

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART J.H.O.

ELLEN DERMIGNY, X
INDEX NO. 13078/99
Plaintiff, MEMORANDUM DECISION

- against -

NICHOLAS DERMIGNY,
Defendant. X

STANLEY GARTENSTEIN, JUDICIAL HEARING OFFICER:

BACKGROUND:

Pursuant to "hear and determine" stipulation, the undersigned, a Judicial Hearing Officer, was designated to preside at the trial of this action. This trial required more than four months and 10 days of testimony to complete. It involved complex formulations relating to valuation of stock options and securities trading practices which brought forth expert testimony and sharply conflicting opinions on behalf of the respective parties. When these issues were brought into focus, the court was placed in an "either-or" position requiring it to accept the expert testimony offered by one party and totally reject that by the other.

In arriving at its determination of the key issues, the court is confronted by two recent decisions of the Court of Appeals which must appropriately be read together. When given this joint reading, they create an issue of apparent first impression.

Throughout the trial, the court took special pains to admonish the parties repeatedly that if the trial proceeded to its conclusion without compromise, its unique issues would mandate a ruling almost certainly inflicting substantial financial loss upon one or the other of them. Nevertheless, when the court requested updates on negotiations, it was consistently reported that nothing meaningful had transpired. Thus, we promulgate this decision cognizant of the uncomfortable reality that a settlement would have been preferable.

THE FACTS:

Defendant is the Chief Operations Officer of the Muriel Siebert conglomerate of companies now engaged in trading in the securities market. Muriel Siebert, founder and driving force of these companies testified at the trial pursuant to subpoena issued by plaintiff-wife.

At issue are two grants of stock options to defendant-husband under the Siebert Financial Corp. 1997 Stock Option Plan. On May 16, 1997, Mr. Dermigny received an option grant for 50,000 shares with an option price of \$9.25 per share. On February 9, 1998 Mr. Dermigny received an additional grant for 10,000 shares with an option price of \$10.75 per share. On April 7, 1998, after the date of both grants, the Company stock split 4 for 1, the effect of which was to increase the number of options received in 1997 to 200,000 shares and the number of

options received in 1998 to 40,000. The Option Price as a result of the split became \$2.3125 per share for the 1997 grant and \$2.6875 for the 1998 grant.

The 1997 Stock Option Plan was adopted by the Board of the Company in March of 1997 and was approved by the shareholders on December 1, 1997. The Plan permits the issuance of either options intended to qualify as incentive stock options, or ISO's, under Section 422 of the Internal Revenue Code of 1986 or options not intended to so qualify.¹

¹

The following are the core terms of the 1997 Stock Option Plan:

Expiration: The tenth anniversary of the Date of Grant. In no event may the Option be exercised in whole or in part after the Expiration Date.

Exercise: On each of the first, second, third, fourth and fifth anniversaries of the Date of Grant, the Optionee shall have the right to purchase up to twenty percent (20%) of the Option Shares, so that on the fifth anniversary of the Date of Grant, the Option shall be fully exercisable.

Retirement: If the Optionee's employment terminates by reason of retirement at, or after age 65, the Optionee's Options may, within 90 days following retirement, at or after age 65, be exercised with respect to all or any part of the shares of Common Stock subject thereto regardless of whether the Option was otherwise exercisable at the time the Optionee's employment terminates.

Death or Disability: If the Optionee ceases to be an employee of the Company by reason of death or permanent disability, the Optionee's options may be exercised within 90 days of such death or disability, with respect to all or any part of the shares of Common Stock subject thereto, regardless of whether the Option was otherwise exercisable at the time the Optionee's employment terminates.

Prior to the commencement of the matrimonial action (June 14, 1999), Mr. Dermigny had exercised 40,000 options issued as part of the 1997 grant and 8,000 options issued as part of the 1998 grant². Thus, at the date of commencement, Mr. Dermigny owned the rights to 160,000 options from the 1997 grant and 32,000 options from the 1998 grant.

ANALYSIS:

As of the date of commencement of this action, Mr. Dermigny owned certain options not exercisable until after the date of commencement.

Termination for Cause: No options may be exercised following the Optionee's termination by the Company for Cause.

Other Circumstances: If the Optionee's employment terminates under circumstances other than those described above, the Optionee's Options must be exercised within 30 days following the date of such termination and only with respect to such number of shares as to which the right of exercise had accrued at the time of termination of employment.

Transferability: The option is not transferable by the Optionee other than by will or the laws of descent and distribution, and is exercisable, during the Optionee's lifetime, only by the Optionee.

²

The transaction was reported on the parties' 1999 personal income tax return and the tax resulting from the exercise and sale of the underlying shares was paid at the prevailing rates applying to ordinary, taxable income.

1997 Stock Option Grant:

Total Option Grant	200,000
Exercised	<u>40,000</u>
Unexercised at date of commencement	160,000
Exercisable:	
2 years from grant - 5/16/1999	40,000
3 years from grant - 5/16/2000	40,000
4 years from grant - 5/16/2001	40,000
5 years from grant - 5/16/2002	40,000

1998 Stock Option Grant:

Total Option Grant	40,000
Exercised	<u>8,000</u>
Unexercised at date of commencement	32,000
Exercisable:	
2 years from grant - 2/9/2000	8,000
3 years from grant - 2/9/2001	8,000
4 years from grant - 2/9/2002	8,000
5 years from grant - 2/9/2003	8,000

DeJesus v DeJesus:

Before any issues of valuation are reached, it is necessary to rule upon the threshold issue of whether or not these stock options granted to the husband as a key employee of Muriel Siebert represent a reward (viz., compensation) for services performed during the marriage or whether they were an incentive for continued future employment. In this latter instance, these options would fall outside the scope of marital assets, thus precluding distribution to the wife (DeJesus v DeJesus, 90 NY2d 543.)

While valuation and distribution of marital assets are both within the court's discretion, the threshold initial determination of whether or not any particular asset is marital property is solely a question of law hinging upon the court's obligation to "*** first determine, based on competent evidence, whether and to what extent the stock plans were granted as compensation for the employer's past services or as incentive for the employee's future services." (DeJesus v DeJesus, supra.)

The basic working proposition governing this litigation therefore is that stock options granted as consideration for future services, do not constitute marital property until the employee has, in fact, performed those future services. (DeJesus v DeJesus, supra.)

In assessing the seminal value of DeJesus, it is important to note that although the Court of Appeals established what appears at first blush to be a definitive rule, it did not give trial courts an exhaustive guide how to apply this general rule. Indeed, DeJesus itself simply found the record of proceedings in the trial court devoid of an evidentiary showing from which that court could determine this key issue (vis., compensation for past services versus incentive for the future thereby falling outside the defined parameters of marital property).

Although faced with a failure of proof at the trial, the Court of Appeals remitted proceedings to the trial court to receive evidence and formulate a determination - this in preference to deciding this issue based upon a failure of proof. In itself, this action must be viewed as a clear signal to trial courts that it is the expectation of the Court of Appeals that no issues of equitable distribution be determined, (except under extraordinary circumstances) based upon a failure of proof.

DeLuca v DeLuca:

In DeLuca v DeLuca, 97 NY2d 139, decided after DeJesus, the Court of Appeals considered the issue of whether or not the variable supplement, an auxiliary benefit of rank and file and superior police officers, constituted a marital asset in view of the reality that its benefits vest only upon fulfillment of a defined length of service and are effectively forfeited if the pensioner leaves active service prior to vesting. In reversing the Appellate Division (276 AD2d 143), it used broad strokes to brush aside the niceties of "vesting" or "maturity" as legal concepts in favor of an across-the-boards amplification of the statutory reference to "thing of value *** earned in whole or in part during the marriage" as marital property. In doing so, its overriding emphasis identified "nothing less than 'all property'" (supra, at p 145) as marital.

"In identifying nothing less than 'all property' acquired during the marriage as

marital property, this section evinces an unmistakable intent to provide each spouse with a fair share of things of value that each helped to create and expects to enjoy at a future date (see, DeJesus v DeJesus, 90 NY2d 643). *** Thus, marital property consists of 'a wide range of intangible interests which in other contexts might not be recognized as divisible property at all' (id., at 647)."

Further:

"Thus, under the broad interpretation given marital property, formalized concepts such as 'vesting' and 'maturity' are not determinative. Indeed, we have held that compensation received after dissolution of the marriage for services rendered during the marriage is marital property (see, Olivo v Olivo, 82 NY2d 202)."

Clearly, we as a trial court acting in the instant litigation are required to read DeJesus thru the eyes of the DeLuca court:

"At issue in DeJesus were stock gift and stock option plans issued to a husband shortly before his wife commenced an action for divorce. Under the plans, the employer would issue stock, or the right to purchase stock, at future dates, assuming the husband stayed at his job. Although the husband argued that the plans were solely an incentive to continued employment and thus primarily separate property, we held that the stock plans might also be considered marital property if they represented compensation for past services." (DeLuca v DeLuca, supra, at 143.)

Nowhere in DeJesus did the Court of Appeals find that the stock option plan before it did not constitute marital property. Rather, it enunciated a principle by virtue of which it might have

been excludable, but neither ratified the claimed exclusion of such plan nor did it indicate under what specific facts such exclusion might be held to exist within the general principle it enunciated.

The record indicates that defendant built his career with the Muriel Siebert organization during the marriage. His becoming a key employee indispensable to its operation, i.e. the threshold for issue of the stock options geared to keep his loyalty came about by virtue of his performance with that organization. This performance occurred during the marriage. It may appropriately be characterized as a "thing of value" within the context of equitable distribution. Admittedly, this "thing of value" is a nominal marital asset. Its value is predicated solely upon the premise that what will take place in the future will not transpire without roots in the past, however negligible this interest may be.

We are constrained to postulate that were the instant facts before the Court of Appeals in the aftermath of DeLuca, that part of Mr. Dermigny's services to the Muriel Siebert conglomerate which made him indispensable for the future would be held to have been performed during the marriage. Accordingly these services constitute a marital asset as a "thing of value."³

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This determination is made solely as a matter of law from a joint reading of DeJesus and DeLuca. Testimony at the trial by Muriel Siebert herself and by other witnesses, which was unchallenged was to the effect that all stock options were issued solely as incentive for future performance by Mr. Dermigny. Not only was Muriel Siebert's testimony unchallenged but it was Mrs. Dermigny herself who subpoenaed her for the trial and who

The record is devoid of any evidence of special contributions by Mrs. Dermigny by virtue of which the court might fix the value of this "thing of value" at any figure other than one which would pay lip service to her being married to Mr. Dermigny at that crucial time in his life during which his performance at Muriel Siebert made him indispensable. We fix the value of this "thing of value" at 20% and plaintiff-wife's share of it at 50%, translating out to 10% of ultimate valuation.

VALUATION-SPECIAL CONSIDERATIONS:

We proceed next to establishing valuations of the different categories of stock options.

A) Exercised Options:

As to the 40,000 options issued as part of the 1997 grant and 8,000 options issued as part of the 1998 grant both of which were exercised prior to commencement and which were sold at prevailing rates, the income thereof having been reported on the parties' joint tax return and the resulting tax having been paid by both parties, the value of this asset is fixed in accordance with the net proceeds thereof less tax paid. Inasmuch as these options were exercised and the stock disposed of during marriage, the

offered her testimony. In doing so, she vouches for its accuracy and reliability and is bound by it. Nevertheless, neither Muriel Siebert nor any of the other witnesses testified in the context of DeLuca's definition of "thing of value" and their testimony, even if unrebutted, must be weighed in that light.

distribution of this asset shall be at the rate of 50% of its net proceeds.

B) Unexercised Options. The Black Schoals Method:

Plaintiff urges that the remaining stock options not vested as of the date of commencement be valued utilizing the so-called Black-Schoals Valuation formula.

The formula, besides being highly speculative, assumes that the proper date for the valuation of the options is the date of the commencement of the matrimonial action and does not consider the "active"/"passive" nature of assets as they are classified in matrimonial case law. In addition, the value arrived at by Mrs. Dermigny's expert does not consider the tax impact to the holder when he exercises the options and sells the underlying shares of stock to satisfy an award of Equitable Distribution.

As established by expert testimony offered of behalf of Mr. Dermigny, the Black Shoals formula is used to value options at a "snap shot" in time and presumes that an investor would be purchasing them for future gains. Mr. Dermigny could not hold the options for future gains since he will have to distribute part of their value in accordance with an award of equitable distribution. In order to do that, he will have to exercise the options and sell the underlying shares, an event that is limited by the terms of the Option Grant.

The Black Shoals formula does not take into consideration the fact that the investor is not allowed to sell the options at a point in time when he or she feels is appropriate. Because of the vesting provisions of the Option Grant, certain options cannot be currently exercised. Mrs. Dermigny's expert attempted to account for this by applying a 2% per year discount for vesting restrictions. Nevertheless, market surveys and studies have established that discounts for lack of marketability occasioned by the inability to sell or transfer securities, ranges between 15% and 75% depending on the facts of each valuation. In the present instance, there is an absolute prohibition on the transfer of the options at any time. Hence, there is no ability to transfer the options until they have vested in accordance with the Option Grant. Indeed, there is a possibility that the options may never vest.

The Black Schoals method has also been criticized by courts on the appellate level. In Cohen v Calloway (246 AD2d 473), the First Department commented:

"and indeed the significance of such method is so imprecise that its inclusion probably would have done more harm than good" (citing TSC Industries v Northway, Inc., 426 US 438 and State of New York v Rachmani Corp., 71 NY2d 718.)

The court finds expert testimony by Richard Freidman, Esq. offered by defendant highly persuasive and adopts his conclusions. In doing so, we reject outright that of Andrew

Delbaum proffered by plaintiff (cf., Brooklyn Union Gas Co. v State Board of Equalization, 101 AD2d 414).

The court elects to allow defendant the right to exercise the same prudent judgment in exercising the remaining stock options after vesting which has proved to be such an asset to the parties and which has made him so indispensable to the Muriel Siebert organization. It is the same judgment which has generated the considerable wealth the parties now enjoy. To speculate that defendant has or will exercise this judgment destructively in a manner which will diminish the value of the distributable corpus would be inconsistent with reality.

We hold the stock options in issue to be passive assets. As defendant points out in his closing submission, to accept plaintiff's position that they are active assets, the court would have to first hold that defendant exercised effective control of the price of Muriel Siebert stock. There is not a scintilla of evidence in the record to support this conclusion.

The remaining unexercised stock options are non-transferable according to the terms of their issue. A court-ordered exercise of these options, at this time, is impracticable and would result in substantial loss to both parties, in effect negating the court's overriding obligation to maximize the marital assets available for distribution. Distribution of their value as of the trial date would effectively destroy

defendant's solvency without any practical benefit to plaintiff. An appropriate solution tailored to the needs of the parties, would appear to be the imposition of a trust upon these options until such time as it is prudent to exercise them. At that time plaintiff's 10% share, valued as of sale, shall be paid to her. The structure of this trust arrangement shall be in accordance with that suggested by defendant's supplemental submission which was invited by the court at a post-trial conference scheduled sua sponte and conducted on the record with both counsel participating.

Marital Domicile

The court has carefully weighed the option of immediate sale of the marital domicile, thus giving plaintiff the wherewithal to stay in the neighborhood by having sufficient funds to purchase a more modest house. While this solution appears to be practical, it still causes a disruption in the lives of the children.

Defendant has testified that he is in agreement with the concept of keeping his children in their current neighborhood. It is his plan to purchase a home closer to his children.

There are two compelling considerations. The children should not be uprooted; nor should defendant be compelled to come from New Jersey to spend meaningful time with them.

In order to order a sale at a time when the infant issue of the marriage are still young enough not to be uprooted, the court must appropriately find that the custodial parent cannot

carry the property financially. (Blackman v Blackman, 131 AD2d 801; Shahidi v Shahidi, 129 AD2d 627.) This showing has not been made. The property is owned free and clear of any mortgages or other encumbrances. On the other hand, defendant has not established a transcendent need to sell this property as a condition precedent to his being near his children. Nor has he demonstrated that the only way this can be effectuated is through the ownership of his own home as opposed to an affordable rental in the area.

Accordingly, plaintiff is awarded exclusive possession of the marital domicile until the last of the children reach majority or is sooner emancipated after which it shall be put on the open market with dispatch and upon sale, the net proceeds to be divided equally between the parties.

The court is cognizant that many variables may yet be factored into any future decision with regard to sale. It is not closing the door to an application for immediate sale upon any legally sufficient new factor or upon a showing that, after the exercise of due diligence, defendant cannot obtain a suitable rental in the neighborhood.

Marital Debt

The marital debt shall be split equally between the parties with each receiving credit for any amount paid during pendency of the action.

Southampton

On December 13, 1993, plaintiff's parents deeded premises known as designated as 59 Lane Drive, Southampton, New York to plaintiff and three of her siblings as joint tenants with the right of survivorship. This transfer took place during the marriage between the parties. Accordingly, plaintiff's interest is subject to a presumption that the conveyance to her constituted marital property. (Lischynsky v Lischynsky, 501 NYS2d 938.) This presumption has not been rebutted. Indeed, the credibility of witnesses presented by plaintiff is questionable and rejected by the court. (See, Seidman v Seidman, 226 AD2d 1011.) This property is valued at \$352,000 pursuant to impartial appraisal conducted pursuant to stipulation. Plaintiff's share computes out to \$88,000. A belated addition to the deed of plaintiff's brother, John Hickey on October 13, 2002 would presumptively lower plaintiff's share to \$70,400. While this court cannot affect the record title of a person not a party to this action, the belated "transfer" to John Hickey is deemed a nullity for purposes of equitable distribution of plaintiff's share thereof. Indeed, from the circumstances surrounding execution of plaintiff's net worth statement which is mysteriously silent with regard to this "transaction" (which purportedly took place a mere eleven days before execution of the net worth statement), the presumptive indication of a "transaction" manufactured for its affect on this litigation cannot be excluded

(cf., Debtor and Creditor Law § 270 et seq.) and is as consistent with reality as is the "transaction" itself.

Taken with the fact that expenses on this property (including payment of the mortgage) came out of the parties' marital funds, the foregoing presents a compelling case that plaintiff's original share is marital property and she is charged with \$44,000 representing 50% of her share thereof. (See, Kobylack v Kobylack, 111 AD2d 221.)

Maintenance

The court has reviewed the evidence in light of the statutory factors enunciated in DRL § 236B(6)(a).

Plaintiff now holds a four year degree from Queens College and is currently in its Advanced Certificates Program. She is 45 years old; attractive; articulate; in good health; and energetic. Her skills are highly marketable notwithstanding that she has made little or no effort to obtain meaningful employment (Sade v Sade, 251 AD2d 646.) She is computer literate and has worked as a secretary prior to marriage. Any claim that her children need her physically present is negated by the fact that she voluntarily absents herself from them on Tuesday and Thursday nights to attend the Advanced Certificate Program.

There is no legal, moral or ethical basis for an award of maintenance.

Child Support

Defendant now pays the sum of \$4,163 per month as child support pursuant to the pendente lite order now in effect. The record is barren of any showing that this figure is inadequate to meet the needs of the children.

The pendente lite order is based upon the CSSA percentage of 25% computed upon a base of \$200,000 yearly income. This figure is 250% higher than the statutory cap of \$80,000. Defendant's W2 income for 2002 was \$387,692.

It is error for a court to blindly apply the CSSA statutory percentages to all earnings of the non-custodial parent even above the statutory cap without an articulable and articulated reason. (Gluckman v Qua, 253 AD2d 267; Frei v Pearson, 244 AD2d 454.)

Defendant is ordered to pay the amount of child support as set in the pendente lite order which is hereby adopted after trial on the merits and made final, together with private school tuitions and summer camp. This latter direction is upon the specific condition that he shall choose both the private schools and the summer camps.

We find no basis in the record to compute the mandated CSSA percentages upon any amount exceeding the \$200,000 base figure now in effect. We are cognizant of the fact that this award is a generous one. The generosity of this award has been taken into

consideration by the court as mandated by statute in denying maintenance.

The husband is authorized to claim deductions for both children in computing his taxes. Plaintiff shall execute any and all forms received by the Internal Revenue Service to effectuate this direction.

Alleged Dissipation of Assets

Plaintiff's claim that defendant dissipated marital assets by not selling his stock options during the pendency of this action is without legal or factual basis and is disallowed. Indeed, the very existence of a restraint upon the negotiation of these assets was at her insistence.

COUNSEL FEES:

The parties have stipulated that counsel fees be set upon submission of the "standard" affidavits. Counsel shall set their own schedule for submission thereof and notify the Clerk of its terms.

The foregoing constitutes the decision and order of this court.

Settle final judgment on notice.

Dated: February 2, 2004

STANLEY GARTENSTEIN
Judicial Hearing Officer