

**COURTESY COPY**

At an I.A.S. Trial Term, Part 5T of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 17<sup>th</sup> day of June, 2014

**P R E S E N T :**

**HON. DELORES J. THOMAS, J.S.C.**

-----X

**Plaintiff,**

**-against-**

**Defendant.**

-----X

**Index No.:**

**DECISION/ORDER**

**Mot. Seq. # 1**

Recitation as required by CPLR § 2219(a), of the papers considered in the review of [this/theses] motion(s).

Papers

Numbered

Order to Show Cause/Cross Motion and Affidavits (Affirmations) Annexed \_\_\_\_\_  
Answering Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

\_\_\_\_\_ 1 \_\_\_\_\_  
\_\_\_\_\_ 2 \_\_\_\_\_  
\_\_\_\_\_ 3 \_\_\_\_\_

Upon the foregoing cited papers, in this matrimonial action, the decision/order on this motion is as follows:

The plaintiff, \_\_\_\_\_ ("Plaintiff") moves by Notice of Motion filed October 24, 2013, and made returnable on December 12, 2013, seeking an order awarding him \$4,963.13 per month as non-taxable maintenance, retroactive to February 25, 2013, based upon the date that the parties agreed to in the Preliminary Conference Stipulation/Order ("PC"), and an award of \$35,000 in interim counsel fees.

The defendant, \_\_\_\_\_ ("defendant"), opposes the motion.

The parties appeared before this court on February 25, 2013 for their PC and agreed that their respective requests for *pendente lite* relief would be retroactive to the date of February 25, 2013. The court has checked the County's clerk's records and it does not appear that a complaint was filed, although defendant's Verified Answer with Counter Claim(s) makes reference to a Complaint.

In a Stipulation dated December 4, 2013, the parties adjourned the instant motion to January 30, 2014. The Court's records indicates that the motion was submitted. However, a decision was not issued on the *pendente lite* motion and the lack of a decision was not brought to the Court's attention at the pretrial conference. The lack of a decision on the *pendente lite* motion was just raised by plaintiff's trial counsel on the eve of trial. The Court shall now render a decision on the outstanding motion as it is required to do.

### **Factual History**

The parties were married on April 22, 2000. There is one minor child of the marriage, to wit: \_\_\_\_\_, born \_\_\_\_\_. The minor child currently resides with the defendant in the former marital residence. The parties separated on or around August 1, 2010 and have lived separate and apart since that time. The plaintiff is 39 years of age as set forth in his Statement of Net Worth sworn to on October 9, 2013. Defendant's age is listed as 46 years old. The plaintiff is a national of Scotland, United Kingdom and the defendant is a United States citizen.

Both parties are lawyers and admitted to practice in the State of New York. The plaintiff has an LL.B. from the University of Edinburgh and an LL.M. from the University of Pennsylvania and had been employed as an attorney at \_\_\_\_\_ LLP. The defendant

earned her J.D. degree from Rutgers School of Law and is employed as an attorney at [redacted], Inc.

The plaintiff was apparently fired from [redacted] in June 2012. He suffered a stroke in October 2012. The plaintiff was hospitalized for around 3½ weeks and thereafter transferred to a rehabilitative facility to begin his rehabilitation. While undergoing rehabilitation, the plaintiff learned that he also suffers from two brain aneurysms. Due to the stroke, the plaintiff did not return to work and has begun to collect Social Security Disability in the sum of \$2,577 per month as of June 2013. He was given a lump sum amount of \$7,731 for the period of March 2013 through May 2013.

The plaintiff moved back to Scotland in June 2013 and lives there with his father and his friend, [redacted]. Since moving back to Scotland, the plaintiff has renounced his Green Card/legal permanent residency in the United States.

As indicated, the defendant still works as an attorney and her 2012 W-2, attached to the plaintiff's moving papers, shows an unadjusted income of \$235,000.12.

***Plaintiff's Contentions***

The plaintiff argues that due to his stroke, he is unable to work and is currently under medical care and still rehabilitating. He claims that the defendant is the monied spouse as is evident by her Statement of Net Worth which shows that she has \$450,000 in assets solely in her name; her W-2 demonstrating her income; and her ability to pay the mortgage on the martial residence while still contributing \$17,000 to her 401k plan and \$4,500 to her Cafe125 plan offered by her job.

The plaintiff alleges that his financial situation is so dire even the defendant agreed to allow him an advance against his equitable portion of her Charles Schwab account in the sum of \$15,000. The plaintiff further argues that he had to take a \$7,000 loan from his father.

The plaintiff alleges that up to the time of the instant motion, he had paid his attorneys \$21,471.50 pursuant to his retainer agreement, and that he is currently seeking the sum of \$35,000 as an interim award of fees. He further seeks to have the defendant be fully responsible for all of his legal fees during the pendency of this action.

***Defendant's Contentions***

The defendant states that she is stunned that three and a half years post-separation, the plaintiff seeks spousal support. The defendant argues that in 2012, the plaintiff earned over \$284,000 as an attorney, and that since June 2012, his basic expenses have been shared with his paramour, [redacted] who lives with him. The defendant indicates that Ms. [redacted] and the plaintiff started living together in June 2012 and commingled their money. The defendant argues that the presumptive award of maintenance that the plaintiff seeks would be unfair and inappropriate. The defendant states that she is the sole support for the parties' 11 year old daughter and that to apply the guideline amount would make it necessary for her to further reduce their daughter's standard of living and further disrupt the continuity in her educational and home environment. The defendant argues that the plaintiff is receiving in kind support from his father and direct support from [redacted].

The defendant argues that the plaintiff is capable of work, albeit not at the same level as before the stroke. The defendant argues that the plaintiff has retooled himself as a

blogger and/or writer as posted in his blog and announced a public reading at a writer's workshop in Brooklyn in January 2013 where the plaintiff performed.

### ***Plaintiff's Reply***

The plaintiff further argues that the defendant earns enough money to support herself, their daughter, and the marital residence, and is still able to save money so much so that her liquid funds increased approximately \$15,000 and her retirements funds increased approximately \$150,000 since January, 2012. The plaintiff argues that since the defendant's November 21, 2013 Statement of Net Worth, the defendant currently has access to approximately \$50,000 in liquid funds and close to \$500,000 in retirement assets. The plaintiff argues further that the defendant's monthly expenses are inflated and that the defendant fails to disclose that their daughter will soon collect social security payments based on his disability.

The plaintiff indicates that he is not paid for his blog but that this helps him in his rehabilitation, and plaintiff still maintains that he is unable to resume competitive employment.

## **Discussion**

### ***Maintenance***

*Pendente lite* maintenance applications must be determined pursuant to the formula set forth in DRL§236[B] (5-a). This formula requires the court to begin by determining the parties' respective gross incomes as was reported or should have been reported in their most recent Federal tax returns, less FICA and New York City taxes. This will determine which litigant is the payor and which is the payee spouse. Once this is done, the court must make two alternate calculations based on the payee's income and the payor's income up to

an initial cap of \$543,000. First, the court calculates the difference between 30% of the payor's income and 20% of the payee's income. Second, the court calculates 40% of the parties' combined income less the payee's income. The lower of the results of these two calculations is the "guideline amount of temporary maintenance". Where the guideline amount does not exceed the statutory cap, the court must consider whether the guideline amount, which is "the presumptive award," would be "unjust or inappropriate" and may adjust the presumptive award of temporary maintenance as it finds proper, based upon its consideration of 17 enumerated factors set forth in the statute (DRL §236[B] (5-a) (e) (1)).

In determining the parties' gross income, the court is required to establish the parties' support obligation "as a function of the income that is, or should have been, reflected on the party's most recently filed income tax return" (see *Wallach v Wallach*, 37 AD3d 707, 708 [2d Dept 2007]; DRL §240(1-b)(b)(5)(i)). Where the record demonstrates that a party's income tax return does not reflect the party's actual income or demonstrated earning potential, the court may impute income to establish the party's support obligation (*id.* at 708; see also *Bittner v Bittner*, 296 AD2d 516, 517 [2d Dept 2002]). For cases where the court is presented with insufficient evidence to determine gross income, or where a party defaults, DRL §236[B] (5-a) (g) requires the court to issue a temporary maintenance award based upon the needs of the party seeking maintenance, or the standard of living of the parties prior to commencement of the divorce action, whichever is greater.

If the plaintiff receives direct or in direct support from his father or , the value of same can be imputed to him as income. However, the court does not have enough facts herein to support the imputation of income to the plaintiff. Therefore, for purposes of this motion, the court must accept the income for plaintiff as reflected in his

award letter from the Social Security Administration ("SSA"). Thus, in the instant case, the Court determines plaintiff's income for temporary maintenance calculation purposes to be \$30,924 with no deductions for FICA or local taxes. The court determines defendant's income to be \$219,141 (\$235,000.2-\$15,859.18 with deductions for FICA and local taxes). Calculation A (30% of Payor's income minus 20% of Payee's income) equals \$59,557.50. Calculation B (40 % of Combined Income minus Payee's Income) equals \$69,102. The guideline amount is the lesser of Calculation A and B and is therefore \$59,557.50 yearly or \$4,963.13 per month. The court finds that the presumptive amount is unfair and unjust. The award is adjusted downward due to the court's consideration of factors b, c, e, l, n, and q. Specifically, the Court takes into account the relatively young age of both litigants, the past and current earning potential of the parties, the allegation that there was wasteful dissipation of marital property, the need to pay for the private education of the parties' daughter, the lack of child support being paid by the plaintiff, and that the defendant pays the mortgage and all costs associated with the marital residence. The court notes that the defendant is the sole supporter of the parties' daughter, and even if their daughter receives derivative social security, the plaintiff still has a child support obligation as benefits paid by an agency such as the SSA is not child support (*see Graby v Graby*, 87 NY2d 605 [1996]; *Maksimyadis v Maksimyadis*, 275 AD2d 459 [2d Dept 2000]; see also *AE v JIE*, 179 Misc2d 663 [Bx Sup Ct 1999]). Furthermore, the Court notes that while the defendant may have substantial retirements savings and other assets, it is well settled that *pendente lite* support payments should not be made from marital property (see *Azizo v Azizo*, 51 AD3d 438, 440 [2008]; *McInnis v McInnis*, 23 AD3d 241, 242 [2005]; *Elkaim v Elkaim*, 176 AD2d 116, 118 [1<sup>st</sup> Dept 991], *lv dismissed* 78 NY2d 1072 [1991]).

The plaintiff is awarded \$3,000 per month in interim maintenance. The award is retroactive to the February 25, 2013 date agreed to by the parties in their PC order. The determination of how arrears are to be paid is held in abeyance pending conference with the parties as to the total of same and a determination as to whether any adjustment is due to the defendant based upon sums voluntarily paid by her during the pendency of this action. The first payment of the current award of maintenance is due on June 30, 2014 and further payments shall continue on the fifteenth of each month thereafter until further order of the Court.

### ***Counsel Fees***

Domestic Relations Law §237(a) authorizes the Court to direct either spouse to pay counsel fees in order to enable the other spouse to “carry on or defend the action... as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the respective parties” (see *Johnson v Chapin*, 12 NY3d 461, 467 [2009]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *Dodson v Dodson*, 46 AD3d 305, 305 [1st Dept 2007]). Domestic Relations Law §237(a), as amended in 2010, creates “a rebuttable presumption that counsel fees shall be awarded to the less monied spouse.”

Interim counsel fees are awarded to level the playing field and “prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation” (*Gober v Gober*, 282 AD2d 392, 393 [1st Dept 2001], quoting *O’Shea v O’Shea*, 93 NY2d 187, 193 [1999]; see also *Prichep v Prichep*, 52 AD3d 61, 65 [2d Dept 2008]). Thus, interim fees are generally warranted ‘where there is a significant disparity in the financial circumstances of the parties’ (*Prichep*, 52 AD3d at 65;

see also *DelDuca v DelDuca*, 304 AD2d 610, 611 [2d Dept 2003]; *Celauro v Celauro*, 257 AD2d 588, 589 [2d Dept 1999]]. “[U]nlike a final award of counsel fees, a detailed inquiry or evidentiary hearing is not required prior to the award of interim counsel fees” (*Isaacs v Isaacs*, 71 AD3d 951, 951 [2d Dept 2010]; see also *Prichep v Prichep* at 65; *Singer v Singer*, 16 AD3d 666, 667 [2d Dept 2005]).

Based upon the credible income of the parties as found herein, the defendant is the monied spouse. However, contrary to the plaintiff’s argument, *pendente lite* awards are to be paid from the party’s income and not the assets which may or may not be subject to equitable distribution. Based upon the income of the defendant, which has now been reduced by the maintenance award to the plaintiff, plaintiff is awarded \$25,000 in interim counsel fees to be paid directly to plaintiff’s counsel in two installments of \$12,500 each. The first payment is to be made within ten (10) days of this decision and order and the second payment is to be made within thirty (30) days of the date of this decision and order. The award of interim counsel fees is subject to reallocation at trial. Upon defendant’s failure to make either payment, the clerk of the court is directed to enter judgment upon plaintiff’s counsel’s affirmation of default without further notice to the defendant or her attorney.

### Conclusion

Accordingly, it is hereby **ORDERED** that the plaintiff is awarded \$ 3,000 per month in interim maintenance. Said award is retroactive to February 25, 2013. The payment of arrears is held in abeyance as provided herein; and it is further

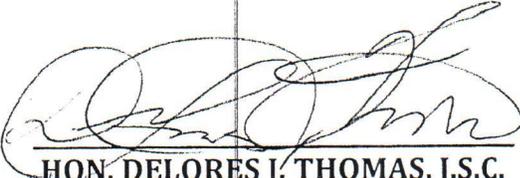
**ORDERED** that plaintiff is awarded \$25,000 in interim counsel fees payable as provided herein; and it is further

**ORDERED** that the parties shall appear in Part 5T on June 18, 2014 at 9:30am for commencement of trial.

**Any issue raised and not specifically addressed by this decision/order is denied.**

This constitutes the decision and order of the Court.

**ENTER :**



**HON. DELORES J. THOMAS, J.S.C.**

**HON. DELORES J. THOMAS**