

After extensive trial testimony, a written stipulation of settlement was entered into by the parties which resolved all issues, as well as their consent to submit the issue of counsel fees for determination by the Court. The Court accepts the parties' waiver of the hearing. See, *Wolfer v. Wolfer*, 176 AD2d 315; *Pinto v. Pinto*, 260 AD2d 622.

An award of reasonable counsel fees is within the sound discretion of the trial court (*Walker v. Walker*, 255 AD2d 375) and is controlled by the equities and circumstances of each individual case. An evaluation of what constitutes reasonable counsel fees is a matter left to the sound discretion of the trial court. See, *Morken v. Morken*, N.Y.L.J., March 25, 2002; *DeCabrera v. DeCabrera-Rosete*, 70 NY2d 879; *Pena v. Pena*, 255 AD2d 498; *Matter of Bailey*, Marshall & Hoeniger v. Merzon, 210 AD2d 474.

Where a spouse has received a sizable distributive award, a court may properly exercise its discretion either to limit a request for counsel fees, or, decline to order same. See, *Chalif v. Chalif*, 298 AD2d 348; *Mica v. Mica*, 275 AD2d 767; *Van Dyke v. Van Dyke*, 273 AD2d 589; *Soule v. Soule*, 252 AD2d 768; *Love v. Love*, 250 AD2d 739. But, a party with finite assets and/or modest income should not be required to spend down an award of equitable distribution in order to receive counsel fees. See, *Melinitsky v. Melinitsky*, 248 AD2d 240. In the face of great disparity in the income of the parties, the fact that the lower income spouse has received a significant distributive award will not bar an award of counsel fees (see, *Hackett v. Hackett*, 147 AD2d 611) which must be "reasonable in light of the skill, experience, and background of counsel, the nature of the services rendered, the difficulty and complexity of the issues of fact and law involved in the case, as well as the time actually spent on the case." See, *Willis v. Willis*, 149 AD2d 584.

ISSUE

In the case before me, the issue, in effect, is whether legal fees be granted to the "monied spouse" for the alleged protraction of the litigation by the "non-monied" spouse.

BACKGROUND

These parties have been involved in this acrimonious divorce action since 2005. Extensive motion practice has taken place in this Court, and after trial, the plaintiff's cause of action based upon constructive abandonment, was dismissed. A divorce was ultimately granted to the plaintiff, in a New Jersey divorce proceeding. The true nature and extent of these assets was critical to effectuate their liquidation. Instead of cooperation, recriminations have set the tone of this litigation which has necessarily involved 17 motions and more than 50 court appearances which included 17 days of trial, inclusive of the grounds issue.

During the course of the marriage, the parties amassed more than nine million dollars in marital assets.

By stipulation, defendant/wife will receive \$42,000 per year for four years in taxable maintenance and child support of \$48,000 per year for two unemancipated children.

In his request for counsel fees, and in opposition to defendant's demand for contribution to her counsel fees, plaintiff submits a statement of net worth and affirmation relying upon his substantial decrease in annual income to \$330,248.68, pursuant to his 2008 tax return. The husband moves for counsel fees and expenses of \$416,142.60 representing one half of his own outlay for total counsel fees and expenses of \$832,285.21. It is represented that this is for 2,168.5 hours of legal services. He claims that \$32,285.21 is outstanding, which sum includes \$17,727.71 in disbursements and costs. It is claimed that additional counsel fees in the sum of \$43,530 were incurred but not billed. Plaintiff's application includes a copy of the

retainer agreement with his attorney, Kenneth Kooper-smith, and detailed monthly billing statements. He seeks one half of his fees from his wife based upon the claim that she engaged in "stonewalling, perjury, concealment, manipulation, failure to cooperate, that she made unreasonable demands."

He also submits that her application must be denied as a matter of law, as a result of her attorney's failure to render appropriate billing statements in compliance with 22 NYCRR §1400.2.

Defendant submits that her husband should be responsible for payment of the entire sum as the "monied" spouse. She further argues that she should not be forced to defend against "litigation that should never have been commenced in the first instance wherein there is no question that plaintiff had no grounds for divorce whatsoever."

The wife seeks counsel fees of \$597,637.47, inclusive of \$569,191.25 for billings of her current counsel (1,391.65 hours) and disbursements of \$19,524.91. \$3,787.50 of the gross request represents payments to prior counsel, and \$5,133.81 paid to her "independently retained real estate counsel," neither of which request is properly before the Court.

The ambit of 22 NYCRR §1400.2, require counsel to render a written bill at least every 60 days. Here, there is no evidence that there was compliance thereto. "This failure alone warrants the denial of the relief [internal citations omitted]." *Wagman vs. Wagman*, 8 AD3d 263; *Zelenz v. Zelenz*, 43 AD3d 1157. The failure to abide by these rules, "promulgated to address abuses in the practice of matrimonial law and to protect the public, will result in preclusion from recovering such fees." *Mulcahy v. Mulcahy*, 285 AD2d 587; *Julien v. Machson*, 245 AD2d 122.

A party may only recover counsel fees from the adversary spouse where there has been substantial compliance with 22 NYCRR §1400. Defendant's submission fails to include the requisite bi-monthly billing statements. Nor is there any indication that amounts were regularly billed in compliance with 22 NYCRR §1400.2. See, *Gahagen v. Gahagen*, 51 AD3d 863. In support of this application, defendant's counsel saw fit to include invoices from defendant's prior divorce counsel, as well as her real estate counsel. He fails, however, to include any periodic invoice for his representation of the defendant.

By stipulation between the parties, defendant/wife has received in excess of \$4,000,000, from the distribution of marital assets, while the plaintiff/husband realized an almost equal amount. The wife also received \$150,000 separately from plaintiff's life insurance policies earmarked to fund college expenses of the unemancipated children.

At the grounds trial conducted on April 30, 2007, defendant prevailed on a finding that plaintiff had failed to prove his entitlement to a divorce. While there is no issue that the matter was protracted because of the contest of grounds, there cannot be any attribution of needless litigation, inasmuch as (1) the current state of the law in New York State permits either of the parties to contest grounds, (2) defendant asserted an appropriate defense to the grounds set forth in defendant's complaint, and (3) the defendant successfully defended the action, resulting in the dismissal of the cause of action alleging abandonment. See, *Molinari v. Molinari*, 15 Misc. 3d 1120(A). The plaintiff ultimately secured a divorce in another jurisdiction and amended his complaint to seek various causes of action, ultimately resulting in the resolution of the claims of equitable distribution, by stipulation between the parties.

In interpreting Domestic Relations Law §237(a), the Court of Appeals, in *O'Shea v. O'Shea*, 93 NY2d 187, stated:

"This enactment, which has deep statutory roots, is designed to redress the economic disparity between the monied spouse and the non-monied spouse. Recognizing that the financial strength of matrimonial litigants is often unequal--working most typically against the wife--the Legislature invested Trial Judges with the discretion to make the more affluent spouse

pay for legal expenses of the needier one. The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet." See, O'Shea, supra.

Defendant seeks, in effect, to allocate legal fees for the "wasteful and frivolous litigation conduct" of the monied spouse. Were we to subscribe to this argument, our order would represent an award of legal fees of a wholly punitive nature, impermissible under Domestic Relations Law §237. To address the issue of the conduct complained of here, there are a number of ways that the plaintiff could have sought reimbursement of legal fees during the course of the proceedings, or even upon the stipulation that was entered into. For example, 22 NYCRR §130-1.1 (c) authorizes use of attorneys fees where the conduct of a party or attorney "is completely without merit" or is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." Kaplan v. Kaplan, 28 AD3d 523 citing Silverman v. Silverman, 304 AD2d 41. Moreover, if the court were to accept the plaintiff's notion of litigation misconduct, another appropriate way for that position to be realized would be to seek a disproportionate division of assets after a trial, or procure same through a negotiated stipulation. The plaintiff, however, settled such claims when the assets were divided between the parties in a written stipulation—which division, in point of fact, gave a slightly disproportionate distribution in favor of the defendant, rather than the plaintiff, who purports to complain of the defendant's litigation conduct.

Both parties were represented by competent counsel. Each was compensated from the funds generated by liquidation of marital assets throughout this three year litigation. The substantial assets of the parties coupled with the June 15, 2006 stipulation establishing an attorney's escrow account from which payments were made with approval of both parties and counsel facilitated the "level playing field" required by Domestic Relations Law §237. See also, Prichep v. Prichep, 52 AD3d 61.

Given the amount of the legal fees requested on both sides, this Court has carefully reviewed counsel's affirmation as it relates to services performed, and the "circumstances" of this case. See, DeCabrera v. Cabrera-Rosete, 70 NY2d 879, 881.

CONCLUSION

An award of counsel fees is designed to redress economic disparity between spouses, not address one party's decision to proceed to trial rather than agree to settlement. See, Comstock v. Comstock, 1 AD3d 307. The plaintiff's position, in effect, seeks to recover legal fees from the "non-monied" spouse for what is perceived to be protraction in the litigation. In part, such "protraction" was not a delay at all, but rather defendant's election to contest grounds, which was successful but later rendered academic by virtue of plaintiff's obtainment of a Judgment of Divorce in another state. The other delays alluded to, as well as violations of orders asserted, were resolved by the parties without costs. While some of the litigation practices of the defendant were troubling, the remedy of sanctions was either not sought or imposed, the plaintiff did not seek a disproportionate share of equitable distribution, and the extensive back-and-forth settlement discussions were ultimately successful. This was not an instance in which defendant, by deception in hiding marital assets, unnecessarily complicated the case, making it more complex. See, Kalinich v. Kalinich, 234 AD2d 244; Persuad v. Persuad, 170 AD2d 763. All of the assets here were identifiable and ultimately distributed. That an investment property was rented in violation of a restraining order, should not be countenanced by the Court. But here, it ultimately was sold, with the proceeds accounted for and the closing consented to by the plaintiff. Moreover, the perceived "stonewalling" in this record had more to do with the defendant's assertions of the "relative merits" of her positions. In considering the parties' respective financial positions as I am required to do (see, Domestic Relations Law §237[a]; Tayar v. Tayar, 250 AD2d 757; Morrissey v. Morrissey, 259 AD2d 472), it would not be appropriate to award the plaintiff legal

fees for such perceptions, especially given the fair and reasonable stipulation of settlement ultimately executed by the parties. The entirety of the trial record of the parties' finances was considered by me, and the same should be considered to facilitate appropriate and complete Appellate review. See, Doescher v. Doescher, 54 AD3d 890; Ferdinand v. Ferdinand, 56 AD3d 604. In my view, the consideration here of all of these factors augers against the granting of legal fees to the plaintiff. To do otherwise would be to penalize a non-monied spouse for pursuing appropriate settlement terms, or litigating grounds, which is entirely permissible in New York State. See, Domestic Relations Law §170. Payment of legal fees by defendant to plaintiff, under the circumstances presented here, would run afoul of the bedrock principles of our Court of Appeals, by erroneously compelling the "non-monied spouse" to pay the legal fees of the "monied spouse" See, O'Shea, supra, DeCabrera, supra.

The cross applications by both parties for payment of legal fees are denied.

The foregoing constitutes the decision and order of this Court.