

SUPREME COURT OF THE STATE OF NEW YORK – NASSAU COUNTY

PRESENT: HON. ROBERT A. ROSS,  
Justice.

TRIAL/IAS PART 18  
Sequence No.:014  
Motion Date: 04/30/09  
Index No.: 201929-06

CHERYL WASSERMAN,  
Plaintiff,

-against-

DECISION AND ORDER

HAROLD WASSERMAN,  
Defendant.

The following papers have been read on this motion by the plaintiff:

Order to Show Cause, Affidavit, Affirmation & Exhibits.....	1
Affidavit in Opposition & Exhibit.....	2
Reply Affirmation & Exhibits.....	3

The application for a Money Judgment, for sequestration, appointment of a Receiver and other branches of relief are decided as follows:

The issue of counsel fees, pendente lite, is controlled by the equities and circumstances of each particular case and the Court must, amongst other factors, consider the relative merits of the parties’ positions and their respective financial positions. See, *Morrissey v. Morrissey*, 259 AD2d 472. Further, in *Prichep v. Prichep*, 52 AD3d 61, the Appellate Division Second Department provided that “courts should not defer requests for interim counsel fees to the trial court,” and “should normally exercise their discretion to grant a request made by the non-monied spouse, in the absence of good cause - - for example, where the requested fees are unsubstantiated or clearly disproportionate to the amount of legal work required in the case, articulated by the court in a written decision.”

This Court scheduled and heard extensive oral argument with respect to the issue of counsel fees pendente lite, and considered the moving papers and opposing affidavits, together with the exhibits thereto. A decision on the application was made by this Court on April 1, 2009, granting the plaintiff’s counsel, Stephen Gassman, the sum of \$25,000 to be paid within ten days of the decision and order. But, the “speedy trial” that would facilitate an examination of the facts and permit an accurate assessment of the financial circumstances of the parties, so as to allocate the pendente lite legal fees ordered under the approach articulated in *Prichep*, was undermined by the failure of the defendant to remit payment as ordered.

If an award of legal fees “is appropriate to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance or by prolonging the litigation

(see, *Gober v. Gober*, 282 AD2d 392, quoting *O'Shea v. O'Shea*, 93 NY2d at 193), there must be appropriate enforcement, to “see to it” that the “matrimonial scales of justice are not unbalanced by the weight of the monied spouse’s wallet.” See, *O'Shea*, supra; *DeCabrera v. Cabrera-Rosete*, 70 NY2d 879.

In an instance such as here, recalcitrance to compliance of court orders is aptly demonstrated by defendant’s failure to pay a previous order of legal fees dated January 14, 2008, an award of counsel fees due to defendant’s dilatory tactics in discovery, dated September 18, 2007, as well as defendant’s acknowledged failure to pay summer camp expenses for the parties’ children, after consenting to do so. The defendant does not include a statement of net worth in his papers, and instead includes only the tax return of a Sub-Chapter S corporation with gross receipts of \$103,123 for which he is the sole shareholder. However, his individual returns reflect income in excess of \$344,000 from commercial real estate interests he owns in excess of \$344,000.

Domestic Relations Law §243 provides:

“Where a judgment rendered or an order made in an action in this state for divorce, separation or annulment . . . requires a spouse to provide for the education or maintenance of any of the children of a marriage, or for the support of his or her spouse, the court, in its discretion, also may direct the spouse from whom maintenance or support is sought to give reasonable security, in such a manner and within such a time as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he or she fails to give the security, or to make any payment required by the terms of such a judgment or order, whether or not security has been given therefor, or to pay any sum of money for the support and maintenance of the children or the support and maintenance of the spouse during the pendency of the action, or for counsel fees and expenses which he or she is required to pay by a judgment or order, the court may cause his or her personal property and the rents and profits of his or her real property to be sequestered, and may appoint a receiver thereof. The rents and profits and other property so sequestered may be applied, from time to time, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires; and if the same shall be insufficient to pay the sums of money required, the court, on application of the receiver, may direct the mortgage or sale of such real property by the receiver, under such terms and conditions as it may prescribe, sufficient to pay such sums.”

In addition to this statutory authority, relevant case law gives the Court the discretion “to sequester assets where an obligated party fails to make any payment required by the terms of such an order.” See, *Rose v Rose*, 138 AD2d 475.

In this instance, the imposition of such a drastic remedy is buttressed by the pattern of non-payment of expenses relating to the children's summer camp, previous orders relating to legal fees, the finding of discovery obfuscation, and this enforcement proceeding that has been occasioned by non-compliance. See, *Sevigny v. Sevigny*, 236 AD2d 205.

In instances such as this, wherein the monied spouse asserts in a sworn affidavit that he "has no other assets" from which to make payment of an order of pendente lite legal fees, the imposition of sequestration is not only a proper exercise of discretion, but is necessitated by such an assertion. See, *Stock v. Stock*, 202 AD2d 914; *Beal v. Beal*, 196 AD2d 471.

The nexus that exists in the award of pendente lite fees with an appropriate enforcement method, is entirely necessary and appropriate and consistent with the statutory mandate to "consider the circumstances of the case and the respective parties." See, Domestic Relations Law §237[a]. Moreover, the bedrock principle articulated by the Court of Appeals of a "level playing field" and "litigation parity" for a non-monied spouse "to carry on or defend the action" is undermined when litigation parity cannot be obtained as a result of non-compliance with an order granting counsel fees pendente lite. See, *O'Shea v. O'Shea*, 93 NY2d 190; *DeCabrera v. Cabrera-Rosete*, 70 NY2d 879; *Charpie v. Charpie*, 271 AD2d 169.

An exposure to an "unlevel playing field" is no more acceptable to the non-monied spouse than the enforcement of an obligation is to the monied spouse. Especially in a scenario such as this, wherein non-compliance with an order of legal fees is met by a sworn assertion by a party that he/she is "without assets" to pay those fees, sequestration, in my view, is an appropriate exercise of discretion, for the non-monied spouse "to carry on or defend the action." See, *O'Shea*, supra.

Accordingly, the receiver appointed here, Peter B. Weiss, Esq., Walters & Samuels, 419 Park Avenue S., New York, New York 10016 (212-685-6200), shall be appointed to oversee the collection and distribution of defendant's interests in the real estate holdings of Blake Terrace Associates, Bettina Associates, Bull & Bear Associates, Wassco Associates, Wassco Properties, Whatever, LLC, Whatfor LLC: Magnolia Pointe, HW-MAGPIG, LLC, Whatfor, LLC: High Pointe, and HW-HIGHPIG, LLC in order to satisfy payment of pendente lite counsel fees as well as the payment of receiver's fees and expenses.

This constitutes the decision and order of this Court.

Dated: Mineola, New York  
May 14, 2009

**ENTER:**

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**ROBERT A. ROSS**  
**J.S.C.**