

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

LAURA PELCAK,

Plaintiff,

- against -

FILED MC

Index # _____

NOV 27 2007

ALLAN O. PELCAK, JR.

ROCKLAND COUNTY
CLERK'S OFFICEVERIFIED
COMPLAINT

Defendant.

-----X

The above named Plaintiff complaining of the above named Defendant, by her attorneys,
CHAR. & HERZBERG, LLP, alleges to this Court as follows:

- 1) At all the times hereinafter mentioned, Plaintiff, Laura Pelcak, was and still is a resident of the County of Rockland, State of New York.
- 2) At all the times hereinafter mentioned, the Defendant, Allen O. Pelcak, Jr., was and still is a resident of the County of Rockland, State of New York.
- 3) On or about February 6, 2007, the Plaintiff and Defendant, knowingly and voluntarily, entered into a Separation and Settlement Agreement (hereinafter referred to as the "Agreement").
- 4) The Agreement was signed and acknowledged by the parties in accordance with Domestic Relations Law section 236(B)(3).
- 5) The Agreement was thereafter incorporated and not merged into a Judgment of Divorce signed by the Honorable Alfred J. Weiner, J.S.C. of the Rockland County Supreme Court on February 21, 2007 and entered in the Office of the Rockland County Clerk on February 27, 2007.

- 6) Pursuant to Article VII of the parties' Separation Agreement, the parties agreed to list the home at 960 Tilton Road, Valley Cottage, New York 10989 for sale which was done on February 17, 2007.
- 7) The listing for the sale of the property expired on or about May 17, 2007.
- 8) Despite being presented with a renewal listing with the original agent and two other listing agreements with new real estate agents, he Defendant is refusing to renew the listing.
- 9) The Defendant is now in breach of his obligation under the parties' agreement for his failure to continue listing the home for sale.
- 10) The Defendant must be compelled by this Court to immediately renew the real estate sale listing (or sign an Agreement with a new agent) for the former marital residence at 960 Tilton Road, Valley Cottage, New York 10989.
- 11) Pursuant to Article XVII of the parties' Separation Agreement, the Plaintiff is entitled to costs and expenses, including legal fees, for having to bring this action due to the Defendant's breach of his obligations pursuant to the Agreement related to the sale of the Marital Residence.
- 12) The Plaintiff should be awarded all costs and expenses, including attorney's fees incurred by the Plaintiff for having to enforce the Agreement due to the Defendant's breach.
- 13) The Plaintiff has previously sought to enforce the Agreement pursuant to an Order to Show Cause holding the Defendant in contempt but said motion was denied for a procedural reason in that the paragraph which is sought to be enforced by the Plaintiff was not specifically included in a So Ordered

~~paragraph of the Judgment of Divorce. There has been no order or decision by~~
a Court of competent jurisdiction on the merits of the relief sought herein.
Otherwise, no previous application has been made to a Court of competent
jurisdiction for the relief sought herein.

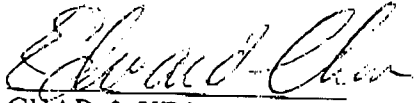
WHEREFORE, the Plaintiff respectfully requests that this Court enter a judgment as
follows:

1. Finding the Defendant in default of his obligation to sell the home at 960
Tilton Road, Valley Cottage, New York 10989;
2. Directing that home at 960 Tilton Road, Valley Cottage, New York 10989
be immediately listed for sale with a real estate agent utilizing the Multiple
Listing Service;
3. Directing that the Defendant co-operate in all necessary steps to effectuate
the listing and sale of the home at 960 Tilton Road, Valley Cottage, New
York 10989 including but not limited signing a new listing agreement with
a real estate agent, making the home available for inspection by
brokers/agents and/or prospective buyers, and executing all documents
necessary to effectuate the sale of the property;
4. Awarding the Plaintiff from the Defendant all costs and expenses,
including attorney's fees incurred by the Plaintiff in having to enforce the
Agreement;

5. And any further and just relief that this Court may appropriate under the circumstances.

Dated: November 19, 2007

New York, New York



CHAR & HERZBERG LLP

By: Edward Char, Esq.

183 Madison Avenue

Suite 503

New York, New York 10016

(212) 696-4912

ROCKLAND COUNTY
CLERK'S OFFICE

LAURA PELCAK,

Plaintiff,

-against-

ALLAN O. PELCAK, JR.,

Defendant.

DECISION
and
ORDER

Index No.: 10864/07

Motion Date:
1/25/07

The following papers numbered 1 to 3 read on this application by Defendant for an order pursuant to CPLR §3211(a)(5) dismissing the complaint on the grounds of collateral estoppel and/or res judicata:

Notice of Motion/Affirmation/Exhibits(A-C)-1-2
Affirmation in Opposition-3

Upon the foregoing papers, it is ORDERED that this application is disposed of as follows

In an earlier post-divorce proceeding, Plaintiff moved to hold Defendant in contempt alleging that Defendant violated terms of their Separation Agreement that was incorporated and not merged into their February 21, 2007 Judgment of Divorce. Defendant contended that Plaintiff willfully refused to sell the former marital residence. The motion was denied after this Court determined there are no specific provisions in the Judgment of Divorce regarding Defendant's obligation to sell the marital residence and that the remedy of contempt was unavailable to Plaintiff.

Plaintiff has now commenced a new and separate action alleging that Defendant has

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breached their separation agreement in failing to sell the former marital residence . In response to the action, Defendant has now moved for dismissal of the action on the grounds of collateral estoppel and/or res judicata.

The doctrine of res judicata bars a party "...from bringing additional actions against the same party on the same claims based upon the same harm". The doctrine applies only when a claim between the parties has been previously "...brought to a final conclusion". *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 1999.

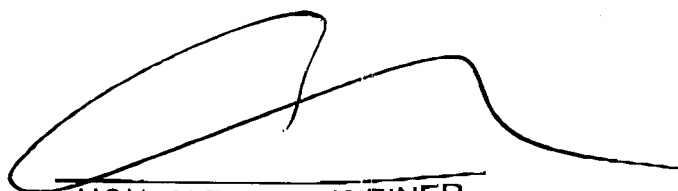
The doctrine of collateral estoppel prevents relitigation of issues previously decided when such issues arise in a subsequent litigation on a claim not barred by res judicata. In order to invoke the doctrine of collateral estoppel, "...[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling". *Buechel v Eain*, 97 NY2d 295, 2001, cert denied 535 US 1096, 2002.

In this new action, the Court finds the issue of Defendants alleged violation of the terms of the parties' separation agreement has never been previously "...brought to a final conclusion" nor has the issue previously been decided. In this Court's prior decision, the Court only found that the Judgment of Divorce contained no specific provision regarding Defendant's obligation to sell the marital residence (and, therefore, Plaintiff was not entitled to a finding of Defendant's contempt.) Accordingly, Defendant's motion is DENIED.

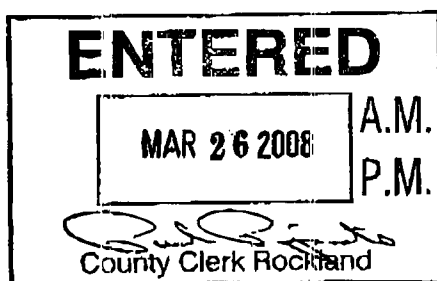
The parties are advised that a Preliminary Conference has been scheduled for **April 15, 2008 at 9:30 am.**

Dated: New City, New York
March 20, 2008

Enter:



HON. ALFRED J. WEINER
Justice of the Supreme Court



To:

David Isaacson, Esq.
Attorney for Defendant

Char & Herzberg LLP
Attorneys for Plaintiff

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ROCKLAND COUNTY
CLERK'S OFFICEon the
2008

Day of

December

Present:

Hon. Alfred J. Weiner, J.S.C.

LAURA PELCAK

X

Index # 10864/2007

Plaintiff

-against-

ALLAN PELCAK, JR.

Defendant

X

ORDER ON NOTICE OF
SETTLEMENT

WHEREAS, the Plaintiff commenced an action in the Supreme Court of the County of Rockland by the filing of a summons and complaint in the Office of the Rockland County Clerk on November 2, 2007; and

WHEREAS, the Defendant filed an answer to the Summons and Complaint and interposed several affirmative defenses and counterclaims; and

WHEREAS, the parties appeared before this Court on September 15, 2008 with their respective counsel, the Plaintiff being represented by Edward M. Char, Esq. of Char & Herzberg LLP and the Defendant being represented by Andrew DePodwin, Esq. of Depodwin & Murphy; and

WHEREAS, the parties have reached a settlement in full satisfaction of the complaints alleged in the Plaintiff's Verified Complaint and the Affirmative Defenses and Counterclaims as alleged in the Defendant's Verified Answer and issues related to the Defendant's child support obligations, the Defendant's child support arrears and the Defendant's daycare and extracurricular activities arrears;

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Pelcak, it is

ORDERED, that the parties' marital residence located at 960 Tilton Road, Valley Cottage, New York shall immediately be placed upon the market for sale, and shall remain on the market for sale until it is sold, at an initial listing price of \$460,000.00. If there are no accepted offers within three (3) months after the house is listed for sale, the listing price shall be reduced by 5%. The listing price shall be reduced by 5% every three (3) months thereafter that there is no accepted offer provided that the listing price shall not be reduced to an amount which would be less than the amount which would be necessary to close so that neither party shall have to bring money to the closing table in order to close the sale; and it is further

ORDERED that the initial listing agreement signed by the parties for the sale of the home shall be for a six-month period and shall be renewed by the parties thereafter for additional six-month periods of time until the house is sold; and it is further

ORDERED that the parties shall accept any offer on the home that is within 5% of the then listing price provided that the offer is no less than the minimum amount previously stated; and it is further

ORDERED that Mr. Pelcak shall provide to the listing broker and/or agent a copy of the current keys to the home and shall not change the locks on the home or in any other way interfere with the showing of the home; and it is further

ORDERED that Mr. Pelcak shall be solely responsible for the payment of the current mortgages on the property for four (4) months, that being for the months of September 2008, October 2008, November 2008 and December 2008; and it further

shall not enter the home, and shall not in way profit from the sale of the home as a real estate agent; and it is further

ORDERED that the home shall be listed for sale by Mr. Jim Damiani; and it is further

ORDERED that Mr. Pelcak shall allow the listing broker and/or agent to place a lockbox on the front door of the home or at whatever entrance to the home that the agent deems appropriate; and it is further

ORDERED that the home is to be sold in "as is" condition and any contract of sale shall reflect the same; and it is further

ORDERED that the parties shall cooperate in all respects with the listing broker and/or agent and sign all necessary documents for the sale and transfer of the home; and it is

ORDERED that Mr. Pelcak shall maintain the home in showing condition, keeping it neat and tidy on the advice of the listing broker and/or agent; and it is further

ORDERED that at the time of the closing of the sale of the marital residence, the gross sale proceeds shall be used to payoff the mortgages on the home in amounts determined from the payoffs received from the mortgage holders, payment of regular and customary closing costs including but not limited to mortgage agent/broker fees, Seller's transfer taxes and Seller's title costs. The balance of any gross proceeds remaining shall be split by the parties 50/50; and it is further

ORDERED that, with respect to basic CSSA child support owed by Mr. Pelcak to Mrs. Pelcak, for the period of March 1, 2007 through and including December 31,

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due for March 1, 2007 through and including December 31, 2007 of \$14,395.20.

Furthermore, for the time period of January 1, 2008 through and including a payment on September 1, 2008, Mr. Pelcak's basic CSSA child support is \$937.50 per month for a total amount due for January 1, 2008 through and including a payment on September 1, 2008 of \$7,968.75; Therefore, the total amount of basic CSSA child support due to Mrs. Pelcak from Mr. Pelcak for the time period of March 1, 2007 through and including a payment due on September 1, 2008 is \$22,363.95. Through September 1, 2008, Mr. Pelcak's basic CSSA child support payments to Mrs. Pelcak, either directly or through the NYS Support Collection Unit, have been \$17,425.31. Therefore, Mr. Pelcak's basic CSSA child support arrears as of September 1, 2008 are \$4,938.64; and it is further

ORDERED that commencing on September 15, 2008 and through and including April 15, 2009, Mr. Pelcak's basic CSSA child support obligation shall be based upon an annual income of \$45,000 with any CSSA statutory deductions have already been deducted from his income. For the two (2) children of the marriage, namely, Kyle Pelcak, d.o.b. 10/1/2000 and Julianne Pelcak, d.o.b. 8/18/2003, Mr. Pelcak's basic CSSA child support obligation for the time period of September 15, 2008 and through and including April 15, 2009 shall in an annualized amount of \$11,250.00, that being $\$45,000.00 \times 25\%$. Said child basic CSSA child support obligation shall be payable commencing on September 15, 2008 in bi-monthly installments of \$468.75; and it is further

ORDERED that on April 15, 2009 and every year thereafter on April 15th, the parties shall exchange state and federal tax returns and recalculate their respective basic

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parties' Separation and Settlement Agreement dated February 6, 2007; and it further

ORDERED that on or before September 30, 2008, Mr. Pelcak shall make a payment of \$4,500.00 towards his basic CSSA child support arrears amount of \$4,938.64 as set forth herein; and it is further

ORDERED, assuming that Mr. Pelcak makes the \$4,500.00 payment on or before September 30, 2008, the remaining basic CSSA child support arrears, which would be \$438.64 if the \$4,500.00 payment is made, shall be paid, by adding \$100.00 to his basic child support payments commencing on October 15, 2008 until the amount is satisfied; and it is further

ORDERED that, with respect to daycare expenses paid for by Mrs. Pelcak for the parties' two (2) children from January 12, 2007 through and including September 15, 2008, Mrs. Pelcak has paid \$16,331.00 for which Mr. Pelcak shall pay to Mrs. Pelcak the amount of \$9,471.00 which represents 58% of the daycare expenses paid for by Mrs. Pelcak through and including September 15, 2008. With respect to extracurricular expenses paid for by Mrs. Pelcak for the parties' two (2) children from January 12, 2007 through and including September 15, 2008, Mrs. Pelcak has paid \$2,440.00 for which Mr. Pelcak shall pay to Mrs. Pelcak the amount of \$1,415.20 which represents 58% of the extracurricular expenses paid for by Mrs. Pelcak through and including September 15, 2008. The total amount due to Mrs. Pelcak from Mrs. Pelcak for daycare and extracurricular expenses arrears paid for by Mrs. Pelcak for the parties' two (2) children from January 12, 2007 through and including payments made by Mrs. Pelcak on September 15, 2008 is \$10,887.18; and it is further

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attorney's office, DePodwin & Murphy, proof of said daycare and extracurricular expenses in the form of the front and backs of cancelled checks payable to the daycare provider and extracurricular activities providers and copies of bank statements showing that the checks have been cashed against Mrs. Pelcak's bank account. Upon presentation of these items to Mr. Pelcak's attorney, Andrew Depodwin, the amount of arrears for daycare and extracurricular expenses set forth herein for the time periods set forth herein shall be deemed conclusive; and it is further

ORDERED that the \$10,887.18 of daycare and extracurricular expenses arrears due to Mrs. Pelcak from Mr. Pelcak shall be payable to Mrs. Pelcak in installments of \$100.00 per week commencing on October 15, 2008. Said installment plan shall not prevent the Plaintiff from seeking to satisfy full payment of said arrears for daycare and extracurricular expenses by other collections means; and it is further

ORDERED that for the time period commencing on September 15, 2008 through and including April 15, 2009, the parties' pro-rata share of daycare and extracurricular expenses for the parties' two (2) children shall be shared on a 50/50 basis. On April 15, 2009 and every April 15th thereafter until the children are emancipated, the parties pro-rata share of pro-rata share of daycare and extracurricular expenses will be based their incomes as reported on their previous year's tax returns as set forth in the parties' Separation and Settlement Agreement dated February 6, 2007; and it is further

ORDERED that Article IV (x) of the parties' Separation and Settlement dated February 6, 2007 is hereby modified to clarify that the payor spouse shall be entitled to deduct from his or her monthly child support the prorated amount he or she pays for the

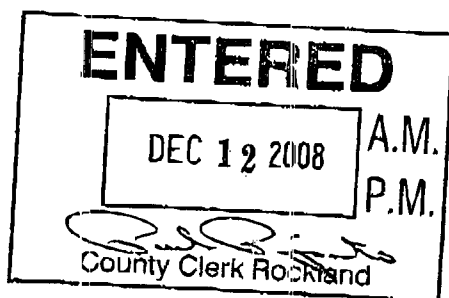
college; and it is further

ORDERED that Article IV (v) of the parties' Separation and Settlement dated February 6, 2007 is hereby modified to clarify that the parties obligation with respect to college expenses is capped at the costs which would be incurred by a New York State resident at the State University of New York at Albany; and it is further

ORDERED that for the tax year 2008, Mrs. Pelcak shall be entitled to claim both children as dependency exemptions on her tax returns provided that Mr. Pelcak has not paid the entire amounts due for his arrears on his basic CSSA child support obligations and daycare and extracurricular expenses. For the tax years thereafter, the parties Separation and Settlement Agreement dated February 6, 2007 shall control with respect to dependency exemptions; and it is further

ORDERED that a copy of this Order shall be served upon Defendant's counsel within 10 days of the receipt of a signed copy of this Order by Plaintiff's counsel with Notice of Entry.

Dated: New City, New York
December 9, 2008



ENTER: 

Hon. Alfred J. Weiner, J.S.C.

3 LAURA PELCAK,

4 Plaintiff,

5 -against-

10864/07

6 ALLAN O. PELCAK, JR.,

7 Defendants.

8 STIPULATION

Rockland County Courthouse
Main Street
New City, New York 10956
September 15, 2008

10 B e f o r e:

11 HONORABLE ALFRED J. WEINER,
12 Supreme Court Justice

13 Appearances:

14 For the Plaintiff(s):

15 CHAR & HERZBERG, LLP
16 183 Madison Avenue
Suite 503
New York, New York 10017
17 BY: EDWARD M. CHAR, ESQ.

18 For the Defendant(s):

19 DePODWIN & MURPHY, ESQS.
20 500 Airport Executive Park.
Nanuet, New York 10954.
BY: ANDREW DePODWIN, ESQ.

21 ALSO PRESENT:

22 James Loures
23 Senior Court Clerk

24 Robin DiMichele, RPR
25 Senior Court Reporter

3 THE COURT: Please. Are you waiting
for your client?

4 MR. DePODWIN: He was here a moment
5 ago.

6 THE COURT: I assume he's indisposed
7 for a few minutes. Let the Court Officer
8 know when you're ready.

9 MR. DePODWIN: Thank you.

10 (Second Call.)

11 THE COURT: This matter has been
12 scheduled for trial. The Court was advised
13 counsel wishes to place a stipulation on the
14 record; is that correct?

15 MR. CHAR: Yes.

16 MR. DePODWIN: Yes.

17 THE COURT: Would you like your clients
18 to come up and stand next to you?

19 MR. CHAR: That's fine.

20 (Plaintiff and Defendant approach.)

21 THE COURT: All right. Counsel may
22 proceed.

23 MR. CHAR: Your Honor, I'm going to
24 place the following stipulation of settlement
25 on the record which will be in full

3 ~~rejection of the complaints alleged in the~~
4 verified complaint and the counterclaims as
5 alleged in the defendant's verified answer
6 with counterclaims, and the Family Court
7 petitions, to the extent that some of them
8 may be effected by this because some of the
9 settlement involves child support an the
10 likes, because we're amending the entire
11 separation agreement.

12 MR. DePODWIN: And the judgement.

13 THE COURT: You may place your
14 agreement on the record.

15 MR. CHAR: All right. The marital home
16 which is the subject of some of this
17 litigation, that being 960 Tilton Road in
18 Valley Cottage, will be placed on the market
19 immediately for sale at a listing price of
20 \$460,000. If there are no offers within
21 three months, which are accepted offers, the
22 price will be reduced by five percent and
23 five percent every three months thereafter if
24 no offer is accepted in that relevant
25 timeframe but, with the caveat that it will
 never be reduced any less than the amount

MR. DePODWIN: Just to clarify, the proceeds will be the source to satisfy any obligations at closing.

MR. CHAR: At the sale of the marital residence all the mortgages to be paid off as determined from the payoff letters from the various mortgage holding banks. Regular closing costs to be paid, normal and customary type of closing costs, and then the balance, if any, will be split by the parties, 50/50.

The parties will cooperate with the broker and/or agent and sign all necessary documents to get the house listed and sold.

Any offer within five percent of the listing price will be accepted, provided that the offer is no less than the minimum amount as stated previously. Mr. Pelcak will provide a copy of current keys to the broker and not change the locks or in any way interfere with the showing of the house, reason being Mr. Pelcak is in possession of

2 the home at this moment.

3 Mr. Pelcak will use all reasonable
4 efforts to pay the first and second mortgages
5 each month for the next four months to the
6 extent that he's financially capable of doing
7 so.

8 Mr. Pelcak, since he's in possession of
9 the home, will maintain the home in some sort
10 of showing condition, keeping it neat and
11 tidy, at the advice of the broker.

12 A gentleman by the name of Art Manion
13 is not to show the house to any potential
14 buyers or enter the house and is not to
15 profit in any way, shape or form from the
16 sale of the house.

17 MR. DePODWIN: Plaintiff is not to
18 enter the residence.

19 MR. CHAR: Mr. Pelcak will consent to a
20 lockbox being placed on the front door, at
21 whatever appropriate entrance the broker
22 deems is proper.

23 MR. DePODWIN: Premises is to be sold
24 as is condition and so provide in the
25 contract of sale assuming we acquire one.

3 agreement will be for six months. Upon its
4 expiration the parties will sign a new
5 six-month listing agreement.

6 Your Honor, just one question we have
7 for you with respect to the house. I'm not
8 sure, does the Court still maintain a list of
9 brokers that you could pick someone from?

10 THE COURT: I don't have a list of
11 brokers. I frequently use Mr. Damiani.

12 MR. DePODWIN: That's fine, your Honor.

13 MR. CHAR: Fair enough. The parties
14 agree to use Mr. Damiani as the listing
15 broker.

16 (Defendant and counsel confer.)

17 MR. CHAR: So, with respect to the
18 house that is the agreement and we'll put it
19 in a nicer little so ordered order for your
20 Honor to sign. Those are the parameters.

21 THE COURT: Is that the agreement or
22 are those the parameters?

23 MR. CHAR: That is the agreement.

24 MR. DePODWIN: Correct.

25 THE COURT: Is that correct, Mr.

3 MR. DePODWIN: Yes.

4 (Defendant and counsel confer.)

5 THE COURT: The record will indicate
6 the agreement that has been set forth on the
7 record by counsel. The record will further
8 indicate that the parties are present. I'd
9 like the parties to each be sworn please from
10 their place.

11 MR. CHAR: Your Honor, we actually have
12 more though. That was just as it relates to
13 the house. I'm sorry.

14 THE COURT: Okay.

15 MR. CHAR: I apologize for the
16 confusion.

17 THE COURT: You may continue.

18 MR. CHAR: There were certain issues
19 amongst the parties also as it relates to
20 child support and daycare expenses and
21 extracurricular expenses.

22 THE COURT: I don't believe that was
23 before the Court however I have no objection
24 to you placing an agreement regarding those
25 issues on the record.

verified complaint but they were by virtue of his counterclaims. But, either way I appreciate you taking the record here.

With respect to child support, from the period of March 1st, 2007 through and including December 31st, 2007, Mr. Pelcak acknowledges that his basic child support would have been, or should have been \$1,439.52 per month payable in bimonthly installments of \$719.76 for a total which should have been payable for the period of March 1st, 2007 through December 31st, 2007, of \$14,395.20. For the period of January 1st, 2008 through and including a hypothetical payment, for calculations purposes, which would have been payable on September 1st, 2008, CSSA basic child support would be based upon a net amount after any statutory deductions of \$45,000, for a monthly amount of \$937.50, which would have been payable in bimonthly installments of \$468.75. Total amount which would have been due for the period of January 1st, 2008