

At a term of the IDV Supreme Court of the State of New York, held in and for the County of Westchester, at Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, NY 10601, on the 8th day of March, 2023.

PRESENT: Hon. Susan M. Capeci, A.J.S.C.

ALLAN KASSENOFF,
Plaintiff,

DECISION AND ORDER
(Mot. Sequence #70)

Index #58217/2019

-against-

CATHERINE KASSENOFF,
Defendant.

In this matrimonial proceeding, the defendant wife makes this motion by Order to Show Cause, signed on January 9, 2023, seeking: 1) an award of counsel fees in the amount of \$150,000 to either be awarded to her directly as *pro se* custody counsel, or alternatively, to be held in escrow by her counsel Mr. Wiederkehr to be released upon her retention of custody counsel; 2) a further award of counsel fees in the amount of \$150,000 to be used in connection with the matter of Kusnetz v Kassenoff, Index #60707/2021; and 3) an additional award of counsel fees in the amount of \$150,000 to be used for financial issues. The plaintiff husband has submitted papers in opposition to the motion, and the defendant has submitted a Reply. The parties were each given leave to submit supplemental papers following appellate court decisions rendered on two outstanding appeals that had been filed in this case. The Court now finds as follows.

As the parties are aware, this matter was transferred to the IDV part as of February 8, 2022. The parties were married November 13, 2006. This divorce action was commenced May 24, 2019, and has been highly contested and heavily litigated, with 72 motions having been filed in the case to date. Both parties are attorneys, with the husband employed as a partner in Greenberg Traurig LLP, with his latest reported earned income being \$873,986 for the year of 2022. The wife is presently employed as a contract attorney, earning approximately \$1,000 per week, as per her most recent Statement of Net Worth. She had previously been employed for a number of years as counsel to the New York Power Authority, earning approximately \$170,000 annually, until she lost that job during this divorce action.

Currently, the wife has retained counsel Evan Wiederkehr, Esq. who is representing her on financial matters. She has another attorney, Andrew Frisch, Esq., (a former colleague of hers) working at reduced rates, who represented her in counsel fee proceedings with the former AFC. She also has another retained counsel, Harold Burke, Esq., who represents her on appellate matters. The wife has been representing herself as to child custody matters.

During the pendency of this case, since 2019, the wife has been awarded a total of \$250,000 in counsel fees; \$100,000 by Order dated June 15, 2020 [Koba, J.], and \$150,000 by Order of this Court dated April 4, 2022. By contrast, the husband has paid his counsel a total of \$987,557 to date, as stated in his opposition papers, and he indicates that he owes more. The wife seeks counsel fees to level the playing field to enable her to effectively litigate this matter. She also contends that she has been unable to secure custody counsel in this highly litigated case, without having been awarded

funds to do so in advance. She seeks compensation as an attorney for having acted as her own counsel, *and/or* an award of fees to obtain an attorney to represent her as to custody.

The wife additionally seeks further fees of \$150,000 to defend herself in a lawsuit that has been brought against her for unpaid counsel fees, by a former attorney of hers in this case. The wife asserts that this former attorney, Ms. Kusnetz, overcharged her by assessing her over \$275,000 in fees in under 6 months of representing her.

Lastly, the wife seeks further counsel fees of \$150,000 to allow her to continue paying her attorney on financial matters. She argues that the husband has increased the litigation costs in this case by unilaterally placing the mortgage on their jointly owned home in forbearance, to her financial detriment. In order to stop him from doing so and to pay for the resulting mortgage arrears and costs, she was required to engage in motion practice. In addition, the wife further contends that she alone paid counsel to conduct a hearing on the former AFC's counsel fees [after the former AFC was removed from this case for cause], which fees were denied. The outcome of this hearing benefitted the husband in that he was not required to pay for over \$90,000 in AFC fees, although the wife was the only party who incurred the costs to litigate the matter.

The husband opposes the motion for any award of fees to the wife, contending that the wife is "trying to "destroy him financially and emotionally." He refers to the July 2020 Decision and Order of Judge Koba, that awarded him temporary custody of the parties' three children, to document the wife's inappropriate behavior. He also points to her many Facebook posts regarding him and this case, her filing of lawsuits against him, her contacting his employer with embarrassing information, among other acts, as a

basis for denying her fees in this case. He also argues that she could be earning in the hundreds of thousands of dollars as an experienced attorney. In his supplemental Affirmation and related documents, the husband also contends that the Court should consider the high costs associated with the wife's appeals of court Orders in this case, which he argues were frivolous and filed in bad faith, as a further reason to deny her motion for counsel fees. He also argues she has filed actions against him and his counsel in federal court, which he has had to spend funds to defend against.

While the husband contends that the wife is overly litigious both with respect to this case and outside of it, and that she should not be awarded any further counsel fees on that basis, it is this Court's view that both parties have engaged in highly contentious, litigious behavior in this case, including since the last award of counsel fees made to the wife on April 4, 2022.

Moreover, while it is true that the wife appealed two of the decisions issued by the Supreme Court (Koba, J.) in this case, this Court does not agree with the husband's characterization, in his supplemental Affirmation, that such appeals were frivolous. The wife's appeal pertaining to the Decision and Order of Judge Koba dated August 10, 2021, which prohibited the parties from "criticizing, denigrating or disparaging the other on any form of social media" and additionally precluded her from communicating with anyone associated with the husband's employer [which was also her prior employer] about the divorce and related issues, was, in fact, partially modified by the Appellate Division. The Appellate Division had also granted the wife's motion for a stay of that Order's enforcement during the pendency of the appeal. Further, the husband even referred to this as a "landmark" holding in his correspondence with Court [NYSCEF doc.

3007], which for the first time “upheld a narrowly tailored order prohibiting social media posting in a divorce action.” The other appeal filed by the wife involved the legal issue of the confidentiality of certain communications utilized by the husband in this case, based upon whether an attorney-client relationship existed between the wife and her friend, who was also an attorney. The Appellate Division decided that motion in the husband’s favor.

Although the husband argues that the wife is capable of earning hundreds of thousands of dollars a year as a seasoned attorney, the fact remains that she was earning a salary of \$170,000 at her previous job, from which she was terminated. She has a demonstrated history of significant health issues, including having had breast cancer twice, and other related surgical complications. In fact, the wife acknowledges she was awarded \$288,000 as compensation for these health problems from the 9/11 Victim’s Compensation Fund as a first responder. Considering all of the assets available to each of the parties, and their incomes, there remains a major disparity between their financial circumstances, with the wife being the less monied spouse.

An award of counsel fees pursuant to Domestic Relations Law § 237(a) is a matter within the sound discretion of the trial court, and the issue “is controlled by the equities and circumstances of each particular case” (Morrissey v Morrissey, 259 AD2d 472, 473; see Timpone v Timpone, 28 AD3d 646 cited in Prichep v Prichep, 52 AD3d 61, 64–65 (2d Dept 2008)). In determining whether to award fees, the court should “review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties’ positions” (DeCabrera v Cabrera–Rosete, 70 NY2d 879, 881 (1987)). The court may

also consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (Prichep v Prichep, 52 AD3d 61, 64–65, supra).

Domestic Relations Law § 237(a) provides that "[t]here shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse" (DRL § 237) (a)). "The purpose of Domestic Relations Law § 237(a) is to redress the economic disparity between the monied spouse and the non-monied spouse by ensuring that the latter will be able to litigate the action, on equal footing with the former" (Brockner v Brockner, 174 AD3d 567, 568 (2d Dept 2019); see Prichep v Prichep, 52 AD3d 61, 64–65 (2d Dept 2008)).

"A less-monied spouse should not be expected to exhaust all, or a large portion, of available finite resources available, particularly where the more affluent spouse is able to pay his or her own legal fees without any substantial lifestyle impact" (Marchese v Marchese, 185 AD3d at 576 (2d Dept 2020); see Prichep v Prichep, supra).

In consideration of all of the circumstances surrounding this case with respect to issues of child custody, the Court finds an award of counsel fees in the amount of \$150,000 to the wife is warranted, to be held in escrow by her counsel Mr. Wiederkehr to be released upon her retention of custody counsel. The wife should be entitled to retain custody counsel in this highly litigated case. An updated forensic report is imminent, and the trial will be scheduled upon its receipt. Thus, the Court awards her \$150,000 in counsel fees, payable by the husband to her counsel Mr. Wiederkehr, to be held in escrow by him and to be released upon the wife's retention of custody counsel. These funds are earmarked for the custody trial and may not be used for another

purpose.

In addition, the Court finds that the wife is entitled to an additional \$150,000 in counsel fees for the financial issues related to this case. The Court finds that both parties to this action have engaged in conduct that has driven up the legal fees incurred here, and the wife has been awarded much less in counsel fees over the course of this matter than the husband has spent thus far. As noted in prior decisions, the parties have substantial marital assets, including the marital home, that are subject to equitable distribution, and the wife is entitled to fees to enable her to litigate these matters. It also cannot be ignored that the wife solely bore the costs for litigating, at a hearing, the fees of the former AFC, which had the result of benefitting the husband, since over \$90,000 in fees he otherwise would have had to pay the former AFC were disallowed. Thus, the Court awards the wife \$150,000 in counsel fees, payable to her directly by the husband, to be used for litigation for financial matters in this case.

Even with this present award of counsel fees, the wife will have been awarded a total of \$550,000 in counsel fees since the commencement of this case, compared to the husband having paid his counsel \$987,557 to date. Even with the \$80,000 in fees the husband states he incurred for his defense of appeals, the wife has nevertheless been awarded substantially less counsel fees than he has spent.


Lastly, the Court denies the wife a further award of counsel fees in the amount of \$150,000 to be used in connection with the matter of Kusnetz v Kassenoff, Index #60707/2021. It has not been determined what the wife owes to her prior counsel in that matter, and the Court finds it premature to award her any fees for this litigation, given that the matter is still pending.

The counsel fee award of \$150,000 ordered herein with respect to custody, to be held in escrow by Mr. Wiederkehr pending Ms. Kassenoff's retaining custody counsel, shall be paid so that it is received no later than March 22, 2023. The additional \$150,000 awarded for finances shall be paid by Mr. Kassenoff to Ms. Kassenoff so that it is received no later than April 5, 2023.

This constitutes the Order of this Court.

The Court considered the following papers on this motion: Def. Order to Show Cause signed January 9, 2023, Affidavit in support, Affirmation in support, Exh. A-H. Plaintiff's Affidavit in Opposition dated Jan. 25, 2023, Memorandum of Law, Exh. 1-9. Def. Reply Affidavit dated February 8, 2023, Amended Memorandum of Law dated February 14, 2023, Exh. A-K. Plaintiff's supplemental Affirmation dated March 6, 2023, Exh. 1-9.

Dated: March 8, 2023
White Plains, NY



Hon. Susan M. Capeci, A.J.S.C.