

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 2, 2023

535431

GREG HARDY,

Respondent,

v

MEMORANDUM AND ORDER

BARBARA HUMMEL,

Appellant.

Calendar Date: September 5, 2023

Before: Lynch, J.P., Clark, Aarons and Ceresia, JJ.

Harris Beach PLLC, White Plains (Brian D. Ginsberg of counsel), for appellant.

Law Firm of Susan BetzJitomir, Bath (Susan M. BetzJitomir of counsel), for respondent.

Aarons, J.

Appeal from an order of the Supreme Court (Christopher P. Baker, J.), entered April 7, 2022 in Schuyler County, which partially granted plaintiff's motion to enforce the parties' divorce decree.

Plaintiff (hereinafter the husband) and defendant (hereinafter the wife) were married in Indiana in 1992, but they later divorced. As part of the divorce, the parties entered into a settlement agreement, which provided that the wife would pay the husband \$70,000 in various installments, the total of which would be paid, as relevant here, within one year after the parties signed the agreement. The agreement further stated that the wife would place a property for sale and that the husband would be entitled to 25% of the profits from that sale. The agreement, however, did not specify when the wife would

have to place the property for sale. The parties ultimately signed the agreement on January 23, 1998, and an Indiana court ratified it four days later in a decree.

In December 2018, the husband commenced a plenary action alleging that the wife breached the settlement agreement by failing to pay him the \$70,000 and to sell the property. In connection with this action, Supreme Court (Reynolds Fitzgerald, J.) decided various motions, including the wife's motion to dismiss the complaint and the husband's motion to enforce the Indiana decree, in a single order. The court, among other things, granted the wife's motion to dismiss and denied the husband's motion without prejudice on the basis that the decree had not been filed in New York. After the husband filed the decree with the Schuyler County Clerk (*see* CPLR 5402 [a]), the husband moved to enforce it and for counsel fees. Supreme Court (Baker, J.) granted the motion to the extent of awarding the husband \$70,000 and directing the wife to place the subject property for sale within 90 days of the date of the court's order. The wife appeals.

"Where . . . a stipulation survives a judgment of divorce . . . it is to be treated as an independent contract, subject to the principles of contract interpretation" (*Wenskoski v Wenskoski*, 265 AD2d 635, 636 [3d Dept 1999] [citation omitted]; *see Su v Su*, 268 AD2d 945, 946 [3d Dept 2000] *lv denied* 95 NY2d 752 [2000]). This is not the case here. The record discloses that the settlement agreement was approved by the Indiana court and "made a part of" the Indiana decree. The decree further directed that "[e]ach of the parties is bound by the terms and conditions of the [a]greement as an [o]rder of this [c]ourt." Given that the settlement agreement merged into the decree, the agreement "cease[d] to exist as a separately enforceable contract" (*Rainbow v Swisher*, 72 NY2d 106, 109 [1988]).

That said, a party may apply to a court for a money judgment when a spouse "defaults in paying any sum of money as required by the judgment or order directing the payment thereof" (Domestic Relations Law § 244). "Domestic Relations Law § 244 encompasses arrears in any payments that should have been paid pursuant to a judgment or order" (*Van Gorder v Van Gorder*, 221 AD2d 858, 858 [3d Dept 1995]). As to the \$70,000 payment, the decree makes it clear that the wife was required to pay a total of \$70,000 to the husband, as relevant here, within one year after the parties signed the settlement agreement. There is no indication in the record that such payment was made within that one-year period. Although the wife argues that the husband's attempt at seeking the \$70,000 payment is time-barred based upon the statute of limitations provided by CPLR 213 (2), such argument is without merit (*see Sangi v Sangi*, 196 AD3d 891, 892-893 [3d Dept 2021]; *Holsberger v Holsberger*, 154 AD3d 1208, 1211 [3d Dept

2017]; *Schnee v Schnee*, 110 AD3d 427, 429 [1st Dept 2013]; *Bayen v Bayen*, 81 AD3d 865, 866 [2d Dept 2011]). Accordingly, Supreme Court correctly granted that part of the husband's motion seeking the \$70,000 payment.

Regarding the directive that the wife place the property for sale and give the husband 25% of the profits from that sale, Supreme Court noted that there was no specific time by when the wife had to place the property for sale. The court nonetheless directed the wife to place the property for sale within 90 days of the date of the court's order. In so doing, the court relied on a principle of contract law – namely, that the law implies a reasonable time when a contract is silent on the time of performance (*see generally Savasta v 470 Newport Assoc.*, 82 NY2d 763 [1993]). This was error. As noted, the settlement agreement no longer existed upon its merger into the decree and, therefore, contract principles do not apply.

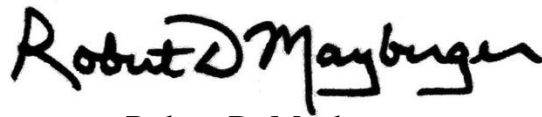
Notwithstanding the foregoing, Supreme Court had the authority to "determine any question as to the title to property" (Domestic Relations Law § 234). That said, in specifying a time by when the wife had to place the property for sale, the court modified the terms of the decree. Although the husband did not explicitly request to modify the decree, the court nonetheless could make such determination "as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties" and "subsequent to final judgment" (Domestic Relations Law § 234; *see Vest v Vest*, 50 AD3d 776, 777 [2d Dept 2008]). For this reason, and considering the parties' temporary reconciliation and the passage of time since the entry of the decree in Indiana, the directive ordering the wife to place the property for sale within 90 days of the court's order will not be disturbed.

Finally, to the extent that the wife contends that collateral estoppel bars the requested relief by the husband, this contention is not properly before us. In this regard, the wife did not rely on collateral estoppel when opposing the husband's motion (*see Garrison v Garrison*, 52 AD3d 927, 928 [3d Dept 2008]). The wife's remaining assertions have been considered and are unavailing.

Lynch, J.P., Clark and Ceresia, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court