

203 A.D.2d 689
 Supreme Court, Appellate Division,
 Third Department, New York.

Millicent KAYE, Respondent,
 v.
 Richard KAYE, Appellant.

April 14, 1994.

Synopsis

Former wife sued former husband, seeking an increase in child support. Former husband cross moved for order compelling **sale** of marital residence. The Supreme Court, Westchester County, Nastasi, J., denied both motions and former husband appealed. The Supreme Court, Appellate Division, **Yesawich**, J., held that former husband could enforce provisions of settlement **agreement** incorporated in **divorce** decree, requiring **sale** of marital residence in the event that former wife remarried, even though former wife's second marriage had ended in **divorce** prior to husband's commencement of proceedings to compel **sale**.

Affirmed as modified.

West Headnotes (2)

[1] Estoppel

🔑 Relying and acting on representations

Divorce

🔑 Rights in property in general

Former husband was not estopped from enforcing right, under **divorce** settlement **agreement**, to have marital residence sold in event of former wife's remarriage, even though former husband did not insist upon resale until after former wife's second marriage had been terminated by **divorce** and she was once again living in marital abode; former wife had not shown how she committed herself in reliance upon former husband's forbearance to claim his contractual right during period of her second marriage.

1 Cases that cite this headnote

[2] Divorce

🔑 Real estate and interests therein

Former husband could compel **sale** of family residence, pursuant to separation **agreement** provision requiring such **sale** in event that former wife remarried, even though former wife's second marriage had ended in **divorce** before former husband sought to have marital property sold and former wife was once again living in marital **home**.

Cases that cite this headnote

Attorneys and Law Firms

**633 Richard Kaye, appellant in person.

Robert G. Schneider, Hartsdale, for respondent.

Before **MIKOLL**, J.P., and **MERCURE**, **CREW**, **WHITE** and **YESAWICH**, JJ.

Opinion

*690 **YESAWICH**, Justice.

Appeal (transferred to this court by order of the Appellate Division, Second Department) from that part of an order of the Supreme Court (Nastasi, J.), entered October 18, 1991 in Westchester County, which denied defendant's cross motion for an order compelling the **sale** of the marital residence.

By the terms of an open court stipulation of settlement, entered into by the parties during their pending **divorce** action and incorporated but not merged into a judgment of **divorce** dated October 12, 1984, plaintiff acquired physical custody of the parties' two children, and was to retain exclusive possession of the marital residence until certain specified "triggering events" occurred, at which time the house was to be sold and she was to receive 60% of the proceeds of the **sale**. One of the triggering events was plaintiff's remarriage.

In August 1988, plaintiff remarried. Defendant claims only to have become aware of this subsequent marriage after it had been terminated by **divorce** in February 1991; this assertion is disputed by plaintiff. In any event, in May

1991, plaintiff moved for an upward modification in the amount of child support and defendant, relying on the fact that plaintiff had been remarried, cross-moved for an order compelling the **sale** of the marital **home**. Both motions were denied and defendant appeals.

Plaintiff, though admitting remarrying, maintains that because she is no longer married, and once again resides in the marital **home** with the parties' two children and no one else, it would be inequitable to order the **home** sold at this time. She contends that defendant, by failing to raise the issue while plaintiff's remarriage was still intact, is estopped from doing so now.

[1] [2] The estoppel argument is unavailing, for plaintiff has neither alleged nor proven that she has changed her position in reliance upon defendant's delay or suffered any detriment as a result (see, *Thurmond v. Thurmond*, 155 A.D.2d 527, 529, 547 N.Y.S.2d 385; cf., *Cotumaccio v. Cotumaccio*, 171 A.D.2d 723, 724, 567 N.Y.S.2d 178). Nor does the fact that plaintiff's later marriage was eventually

terminated have any bearing on defendant's rights under the contract; it is the event of remarriage that the parties **634 stipulated is to have legal effect, and the **agreement** contains no provision for a revival of plaintiff's right to exclusive possession and control of the marital residence once that right has been extinguished (cf., *Gaines v. Jacobsen*, 308 N.Y. 218, 223, 124 N.E.2d 290; *R.L.G. v. J.G.*, 387 A.2d 200 [Del]).

ORDERED that the order is modified, on the law, with costs to defendant, by reversing so much thereof as denied defendant's cross motion; cross motion granted; and, as so modified, affirmed.

*691 **MIKOLL**, J.P., and **MERCURE**, **CREW** and **WHITE**, JJ., concur.

All Citations

203 A.D.2d 689, 610 N.Y.S.2d 632