SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1287
CA 09-01005
PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, CARNI, AND GREEN, JJ.

JAMES R. LAHEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KATHRYN E. LAHEY, DEFENDANT-RESPONDENT.

MEGGESTO, CROSSETT & VALERINO, LLP, SYRACUSE (JAMES A. MEGGESTO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (HARLAN B. GINGOLD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Martha Walsh Hood, A.J.), entered August 5, 2008 in a divorce action. The amended order, among other things, ordered that, pursuant to the parties' separation agreement, plaintiff shall provide defendant with $300 per month for her lifetime.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by vacating the second, third and fourth ordering paragraphs and as modified the amended order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for a hearing in accordance with the following Memorandum: In 2004 the parties entered into an Opting Out Agreement (Agreement) that was incorporated but not merged into their divorce judgment. Pursuant to paragraph 15 of the Agreement, defendant would receive payments of $250 per month for 24 months and then $300 per month "for her lifetime," as her share of the equitable distribution of plaintiff's retirement benefits. The record establishes that, when the Agreement was executed, defendant was aware that plaintiff was collecting his retirement benefits and that he had made an irrevocable election that did not provide survivorship benefits to defendant. In 2005 Supreme Court (Murphy, J.) denied that part of the motion of defendant "for an order compelling the Plaintiff to obtain either life insurance or an annuity sufficient in amount" to secure the $300 lifetime monthly payment of defendant in the event that plaintiff predeceased her. In 2006 defendant moved for, inter alia, the same relief, and Supreme Court (Hood, J.) denied the motion on the ground that the 2005 order denying that part of defendant's prior motion previously determined the issue on the merits.

Defendant thereafter moved for leave to renew the 2006 motion pursuant to CPLR 2221 (e). We conclude that the court properly deemed defendant's third motion as a motion for leave to reargue despite

defendant's characterization of the motion as one for leave to renew (*see DiCienzo v Niagara Falls Urban Renewal Agency*, 63 AD3d 1663), and we further conclude that the court properly granted the third motion insofar as it sought leave to reargue. The record establishes that, by the 2005 order, the court (Murphy, J.) determined that it had insufficient information to address the merits of the 2005 motion and denied it " 'without prejudice to renew.' " Thus, the court properly granted leave to reargue inasmuch as it " 'mistakenly arrived at its earlier decision' " denying defendant's 2006 motion on the ground that the 2005 order determined the issue on the merits (*Davis v Firman*, 53 AD3d 1101, 1102; *see Gaeta v Kosek*, 273 AD2d 801).

The court, however, erred upon reargument in summarily granting the relief sought by defendant in the 2006 motion. The Agreement is ambiguous with respect to the intent of the parties in the event that defendant survives plaintiff. Indeed, the issue whether the parties intended that defendant would continue to receive payments for her lifetime or only until the retirement benefits terminated upon plaintiff's death cannot be resolved as a matter of law by reference to the Agreement (*see Finkelstein v Tainiter*, 264 AD2d 587, 588). Rather, "[r]esolution by a fact finder is required where, as here, interpretation of [an agreement] is susceptible to varying reasonable interpretations and intent must be gleaned from disputed evidence or from inferences outside the written words" (*Time Warner Entertainment Co. v Brustowsky*, 221 AD2d 268). We therefore modify the amended order accordingly, and we remit the matter to Supreme Court for a hearing to determine the intent of the parties with respect to paragraph 15 of the Agreement.

Entered: December 30, 2009 Patricia L. Morgan
Clerk of the Court