

Squicciarini v Oreiro

2012 NY Slip Op 32745(U)

October 24, 2012

Supreme Court, New York County

Docket Number: 114338/11

Judge: Ellen Frances Gesmer

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Gesmer
Justice

PART 24

Spicciardini
- v -
Oreiro

INDEX NO. 114338/11
MOTION DATE _____
MOTION SEQ. NO. 3
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

are fully resolved by the attached decision & order.

FILED
NOV 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10-24-12

HON. ELLEN GESMER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

-----X
RICCARDO SQUICCIARINI,

Index No. 114338/11

Petitioner,
-against-

DECISION AND ORDER
Motion Sequences 2 & 3

DIANA OREIRO,
Respondent.

Hon. Ellen Gesmer, JSC

FILED

NOV 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequences two and three are consolidated for decision.

On motion sequence two, respondent¹ Diana Oreiro (Mother) seeks an order: (1) granting her leave to renew and/or reargue this court's decision and dated March 14, 2012 (the March Order), which directed the return of the parties' children, Diego Riccardo Squicciarini (DOB: 7/18/06) and Eve Lourdes Squicciarini (DOB: 7/26/08), to Italy with their father, petitioner Riccardo Squicciarini (Father), pursuant to Article 3 of the Hague Convention and the International Child Abduction Remedies Act (42 USC §§11601-11611); (2) upon renewal and reargument, (a) finding that there is grave risk that the children's return to Italy would expose them to physical and/or psychological harm; or, in the alternative (b) appointing an attorney to represent the parties' children and scheduling a hearing on whether the Mother wrongfully removed the children from Italy; or, in the alternative, (c) staying the return of the children and permitting the Mother to litigate custody in Italy while she and the children remain in New York, and directing the Father to pay support and provide housing for the Mother and the children, and directing the Father to stay away from the Mother except incidental to visitation, pending resolution of this matter; or, in the alternative, (d) directing the Mother to post a bond and retain physical custody of the children for purposes of returning them to Italy; and (3) granting her time to file an answer to the Father's Petition. The Father opposes the motion and cross-moves for an order awarding him costs and counsel fees as sanctions for frivolous behavior.

On motion sequence three, the Father seeks an order: (1) granting him unsupervised overnight parenting time with the parties' children in New York in July 2012; (2) consolidating all matters concerning the parties and their children pending in Suffolk County Family Court; and (3) granting him a temporary parenting time schedule, via regular Skype and telephone contact when he returns to Italy, during the pendency of the appeal to the Appellate Division in the First Department by the Mother of the March Order. The Mother opposes the motion, and cross-moves for counsel fees as sanctions.

FACTS

The background facts of this matter are set forth in the March Order, this court's interim order on motion sequence three dated July 23, 2012 (the July Order), and the Order of the Appellate Division for

¹ The court notes that in prior filings, the parties have erroneously been referred to as "plaintiff" and "defendant," respectively. However, since this matter is a special proceeding pursuant to Article 4 of the CPLR, they should have been referred to as "petitioner" and "respondent," and the court will refer to them that way in this decision and order.

the First Department dated October 23, 2012 on the Mother's appeal of the March Order. They will not be repeated here.

PROCEDURAL HISTORY

This is a special proceeding pursuant to Article Four of the CPLR, in which the Father seeks the return of the parties' children to his custody so that he can return to Italy with them, where both parties and the children resided until the Mother brought the children to New York on or about November 14, 2011. The Father's Petition was brought on by Order to Show Cause (motion sequence one) dated December 22, 2011. The Mother opposed the Father's motion, and filed a Cross-motion seeking to dismiss the Petition. On March 14, 2012, this court issued the March Order, granting the relief requested by the Father, and denying the Mother's Cross-motion to dismiss. Thereafter, the Mother filed an appeal of the March Order.

On July 23, 2012, this court granted the Father's request on motion sequence three to consolidate with this proceeding the Mother's family offense proceeding pending in Suffolk County Family Court, and held a hearing that morning with respect to the Father's application on motion sequence three for unsupervised overnight parenting time in New York, and Skype and telephone contact with the children *pendente lite*, following his return to Italy. On the same day, following the hearing, the court issued an interim decision and order on motion sequence two, which: (1) granted the Father's request for unsupervised overnight visitation in July 2012 with the children; (2) directed the Father to turn over his passport to the Mother's attorney until the children were returned from the visitation; (3) directed the Father to undergo hair follicle and urinalysis tests for a drug panel, including cocaine, prior to the beginning of the visitation;² (4) directed the Father not to use cocaine or any other illegal substance during the remainder of the time that he is in New York, and not to drink alcohol while with the children or for twelve hours before each access period began; (5) directed the Father not to operate a motor vehicle with the children in it during any of the access periods; (6) prohibited him from possessing a gun during any of his access periods with the children; (7) required him to post the sum of \$15,000, along with his Rolex watch, with the Mother's attorney as escrow agent, pending return of the children from the scheduled visitation; (8) awarded the Father Skype contact with the children every Monday and Wednesday at 5:30 p.m. New York time and every Saturday between 7:30 and 8:00 a.m.; and telephone contact with the children every Tuesday, Thursday, Friday and Sunday between 5:30 and 7:00 p.m.; and (9) directed the parties and counsel to appear on September 5, 2012 at 9:30 a.m. for a hearing on the Mother's family offense petition.

By stipulation dated August 29, 2012, which was so-ordered by the court (the August Stipulation): (1) the Mother withdrew her family offense petition with prejudice; (2) the Mother agreed to surrender her passport and the children's U.S. passports to her attorney as escrow agent; (3) the Mother surrendered the children's Italian passports to the Father's attorney as escrow agent; (4) the Mother agreed not to travel outside the United States or to Hawaii with the children without the written agreement of the Father or order of the court, and not to leave this jurisdiction with the children without notifying the Father in advance; (5) the Mother agreed that this court has exclusive jurisdiction over the proceeding commenced

² The result of the drug testing was provided to the court, and was negative for cocaine and other substances.

by the Father in this court; and (6) the parties agreed not to commit any family offenses against each other.

Thereafter, counsel for the parties asked this court to hold motion sequences two and three in abeyance pending a determination by the Appellate Division for the First Department on the Mother's pending appeal of the March Order.

By order dated October 23, 2012, the Appellate Division for the First Department affirmed the March Order by unanimous decision, finding that

the petition was properly granted since [the Father] met his burden of establishing by a preponderance of the evidence that the children had been wrongfully removed from their country of habitual residence (42 USC §11603[e][1][A]; see *Gitter v Gitter*, 396 F3d 124, 130-131 [2d Cir 2005]). In opposition, [the Mother] failed to satisfy her burden of establishing by clear and convincing evidence that a grave risk of harm to the children would result by their return to Italy (42 USC §11603[e][2][A]). Other than the allegations contained in [the Mother's] affidavit, there is no evidence that [the Father] verbally or physically abused [the Mother]. To the contrary, the evidence establishes that the parties had an amicable relationship prior to [the Mother's] departure with the children.

(*Squicciarini v Oreiro*, __ AD3d __, 2012 NY Slip Op. 07070 [1st Dept 2012]).

Therefore, the only issues left on motion sequence two are: the Mother's requests for: (1) leave to renew and/or reargue the March Order; (2) various relief upon renewal and/or reargument; and (3) time to file an Answer; and the Father's request for counsel fees as sanctions. The only issue left on motion sequence three is the Mother's Cross-motion for counsel fees as sanctions.

ANALYSIS

The Mother's Request for an Extension of time to File an Answer

Section 404(a) of the CPLR permits respondent in a special proceeding to either file an answer to the petition, or raise legal objections in a motion to dismiss. The Mother filed a Cross-motion to dismiss the Petition, which was denied. It is within the court's discretion to grant or deny a request to file an answer after denial of a motion to dismiss a petition in a special proceeding (CPLR §404[a]; see also *Matter of Dodge*, 25 NY2d 273 [1969][respondent in a special proceeding does not have a right to interpose an answer after denial of motion to dismiss petition]). Given that the court has considered not only the Mother's affidavit and exhibits in support of her Cross-motion, but her affidavits and exhibits on two additional motion sequences as well as her family offense petition, which was consolidated with this matter, the court is well aware of the Mother's position on all of the issues in the Petition, as well as of her defenses and counterclaims. Accordingly, the Mother's request for time to file an Answer is denied.

Renewal and Reargument

A motion for leave to reargue "shall be specifically identified as such," and shall be "based upon matters of fact or law allegedly overlooked or misapprehended by the court...but shall not include any matters of fact not offered on the prior motion" (CPLR §2221[d]). A motion for leave to renew "shall be

Decision and Order Motion Sequences Two and Three

identified specifically as such,” and “shall be based upon new facts not offered on the prior motion that would change the prior determination...” (CPLR §2221[e]). A combined motion for leave to renew and reargue “shall identify separately and support separately each item of relief sought” (CPLR §2221[f]). Failure to include the underlying motion papers on a motion to renew or reargue can be fatal to such a motion (*Sheedy v Pataki*, 236 AD2d 92 [3d Dept 1997], lv den 91 NY2d 805 [1998]; *Lower Main Street, L.L.C. v Thomas Re & Partners*, 4/5/2005 NYLJ 19, at col 3 [Sup Ct Nassau Co 2005]). “Renewal is granted sparingly ... ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010][quoting *Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], lv dismissed 71 NY2d 994 [1988]). A motion to reargue must be made within thirty days after service of a copy of the underlying order with notice of entry (CPLR 2221[d][3]).

The Mother’s motion for leave to renew and/or reargue is denied for the following reasons. First, the “new” allegations in her papers are about events she claims happened prior to November 14, 2011, but which she failed to include in her affidavit in support of her Cross-motion on motion sequence one. She provides no reasonable excuse for not having produced these allegations earlier. Accordingly, they do not form a proper basis for a motion to renew (CPLR §2221[e][2]; *Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010]). Second, the only legal argument that the Mother makes as a basis for reargument is that she should have been given the “right” to submit an answer to the Petition before “summarily” disposing of this “action.” As discussed above, this is wrong as a matter of law. Finally, to the extent that the Mother is arguing that this court overlooked or misapprehended facts, the court considered the Mother’s vague and unsubstantiated claims about the Father’s behavior, and the temporary order of protection she obtained *ex parte* in Suffolk County Family Court (TOP),³ and did not find them sufficient to make out a *prima facie* case, much less to meet her burden to prove by clear and convincing evidence, that returning the children to Italy would pose a grave risk to them of physical harm or otherwise place them in an intolerable situation (*People ex rel. Geiser v Valentine*, 17 Misc3d 1117A [Sup Ct Richmond Co 2007]). Since the Mother’s motion to renew and/or reargue is denied, the court need not address her requests for relief upon renewal and reargument.

Sanctions

Each party has a pending request for counsel fees and costs as sanctions from the other. The Mother’s request for sanctions was based on her position that this court did not have jurisdiction over this matter. Given the parties’ agreement that it does in the August Stipulation, and given the recent Order of the Appellate Division for the First Department, the court deems her request withdrawn. As for the Father’s request, although the Mother was not successful on most of her requests and arguments to this court, and withdrew others, the court cannot find, on balance, that her actions were frivolous within the meaning of 22 NYCRR §130-1.1. Accordingly, the Father’s request for sanctions is denied.

Accordingly, it is

ORDERED that all relief requested on motion sequences two and three not previously granted is

³ The TOP was subsequently vacated with the consent of the Mother, pursuant to the August Stipulation.

denied; and it is further

ORDERED that the Mother shall produce the parties' children, Diego Riccardo Squicciarini (DOB: 7/18/06) and Eve Lourdes Squicciarini (DOB: 7/26/08) (collectively, the Children), in Part 24, Room 210 of the Supreme Court at 71 Thomas Street, New York, New York on Thursday, October 25, 2012 at 10:30 a.m.; and it is further

ORDERED that, pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 (Convention) and the International Child Abduction Remedies Act, 42 U.S.C. §11601 *et seq.*, the minor children, Diego Riccardo Squicciarini (DOB: 7/18/06) and Eve Lourdes Squicciarini (DOB: 7/26/08) (collectively, the Children), shall be returned in the company of their Father, Riccardo Squicciarini (Father), to the sovereign nation of Italy, and the Father shall report the delivery of the children to the appropriate Central Authority; and it is further

ORDERED that the Father has the exclusive right to the physical and legal custody of the children during the period of time required to return the Children to Italy, the country of the Children's habitual residence, provided, however, that nothing in this Order shall prevent the Mother from traveling to Italy to pursue her custodial and/or visitation rights as to the Children there, either by agreement of the parties, or from a tribunal of competent jurisdiction, as the case may be; and it is further

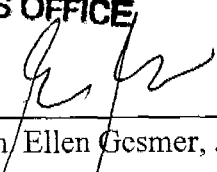
ORDERED that the Father shall keep the Mother apprised of the Children's whereabouts in Italy, including their residence address and a telephone number, and, if possible a Skype or other computer video address, so that she may communicate with the Children at times reasonably convenient for the Children and for reasonable periods of time, subject to further order of a court of competent jurisdiction; and it is further

ORDERED that this Order is not a determination of the merits of any custody issues within the meaning of Article 19 of the Convention; and it is further

ORDERED that this Order is made under the authority of U.S.C. §11603(a), conferring upon this court original and concurrent jurisdiction with federal district courts of the United States.

This constitutes the decision and order of this court.

Dated: October 24, 2012

FILED
NOV 07 2012
ENTER:
NEW YORK
COUNTY CLERK'S OFFICE

Hon/ Ellen Gesmer, JSC
HON. ELLEN GESMER