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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. DARRELL L. GAVRIN MM PART 52  
Acting Justice

\_\_\_\_\_  
DEMETRIOS ZAFIRIADIS

Plaintiff,

- against -

HELEN ZAFIRIADIS

Defendant.  
\_\_\_\_\_

INDEX  
NUMBER ..14665/2000..

MOTION  
DATE ..7/31/2001..

MOTION  
CAL.NUMBER ...7...

The following papers numbered 1 to 9 read on this motion:

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Order/Show Cause-Affid(s)-Exhibits - Service.....	1-4
Notice of Motion/Affid(s)-Exhibits.....	
Notice of Cross Motion/Answering Affidavits-Exhibits.....	5-7
Replying Affidavits/Opposition to Cross Motion - Exhibits.....	8-9
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Defendant moves for *pendente lite* relief regarding, *inter alia*, maintenance; child support; custody/parenting time; exclusive use and occupancy of the marital residence; counsel fees; injunctive relief and an order permitting plaintiff to interpose a counterclaim for divorce.

Plaintiff cross-moves for an order imposing sanctions on defense counsel for alleged frivolous motion practice.

The motion and cross-motion are decided as follows:

Defendant's applications for an order restraining the plaintiff from petitioning the United States Bankruptcy Court for an order authorizing the sale of marital property located at 30-31 36<sup>th</sup> Street, Astoria, New York and for an order enjoining the plaintiff from "transferring, borrowing or encumbering" the aforementioned and another property are denied. There is a motion already pending before the Bankruptcy Court regarding the sale of this property which is part of the plaintiff's bankruptcy estate. The motion before this Court is an attempt to make an end run around that application. Defendant's recourse is to file opposition to the motion before the U.S. Bankruptcy Court.

Defendant's application for a order restraining the plaintiff from "transferring, borrowing or encumbering" a premises located at 25-58 43<sup>rd</sup> Street, Astoria, New York is also denied. The defendant has failed to show that the plaintiff has attempted or threatened to transfer or encumber that property. It fact, it is clear that the plaintiff's motion in Bankruptcy Court does not concern the property located at 25-58 43<sup>rd</sup> Street, Astoria, New York.

Plaintiff's claim that this Court is prohibited from making *pendente lite* awards of maintenance and child support because of the automatic stay that arose from the plaintiff's filing of a bankruptcy petition (See, 11 U.S.C.A. §362) is without merit. The automatic stay is subject to an exception and the statute could not be clearer. It provides that the filing of a petition for bankruptcy "does not operate as a stay . . . of the commencement or continuation of an action or proceeding for . . . the establishment of or modification of an order for alimony, maintenance, or support. . ." (11 U.S.C.A. §362[b][2][A][ii])

Plaintiff's assertion that the "[d]efendant does not benefit form the provisions of 11 USC §362[b][A][ii]" is unfounded and his claim that the "[w]ell settled case authority amply supports" his conclusions is equally baseless. Had the plaintiff analyzed more carefully the "well settled case authority" he cited, he would have realized those cases were hopelessly outdated.

All the cases cited by defendant date from 1987 and before. At that time only "the collection of alimony, maintenance, or support" was listed as an exception to the automatic stay. Courts regularly applied a restrictive interpretation to this provision and found applications to establish or modify support orders were not excepted from the automatic stay. (See *e.g.*, *Stringer v. Huet*, 847 F.2d 549 [9<sup>th</sup> Cir. 1988]) In the Bankruptcy Reform Act of 1994, however, Congress, clearly acting in response to the aforementioned cases, enacted a new exception that "specifies that the automatic stay does not apply to a proceeding that seeks . . . the establishment or modification of an order for alimony, maintenance, and support." (140 Cong. Rec. H 10,764 [daily ed. Oct. 4, 1994][report submitted with statements of Cong. Brooks]) Accordingly, this Court will address the defendant's applications for interim child support and maintenance.<sup>1</sup>

For some inexplicable reason, defendant did not submit a net worth statement with his cross-motion and affidavit in opposition. Furthermore, plaintiff's affidavit in opposition does not address his income, finances or expenses in any manner. The only financial information provided by plaintiff consisted of a photocopy of a disclosure statement and reorganization plan that was probably filed with the Bankruptcy Court. Although the document contains purported

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<sup>1</sup> Plaintiff's protestations regarding the enforcement of any support order issued by this Court is premature. Defendant has not sought an income deduction order or requested enforcement pursuant to DRL §244 or §245.

income statements for plaintiff's business, balance sheets and income projections, no supporting documentation is annexed to corroborate the alleged income figures. Furthermore, the latest income information is more than four months old. The Court finds the plaintiff's income disclosure to be insufficient and will, therefore, base its support awards on the needs of the infant issue and the plaintiff. (See, DRL §240[1-b][k]; Uniform Rules for Trial Courts 22 NYCRR §202.16[k][4],[5])

In determining the following award as to maintenance, the Court has also taken into consideration the standard of living of the parties established during the marriage, whether the plaintiff lacks sufficient property and income to provide for her reasonable needs and the circumstances of the case and of the respective parties (DRL §236-Part B-6[a])

Accordingly, the plaintiff is ordered to pay to the defendant, *pendente lite*, the sum of \$100.00 per week for maintenance.

The Court has further considered the following relevant factors in reaching the following determination as to child support, including the financial resources of the custodial parent, the physical and emotional health of the infant issue, the educational or vocational needs and aptitudes of said infant issue (where practical and relevant), the standard of living enjoyed by the infant issue, and the non-monetary contribution that each of the parties will make toward the care and well-being of the infant issue, (DRL §236-B[7][a]; see also, *Fieland v. Fieland*, 229 A.D.2d 465, 466 [2d Dept. 1996]; *Weber v. Weber*, 186 A.D.2d 189, 190 [2d Dept. 1992])

Accordingly, the plaintiff is ordered to pay, *pendente lite*, the sum of \$350.00 per week to defendant for support of the infant issue (DRL §236-B[7][a])

Said payments for maintenance and child support shall be made by check or money order and sent to defendant thereafter at her residence or such other place as she may designate in writing.

The award[s] of *pendente lite* child support/maintenance is/are only retroactive to the "date of the application therefor" (DRL § 236-B [6],[7]; *McNally v. McNally*, 251 A.D.2d 302 [2d Dept. 1998]) With respect to applications for temporary support, this phrase has been interpreted to mean the date of service of the motion (*Selznick v. Selznick*, 251 A.D.2d 489 [2d Dept. 1998]; *Dooley v Dooley*, 128 A.D.2d 669 [2d Dept. 1987])

The plaintiff is to be given credit for these amounts toward any final maintenance and/or child support award. (See, *Yunis v. Yunis*, \_\_\_ NY2d \_\_\_; NYLJ 10/22/99, p. 28, col. 3)

Defendant's application for temporary custody of the infant issue of the marriage is denied with leave to re-submit. This issue is neither addressed nor supported in any manner in her supporting

affirmation.

The application for exclusive occupancy is denied. Defendant has adduced no evidence that it is necessary to protect the safety of persons or property. (*Schadoff v. Schadoff*, 244 A.D.2d 473 [2d Dept. 1997]) Furthermore, defendant has failed to demonstrate that the plaintiff's presence in the residence has caused domestic strife and that he has voluntarily established an alternative residence. (*Preston v. Preston*, 147 A.D.2d 464 [2d Dept. 1989]) Indeed, defendant's affirmation in support does not address the issue at all.

The application for interim counsel fees is denied with leave to re-submit upon the filing of more substantial documentation. The defendant's attorney has not given a detailed breakdown of the services rendered to date and the hours spent on each service. (see, *Darvas v. Darvas*, 242 A.D.2d 554 [2d Dept. 1997]; *Hughes v. Hughes*, 208 A.D.2d 502 [2d Dept. 1994]; *Cronin v. Cronin*, 158 A.D.2d 447 [2d Dept. 1990]) Furthermore, defense counsel's affirmation fails to conform with Uniform Rule §202.16[k][3] in that it does not indicate the "moneys, if any, received on account . . . from the movant or any other person on behalf of the movant, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee"

With regard the pleadings issue raised, plaintiff shall, if he has not already done so, serve a verified complaint upon the defendant within twenty [20] days of the date of this order. Defendant shall serve her answer, including any counter-claim for divorce, no later than twenty [20] days after being served with the verified complaint.

In accordance with the Federal Welfare Reform Law amendment to Social Services Law §111-b-4-a and Family Court Act §440-5, this Court directs that a copy of this order and support information form shall be filed with the State Case Registry by the Clerk of the Court.

Plaintiff's cross-motion for sanctions is denied.

A copy of this order has been mailed to the parties and/or their respective counsel.

Dated: October ,2001

\_\_\_\_\_/s/\_\_\_\_\_  
**DARRELL L. GAVRIN, A.J.S.C.**