

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

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

WENDY FOMKIN

Plaintiff,

- against -

MICHAEL FOMKIN

Defendant.

INDEX
NUMBER ..29907/2001..

MOTION
DATE ..6/27/2002..

MOTION
CAL.NUMBER ...10...

The following papers numbered 1 to 8 read on this motion:

	PAPERS NUMBERED
Order To Show Cause-Affid(s)-Exhibits-Service.....	1-5
Notice of Motion/Affid(s)-Exhibits.....	
Notice of Cross Motion/Affidavits in Opposition-Exhibits.....	6-8
Replying Affidavits-Exhibits.....	
Other.....	

Plaintiff moves for *pendente lite* relief regarding, *inter alia*, maintenance; child support; custody/parenting time; health, life, automobile insurance; exclusive use of an automobile; counsel fees; expert accountant and/or appraisal costs and injunctive relief.

Defendant cross-moves for an order dismissing the action: [1] on the ground there is a prior divorce action pending in New Jersey, [2] since "no grounds exist with regard to the jurisprudence of the State of New York which would allow the plaintiff to become divorced from the defendant," [3] as there is prior child support proceeding pending in the "infant's home state of the State of New Jersey" and [4] on the ground that the summons in this action was not served within the time required under CPLR §306-b.

The motion and cross-motion are decided as follows:

Preliminarily, the Court will address the procedural objections raised by the defendant in his cross-motion to dismiss.

Defendant claims that there is a prior action for divorce pending between the parties in New Jersey. Pursuant to CPLR §3211[a][4], "in order to sustain a claim that another action is pending . . . the movant must establish that the other action was commenced first." (*Reckson Assocs. Realty Corp. v. Blasland, Bouck & Lee*, 230 A.D.2d 723 [2d Dept. 1996]) Defendant did not annex any documentation to substantiate that there is a divorce action pending in New Jersey that was commenced prior to this action. Accordingly, this branch of defendant's cross-motion to dismiss is denied.

Concerning the defendant's claim that "no grounds exist with regard to the jurisprudence of the State of New York which would allow the plaintiff to become divorced from the defendant," as best as the Court can comprehend the defendant seeks to dismiss this divorce action for failure to state a cause of action. (CPLR §3211[a][7]) As only a summons with notice has been served and filed in this case, this application is denied as premature. A summons with notice does not contain causes of action, only "a notice stating the nature of the action and the relief sought" (CPLR §305[b]) Moreover, as there is no indication from the defendant that he served a demand for a complaint or notice of appearance, plaintiff's time to serve a complaint has not even begun to run. (*See*, CPLR §3012[b]) Accordingly, this branch of defendant's cross-motion to dismiss is denied.

The defendant does not cite, and this Court is not aware of any statute, rule or case law which proscribes it from having jurisdiction over an action for a divorce when there is a prior child support proceeding in another state pending between the parties. Accordingly, this branch of the defendant's cross-motion to dismiss is denied.

The defendant's assertion that the summons with notice was not served within the 120 day time period prescribed under CPLR §306-b is incorrect. The Court's file indicates that the summons with notice was filed by the plaintiff on November 26, 2001. Annexed to the plaintiff's order to show cause is an affidavit of service that states the defendant was served with the summons with notice on January 24, 2002, approximately 60 days after the action was commenced. Accordingly, that branch of the defendant's cross-motion to dismiss is denied.

The defendant failed to substantively oppose the application for *pendente lite* custody of the parties' infant issue, Brandon Fomkin, age 8 and Ashley Fomkin, age 3. There has also been no indication that the defendant has affirmatively sought custody of the children since the plaintiff left the marital residence in June of 2000. Accordingly, the plaintiff is awarded temporary custody of the infant issue of the marriage. Defendant is awarded liberal parenting time with the infant issue which shall be agreed upon between the parties.

The parties shall report *forthwith* to Andrew Weinstein, MSW, the Court's Family Counseling and Case Analyst for the purpose of resolving, either *pendente lite* or permanently, their dispute concerning the

custody and/or visitation issues raised in this matrimonial action. **Mr. Weinstein can be reached at his Court office number (718) 520-3381 on Monday, Thursday and Friday, or leave a Voice Mail message to arrange such consultation.** Should a resolution not be reached with Mr. Weinstein concerning an interim visitation schedule the Court will order the same.

Turning to the financial aspects of the plaintiff's order to show cause, the Court notes that the defendant has not annexed a net worth statement nor any other financial information to his cross-motion. Moreover, he fails to substantively address the majority of the plaintiff's requests for *pendente lite* relief in his affirmation in opposition. Accordingly, the Court will base its support awards on the needs of the plaintiff and the infant issue. (See, DRL §240[1-b][k]; Uniform Rules for Trial Courts 22 NYCRR §202.16[k][4],[5])

In determining the plaintiff's application for interim 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 defendant is ordered to pay to the plaintiff, *pendente lite*, the sum of \$250.00 per week for maintenance.

The Court has also considered the following relevant factors in reaching its 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 defendant is ordered to pay, *pendente lite*, the sum of \$485.00 per week to plaintiff 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 plaintiff thereafter at her residence or such other place as she may designate in writing.

The awards of *pendente lite* child support and maintenance 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]), which in the present case is May 30, 2002. As of the date of this decision, therefore, retroactive child support is \$3,395.00 (7 weeks x 485.00) and retroactive maintenance is \$1,750.00 (7 weeks x 250.00) Accordingly, the plaintiff shall pay to the defendant, *forthwith*, the sum of \$5,145.00

The defendant is to be given credit for these amounts toward any final maintenance and/or child support award. (See, *Yunis v. Yunis*, 94 NY2d 787 [1999])

Defendant is further directed to obtain and maintain, *pendente lite*, major medical, dental and eye care coverage for the benefit of the plaintiff and the infant issue (see, *Zerilli v. Zerilli*, 110 A.D.2d 634 [2nd Dept. 1985]; *Erdheim v. Erdheim*, 110 A.D.2d 803 [2nd Dept. 1984])

The defendant is also directed to maintain, *pendente lite*, all existing life insurance policies naming the plaintiff and infant issue as beneficiaries.

The plaintiff is awarded *pendente lite*, exclusive use of the parties' 1994 Jeep Laredo.

The plaintiff's application for the defendant to pay for the automobile insurance costs for the 1994 Jeep Laredo is denied.

The application for interim counsel fees is denied with leave to re-submit upon the filing of more substantial documentation. The plaintiff's attorney has not provided the Court with 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 [2nd Dept. 1994]; *Cronin v. Cronin*, 158 A.D.2d 447 [2d Dept. 1990])

The plaintiff's application for an award of appraisal fees is granted to the extent that counsel for each party shall submit to the Court, by August 23, 2002 the names of three proposed appraisers to evaluate the defendant's interest in the businesses e-model and/or Option Talent Group. The Court will select an appraiser from the submitted names. The cost of the appraiser shall be paid by the plaintiff subject to reallocation at trial.

The defendant his agents, servants and/or employees, are enjoined, restrained, and prohibited from transferring, selling, mortgaging, hypothecating, encumbering, conveying, or otherwise dissipating or diminishing, except in the ordinary course of business, any and/or all property and assets of the parties, marital or personal, until further order of the Court.

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.

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

Dated: July ,2002

DARRELL L. GAVRIN, A.J.S.C.