

## MATRIMONIAL

# A Motion for All Seasons: Summary Judgment in Matrimonials

By Vesselin Mitev

Most often flung about in commercial disputes and personal injury cases, yet available to virtually any civil proceeding under the (New York) sun, the summary judgment motion can be a powerful cudgel in cleaving off some, if not all, disputed issues, in a matrimonial action.

The jump-off point in any matrimonial is typically the preliminary conference, where courts invite the parties to chart their initial litigation course on a pre-printed form, by laying out areas that are not disputed or consented to, e.g., the plaintiff is taking the divorce on “no fault” grounds, and those that are in contention, such as title to a property, maintenance, and/or equitable distribution.

The P.C. form then is the first chance to start building a summary judgment case, since it will be reduced to an order at the first appearance. Any

issues in dispute should be set forth in some detail, e.g., “Plaintiff contends that the home at 123 America Lane currently owned by the parties as husband and wife is her separate property;” since the P.C. forms usually provide limited discovery schedules as well, narrowly tailored discovery demands going straight to the heart of the issues can and should be inserted, e.g.: “Plaintiff to provide any and all documents plaintiff will rely on to support her claim that the home at 123 America Lane is her separate property.”

The moment the judge signs off on the P.C. form, plaintiff has now become bound, under a court order, to come forward with her proof on this issue. Should plaintiff fail to comply with the order, this shortcut the (likely inevitable) motion to compel under



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CPLR 3124 and the concomitant request to strike the pleadings and/or issue a default judgment under CPLR 3126 (rarely granted, even in the most egregious cases, and even then, typically conditionally).

Assuming discovery proceeds in typical breakneck, timely and orderly fashion<sup>1</sup>, depositions are held, and post-deposition demands are served and answered, and the case languishes in pre-trial purgatory, and there are issue(s) still in contention, a motion for summary judgment may be prudent.

In the example above, whether or not the property is marital and thus subject to equitable distribution, or separate, as the plaintiff has contended, is an appropriate issue for summary judgment<sup>2</sup>.

Under CPLR 3212(a), any party can move for summary judgment at any time “after issue has been joined;” this

is another reason why the P.C. order is important, as in matrimonial actions, service of the complaint and/or the answer may sometimes linger on for months while the parties either attempt to settle or go through the motions of being trial ready; it is not uncommon for the answer to be filed with the Note of Issue, for example.

But both parties sign the P.C. order, and, typically, agree to the grounds; thus, there has been de facto joinder of issue, and even if the pleadings have yet to be served/responded to, case law suggests that parties who chart a pre-joinder course of litigation for summary judgment will be deemed to have waived the statutory mandate of joinder of issue before consideration of a CPLR 3212 motion.<sup>3</sup>

Of course, the best practice is to have the pleadings and include them (as failure to include the pleadings is a

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fatal defect to a summary judgment motion). CPLR 3212(b) mandates that a motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.”

Thus an affirmation by an attorney lacks probative value and is not properly considered on a summary judgment motion, since by definition, the attorney has no personal knowledge of the under-

lying facts. An attorney affirmation as to a written admission (an affidavit by the partie(s) or their signatures on the P.C. order, for proving the date of the marriage.

CPLR 3212(b) provides that a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.”

The litany of standard defenses to a summary judgment motion including the truism that it is a drastic remedy that is only appropriate where there is no doubt that there are no triable issues of fact, as it deprives a litigant of their day in court, should be expected to be on full display, especially in a matrimonial. Two other

judgment, will also presumably be trotted out in opposition.

Nonetheless, a cut and dry issue like whether or not property, titled in both parties’ names, acquired during the marriage, and improved upon by the parties is marital property subject to equitable distribution can and should be determined on summary judgment. The proofs are not subject to interpretation, and disproving plaintiff’s contention that the property is her separate property should be mathematical: a deed is prima facie best evidence of property ownership, the date on the deed post-dates the marriage, the deed lists the parties as owning the property as husband and wife (or tenants by the entirety). The

One statutory exception is that under subdivision (e), the court may not grant summary judgment to the non-moving party in a matrimonial, even if said party merely requests it in opposition. Thus the best defense in a matrimonial summary judgment case is to simply oppose, by affidavit and supporting proof, the relief sought.

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