAITE NELSON, J.P., MALTESE, FORD and LANDICINO, JJ., concur.

All Citations

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