

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 5G

**EDITED FOR
PUBLICATION**

-----x
MC,

Plaintiff,

INDEX NO.:

-against-

DECISION

WC,

Defendant.

-----x
P R E S E N T :

HON. JEFFREY S. SUNSHINE
J.S.C.

Introduction

The above captioned matrimonial action was commenced by the filing of a summons and a verified complaint on November 5, 2003, wherein plaintiff wife (hereinafter "wife") sets forth a cause of action for constructive abandonment pursuant to Domestic Relations Law §170 (2). Defendant husband (hereinafter "husband") answered on or about November 18, 2003 wherein he denied all allegations.

Findings of Fact

The parties were married in a religious ceremony on _____, 1993 in Kings County. There is one child born of this marriage on _____, 1996. Wife works, full time, in the medical field.

Unfortunately, prior to the marriage, husband was diagnosed with multiple sclerosis, an inflammatory disease of the central nervous. Wife testified that she was

aware of husband's illness and the physical progression to be expected, including becoming wheelchair bound. Wife described the illness symptoms and the devastating progression in detail, as follows: double blindness, requiring wife to read everything to husband, inability to touch and pick up things, trouble walking and numbness in his hands and toes.

It is undisputed that wife assisted husband on a daily basis. Such help included, but was not limited to, dressing, feeding and bathing. During this time, wife worked full time with exception for the one (1) year leave taken after the birth of the parties child. Wife's testified that as husband's illness progressed, his attitude changed. Husband grew nasty, bitter and a resentment developed and was evinced through swearing at wife. This conduct was a clear indication to wife that husband did not appreciate her daily labor in caring for husband, in addition to her maintaining the family household and caring for the parties child.

Wife testified that in the early years of the marriage she and husband had sexual relations on a frequent and regular basis. However, as a result of husband's irritation towards wife and its continuous growth, the couple's marital relations decreased towards the latter years of the marriage to once every three (3) to four (4) months. Husband occasionally refused to engage in sexual relations but, not on a constant basis.

Eventually, husband refused sexual relations on a repeated basis. Wife testified that in or about August 2002, husband refused to have marital relations with her because he was unhappy and hated the environment where he lived, complaining of all of his problems. Wife believed that husband expressed his frustration and anger by

turning her away. Within the same week, wife tried to have relations with husband, but encountered rejection. Beginning in August 2002, wife repeatedly requested sexual relations, a couple of times a month, but, to no avail. During her repeated requests, wife attempted to re-establish an intimacy with husband by rubbing his shoulder, putting her arms around husband, and rolling towards him, but husband rolled aside, pushed and “shouldered” wife away.

Wife stated that husband’s refusal took both physical and verbal forms. Husband responded with belittling names and commenting on wife’s physical appearance, calling her fat. Husband complained that wife did not “do it” right and he did not want to have sex; husband rolled away from wife and excused himself by saying that he did not take his Viagra pill. However, wife testified that she would awake to find husband “going about his own business”. Wife posits that husband’s sexual indifference to wife translated into a sexual obsession with himself and adult movies.

Wife testified that husband had a monthly prescription for Viagra and “ate them like candy”, although he was able to obtain an erection without Viagra. Wife acknowledged that husband took Viagra to experience the blood rush in getting a harder erection and because Viagra maintains a man’s erection until completion. Wife believed that husband used Viagra solely to masturbate with lubricating jelly while watching adult films or with the use of other stimuli, rather than having sexual relations with wife. Husband used these items a few times a week for approximately one (1) year from when the marital relations ended.

Wife testified that husband’s refusal to engage in sexual relations continued despite wife’s repeated requests and complaints. Wife stated that she was young, in

her thirties, and was not dead. Wife was confused by husband's sexual rejection and perceived no justification for such continuous refusal. Wife testified that after commencing the within matrimonial action in November 2003, she left the marital home because she could not bear husband's verbal abuse in front of their then seven year old son. Wife also testified that before she left, she made "a good faith offer to resume the marital relations" with husband.

Husband denied wife's allegation that he refused to engage in sexual relations. He stated that he would have marital relations with wife as long as she was willing at the time of this action. Husband testified that prior to wife's leave from the marital residence it was he who usually initiated marital relations with wife by rubbing himself in bed and it was wife who many times denied relations. Particularly between August 2002, and August 2003, wife refused husband several times. During this period, husband stated the parties had sexual relations approximately five or six times. Husband also testified that prior to August 2002, the parties had sexual relations "once a month or sometimes more, but a lot of times not much". Husband contends that the last sexual relations occurred in July or August 2003.

Husband testified that his use of Viagra was necessary due to the impact multiple sclerosis had on his ability to attain an erection. He took twenty (20) to thirty (30) pills a month. Husband stated that he ingested this volume of Viagra in the hope that the opportunity for marital relations arose. He usually prepared for sexual relations with the use of Viagra on the weekend when wife was off work. Husband testified that he stopped using the Viagra because he had no marital relations with wife. Husband ended his last Viagra prescription shortly after commencement of this matrimonial

action in November 2003.

Discussion

“Constructive abandonment occurs when a spouse refuses to engage in sexual relations for one or more years and such a refusal is “unjustified, willful, and continued, despite repeated requests from the other spouse for resumption of cohabitation” (*Tissot*, 243 AD2d 462, 463, 662 NYS2d 599 [2nd Dept. 1997] *lv denied* 92 NY2d 803, quoting *Caprise v Caprise*, 143 AD2d 968, 970, 533 NYS2d 622 [2nd Dept. 1998] quoting Scheinkman, Practice Commentaries, McKinney’s Consolidated Laws of New York, Book 14, Domestic Relations Law C170:7, at 608; see also *Silver*, 253 AD2d 756, 757, quoting *Lyons v Lyons*, 187 AD2d 415, 416 [2nd Dept. 1992]). The fact that the parties did not have sexual relations for more than one year does not by itself establish constructive abandonment (*Edward W.R. v Barbara A.R.*, 248 AD2d 964, 965 670 NYS2d 162 [4th Dept. 1998]). Plaintiff must also prove that such refusal was unjustified, willful, and continued, despite repeated requests for resumption of same (*Fairweather v Fairweather*, 256 AD2d 537, 538 682 NYS2d 873[2nd Dept. 1998]).

“Repeated requests” for resumption of conjugal relations is fundamental to a plaintiff’s claim of constructive abandonment (see *Shortis v. Shortis*, 274 A.D.2d 880, 882, 711 N.Y.S.2d 578, 581 [3rd Dept. 2000]). There is no constructive abandonment when a plaintiff fails in requesting a resumption of sexual relations with the defendant (see *Lyons v. Lyons*, 187 A.D.2d 415, 416, 589 N.Y.S.2d 557, 559 [2nd Dept. 1992]). The husband who alleged a ten years of abstention failed to prove constructive abandonment because he neither demanded a renewal of sexual relations nor threatened to terminate the marital relationship because of the abstention (see *Hammer*

v. Hammer, 34 N.Y.2d 545, 546, 354 N.Y.S.2d 105 [1974]). What constitutes “repeated requests” is not a definite standard. However, if one spouse refused to engage in sexual relations in response to a single request, it is insufficient to sustain a cause of action for a divorce on the ground of abandonment in the absence of proof that the other spouse thereafter repeatedly requested a resumption of sexual relations (see *Lyons v. Lyons*; see also *Caprise v. Caprise*). On the other hand, a plaintiff shows sufficient proof by making multiple good-faith requests and encountering consistent refusals (see *Donohue v. Donohue*, 222 A.D.2d 646, 636 N.Y.S.2d 104, 105 [2nd Dept. 1995]; see also *Diemer v. Diemer*, 8 N.Y.2d 206, 208, 210, 203 N.Y.S.2d 829, 832, 833 [1960]) (husband who made constant attempts to change his wife’s persistent refusal of marital relations is entitled to separation on the ground of constructive abandonment). “Repeated requests” are also sufficient when plaintiff wife made overtures from time to time and she was entitled to a finding of constructive abandonment when she was rejected by defendant husband who wanted nothing to do with her (see *Ostriker v. Ostriker*, 203 A.D.2d 343, 344, 609 N.Y.S.2d 922, 923 [2nd Dept. 1994]).

Without a plaintiff’s repeated requests, even if the refusal is unjustified, willful, and continued, the refusal is negated by a plaintiff’s consent or acquiescence and therefore the cause of action on constructive abandonment cannot be established (see *France G. v. Vincent G.*, 145 A.D.2d 599, 600, 536 N.Y.S.2d 138, 139 [2nd Dept. 1988]). An implied consent by way of maintaining a separate bedroom also supports a finding of consent to a sex-limited relationship and precludes a finding of abandonment (see *Murphy v. Murphy*, 257 A.D.2d 798, 799, 683 N.Y.S.2d 650 [3rd Dept. 1999]). When a plaintiff never asked again after the first time of refusal, the Court finds that he failed to

support his claim for a failure to demonstrate that he did not consent to the disengagement of sexual relations between himself and his wife for a period of more than seven years (see *Nicholson v. Nicholson*, 87 A.D.2d 645, 449 N.Y.S.2d 4 [2nd Dept. 1982]).

Furthermore, it is held that a plaintiff shall prove the absence of justification and a judgment of divorce will be granted based on a prima facie case of abandonment unless the defendant pleads and proves justification (see *Maryon v. Maryon*, 60 A.D.2d 623, 400 N.Y.S.2d 160 [2nd Dept. 1977]). A defendant's refusal can be justified in light of inappropriate conduct by the allegedly abandoned spouse (see *George M. v. Mary Ann M.*, supra at 133).

The legal sufficiency for a constructive abandonment claim requires specific detail in testimony. The Appellate Division, Second Department reversed a finding of constructive abandonment because plaintiff could not remember the last time he requested to have sexual relations or had sexual relations with the defendant (see *Schildkraut v. Schildkraut*, 223 A.D.2d 585, 586, 636 N.Y.S.2d 411, 412 [2nd Dept. 1996]; see also *Biegeleisen v. Biegeleisen*, 253 A.D.2d 474, 475, 676 N.Y.S.2d 684, 685 [2nd Dept. 1998]) (wife's testimony relating to the details of the constructive abandonment was too vague and unspecific to support a finding of constructive abandonment). The Court found sufficiency in making a prima facie case of constructive abandonment based on the plaintiff wife's specific claim that the defendant husband made a disparaging remark about her weight and words that she was no longer attractive to him as well as his action of removing himself (see *Smith v. Smith*, 254 A.D.2d 788, 789, 677 N.Y.S.2d 847, 848 [2nd Dept. 1998]).

In the case where a plaintiff's testimony makes out a prima facie case of constructive abandonment, if the testimony is directly contradicted by defendant's, the determination of constructive abandonment is premised upon an evaluation of the credibility of the respective parties (see *Caso v. Caso*, 161 A.D.2d 683, 555 N.Y.S.2d 820, 821 [2nd Dept. 1990]). Great weight shall be accorded to the trier of fact who hears and observes witnesses (see *id.*; see also *Schottenfeld v. Schottenfeld*, 152 A.D.2d 690, 544 N.Y.S.2d 27 [2nd Dept. 1989]) (trial court's decision based on far better position of assessing witnesses as to the credibility cannot be substituted by higher court's judgment); (see *Tissot v. Tissot*, 243 A.D.2d 462, 464, 662 N.Y.S.2d 599, 601 [2nd Dept. 1997]) (whether husband's refusal of sexual relations with wife is justified by his complaint of wife's fault should be resolved by trial court). The Court considers the totality of circumstances. Even though a plaintiff is unable to specify particular dates, the testimony that defendant's refusals occurred approximately one hundred times establishes sufficient cause of action for constructive abandonment (see *Gonzalez v. Gonzalez*, 262 A.D.2d 281, 282, 691 N.Y.S.2d 122, 123 [2nd Dept. 1999]). Similarly, a Court requires the plaintiff request continuously or at least periodically a resumption of conjugal relations in light of his summarized testimony that "I mentioned it and I approached her, but it just ended up nowhere" is too vague and unspecific to permit a finding of constructive abandonment (see *Caprise v. Caprise*, *supra*, at 971).

After viewing the witnesses, hearing the testimony and observing the demeanor, this court concludes that wife testified credibly, providing insight to the condition of the couple's marital relations. In this case, wife testified that for a period of at least one year prior to the commencement of the divorce action defendant willfully and

unjustifiably refused to engage in sexual relations with her, despite her repeated requests. This is sufficient to state a cause of action for constructive abandonment (*Silver*, 253 AD2d 756, 757, *citing Lyons*, 187 AD2d at 416).

In case at bar, wife's testimony clearly demonstrates husband's refusal to engage in sexual relations for one or more years and the refusal was unjustified, willful, and continued, despite repeated requests from the wife for resumption of cohabitation. Wife's testimony presents more than a single rebuffed request for sexual relations both in words and actions. The details of wife's testimony as to husband's lack of interest in sexual relations are neither vague or unspecific. Husband denied wife's requests with disparaging comments about her weight reflecting his lack of interest in wife. The Court further recognizes wife's overtures of intimate behavior to obtain husband's interest in marital relations. In addition to these multiple requests, wife attempted to reconcile after the commencement of this action, but before leaving the marital home. The Court also finds that wife neither consented or condoned husband's refusal to have sexual relations with wife nor was there an implied consent to have a limited sexual relationship between the parties, such as maintaining a separate sleeping area in the marital home.

The Court does not believe husband's contention that he ingested twenty to thirty Viagra pills a month in the hope of being ready to have sexual relations with wife. Plaintiff's rendition, that husband ingested these large quantities of Viagra for the purpose of self gratification, is far more credible.

This Court finds husband's testimony incredible in making conclusive accusations of wife's refusal for marital relations without referring to a specific incident. The Court

credited wife in giving details of husband's denial of marital relations and the extent of his self gratification.

Wife testified that husband was capable of obtaining an erection without Viagra. Husband failed to plead or prove any justification that wife contributed to his refusal by any inappropriate conduct. The Court also finds husband's testimony incredible in that he is the person who initiated marital relations yet at the same time, he claimed justification for his refusal based on his inability to obtain erection. The Court finds that wife's version of husband's self-gratification by Viagra further explains his unwillingness for marital relations.

Conclusion

Accordingly, this court finds that wife met her burden of demonstrating constructive abandonment by a fair preponderance of the credible evidence and a judgment of divorce is granted on the ground of abandonment pursuant to Domestic Relations Law §§ 170 (2). This Court cannot ignore the sad and unfortunate predicament the parties find themselves facing. It is clear that husband's life was altered by his illness and that wife was a good and dutiful spouse. Husband's rejection of wife and wife's acceptance of husband's self gratification was clearly devastating to wife. Husband's sadness and agitation over the loss of his marriage and the prospect of facing his illness without his wife is also evident to this Court.

E N T E R

Jeffrey S. Sunshine
J.S.C.

Dated: September 27, 2004