

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D34134
O/kmb

_____AD3d_____

Argued - January 27, 2012

RUTH C. BALKIN, J.P.
THOMAS A. DICKERSON
ARIEL E. BELEN
JEFFREY A. COHEN, JJ.

2011-02645
2011-02650

DECISION & ORDER

Suwei Chuang, appellant, v Ya Chen Hsieh,
respondent.

(Index No. 9043/06)

Samuel Chuang, Flushing, N.Y, for appellant.

Vincent M. Lentini, Garden City, N.Y., for respondent.

In an action to annul a marriage, the plaintiff appeals (1), as limited by his brief, from so much of an order of the Supreme Court, Queens County (Raffaele, J.), dated February 2, 2011, as, upon that branch of the defendant's cross motion which was pursuant to CPLR 3212 and 3215 for leave to enter a default judgment against him based on his failure to timely answer her counterclaim for a divorce based on cruel and inhuman treatment, in effect, searched the record and awarded summary judgment in favor of the defendant dissolving the marriage on the basis of his incarceration pursuant to Domestic Relations Law § 170(3), and directed the defendant to submit findings of fact, conclusions of law, and a judgment of divorce on that ground, and (2) from an order of the same court, also dated February 2, 2011, which denied, as academic, his motion to compel the defendant to respond to his discovery demands.

ORDERED that the first order dated February 2, 2011, is reversed insofar as appealed from, on the law; and it is further,

ORDERED that the second order dated February 2, 2011, is reversed, on the law, and the matter is remitted to the Supreme Court, Queens County, for a determination, on the merits, of the plaintiff's motion to compel the defendant to respond to his discovery demands; and it is further,

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ORDERED that one bill of costs is awarded to the plaintiff.

The parties were married in January 2004. In February 2005 the defendant moved out of the marital home. In April 2006 the plaintiff commenced this action seeking an annulment of the marriage on the ground of fraud (*see* Domestic Relations Law § 140[e]). The defendant asserted a counterclaim for a divorce on the ground of cruel and inhuman treatment (*see* Domestic Relations Law § 170[1]). Subsequently, the plaintiff moved to compel the defendant to respond to certain discovery demands, and the defendant cross-moved, among other things, for leave to enter a default judgment against the plaintiff based on his failure to timely answer her counterclaim for a divorce based on cruel and inhuman treatment. On February 2, 2011, the Supreme Court issued two orders. In the first order, the Supreme Court, in effect, searched the record and awarded summary judgment in favor of the defendant dissolving the marriage on the basis of the plaintiff's incarceration pursuant to Domestic Relations Law § 170(3), and it directed the defendant to submit findings of fact, conclusions of law, and a judgment of divorce on that ground, despite the fact that the defendant had not sought a divorce on that ground. In the second order, the Supreme Court denied, as academic, the plaintiff's motion to compel the defendant to respond to his discovery demands in light of the court's first order.

The Supreme Court should not have, in effect, searched the record and granted the defendant a divorce on a ground that she had not asserted. Furthermore, an essential element of a cause of action for a divorce is the existence of a valid marriage (*cf. Statter v Statter*, 2 NY2d 668, 672; *Botti v Botti*, 55 Misc 2d 269). Inasmuch as the plaintiff's verified complaint seeking an annulment placed into issue the validity of the marriage, the Supreme Court should not have awarded summary judgment to the defendant (*see Friedman v Roman*, 65 AD3d 1187, 1188; *Gulati v Gulati*, 60 AD3d 810; *cf. Young Chen v Yehan Zhang*, 67 AD3d 1005).

Since the Supreme Court denied, as academic, the plaintiff's motion to compel the defendant to respond to his discovery demands, we remit the matter to the Supreme Court, Queens County, to decide the plaintiff's motion on the merits (*see Ramsey v Ramsey*, 69 AD3d 829, 833).

BALKIN, J.P., DICKERSON, BELEN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court