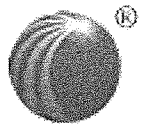

Positive
As of: Dec 26, 2013

CLAIRE VAN KIPNIS, Appellant, v GREGORY VAN KIPNIS, Respondent.

No. 213

COURT OF APPEALS OF NEW YORK

11 N.Y.3d 573; 900 N.E.2d 977; 872 N.Y.S.2d 426; 2008 N.Y. LEXIS 3920; 2008 NY Slip Op 9862

November 20, 2008, Argued
December 18, 2008, Decided

PRIOR HISTORY: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered July 12, 2007. The Appellate Division affirmed, insofar as appealed from, a judgment of the Supreme Court, New York County (Judith J. Gische, J.), to the extent that it had confirmed in all respects the report of the Special Referee declaring that the "Marriage Contract" dated September 30, 1965 between the parties was valid and enforceable in New York, and provided that defendant pay plaintiff as spousal maintenance $ 7,500 per month until defendant's death, plaintiff's death or plaintiff's remarriage, and that defendant pay plaintiff the sum of $ 92,779.57 for counsel fees.
Van Kipnis v. Van Kipnis, 43 AD3d 71, 840 NYS2d 36, 2007 N.Y. App. Div. LEXIS 8447 (N.Y. App. Div. 1st Dep't, 2007), modified.

DISPOSITION: Order modified, without costs, by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The trial court allowed defendant former husband to assert the parties' prenuptial agreement as a defense to plaintiff former wife's equitable distribution claim. It awarded the wife maintenance under Domestic Relations Law § 236(B)(6)(A), but denied her request for legal fees under Domestic Relations Law § 237. She appealed; the New York Supreme Court, Appellate Division, affirmed. She sought further review.

OVERVIEW: Under the prenuptial agreement, the parties agreed to adopt France's marital property system of separation of estates and that each spouse would retain ownership of the property he or she then owned or later came to acquire. Throughout their marriage, they maintained separate accounts and assets, except for two jointly owned homes, which they agreed were subject to equitable distribution. The wife argued that all the parties' property should have been subject to equitable distribution under Domestic Relations Law § 236(B)(5)

because the premarital agreement was not intended to apply to distribution of property in a divorce. The high court held the agreement was unambiguous and precluded equitable distribution of the parties' separate property after dissolution of the marriage, pursuant to § 236(B)(1)(d)(4) and (B)(5)(b). The trial court did not abuse its discretion in calculating the wife's maintenance award. But the wife's fee application for legal fees under Domestic Relations Law § 237 should not have been excluded as a matter of law, as she did not seek to set aside the prenuptial agreement, but disputed whether its terms applied to the ownership of assets upon divorce.

OUTCOME: The order denying the wife's request for legal fees was reversed and the case was remanded to the trial court for further proceedings on that issue. The judgment was otherwise affirmed.

HEADNOTES

Marriage -- Prenuptial Agreement -- Enforceability of French Prenuptial Agreement Providing for Separation of Estates Regime

1. A prenuptial agreement that was executed in France and provided for the separate ownership of assets held in the parties' respective names during the course of the marriage was enforceable in a subsequent divorce action to preclude equitable distribution of the parties' separately owned assets. The Domestic Relations Law contains no categorical requirement that a prenuptial agreement must set forth an express waiver of equitable distribution. Rather, when read together, Domestic Relations Law § 236 (B) (1) (d) (4) and (5) (b) provide that assets designated as separate property by a prenuptial agreement will remain separate after dissolution of the marriage. Here, with the exception of two jointly owned residences, which were distributed as marital property, the parties did not commingle their separately owned assets throughout their marriage.

Husband and Wife -- Counsel Fees

2. In a divorce action in which the parties disputed whether the terms of their prenuptial agreement applied to the ownership of assets upon divorce, plaintiff wife should not have been precluded as a matter of law from recovering counsel fees under Domestic Relations Law § 237 for services provided in opposing defendant husband's affirmative defense predicated on the prenuptial agreement.

COUNSEL: *Berkman Bottger & Rodd, LLP,* New York City (*Walter F. Bottger, Elizabeth A. Fox* and *Amelia A. Nickles* of counsel), for appellant. I. An agreement to hold property separately should not, without more, effect a waiver of equitable distribution. (*Mercier v Mercier,* 103 Misc 2d 1029, 432 NYS2d 123; *Torres v $ 36,256.80 U.S. Currency,* 827 F Supp 197; *Lauro v Bradley,* 266 AD2d 911, 697 NYS2d 882; *McLaren v McLaren,* 99 Misc 2d 797, 417 NYS2d 434; *Tucker v Tucker,* 55 NY2d 378, 434 NE2d 1050, 449 NYS2d 683; *Valladares v Valladares,* 80 AD2d 244, 438 NYS2d 810; *DeLuca v DeLuca,* 97 NY2d 139, 762 NE2d 337, 736 NYS2d 651; *DeJesus v DeJesus,* 90 NY2d 643, 687 NE2d 1319, 665 NYS2d 36; *Price v Price,* 69 NY2d 8, 503 NE2d 684, 511 NYS2d 219; *O'Brien v O'Brien,* 66 NY2d 576, 489 NE2d 712, 498 NYS2d 743.) II. All of the wife's counsel fees should be paid by the husband. (*Schapiro v Schapiro,* 204 AD2d 87, 612 NYS2d 6; *Lucci v Lucci,* 227 AD2d 387, 642 NYS2d 326; *Lamborn v Lamborn,* 56 AD2d 623, 391 NYS2d 679; *O'Shea v O'Shea,* 93 NY2d 187, 711 NE2d 193, 689 NYS2d 8.) III. The maintenance award fails as against the statutory standards, the evidence and equity. (*Comstock v Comstock,* 1 AD3d 307, 766 NYS2d 220; *Spencer v Spencer,* 230 AD2d 645, 646 NYS2d 674; *Patron v Patron,* 40 NY2d 582, 357 NE2d 361, 388 NYS2d 890; *Holterman v Holterman,* 3 NY3d 1, 814 NE2d 765, 781 NYS2d 458; *Matter of Cassano v Cassano,* 85 NY2d 649, 651 NE2d 878, 628 NYS2d 10.)

Gartner + Bloom, PC, New York City (*Stuart F. Gartner* and *Arthur P. Xanthos* of counsel), for respondent. I. The prenuptial agreement is a valid and enforceable agreement, and by its terms applicable upon divorce. (*Roos v Roos,* 206 AD2d 293, 614 NYS2d 522; *Matter of Weeks,* 294 NY 516, 63 NE2d 85; *Lemye v Sirker,* 226 App Div 159, 235 NYS 273; *Matter of Majot,* 199 NY 29, 92 NE 402; *Bonati v Welsch,* 24 NY 157; *Van Cortlandt (de Graffenried) v de Graffenried,* 147 App Div 825, 132 NYS 1107; *De Ganay v De Ganay,* 269 AD2d 157, 701 NYS2d 434; *Bourbon v Bourbon,* 300 AD2d 269, 751 NYS2d 302; *Strebler v Wolf,* 152 Misc 859, 273 NYS 653; *Housset v Housset,* 200 AD2d 508, 606 NYS2d 680.) II. The equitable distribution, legal fees and maintenance ordered by the trial court were more than fair to appellant and in accordance with the law. (*Ford Motor Credit Co. v Colonial Funding Corp.,* 215 AD2d 435, 626 NYS2d 527; *Jones Lang Wootton USA v*

LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 674 NYS2d 280; *D &L Holdings v Goldman Co.,* 287 AD2d 65, 734 NYS2d 25; *Environmental Concern v Larchwood Constr. Corp.,* 101 AD2d 591, 476 NYS2d 175; *Matter of Bianchi v New York State Div. of Hous. & Community Renewal,* 5 AD3d 303, 774 NYS2d 127; *Schapiro v Schapiro,* 204 AD2d 87, 612 NYS2d 6; *Wyser-Pratte v Wyser-Pratte,* 160 AD2d 290, 553 NYS2d 719; *Lamborn v Lamborn,* 56 AD2d 623, 391 NYS2d 679; *Anonymous v Anonymous,* 258 AD2d 547, 685 NYS2d 294; *Kenyon v Kenyon,* 155 AD2d 825, 548 NYS2d 97.)

JUDGES: Opinion by Judge Graffeo. Chief Judge Kaye and Judges Ciparick, Read, Smith, Pigott and Jones concur.

OPINION BY: GRAFFEO

OPINION

[***427] [*575] [**978] Graffeo, J.

The principal issue in this matrimonial case is whether the parties' foreign prenuptial agreement precludes the equitable distribution of certain property under New York law. Like the courts below, we conclude that it does.

Plaintiff Claire Van Kipnis (wife) and defendant Gregory Van Kipnis (husband) were married in Paris, France in 1965. At the time of the parties' marriage, wife was a Canadian citizen from Quebec studying at the Sorbonne and husband was a citizen of the United States, having recently completed college. Prior to the marriage ceremony, wife had a "Contrat de Mariage" drafted under the French Civil Code and arranged for legal counsel to explain the terms of the prenuptial agreement in English to husband. The agreement was executed by the parties on September 30, 1965.

Under the provisions of the Contrat de Mariage, the parties opted out of the community property scheme (the governing custom in France) in favor of a separation of estates regime. In relevant part, the agreement provides:

> "The future spouses declare that they are adopting the marital property system of separation of estates, as established by the French Civil Code.
>
> "Consequently, each spouse shall retain ownership and possession of the chattels and real property that [*576] he/she may own at this time or may come to own subsequently by any means whatsoever.
>
> "They shall not be liable for each other's debts established before or during the marriage or encumbering the inheritances and gifts that they receive.
>
> "The wife shall have all the rights and powers over her assets accorded by law to women married under the separate-estates system without any restriction."

After the wedding, the parties moved to New York where they resided during their 38-year marriage. Husband was employed [**979] [***428] in finance while wife worked as a professor at Cooper Union and later as a cultural counselor for the Quebec government. Wife was also the primary caretaker of the parties' two children, now emancipated. Throughout their marriage, the parties maintained separate accounts and assets, with the exception of the joint ownership of their two homes--a $ 625,000 house in Massachusetts and a cooperative apartment in Manhattan valued at $ 1,825,000.

In 2002, wife commenced this action for divorce and ancillary relief. [1] Following discovery, but before trial, Supreme Court granted husband's motion to amend his answer to assert the 1965 prenuptial agreement as a defense to wife's equitable distribution claims. After the Appellate Division affirmed the order permitting the amendment (8 AD3d 94, 778 NYS2d 153 [2004]), Supreme Court appointed a Special Referee to conduct a hearing on the issues of equitable distribution, maintenance and counsel fees.

> 1 Husband had also commenced an action for divorce in Massachusetts that resulted in an ex parte, no-fault divorce. The Massachusetts court referred the parties' economic issues to wife's pending proceeding in New York.

The Referee determined that the French contract provided for the separate ownership of assets held in the parties' respective names during the course of the marriage. As a result, husband retained his liquid assets

of approximately $ 7 million and wife kept her assets ranging from $ 700,000 to $ 800,000. But as to the jointly held properties, which the parties agreed were subject to equitable distribution, the Referee recommended that wife be awarded the Manhattan apartment, together with $ 75,000 in reimbursement for repairs, and husband be awarded the country home in Massachusetts. After reviewing the statutory factors related to maintenance, the Referee proposed that wife receive $ 7,500 per month in maintenance until either [*577] husband or wife dies or wife remarries. Finally, the Referee concluded that legal fees expended in connection with wife's challenge to the prenuptial agreement were not compensable under Domestic Relations Law § 237. After deducting that portion of wife's claim for counsel fees attributable to contesting the agreement, the Referee awarded wife $ 92,779.57 in attorneys' fees. Supreme Court confirmed the Referee's report. The Appellate Division, with one Justice dissenting, affirmed (43 AD3d 71, 840 NYS2d 36 [2007]), and we granted wife leave to appeal (10 NY3d 705, 886 NE2d 803, 857 NYS2d 38 [2008]).

Wife contends that all of the parties' property should be subject to equitable distribution under Domestic Relations Law § 236 (B) (5). She asserts that the 1965 agreement, drafted and executed in France, was intended to apply to property ownership during the course of the marriage, but not to the distribution of property in the event of a divorce. In her view, the primary purpose of the agreement was for each spouse to avoid liability for the other's debts. Relatedly, wife posits that a prenuptial agreement cannot waive a party's right to equitable distribution under the Domestic Relations Law absent an explicit waiver. Husband counters that the agreement unambiguously provides that the parties shall retain their property separately throughout their marriage and, as a result, all property not held in joint names must be treated as separate property and excluded from equitable distribution.

It is well settled that duly executed prenuptial agreements are generally valid and enforceable given the "strong [**980] [***429] public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Bloomfield v Bloomfield*, 97 NY2d 188, 193, 764 NE2d 950, 738 NYS2d 650 [2001] [internal quotation marks and citation omitted]). As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing. Consequently, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569, 780 NE2d 166, 750 NYS2d 565 [2002]). Extrinsic evidence of the parties' intent may not be considered unless a court first finds that the agreement is ambiguous.

Prenuptial agreements addressing the ownership, division or distribution of property must be read in conjunction with Domestic Relations Law § 236 (B), enacted in 1980 as part of New York's Equitable Distribution Law. The statute provides that, [*578] unless the parties agree otherwise in a validly executed prenuptial agreement pursuant to section 236 (B) (3), upon dissolution of the marriage marital property must be distributed equitably between the parties while separate property shall remain separate (*see* Domestic Relations Law § 236 [B] [5] [a]-[c]). [2]As relevant here, separate property is defined to include "property described as separate property by written agreement of the parties pursuant to subdivision three of this part" (Domestic Relations Law § 236 [B] [1] [d] [4]). Under the statute, a prenuptial agreement may include a "provision for the ownership, division or distribution of separate and marital property" and is valid and enforceable if it "is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (Domestic Relations Law § 236 [B] [3]; *see also Matisoff v Dobi*, 90 NY2d 127, 130, 681 NE2d 376, 659 NYS2d 209 [1997]). [3]

2 Marital property is defined as

> "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, *except as otherwise provided in agreement pursuant to subdivision three of this part*" (Domestic Relations Law § 236 [B] [1] [c] [emphasis added]).

3 Noncompliance with the execution formalities outlined in Domestic Relations Law § 236 (B) (3) does not invalidate prenuptial agreements that predate the effective date of that subdivision (*see Bloomfield v Bloomfield*, 97 NY2d 188, 194, 764 NE2d 950, 738 NYS2d 650 [2001]). Here, wife concedes that the prenuptial agreement was

validly executed.

The Domestic Relations Law therefore contemplates two basic types of prenuptial agreement that affect the equitable distribution of property. First, parties may expressly waive or opt out of the statutory scheme governing equitable distribution (*see e.g. Bloomfield*, 97 NY2d at 193; *Housset v Housset*, 200 AD2d 508, 509, 606 NYS2d 680 [1st Dept 1994]). Second, parties may specifically designate as separate property assets that would ordinarily be defined as marital property subject to equitable distribution under Domestic Relations Law § 236 (B) (5). Such property would then remain separate property upon dissolution of the marriage. In either case, the intent of the parties "must be clearly evidenced by the writing" (*Tietjen v Tietjen*, 48 AD3d 789, 791, 853 NYS2d 118 [2d Dept 2008]).

[1] Here, the parties' written agreement, adopting a "separation of estates" scheme, falls within the second prenuptial [**981] [***430] agreement category. The agreement specifies that separate ownership of assets applies not only to the property that each party had [*579] acquired at the time of the marriage, but also to property that they "may come to own subsequently by any means whatsoever." It further assures that "wife shall have all the rights and powers over her assets accorded by law to women married under the separate-estates system without any restriction." Contrary to wife's argument, the Domestic Relations Law contains no categorical requirement that a prenuptial agreement must set forth an express waiver of equitable distribution. Rather, when read together, Domestic Relations Law § 236 (B) (1) (d) (4) and(B) (5) (b) provide that assets designated as separate property by a prenuptial agreement will remain separate after dissolution of the marriage. Such is the case here. Indeed, as recognized by the Appellate Division, with the exception of two jointly owned residences (which were distributed as marital property), the parties did not commingle their separately owned assets throughout their 38-year marriage. We therefore agree with the courts below that the agreement constitutes an unambiguous prenuptial contract that precludes equitable distribution of the parties' separate property, rendering it unnecessary to resort to extrinsic evidence.

Turning to the issue of maintenance, which was not addressed by the prenuptial agreement, wife contends that the courts below improperly weighed the factors listed in Domestic Relations Law § 236 (B) (6) (a), resulting in an inadequate monthly maintenance award. The record here, however, supports the affirmed findings of the courts below and we perceive no abuse of discretion in their calculation.

[2] Finally, wife submits that the courts below erred in precluding her recovery of legal fees under Domestic Relations Law § 237 for services provided in opposing her husband's affirmative defense predicated on the prenuptial agreement. Neither party here seeks to set aside the prenuptial agreement; instead, their dispute centers on whether the terms of the contract apply to the ownership of assets upon divorce. In this respect, her request is similar to the fee application in *Ventimiglia v Ventimiglia* (36 AD3d 899, 830 NYS2d 210 [2d Dept 2007]), where attorneys' fees were awarded to a party who contested her spouse's affirmative defense based on an antenuptial agreement. Remittal to Supreme Court for reconsideration is therefore necessary because this portion of wife's fee application should not have been excluded as a matter of law.

Accordingly, the order of the Appellate Division should be modified, without costs, by remitting to Supreme Court for further [*580] proceedings in accordance with this opinion and, as so modified, affirmed.

Chief Judge Kaye and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Order modified, etc.