

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH P. DORSA IA Part 51
Justice

_____ x Index
ANGELA HALLORAN Number 16532 1982

- against - Motion
Date September 30, 2002

BERNARD HALLORAN Motion
Cal. Number 6
_____ x

The following papers numbered 1 to 14 read on this motion by plaintiff for a money judgment against defendant and for counsel fees.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-9
Reply Affidavits	10-11
Other	12-14

Upon the foregoing papers it is ordered that the motion is determined as follows:

Pursuant to a stipulation entered into on May 12, 1987 and a judgment of divorce dated February 10, 1989, upon defendant's pension with Metropolitan Life Insurance Company (MetLife) entering a pay status, plaintiff was to receive one-half of any payment valid as of October 21, 1982. To give effect to that provision, the stipulation and judgment also allowed for the issuance of a Qualified Domestic Relations Order (QDRO) directing MetLife to comply with the terms of the stipulation and judgment regarding the pension. A further stipulation reiterating these terms was entered into by the parties on March 25, 1992.

Although a QDRO was entered in this action on July 6, 1992, no proof has been submitted as to whether the order was served upon MetLife at that time or at any time prior to defendant being placed on retirement by MetLife in September 1996 at the age of 62. However, it is undisputed that defendant's pension entered a pay status on September 1, 1996, and that plaintiff did not receive the amount due to her each month pursuant to the stipulations and divorce judgment until December 2001, following service of a copy of the QDRO on MetLife in October 2001.

Plaintiff is entitled to a money judgment for arrears in the amount

of \$14,280.21, representing the monthly payments of \$226.67 she should have received from September 1996 through November 2001. (Domestic Relations Law § 244; see, Wolfson v Public Adm'r of Nassau County, 282 AD2d 743.) The QDRO was provided for to implement the portion of the judgment of divorce awarding plaintiff an interest in the marital portion of defendant's retirement pension. (See, Sylvester v Sylvester, 290 AD2d 501.) Plaintiff's right to receive the interest in marital property was agreed upon by stipulation of the parties and awarded by judgment of the court. While defendant argues that plaintiff waived her rights under the agreement and decree, waiver cannot be created by negligence or oversight and cannot be inferred from mere silence, but requires proof of a voluntary and intentional relinquishment of a known and otherwise enforceable right. (See, Peck v Peck, 232 AD2d 540; Messina v Messina, 143 AD2d 735.) There has been no showing herein that plaintiff voluntarily relinquished her entitlement to a share of defendant's pension. (See, Coppola v Coppola, 291 AD2d 477; Peck v Peck, supra.) The parties admittedly did not have any contact with or information concerning each other from 1992 until 2001, and there is no proof to refute plaintiff's contention that she did not know until 2001 that defendant had retired and was receiving pension benefits. Nor would the failure of her prior attorney to have served the QDRO on MetLife, without more, be sufficient to demonstrate plaintiff's waiver of her share of marital property.

However, under the facts and circumstances of this case, it cannot be said that defendant's default in paying the amount due under the pension was willful. Therefore, plaintiff's requests for the imposition of prejudgment interest and for counsel fees are denied. (Domestic Relations Law §§ 244, 237[c]; see, Kristiansen v Kristiansen, 236 AD2d 521; Maser v Maser, 226 AD2d 684; Manno v Manno, 224 AD2d 395.)

Accordingly, the motion is granted to the extent that plaintiff may enter a judgment against defendant in the amount of \$14,280.21. In all other respects, the motion is denied.

Dated: December 6, 2002

J.S.C.