

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN K. BURKE,	§
	§ No. 162, 2012
Respondent Below,	§
Appellant,	§ Court Below – Family Court
	§ of the State of Delaware,
v.	§ in and for Sussex County
	§ File No. CS06-03293
M. EILEEN BOOTH,	§ Petition 11-17802
	§
Petitioner Below,	§
Appellee.	§

Submitted: August 22, 2012

Decided: September 6, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

O R D E R

This 6th day of September, 2012, it appears to the Court that:

1) The respondent-appellant John Burke (the “Husband”) appeals from a final judgment of the Family Court that granted a petition for specific performance filed by the petitioner-appellee M. Eileen Booth (the “Wife”). The Husband raises one claim on appeal. The Husband contends that the Family Court erred, as a matter of law, when it denied the Husband’s claim for a set-off on grounds that it was a compulsory counterclaim that was not properly pled.

2) The parties were married on June 14, 1997 and separated on or about December 27, 2006. The parties’ final divorce decree was issued on

October 18, 2007. On January 8, 2010, the parties entered into a Stipulation, Agreement, and Order (the “Agreement”) resolving their ancillary matters. One and one-half years later, the Wife filed a Petition for Specific Performance. She alleged that the Husband had breached the Agreement in certain aspects.

3) Paragraph 17(a) of the Agreement required the Wife to pay the Husband \$2,000 for the portion of her 2007 taxes that the Husband paid. The Wife testified at the hearing that she had not paid the \$2,000. The Husband did not make a claim for the \$2,000 in his answer to the Wife’s petition, but argued at the hearing that this amount should be set-off from any money that the Husband was determined to owe the Wife.

4) The Family Court denied the Husband’s request for the set-off, on the basis that it was a compulsory counterclaim that should have been included in his answer but was not. The Family Court also reasoned that the exceptions provided by Rule 13(e) for an omitted counterclaim did not apply. This appeal followed.

5) Our standard and scope of review involves the facts and law, as well as the inferences and deductions that the Family Court has made.¹ To

¹ *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).

the extent that the issues on appeal implicate rulings of law, we conduct a *de novo* review.²

Family Court Rule of Civil Procedure 13(a) provides:

Compulsory counterclaims. -- A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against an opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

Rule 13(e) provides:

Omitted counterclaim. -- When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of Court set up the counterclaim by amendment.

6) In denying the Husband's request for a set-off, the Family Court reasoned that the Husband had not presented any evidence that his failure to include the counterclaim was due to oversight, inadvertence, or excusable neglect, or that consideration was required by the interests of justice. The Family Court also reasoned that the Husband had not sought leave of the Court to establish the counterclaim by amendment, as provided for in Rule 13(e).

² *Powell v. Dep't of Servs. for Children, Youth, & Their Families*, 963 A.2d 724, 730–31 (Del. 2008); *In re Heller*, 669 A.2d 25, 29 (Del. 1995).

7) The Family Court properly interpreted and applied Rule 13 in assessing the Husband's request. The Husband did not seek leave by the Family Court to set-up the omitted counterclaim by amendment, and the Family Court was under no duty to grant such relief based solely on his presentation at the hearing.

8) In her answering brief, the Wife argues that the Husband has filed a frivolous appeal because she concedes that the Husband is entitled to a \$2000 set-off, and that the Wife is thereby entitled to attorney's fees. The Family Court denied the request for a set-off because it had not been properly pled. Other than counsel's assertions in the answering brief on appeal, the record does not reflect that the Wife previously paid or agreed to pay the Husband the \$2,000 sum through counsel. Rather, the Wife objected to the \$2,000 sum at the Family Court hearing. If the Wife concedes that the Husband is entitled to a \$2000 set-off, she should join the Husband in seeking a stipulated modification of its judgment. However, her claim to attorney's fees on appeal is without merit.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice