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FEDERAL COURTS

NEW YORK COURTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (MARCH 12, 2019)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AVTAR S. BADWAL,

Plaintiff-Appellant,

v.

RAMANDEEP BADWAL, JEFFREY S. BROWN,
In his Official and Personal Capacity,

Defendants-Appellees.

No. 18-827

Appeal from a Judgment of the United States District Court for the Eastern District of New York (DeArcy Hall, J.).

Before: Amalya L. KEARSE, Dennis JACOBS, Peter W. HALL, Circuit Judges.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Appellant Avtar Badwal, pro se, appeals from the district court's judgment dismissing *sua sponte* his complaint for lack of subject matter jurisdiction and as frivolous. Badwal brought claims under 42 U.S.C.

§ 1983 and state law against his former wife and the state court judge who presided over their divorce proceedings. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

On appeal from a judgment dismissing a complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h)(3), we review the district court's factual findings for clear error and its legal conclusions de novo. *See Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 74 (2d Cir. 2008) (per curiam). Although we have not yet decided whether we review de novo or for abuse of discretion the exercise of inherent authority to sua sponte dismiss a complaint as frivolous, we need not do so here because the district court's decision "easily passes muster under the more rigorous *de novo* review." *Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 364 n.2 (2d Cir. 2000) (per curiam). We afford a pro se litigant "special solicitude" by interpreting a complaint filed pro se "to raise the strongest claims that it suggests." *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (internal alterations and quotation marks omitted).

To the extent Badwal seeks to vacate orders of the state court, his complaint was properly dismissed pursuant to the *Rooker-Feldman* doctrine. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (noting that *Rooker-Feldman* bars consideration of "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments").!! Further, as the district court concluded, Justice Brown is immune from suit.

See Gollomp v. Spitzer, 568 F.3d 355, 365-68 (2d Cir. 2009) (noting that sovereign immunity bars § 1983 action brought against the New York Unified Court System and an individual acting in his judicial capacity); *Green v. Maraio*, 722 F.2d 1013, 1016-18 (2d Cir. 1983) ("A judge defending against a section 1983 action is entitled to absolute judicial immunity from damages liability for acts performed in his judicial capacity."); *see also* 42 U.S.C. § 1983 (barring injunctive relief against judicial officers "unless a declaratory decree was violated or declaratory relief was unavailable").

To the extent the complaint may be construed to raise a § 1983 conspiracy claim against Badwal's former wife, which might be outside the *Rooker-Feldman* doctrine, any such claim is inadequately pleaded. "To state a claim against a private entity on a section 1983 conspiracy theory, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional act." *Spear v. Town of W. Hartford*, 954 F.2d 63, 68 (2d Cir. 1992). Badwal alleges only that his former wife benefited from the alleged violations of his rights and that the alleged abuse of judicial powers occurred "in concert with others." App'x 10. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Badwal does not challenge the denial of leave to amend his complaint; in any event, Badwal's complaint does not "suggest[] that [Badwal] has a claim that []he has inadequately or inartfully pleaded and that []he should therefore be given a chance to reframe." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

Badwal does not challenge the district court's decision declining to exercise supplemental jurisdiction over his state law claims and, in any event, the district court did not abuse its discretion in declining to do so because Badwal's federal claims were properly dismissed. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.").

We have considered all of Badwal's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe
Clerk of Court

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (FEBRUARY 2, 2018)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AVTAR S. BADWAL,

Plaintiff,

v.

RAMANDEEP BADWAL; JEFFREY S. BROWN, in his Official and Personal Capacity,

Defendants.

17-CV-4310 (LDH)(CLP)

Before: Lashann Dearcy HALL, United States District Judge.

Plaintiff Avtar Badwal, proceeding pro se, brings this action against Ramandeep Badwal, his ex-wife, and Jeffrey S. Brown, a state court judge, asserting claims under 42 U.S.C. § 1983 and state law.[1] For the reasons set forth below, the action is dismissed.

[1] In commencing this action, Plaintiff paid the requisite filing fee.

I. Background[2]

Plaintiff and Defendant Badwal were divorced by judgment dated July 1, 2010 and entered in the Supreme Court of the State of New York, Nassau County by Judge Jeffrey Brown. (Compl. ¶ 6; *see also* Ex. 3.) Plaintiff brings the instant action to challenge the state court's decisions regarding his divorce, equitable distribution, and child support on the grounds that the decisions violated his equal protection and due process rights under the United States Constitution. (Compl. ¶ 2.) Plaintiff also alleges various state law claims, including violation of the New York State Constitution, breach of implied covenant of good faith and fair dealing, civil conspiracy, and intentional and negligent infliction of emotional distress.

II. Standard of Review

A court must construe a pro se litigant's pleadings liberally, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and a pro se complaint should not be dismissed without granting the plaintiff leave to amend "at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999) (internal quotation marks and citations omitted). Nevertheless, "a *pro se* plaintiff must still comply with the relevant rules of procedural and substantive law, including establishing that the court has subject matter jurisdiction over the action." *Wilber v. U.S.*

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[2] The following facts are drawn from the complaint and its attachments, the allegations of which are assumed to be true for purposes of this Memorandum and Order.

Postal Serv., No. 10-CV-3346 (ARR), 2010 WL 3036754, at *1 (E.D.N.Y. Aug. 2, 2010) (internal quotation marks and citations omitted).

Moreover, even if a plaintiff has paid the filing fee, a district court may dismiss the case, *sua sponte*, if it determines that the action is frivolous. *Fitzgerald v. First East Seventh Street Tenants Corp.*, 221 F.3d 362, 363-64 (2d Cir. 2000); *see Mallard v. United States District Court*, 490 U.S. 296, 307-08 (1989) (noting that "[28 U.S.C. §] 1915(d), for example, authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provision"). "A complaint will be dismissed as 'frivolous' when 'it is clear that the defendants are immune from suit.'" *Montero v. Travis*, 171 F.3d 757, 760 (2d Cir.1999) (quoting *Neitzke v. Williams*, 490 U.S. 319, 325, 327 (1989)); *see also Jolley v. Chatigny*, No. 04-Civ-182, 2004 WL 306116, at *2 (D. Conn. Feb.12, 2004) (stating that, when it is clear that the defendants are immune from suit, a dispositive defense appears on the face of the complaint, the action can be dismissed as frivolous). Indeed, "district courts are especially likely to be exposed to frivolous actions and, thus, have [a] . . . need for inherent authority to dismiss such actions quickly in order to preserve scarce judicial resources." *Fitzgerald*, 221 F.3d at 364. A cause of action is properly deemed frivolous as a matter of law when, *inter alia*, it is "based on an indisputably meritless legal theory"—that is, when it "lacks an arguable basis in law . . ., or [when] a dispositive defense clearly exists on the face of the complaint." *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998).

III. Discussion

A. Lack of Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction and may not preside over cases absent subject matter jurisdiction. *Exxon Mobil Corp. v. Allanattah Servs., Inc.*, 545 U.S. 546, 552 (2005); *Frontera Res. Azerbaijan Com, v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 397 (2d Cir. 2009). The requirement of subject matter jurisdiction cannot be waived, *United States v. Cotton*, 535 U.S. 625, 630 (2002), and its absence may be raised at any time by a party or by the court *sua sponte*. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."). When a court lacks subject matter jurisdiction, dismissal is mandatory. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *see also* Fed.R.Civ.P. 12(h)(3). Federal jurisdiction is available only when a "federal question" is presented, 28 U.S.C. § 1331, or when the plaintiff and defendant are of diverse citizenship and the amount in controversy exceeds $75,000.00. 28 U.S.C. § 1332.

Federal courts have customarily declined to intervene in the realm of domestic relations. "Long ago [the Supreme Court] observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' So strong is our deference to state law in this area that we have recognized a 'domestic relations exception' that 'divests

the federal courts of power to issue divorce, alimony, and child custody decrees'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593-594 (1890) and *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992)), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *see also Neustein v. Orbach*, 732 F. Supp. 333, 339-40 (E.D.N.Y. 1990) (district court held that it lacked jurisdiction because it could not resolve factual disputes connected to domestic relations). As such, federal courts repeatedly dismiss actions aimed at changing the results of domestic proceedings, including orders of child custody. *See Ruchinsky v. Devack*, No. 14-CV-2219 SLT, 2014 WL 2157533, at *9 (E.D.N.Y. May 23, 2014) ("While *Ankenbrandt* did not expressly state that the domestic relations exception extends to child support decrees, the Second Circuit has stated that 'where a federal court is asked to grant a divorce or annulment, determine support payments, or award custody of a child'. . . [courts] generally decline jurisdiction pursuant to the matrimonial exception.") (quoting *American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir.1990)); *Sullivan v. Xu*, No. 10-CV-3626 ENV, 2010 WL 3238979, at *2 (E.D.N.Y. Aug. 13, 2010) (finding no jurisdiction over plaintiff's challenges to child custody and child support orders); *Neustein*, 732 F. Supp. at 339.

That said, dismissal is warranted here as Plaintiff asks this Court to undertake a wholesome review of the state court's decisions regarding his domestic relations on the basis that "his due process was violated and the State Court was bias and the decisions were prejudicial." (Compl. ¶ 2.) If this Court were to allow

Plaintiff to pursue this action, the Court would be "forced to re-examine and re-interpret all the evidence brought before the state court" in the earlier proceedings. *See McArthur v. Bell*, 788 F. Supp. 706, 709 (E.D.N.Y. 1992) (former husband's 42 U.S.C. § 1983 action in which he claimed that his constitutional rights were violated in proceedings in which former wife obtained upward adjustment of child support would require the court to "re-examine and re-interpret all the evidence brought before the state court" in the earlier state proceedings and, therefore, district court did not have subject matter jurisdiction). As such, this action is barred by the domestic relations exception to this Court's jurisdiction.

Further, to the extent Plaintiff requests that this Court review and vacate the orders of the state court, such relief is barred by the *Rooker-Feldman* doctrine, which precludes federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

B. Immunity to § 1983 Actions

Even if the Court had subject matter jurisdiction over this complaint, the claims against Judge Brown would be dismissed as frivolous because it is "clear that the defendant[] [is] immune from suit." *Montero*, 171 F.3d at 760. Indeed, judges have absolute

immunity from suits for damages for judicial acts performed in their judicial capacities. *See Warden v. Dearie*, 172 F.3d 39 (2d Cir. 1999) (citing *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (judges are immune to suit except for actions not taken in judicial capacity and actions taken in complete absence of all jurisdiction).

The fact that Plaintiff also seeks injunctive relief in this action does not alter Judge Brown's entitlement to immunity in this action. In 1996, Congress enacted the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996), amending 42 U.S.C. § 1983 to provide that in "any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." *See* 42 U.S.C. § 1983. The complaint does not allege that a declaratory decree was violated or allege facts suggesting that declaratory relief was unavailable. In any event, "[d]eclaratory relief against a judge for actions taken within his or her judicial capacity is ordinarily available by appealing the judge's order." *LeDuc v. Tilley*, No. 3:05CV157MRK, 2005 WL 1475334, at *7 (D. Conn. June 22, 2005) (citing cases). Because Plaintiff has not alleged violation of a judicial decree or that declaratory relief was unavailable, his claims against Judge Brown are also dismissed as frivolous.

CONCLUSION

Accordingly, the complaint is dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12 (h)(3) and as frivolous because Judge Brown is immune to this action. *Montero v. Travis*, 171 F.3d at

760. The Court has considered affording Plaintiff leave to amend the complaint, *see Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000), but declines to do so. Any opportunity to amend would be futile because a review of the complaint does not suggest that Plaintiff has inadequately or inartfully pleaded any potentially viable claims. Any state law claims are dismissed without prejudice. Although Plaintiff paid the filing fee, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith and therefore in forma pauperis status is denied for purpose of an appeal. *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

/s/ LDH
Lashann Dearcy Hall
United States District Judge

Dated: Brooklyn, New York
February 2, 2018

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING (MAY 28, 2019)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AVTAR S. BADWAL,

Plaintiff-Appellant,

v.

RAMANDEEP BADWAL, JEFFREY S. BROWN, in his Official and Personal Capacity,

Defendants-Appellees.

Docket No. 18-827

Before: Amalya L. KEARSE, Dennis JACOBS, Peter W. HALL, Circuit Judges.

Appellant having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:

/s/ Catherine O'Hagan Wolfe,
Clerk of Court

ORDER OF THE
COURT OF APPEALS OF NEW YORK
(NOVEMBER 22, 2016)

STATE OF NEW YORK COURT OF APPEALS

RAMANDEEP BADWAL,

Respondent,

v.

AVTAR S. BADWAL,

Appellant.

Mo. No. 2016-923

Before: Hon. Janet DIFIORE,
Chief Judge, Presiding.

Appellants having moved for leave to appeals to the court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

Ordered, that the motion is dismissed upon the ground that this Court does not have jurisdiction to entertain the motion (*See* NY Const, art VI, § 3(b); CPLR 5602).

/s/ John P. Asiello
Clerk of the Court

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK (OCTOBER 2, 2015)

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NASSAU

RAMANDEEP BADWAL,

Plaintiff,

v.

AVTAR S. BADWAL,

Defendant.

TRAIL/IAS PART 25
Index No. 201751/06
Seq. No.: 012

Hon. Jeffery A. GOODSTEIN, A.J.S.C.

The following papers were read on this motion:[1]

Notice of motion, Affirmative in Support, and Exhibits

Affirmation in Opposition

[1] The instant motion was filed by the Defendant, Ex-Husband The ex-husband does not offer any new additional facts or law which have not been previously submitted and determined by this Court that would justify the Ex-Husband's request for vacating, amending or reversing the prior determination of this court. Additionally, Ex-Husband filed an appeal to the Second Department Appellate Division, in which the terms of the judgment of Divorce were upheld.

This post judgment motion was brought by the defendant ("Ex Husband") seeking the following relief vacating the default order/Judgment; (2) ordering a traverse hearing and vacating the order dated August 3, 2015; (3) dismissing the instant motion for failure to serve the defendant'; (4) amending calculations of child support and arrears; and (5) opposing the sale of the former marital residence and distribution of the proceeds. The Plaintiff ("Ex-Wife") opposes the Ex-Husband's motion in its entirety.

The Ex-Husband has filed a series of motions seeking to reverse the Judgment of Divorce. The Court has repeatedly denied the Ex-Husband's request to reverse the Judgment of Divorce, including the provisions requiring that the marital residence be sold. Also, the Ex-failed to attach said Judgment of Divorce in his papers. The ex-husband provides no background to this case, nor does he provides the Court with any evidence to grant his request for a traverse hearing.

Pursuant to the Decision After Trail of Judge Jeffrey Brown dated July 1, 2010 (the "Trial Decision"), the Ex-Husband was directed to place the former marital residence on the market for sale within 30 days after service of a copy of the Trial Decision. The Trial Decision also required the Ex-Husband, who was in sole possession of the former marital residence, to pay all of the carrying charges, including the mortgage, until the property was sold. By Decision and Order, dated September 17, 2014, Judge Margaret Reilly appointed a receiver, at a payment rate of 5% commission of the sale price, to sell the former marital residence. The marital residence was then sold by the receiver and a writ of assistance was issued. The net proceeds of the sale has been disbursed by the

Decision and Order dated August 3, 2015. The dispute regarding the broker's commission have also been resolved. For these reasons, the Ex-Husband's requests are all DENIED.

Any other requested relief not addressed herein is DENIED.

This is the Decision and Order of this Court.

Enter:

/s/ Hon. Jeffery A. Goodstein
A.J.S.C.

Dated: October 7, 2015
Mineola, New York

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK (AUGUST 3, 2015)

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NASSAU

RAMANDEEP BADWAL,

Plaintiff,

v.

AVTAR S. BADWAL,

Defendant.

TRAIL/IAS PART 25
Index No. 201751/06
Motion Seq. 005 & 006

Before: Hon. Margaret C. REILLY, J.S.C.,
Hon. Jeffery A. GOODSTEIN, A.J.S.C.

Upon the foregoing papers, it is ordered that the parties' respective motions are decided as follows:

The plaintiff moves (motion sequence #005) for an order (a) punishing the defendant for contempt of Court, pursuant to DRL § 245 and Judiciary Law § 753, as a result of the defendant's failure to abide by that part of the Judgment of Divorce which directed that the former marital home, be placed on the market for sale within thirty (30) days after the Court's Decision is served on the defendant's counsel, and further di-

rected the defendant to continue to pay the carrying charges for the marital home, including the mortgage, until said . . . the plaintiff as agent for the defendant allowing the plaintiff to list the former marital residence and to execute a brokerage agreement, sales contracts, and to execute a deed conveying the property, on behalf of the parties hereto, and all documents required to transfer said property; (c) directing the defendant be removed from the former marital residence in order to facilitate the sale; (d) awarding the plaintiff counsel fees; and (e) awarding the plaintiff a money judgment for child support arrears.

The defendant cross moves (motion sequence #006) for an order (1) denying plaintiff's application in its entirety; and (2) issuing defendant a stay with respect to this matter, including but not limited to enforcement of the April 10, 2013. Judgment incorporating the Decision.

LEGAL ANALYSIS AND ORDER OF THE COURT
PLAINTIFF'S ORDER TO SHOW CAUSE
MOTION SEQUENCE #005

(1) The branch of the plaintiff's order to show cause for an order adjudging the defendant guilty of contempt for his misconduct in failing to obey the Order of the Honorable Jeffrey S. Brown, in the Decision of the Supreme Court, dated December 22, 2011, read in relevant part as follows:

> " . . . As a result, the court directs the sale of the marital residence with the net proceeds being divided equally. The litigants shall contact broker and comparables shall be used to set a listing price. The house shall be placed on the market within 30 days after service

> of a copy of this order upon the defendant's counsel with notice of entry. Defendant shall use the rental income to pay the mortgage."

On November 13, 2010, a copy of the Decision was mailed to the defendant with Notice of Entry. A Judgment of Divorce was entered on April 10, 2013.

The plaintiff asserts that, although it has been almost four years since the Court's Decision, the defendant has refused to cooperate with the sale of former marital residence. The defendant has also failed to pay for the mortgage, causing the property to fall deduction of $29,400.00, the Ex-Wife requests that the fee of the Receiver, totaling $36,750.00, be paid from the Ex-Husband's share of the net proceeds. Ex-Wife argues that the entire fee of the Receiver should be deducted from the Ex-Husband's share of the proceeds. If granted, after the deduction of the fees of the Receiver, Ex-Husband's interest in the net proceeds would be $103,162.19. From said balance, the Ex-Wife requests her attorney fees be paid in full by the Ex-Husband based upon his failure to abide by the Trial Decision. The legal fees incurred through the. Preparation of the instant Motion total $15,740.00. Therefore, after a deduction of counsel fees Ex-Wife argues that, there remains the sum of $87,522.19 from the Ex-Husband's share of the proceeds. Ex-Wife further argues that an. additional $19,526.00 should be deducted from the. Ex-Husband's interest representing one-half of the reduction of the mortgage principal which would have occurred if the Ex-Husband had not defaulted on the payments of the mortgage on November 1, 2011. The amount is one-half of the amount that the mortgage balance would have been reduced if Ex-Husband followed the Trial

Decision. After applying all of these deductions, to the Ex-Husband's interest, his remaining net proceeds is $21,286.51 However, Ex-Wife requests that since she has an outstanding money 'judgment against Ex-Husband for $64,000.00 in child support arrears, the remaining balance should be deducted and paid to Ex-wife to reduce the monies owed by the Ex-Husband on the' money judgment to $42,713.49.

DISCUSSION

With regard to the issue of the broker's commission dispute, the Receiver, in his Report, explains that he did not pay a broker's commission at the time of the closing because:

a) It appears that the listing' agreement expired August 30, 2014 and was not renewed and the contract of sale was consummated on October 3, 2014;

b) There is a dispute between the Ex-Wife, who is the only signatory to the listing agreement, as to what the percentage of the commission was; and

c) The Receiver was not given a commission statement until after the closing and the Ex-Wife's attorney indicated that he would work it out post-closing. None of the brokers appeared at the closing. The potential commission is approximately $44,100.00 based on 6% however the Ex-Wife maintains it is 2% and that the agreement was changed after she signed it.

Based on the foregoing, the Ex-Wife's requests are to a certain extent, GRANTED. The Ex-Husband

simply failed to abide by the Trial Decision, delayed access to the Receiver, and made frivolous motions seeking to reargue the Trial Decision year later, all of which required the Ex-Wife to obtain counsel to force the Ex-husband to comply with the Trial Decision. For the Ex-Wife to receive less proceeds due to Ex-Husbands failure to pay the mortgage decreasing the net proceeds from the sale of the former marital residence would be inequitable. In addition, in compliance with the order appointing Receiver, he is entitled to 5% commission plus his additional expenses totaling $553.18, of which he provided proper proof. Accordingly, it is hereby

ORDERED, that with the proceeds of $309,224.38 being held in escrow by the Receiver, he shall continue to hold $44,100.00[2] in escrow until the issue regarding the broker's' fee is resolved.

ORDERED, that the Receiver shall release to himself $36,750.00 as and for his 5% fee pursuant to the Order Appointing Receiver, plus $553.38 in expenses from the Ex-Husband's share of the proceeds and it is further.

ORDERED; that $15,700.00 shall be distributed from Ex-Husband's interest to Ex-Wife's counsel as and for the legal fees incurred seeking to enforce the Trial Decision based on Ex-Husband's dilatory tactics; and it is further

ORDERED, that all remaining funds ($212, 121.00) shall be distributed to the Ex-Wife consisting of her half interest in the proceeds of the former

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[2] Totaling the possible 6% commission, based upon the listing agreement.

marital residence as set forth in the Trial Decision, and a credit of $19,526.00 which represented one-half of the reduction of the mortgage principal which would have occurred if the Ex-husband had not defaulted on the payments of the mortgage on November 1, 2011; and $46,507.67 as and for one-half of the additional fees (including, interest, penalties, late fees, fees of the Lender's foreclosure attorney and other fees associated with the foreclosure) charged by CitiMortgage as a result of the Ex-Husband's default and the remaining $13,525.14 shall to be applied to Ex-Husband's child support arrears reducing his money judgment; and it is further

ORDERED, that after the dispute with the broker regarding the remaining $44,100.00 in escrow is resolved between the Ex-Wife and the brokers, or further order of a court of competent jurisdiction, the remaining sum, if any, shall be distributed to Ex-Wife as a further credit against the money judgment for Ex-Husband's child support arrears.

Therefore, based upon the foregoing, after deducting the $44,100.00 to continue to be held in escrow, the remaining balance is $265,124.38. Pursuant to the Trial Decision, each party is supposed to receive half of the proceeds. This would entitle each party to $132,562.19. However, based, upon the credits listed above, the Ex-Wife shall receive $212,121.00 and the Ex-Husband shall receive $0.00, as follows:

Deducted from the Ex-Husband's share is $37,303.38 for the Receiver (Ex-Husband's distributive share is now reduced to $95,258.81); Deducted from Ex-Husband's share is $15,700.00 to be paid to Ex-Wife's counsel (Ex-Husband's distributive share is now reduced to $79,558.81);

Deducted from Ex-Husband's share and added to the Ex-Wife's share is $19,526.00 representing, one-half of the reduction of the mortgage principal if Ex-Husband did not default (Ex-Husband's distributive share is now reduced to $60,032.81 and Ex-Wife's distributive share is increased to $152,088.19);

Deducted from Ex-Husband's share and added to Ex-Wife's share is $46,507.67 representing one-half of the additional fees charged by CitiMortgage as a result of Ex-Husband's default (Ex-Husband's distributive share is now reduced to $13,525.14 and Ex-Wife's distributive share is increased to $198,595.86); and;

Deducted from, Ex-Husband's share and increasing the Ex-Wife's share is $13,525.14 to reduce Ex-Husband's child support arrears (Ex-Husband's distributive share is now reduced to $0.00 and the Ex-Wife's distributive . . . .

Any other requested relief not addressed herein is denied.

This is the Decision and Order of this Court.

ENTER

Jeffery A. Goodstein
A.J.S.C.

Dated: August 3, 2015
Mineola, New York

OPINION OF THE APPELLATE DIVISION SUPREME COURT OF THE STATE OF NEW YORK (MARCH 11, 2015)

SUPREME COURT OF THE
STATE OF NEW YORK APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

RAMANDEEP BADWAL,

Respondent,

v.

AVTAR S. BADWAL,

Appellant.

No. 2013-06098

(Index No. 201751/06)

Before: William F. MASTRO, Presiding Judge.,
Thomas A. DICKERSON, Jeffrey A. COHEN,
Hector D. LASALLE, Judges.

DECISION AND ORDER

In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from stated portions of a judgment of divorce of the Supreme Court, Nassau County (Brown, J.), entered April 10, 2013, which, upon a decision of the same court dated July 1, 2010, made after a nonjury trial, inter alia, failed to equitably distribute certain residential prop-

erty in New Hyde Park, the value of the plaintiff's nursing license, and the proceeds from the sale of a motel owned by the parties, and directed him, among other things, to pay child support in the sum of $220 per week to the plaintiff through the Child Support Collection Unit.

ORDERED that the judgment is affirmed insofar as appealed from, without costs or disbursements.

Contrary to the defendant's contention, the Supreme Court properly determined that there was no need to equitably distribute $200,000 in proceeds from the sale of a motel owned by the parties. Although the defendant contends that the plaintiff improperly engaged in self-help by taking these funds, the record supports the court's determination that the parties agreed to the division of the proceeds of the sale of the motel prior to their separation, and that the plaintiff received two checks totaling $200,000 pursuant to that agreement. Accordingly, it was unnecessary to equitably distribute the subject proceeds.

The Supreme Court correctly determined that the plaintiff's home in New Hyde Park was not marital property subject to equitable distribution, as it was purchased after the commencement of this action (*see* Domestic Relations Law § 236[B][1][c]; *Mesholam v. Mesholam*, 11 NY3d 24, 28).

The Supreme Court did not err in determining that the plaintiff's nursing license was not marital property subject to equitable distribution. Although the enhanced earnings from academic degrees and professional licenses attained during the marriage are subject to equitable distribution, it is incumbent upon the non-titled party seeking a distributive share of such assets

to demonstrate a substantial contribution to the titled party's acquisition of that marital asset. Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity (*see Haspel v. Haspel*, 78 AD3d 887; *Higgins v. Higgins*, 50 AD3d 852). Here, there is no evidence that the defendant made a substantial contribution to the plaintiff's acquisition of her nursing degree. There is no evidence that the defendant made career sacrifices or assumed a disproportionate share of household work as a consequence of the plaintiff's education; his contributions were minor (*see Higgins v. Higgins*, 50 AD3d at 853).

The defendant contends that the pendente lite award of child support was improper. The propriety of the pendente lite order may not be reviewed on the appeal from the judgment of divorce (*see Anderson v. Anderson*, 50 AD3d 610; *Samuelsen v. Samuelsen*, 124 AD2d 650). In any event, the proper remedy for any perceived inequity in a pendente lite award is a speedy trial, at which the financial circumstances of the parties can be fully explored. Here, the trial has been completed, and the judgment of divorce entered (*see Anderson v. Anderson*, 50 AD3d at 610; *Samuelsen v. Samuelsen*, 124 AD2d at 651).

The Supreme Court did not improvidently exercise its discretion in imputing income for the purpose of determining the defendant's child support obligation based on his employment history, future earning

capacity, and money received from friends and relatives (*see Hainsworth v. Hainsworth*, 118 AD3d 747; *Baumgardner v. Baumgardner*, 98 AD3d 929). The court's determination concerning the imputation of income was based on the resolution of credibility, which is given great deference on appeal (*see Khaimova v. Mosheyev*, 57 AD3d 737). There is no basis in the record to disturb the court's determination that the husband's testimony concerning his finances was not credible.

The defendant's remaining contentions are without merit.

MASTRO, J.P., DICKERSON, COHEN and LASALLE, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

DECISION AFTER TRIAL OF THE SUPREME COURT OF THE STATE OF NEW YORK (MAY 2, 2008)

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NASSAU

RAMANDEEP BADWAL,

Plaintiff,

v.

AVTAR S. BADWAL,

Defendant.

Index No. 201751/06

Before: Hon. Jeffrey S. BROWN, J.S.C.

Before this court is a contested matrimonial action. Plaintiff-wife, Ramandeep Badwal, and defendant-husband, Avtar Singh Badwal, were married in India in a religious ceremony on February 14, 1988. Subsequently, on July 29, 1991 plaintiff and defendant were married in a civil ceremony by a Judge in Queens County, New York. This action was commenced on or about June 16, 2006.

Plaintiff is approximately 42 years of age and defendant is approximately 57 years of age. There are three children of this union: Sujit Singh, born June 27, 1989, who resides with defendant; Bani Badwal

born November 1, 1991; and Simaran Badwal, born November 19, 1993 who reside with the plaintiff.

With respect to custody and parenting time, on April 8, 2009, a stipulation was placed on the record in open court wherein the plaintiff would have sole physical and legal custody of the two children of this marriage who are below the age of 18, namely Bani and Simaran. The parties also agreed that the plaintiff-mother would consult with the defendant-father regarding all issues pertaining to health, education, schooling and the children's welfare. Further, the defendant father would have liberal visitation with Bani and Simaran as mutually agreed to by the parties and the children.

With respect to grounds, plaintiff testified that commencing on or about January 1, 2005, she repeatedly asked defendant to engage in sexual relations for a period of at least one year, and for this one year period, defendant continuously refused to engage in sexual relations with her. Further, there was no psychological or physical reason preventing the defendant from having sexual relations with the plaintiff.

Plaintiff testified that she was a resident of the State of New York for at least two years prior to the commencement of the action. She also testified that she would take all steps necessary to remove all barriers to the defendant's remarriage following the divorce. There are no other actions pending for divorce, separation or annulment or judgments resulting therefrom. Defendant withdrew his answer and neither admitted nor denied the allegations testified to by the plaintiff.

Pursuant to *a pendent lite* order of this court (Brown, J., 5/2/08) defendant was directed to pay child support in the amount of $250.00 a week retroactive to the date of the application. Defendant was also directed to maintain and continue policies of life, auto, medical and dental insurance and to pay 50% of all unreimbursed non-elective medical, psychiatric and dental expenses provided by a participating physician for the plaintiff and the children retroactive to the date of the application.

Plaintiff testified that defendant failed to pay any child support pursuant to that order. Defendant concedes that he has not paid the child support as directed by the court, nor did defendant pay the automobile, medical or dental insurance premiums. Plaintiff testified that she paid $222.00 per month as and for automobile insurance.

The children were covered until a few months before April 2009 with Child Health Plus where there were no premiums. However, the policy was cancelled due to the fact that plaintiff earned too much money. Presently she pays $550.00 per month for health insurance for herself and the children.

Plaintiff was born January 1, 1968 in India. The parties first met there in January 1988. She came to the United States in May 1988. Prior to that she was enrolled in an interior design course. The defendant told her that he was in the "fast food restaurant" business, and if she came to the United States with him, there would be no need for her to work.

Upon arriving in the United States, the parties resided in a small room in Elmhurst, Queens, with friends of the defendant. Plaintiff learned that her

husband was unemployed. Prior to that, the defendant was employed in West Germany for approximately ten years. Defendant rented a newsstand in 1988. After a few months, the plaintiff and defendant moved to Sunnyside, Queens. At that time, defendant started to drive a taxi, with a rental fee of approximately $80 a day. After three years, in 1991, he purchased his own medallion for approximately $150,000; $5,000 of which came from plaintiff's savings, and the balance came from friends. Plaintiff testified that the $5,000 came from money she received from her husband and gifts from friends. Her cousin and a family friend, Mr. Sharma, each gave her $1,500. She kept $4,000 in the closet. On May 7, 1993, defendant also took out a small business loan for $116,000.

Plaintiff was a full time student at La Guardia College in 1991. After six years, she transferred to Wagner College and obtained a Bachelor's Degree in Nursing in 1997. She was employed part time in a nursing home for about one year. In December 1998, she became employed full time as a registered nurse at Mount Sinai Hospital in Astoria, Queens, and was employed there approximately four years. At that time she earned approximately $50,000 to $55,000 per year. She worked at St. John's Hospital for about eight months in 2002 earning approximately $72,000.

The parties purchased a legal two-family home in Forest Hills, Queens, in 1997, for approximately $255,000. Joint funds and money from friends in the amount of $35,000 were used to make this purchase. Plaintiff estimates that they borrowed less than $20,000 from friends. Their friend, Mr. Sharma, gave them $5,000 in cash toward the purchase of the house. Additionally, defendant told plaintiff that a Mr. Daniel

also gave them $5,000. Plaintiff testified that once she started working she paid back Mr. Sharma. Plaintiff believes some of the down payment came from defendant's medallion. A mortgage of approximately $200,000 was obtained from the Greenpoint Savings Bank and the deed contained both of their names.

Defendant sold his medallion for about $230,000 in 2003 and then purchased a 29-unit motel in Abilene, Kansas, for $370,000. Approximately $80,000 towards the purchase price came from the sale of the medallion, $30,000 came from plaintiff's savings and other funds came from a refinance of the mortgage on the marital residence with Citibank. Defendant testified that the motel generated approximately $5,000 in profit year. Further, defendant testified that he drew a salary of $5,000 in 2005. However, defendant testified that he received cash from the daily check-in at the motel which he allegedly gave to his wife.

Plaintiff and her two daughters moved to Abilene, Kansas. Their son remained with plaintiff's mother in the marital residence. Plaintiff paid the mortgage on the marital residence from the HSBC account while the parties were in Kansas.

Plaintiff returned to the marital residence in New York in August of 2004 with her daughters. Her husband remained in Abilene, operating the motel until March of 2006. Upon his return, defendant advised the plaintiff that he sold the motel for $470,000. Plaintiff did not have any advance knowledge of the sale nor did she sign any papers. Defendant testified that plaintiff gave him her power of attorney in order to close on the sale of the motel. Defendant advised plaintiff that he received $100,000 in cash for the sale of the motel. He also showed her

three checks; two checks in the amount of $100,000 each and one check in the amount of $88,000. Plaintiff testified that defendant gave her two checks ($200,000) from the sale of motel. She put that money in her own Chase checking account. Plaintiff testified that defendant tool the $100,000 in cash to India. The balance of the money that defendant kept was used to purchase a tow truck. Defendant now owns two tow trucks.

Plaintiff is presently employed as a Registered Nurse supervisor. She works part time for two organizations; Personal Touch and First Choice. For the tax year 2008, plaintiff earned $84,334 in wages. As of March 1, 2009, plaintiff earned $12,556 from First Choice Home Care.

Defendant started a 24-hour towing service, on or about December 17, 2006 called Eagle Grip Towing. The defendant testified that he is the only employee. He has a certificate from the City of New York Consumer Affairs Department which authorizes him to operate a tow company on local streets. Other than the rental income, the corporation is his sole source of income. He testified that he purchased a truck in August of 2006 for $30,000. The money came from the sale of the motel and cash from a Citibank account. The account was funded by the return of the escrow funds held by the title company. Defendant was unsure if any funds were left in this account. He purchased the second truck in September 2007 for about $56,000. The money came from cash advances from credit cards as well as loans from his nephew and friend. Apparently a friend, Mr. Paul, is making the monthly credit card payments. This friend is reimbursed in India by the defendant's parents who pay Mr. Paul's parents in cash.

These payments commenced in 2009 and are continuing.

The defendant operates the tow truck during the day. Mr. Paul takes the evening shift and keep the money he earns from those calls, as he is an independent contractor. Defendant denies that Mr. Paul pays him money for use of the truck. Defendant also gets business from 10-15 repair shops.

Defendant testified that he attempted to purchase a gasoline station in June of 2006 for $35,000. Presently litigation is pending since the deal did not conclude.

Defendant's 2006 Federal Tax Return showed earnings of $1,000; defendant's W-2 in 2007 showed wages of $19,999; and in 2008 defendant's federal tax return showed earnings of 18,867. Defendant's corporate entity, Eagle Grip Towing, Inc., filed a 1120 corporate tax return in 2008 which showed gross receipts of $29,914 and compensation for officers of $16,667. Defendant's personal income tax return for 2009 showed earnings of $20,000. Defendant presently takes a salary from the corporation of $400.00 per week.

There are also hundreds of dollars of monthly incidental expenses. However, defendant failed to provide the court with any evidence that substantiates his testimony with respect to the carrying charges and expenses. Defendant alleges that he took a loan from a Prudential Insurance life policy in 2008 to help repay money owed to Chase and Citibank. However, he has no recollection as to the amount of the loan.

Plaintiff purchased a Honda CRV in 2002 for approximately $22,000 or $23,000 and the car was paid off in two years. However, plaintiff had no recollection of the monthly payments or whether she completely

financed it. She purchased a Rav4 for $28,000 in April 2008. Plaintiff financed the automobile. The monthly insurance for the two cars is $222 per month.

Maintenance

"The amount and duration of a maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its own unique facts." (*DiBlasi v. DiBlasi*, 48 A.D.3d 403, 404, quoting *Wortman v. Wortman*, 11 A.D.3d 604, 606). "In determining the appropriate amount and duration of maintenance, the court is required to consider, among other factors, the standard of living of the parties during the marriage and the present and future earning capacity of both parties" (*Ruane v. Ruane*, 55 A.D.3d 586; *DiBlasi v. DiBlasi*, *supra* at 404, quoting *Haines v. Haines*, 44 A.D.3d 901, 902; *see also* Domestic Relations Law § 236[B][6][a]). "In fixing the amount of a maintenance award, a court must consider the financial circumstances of both parties, including their reasonable needs and means, the payor spouse's present and anticipated income, the benefitting spouse's present and future earning capacity, and both parties' standard of living" (*Cerabona v. Cerabona*, 302 A.D.2d 346; *Morrissey v. Morrissey*, 259 A.D.2d 472, 473; *see Feldman v. Feldman*, 194 A.D.2d 207, 218).

Plaintiff is employed full time as a registered nurse supervisor for businesses that provide home care. Defendant is gainfully employed as the owner of a tow truck company. At the commencement of this trial, both counsel acknowledged to the court that maintenance was not an issue at this trial. Therefore, no award of maintenance is made for either the plaintiff or defendant.

Equitable Distribution

DRL § 236(B)(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage and before . . . the commencement of a matrimonial action, regardless of the form in which title is held" (*see Seidman v. Seidman*, 226 AD2d 1011, 1012 [1996]). "Separate property, on the other hand, is defined, in part, as property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse'" (DRL § 236[B][1][d][1]; *Sieger v. Sieger*, 8 Misc.3d 1029[A]). "In determining equitable distribution, the trial court is directed to consider statutory factors, including the income and property of each party at the time of the marriage, and at the time of commencement of the divorce action, the duration of the marriage, the age and health of the parties, any maintenance award, and the nontitled spouse's direct or indirect contributions to the marriage, including services as a spouse, parent, wage earner and homemaker'" (*Loria v. Loria*, 46 A.D.3d 768; Domestic Relations Law § 236[B][5][d][6]; *see Holterman v. Holterman*, 3 N.Y.3d 1, 8; *Price v. Price*, 69 N.Y.2d 8, 11). "In fashioning an award of equitable distribution upon dissolution of marriage, the Supreme Court is required to discuss the statutory factors it relied upon in distributing marital property" (*Milnes v. Milnes*, 50 A.D.3d 750). "Equitable distribution, however, does not necessarily mean equal distribution" (*Arrigo v. Arrigo*, 38 A.D.3d 807).

The plaintiff and defendant were married approximately 20 years. Plaintiff is approximately 42 years of age, and defendant is approximately 57 years of age. Both litigants are in good health and gainfully employed. Prior to commencement of the action in June

2006, defendant sold the motel which was marital property. Only defendant was at the closing. The parties dispute the distribution of the net proceeds of the sale. Plaintiff testified that defendant sold the motel for $470,000. Defendant allegedly received $100,000 in cash from the purchasers, which plaintiff claims was taken to India by the defendant. Three additional checks were out; two for $100,000 each, which plaintiff kept and deposited, and one for $88,000, which plaintiff contends defendant kept. Defendant agrees that plaintiff received $200,000. However, he claims that plaintiff took the checks from a briefcase without his knowledge. He testified that he kept one check in the amount of $89,000 as well as $60,000 returned to him from escrow and $15,000 from the buyers. The closing statement from the sale of the motel was not put into evidence. No other financial evidence was produced that would substantiate either claim.

Both litigants' testimony tests the limits of credibility. All through their marriage, friends and relatives were lending and gifting large sums of money. Money was also kept in the closet. Convoluted repayment arrangements were made through defendant's family in India. Cash was allegedly received from a buyer at the closing in the amount of $100,000 which was subsequently taken to India. The court finds it difficult to believe either litigant with respect to the financial transactions of this marriage. With respect to the motel net proceeds, the court determines that the parties equitably distributed these funds back in 2006. Therefore, no distribution will be made as part of this decision.

Domestic Relations Law § 236(B)(1)(c) defines marital property as all property acquired "during the

marriage and before the execution of a separation agreement or the commencement of a matrimonial action." Thus, in the absence of a separation agreement, the commencement date of a matrimonial action demarcates "the termination point for the further accrual of marital property" (*Mesholam v. Mesholam*, 11 N.Y.3d 24; *Anglin v. Anglin*, 80 N.Y.2d 553, 556[1992]).

Post commencement, each party used their respective net proceeds in different ways. Plaintiff purchased a house in New Hyde Park, and defendant opened his towing company. Therefore, these properties are not considered marital property and are not subject to equitable distribution.

The marital home is subject to equitable distribution. It is problematic that no expert testimony was adduced as trial as to the value of this home. The defendant presently resides there with his son who is over the age of 21 years. The defendant presently resides there with his son who is over the age of 21 years. He uses the money from the rental apartments located in the marital home in order to partially pay the mortgage. However, by the court's calculation defendant does not bring in sufficient sums to keep the house financially solvent. There is no credible evidence presented to the court relative to what equity remains, if any, with respect to the marital residence. As a result, the court directs the sale of marital residence with the net proceeds being divided equally. The litigants shall conduct a broker and comparables shall be used to set a listing price. The house shall be placed on the market within 30 days after service of a copy of this order upon the defendant's counsel with notice of entry. Defendant shall use the rental income to pay the mortgage.

Child Support

"Child support is determined by the parents' ability to provide for their child rather than their current economic situation" (*Bittner v. Bittner*, 296 A.D.2d 516; *Kalish v. Kalish*, 289 A.D.2d 202; *see Matter of Zwick v. Kulhan*, 226 A.D.2d 734) In determining a party's child support obligation, the court "need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential." (*Strella v. Ferro*, 42 A.D.3d 544; *Matter of Westenberger v. Westenberger*, 23 A.D.3d 571; *see Spreitzer v. Spreitzer*, 40 A.D.3d 840; *Matter of Apgar v. Apgar*, 37 A.D.3d 598, 599; *Bernstein v. Bernstein*, 18 A.D.3d 683, 684). "Moreover, the court is not required to find that a party has deliberately reduced his income to avoid his support obligations in order to impute income to that party" (Bittner, supra; *Goddard v. Goddard*, 256 A.D.2d 543). This determination must be grounded in law and fast (*see Powers v. Wilson*, 56 A.D.3d 639). In addition, the defendant's invocation of his fifth amendment privilege when asked certain questions about reporting income, permits the court to make an adverse inference against him." (*Fritz v. Fritz*, 88 A.D. 2d 778);

Sujit, the oldest child, age 21, resides with the defendant. As a result, defendant cannot receive prospective child support on behalf of Sujit. The two youngest children presently reside with the plaintiff having left the marital residence in September 2006 and moving to New Hyde Park. By order of this court (Brown, J., 5/2/08), defendant was directed to pay child support in the amount of $250 per week. Defendant concedes that he has not made these payments.

Defendant testified that he earns $400 per week. His 2009 tax return shows that he earned approximately $20,000. He also receives $2,030 monthly for apartments he rents in the marital residence or approximately $24,360 per year. Defendant exercised his fifth amendment right against self incrimination when asked whether he reported the 2009 rental income which amounts to $44,360 annually.

The monthly mortgage and real estate taxes amount to $2,814.30 or approximately $33,771.60 annually. The other carrying charges of the marital residence plus incidental expenses amount to $1,783 a month or approximately $21,396 per year. The total expenses are $55,167 a year, not including other incidental expenses a person incurs during his day-to-day existence. It is apparent that more than $10,000 a year is needed above this income in order to pay the fixed expenses.

The Supreme Court is not required to rely upon a party's account of his or her finances (*see DeSouza-Brown v. Brown*, 71 A.D.3d 946; *Khaimova v. Mosheyev*, 57 A.D.3d 737; *Ivani v. Ivani*, 303 A.D.2d 639). In determining an award of child support, the Supreme Court "may depart from a party's reported income and impute income based on the party's past income or demonstrated earning potential" (*Mongelli v. Mongelli*, 68 A.D.3d 1070, 1071). Such a determination must be grounded in law and fact (*Id.*) Here, the defendant's expenses exceeded his income as reported in his tax returns and testified to in court. It is interesting to note that when the parties owned the motel, defendant would give money to his wife from the cash received at the daily check in. Additionally, defendant would permit his friend, Mr. Paul, to use the tow

truck to pick up calls without receiving any compensation from him. No satisfactory explanation was made regarding defendant's business compensation for the use of the truck and how it affects his income.

For the purpose of determining child support, plaintiff earns $84,434 as a Registered Nurse Supervisor. Based on the credible evidence the court determines that defendant earns more money than which he testified. However, the court will not consider the rental income as part of the imputed amount, since the marital residence has been directed to be sold as part of equitable distribution and is presently being used for partial payment of the mortgage. Based upon defendant's earning potential and other evidence, the court imputes income in the amount of $50,000 annually to defendant for the purpose of determining child support. The combined parental income after deduction of FICA is $124,150. The presumptive child support for two children at 25% is $31,037.50

Pursuant to a previous stipulation, custody of the two youngest children was awarded to the plaintiff. Therefore, pursuant to the Child Support Standards Act, defendant is directed to pay prospectively $222.00 per week until Bani reaches the age of 21 years, or is sooner emancipated. Thereafter, child support shall be $150.96 per week until Simaran reaches the age of 21 years, or is sooner emancipated. Defendant has made no payments pursuant to the pendent lite order. These future payments shall be made through the Child Support Collection Unit of the Family Court. These payments are retroactive to the commencement of the action.

Finally, plaintiff is responsible for 63% and defendant is responsible for 37% of child care expenses and unreimbursed medical expenses.

Arrears

Plaintiff left the marital residence with Bani and Simaran in September 2006. Sujit remained in the marital residence with the defendant. Plaintiff is entitled to arrears for child support for the two youngest children based upon the award of custody. However, it would be inequitable not to grant defendant a credit for the period of time Sujit resided with him, from September 2006 until his 21st birthday.

As a result, plaintiff is entitled to arrears based upon custody of the two children. The arrears are calculated at 25% from the commencement of the action, June 16, 2006, through the end of June, 2010. The amount of arrears, based upon defendant's income and due to plaintiff is $46,619.00. Additionally, a credit is due plaintiff in the amount of $3,053.00 for defendant's to plaintiff. However, a credit is awarded to defendant based upon 17% from the end of September 2006 until June 27, 2010, the date Sujit turned 21. The amount of credit due to defendant is $49,530 based upon plaintiff's present salary. As a result, plaintiff is entitled to a credit of $142.00 which shall be paid to plaintiff from defendant's share of the net proceeds at the time the marital residence is sold.

Counsel Fees

An award of counsel fees pursuant to Domestic Relations Law § 237(a) is a matter within the sound discretion of the trial court, and the issue "is controlled by the equities and circumstances of each particular

case" (*Morrissey v. Morrissey*, 259 A.D.2d 472, 473; *see also Timpone v. Timpone*, 28 A.D.3d 646; *Walker v. Walker*, 255 A.D.2d 375, 376). In determining whether to award fees, the court should "review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" (*DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879; *see also Ciampa v. Ciampa*, 47 A.D.3d 745). The court may also consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (*see Ciampa v. Ciampa*, 47 A.D.3d at 748; *Timpone v. Timpone*, 28 A.D.3d at 646; *Morrissey v. Morrissey*, 259 A.D.2d at 473; *Walker v. Walker*, 255 A.D.2d 375, 376).

Other factors include the nature and extent of services rendered and the complexity of issues involved (*see Farrell v. Cleary-Farrell*, 306 A.D.2d 597 [3d Dept 2003]), the ability of each spouse to pay their own counsel fees (*see Solofani v. Solofani*, 178 A.D.2d 830 [3d Dept 1992]), whether an equitable distribution award was made (*see Zema v. Zema*, 17 A.D.3d 360 [2d Dept 2005]), and the earning power and assets of the parties (*see Kavanakudiyil v. Kavanakudiyil*, 203 A.D.2d 250 [2d Dept 1994]; *S.P. v. F.O.*, 20 Misc.3d 1104[A]).

The Court finds that each litigant shall be responsible for paying their own legal fees. The amount of gifts, loans and unusual financial transactions testified to by the plaintiff and the defendant convinces the court that each spouse has the ability to pay their own counsel fees.

This constitutes the decision and order of the court. Submit findings of fact, conclusions of law and a judgment on notice.

Enter:

/s/ Jeffrey S. Brown
J.S.C.

Dated: Mineola, New York
July 1, 2010

To:

Plaintiff's Attorney
Ira Bierman, Esq.
485 Underhill Blvd.
Syosset, NY 11791

Defendant's Attorney
John Lawrence, Esq.
190 Willis Avenue
Mineola, NY 11501

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK (SEPTEMBER 15, 2008)

SUPREME COURT OF THE STATES OF NEW YORK COUNTY OF NASSAU

RAMANDEEP BADWAL,

Plaintiff,

v.

AVTAR S. BADWAL,

Defendant.

No.

Before: Hon. Jeffery S. BROWN, J.S.C.

The Parties and their counsel having appeared before the undersigned on September 11, 2008, and upon consent of counsel, the court hereby appoints J.C. Appraisal, 181 So. Franklin Avenue, Ste. 3, Valley Stream, New York 11581 to appraise

- The real property located 110-30 62nd Drive, Forest Hills, New York

It is further Ordered, the cost of such appraisal shall

- be paid by the defendant husband subject to reallocation.

The ultimate responsibility for these costs shall be determined by the Court at the conclusion of the matter.

The retainer and all subsequent billing shall be paid promptly.

Counsel and the parties are further directed to supply the appraiser with all requested information forthwith.

The appraiser is directed to contact the court if any difficulty arises in complying with the report due date or if the required information it not forthcoming with two (2) weeks of the date of this order.

Please indicate the case name and index number on the report.

/s/ Jeffery S. Brown
J.S.C.

Dated: September 11, 2008
Mineola, New York

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK (MAY 2, 2008)

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NASSAU

RAMANDEEP BADWAL,

Plaintiff,

v.

AVTAR S. BADWAL,

Defendant.

Index No. 201751/06

Before: Hon. Jeffrey S. BROWN, J.S.C.

The following papers were read on this motion:

1. Notice of Motion for Pendente Lite Relief
2. Affidavit in Support of Motion for Temporary Support
3. Affidavit in Opposition
4. Reply Affirmation

Plaintiff moves by motion for the following pendente lite relief: a) granting Plaintiff temporary sole custody of the minor children of the marriage; b) pursuant to DRL § 236, directing the Defendant to pay to the Plaintiff temporary weekly child support in the amount of $400.00 per week; c) pursuant to DRL § 236(b)(6)(a), directing that Defendant pay any

and all carrying charges for the former marital residence in Forest Hills, New York, which is exclusively occupied by the Defendant, including, but not limited to the mortgage, taxes, homeowners insurance, maintenance and repairs, oil, water, electric, and other utilities; d) pursuant to DRL § 237(d), directing Defendant to maintain and pay the existing home, automobile, life insurance and health insurance and to pay a pro rata share of all uncovered or unreimbursed health costs for the minor children; e) restraining and enjoining the Defendant or his attorney, agents, heirs or assigns, or anyone acting in concert therewith, be they known or unknown, from transferring, removing, dissipating, encumbering or hypothecating assets subject to equitable distribution ending the determination of the underlying matrimonial action.

The instant action was commenced on June 16, 2006 by the filing of a Summons for Divorce. The Plaintiff states that the parties were married in Chandigarh, India on February 14, 1988 in arranged marriage, which is the custom in India. The Plaintiff moved to the United States in May, 1988 to live with the Defendant who was a resident here. There are three children born of this marriage, to wit: Sujit Singh born June 27, 1989; Bani Kaur Badwal born November 1, 1991; and Simran Kaur Badwal born November 19, 1993. Plaintiff states that the two younger children currently reside with her in a one family residence in New Hyde Park, New York. The oldest child resides at Stonybrook University where he attends college. The Defendant resides, with his nephew in the former marital residence located in Forest Hills, New York. Plaintiff avers that the nephew works and contributes money to the Defendant.

The former marital home is a legal two family, residence. Plaintiff alleges the upstairs apartment is rented at a rate of $1,330.00 per month and the basement apartment is rented at $750.00 per month bringing the total rental income to $2,080.00 per month. Defendant allegedly retains all of the rental income.

Plaintiff is currently employed as a nurse earning an annual salary of $65,000.00. She states she has no other source of income and has credit card debt totaling over $30,000.00. Defendant allegedly earned a bachelor's degree in education and a master's degree in botany in India before immigrating to the United States. Defendant has held many different jobs during the course of the marriage. In 1993, Defendant allegedly purchased a taxi Medallion. In 2003, he sold the Medallion for the approximate sum of $227,000.00. Thereafter, a motel purchased in Kansas. The parties moved to Kansas and worked to run the motel until 2006 when it was sold. The Plaintiff believes, the motel was sold for the advertised price of $500,000.00 although Plaintiff was not informed of the actual sale price. Plaintiff was given $200,000.00 from the proceeds of that sale. Defendant allegedly kept the balance.

In June 2006, Plaintiff filed for divorce, moved out of the marital residence and purchased a home in New Hyde park, New York for $725,000.00. The home was financed with a mortgage of $580,000.00 and with Plaintiff's proceeds from the sale of the Motel. Plaintiff contends that the Defendant started a business as a tow truck operator and owns his truck. She is unaware of how much the Defendant currently earns but believes he is doing "well." It is alleged that the Defendant has not paid any child support since the Plaintiff moved

out of the marital home in June 2006. Plaintiff has put the New Hyde Park residence on the market.

According to Plaintiff's statement of net worth, she and the children incur the following monthly expenses: mortgage $4,500.00; utilities $950.00; food $1,550.00; clothing $750.00; laundry $130.00; insurance $270.00; unreimbursed medical $700.00; household maintenance $970.00; automotive $540.00; educational $850.90; recreational $1,153.00; miscellaneous $805.00 for a total of $13,168.00.

Plaintiff indicates the value of her savings accounts are $3,015.00; value of real estate amounts to $780,000.00; and value of two vehicles are $23,000.00.

Defendant opposes the motion. In his Affidavit in Opposition, Defendant asserts that he presently earns $18,000.00 per year as a tow truck operator. He attaches for the Court's review copies of his 2007 W-2 form which shows earnings of $19,999.92 and a copy of his 2006 income taxes that states that he lives in the marital home and receives rental income of $1,340 income monthly. He denies receiving rental income from a basement apartment. He indicates the monthly mortgage payment is $2,650.00 and the monthly tax payment is $400.00.

Defendant alleges that the motel in Kansas was bought and sold for $375,000.00. He indicates there were closing costs in the amount of $25,000.00 and he received $144,000.00 from the sale while the Plaintiff received $245,000.00. Defendant purchased a tow truck for $35,000.00 and lost $40,000.00 in a gas station investment. He allegedly used the remaining $69,000.00 to support the family in 2006 when he was too ill to work. Defendant indicates a credit card debt in the

amount of $38,000.00, however, this debt is not reflected on his statement of net worth. Defendant contends that the parties' son resides with him while he attends Stony Brook University.

Defendant's statement of net worth reflects the following monthly expenses; housing and taxes $2920. 00; utilities $625.00; food $600.00; clothing $150.00; laundry $40.00; insurance 250.00; unreimbursed medical $125.00; household maintenance $220.00; automotive (Mercedes) $510.00; educational $50.00; Recreation $30.00; Miscellaneous $120.00 for a total of $5,640.00.

The statement of net worth indicates a gross income of $5,001.98; value of household furnishings $10,000.00; value of jewelry of wife $7,000.00 and a credit card debt in the amount of $2,000.00.

In reply, Plaintiff points out that Defendant's expenses far exceed his alleged income of $18,000.00 per year. In addition, Plaintiff asserts that on February 27, 2008 Defendant mailed a notarized affidavit to her counsel's office which indicates he earned a gross income from the motel of $130,000.00 per year (*Reply Affirmation Exhibit A*).

It is contained in the Child Support Standards Act (Domestic Relations Law § 240 [1-b][c]) the factors which permit a deviation from the standard calculation, as delineated in § 240 (1-b)(f), such as the financial resources of the custodial and noncustodial parent and those of the children, the physical, and emotional health of the children, and his or her educational or vocational needs and aptitudes, as well as the non-monetary contributions that the parents will make toward the care and wellbeing of the children. *See Killian v. Lowden*, 236 A.D.2d. 236, 654 N.Y.S.2d. 288

(1st Dept. 1997). The court also has taken into account the shelter costs attributable to the children in order to avoid duplication of awards. *Linda R.H. v. Richard E. H.*, 205 A.D.2d 498, 612 N.Y.S.2d. 656 (2nd Dept. 1994). In calculating an award of child support, the court can impute income to a spouse predicated upon that individual's past earnings, actual earning capacity and educational background, however, the parents' earnings potential upon which the court relies to render an award, must have a basis in law and fact. *Gezesher v. Shoshani*, 283 A.D.2d 455 [2nd Dept 2001]; *see also Petek v. Petek*, 239 AD2d 327 (2nd Dept. 1997).

Guided by the above, Defendant is directed to Pay $250.00 per week child support. The Court bases its decision on the documentation and, more importantly, the lack of documentation, provided by the parties. For instance, the Court was not provided with a closing statement from the sale of the motel. Since the affidavits of the parties conflict it was impossible to discern what the proceeds from the sale were.

Based on the foregoing, Defendant is directed to pay all carrying charges, including but not limited to, mortgage payments, insurance and utilities such as gas, electricity, heat, and telephone service, for the marital residence in Forest Hills. Defendant is also directed to maintain and continue policies of life, auto, medical and dental insurance, if any, on behalf of Plaintiff and the parties' children and to pay a pro rata share (50%) of all un-reimbursed non-elective medical, psychiatric and dental expenses for the parties' children. He shall not be responsible for any elective procedures, nor to pay for services of any physicians who are not participants in the medical insurance plan network maintained by defendant,

except in consideration of any established physician relationship. *Hills v. Hills*, 240 A.D.2d. 707, 660 N.Y.S. 2d 36 (2nd Dept. 1997)

The award is retroactive to the original date of service of this application. *See* Domestic Relations Law § 236B(6). *Selznick v. Selznick*, 251 A.D.2d 489,673 N.Y.S.2d 919 (2nd Dept. 1998). Retroactive sums due by reason of this award shall be paid at the rate of $400.00 per month in addition to the sums awarded until all arrears have been satisfied. Defendant may take a credit for sums voluntarily paid for actual support of the children incurred after the making of this motion and prior to the date of this decision for which he has canceled checks or other similar proof of payment. *See Daniels v. Daniels*, 243 A.D.2d 254, 663 N.Y.S.2d 141 (1st Dept. 1997); *Ferraro v. Ferraro*, 257 A.D.2d 598, 684 N.Y.S.2d 276 (2nd Dept. 1999). The first payment hereunder shall be made within seven (7) days of the date, of this decision and then weekly thereafter.

The branch of Plaintiff's motion requesting temporary sole custody of the children is denied.

In child custody proceedings the court must consider the best interests of the child. In determining the best interests of the child, the court must look at the totality of the circumstances, and consider the quality of the home environment, the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the relative fitness of the respective patent, and the effect an award of custody to one parent might have on the child's relationship with the parent.(*Zafran v. Zafran*, 306 AD2d 468 [2nd Dept. 2003] Domestic Relations Law § 70[a];

Eschbach v. Eschbach, 56 N.Y.2d 167, 171, 451 N.Y.S. 2d 658, 436 N.E.2d 1260 [1982]; *Miller v Pipia*, 297 AD.2d 362, 364, 746 N.Y.S.2d 729 [2002]).

The issue of temporary custody is hereby referred to a hearing for a determination as to what is in the children's best interest. Said hearing shall be scheduled at the next conference date, at which time all parties are expected to be present.

Ordered that both the Plaintiff and Defendant are enjoined from selling, transferring, conveying or otherwise disposing of assets pending further court order, except for ordinary and routine living and business expenses, in order to maintain the status quo for possible equitable distribution upon the plenary trial of this action (*see Leibowits v. Leibowitz*, 93 AD2d 536 [2nd Dept. 1983]). "The exception for "ordinary and routine living expenses" contemplates that payment of these expenses be paid from current income unless current income is insufficient to meet the reasonable needs of the parties. The parties are cautioned that any unauthorized invasions of assets for any purpose may result in a finding of contempt if it is later found that current income was not exhausted prior to invasion of assets.

The parties are directed to appear for a conference on May 20, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

/s/ Jeffrey S. Brown
J.S.C.

Dated: Mineola, New York
May 2, 2008