

At Matrimonial Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 26<sup>th</sup> of October, 2006.

**PRESENT:      HON. HAROLD B. BEELER,**  
Justice

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M K,

Plaintiff,

-against-

MP,

Defendant.

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**INDEX NUMBER**  
**Motion Sequence 001**  
**DECISION & ORDER**

This is a matrimonial action in which the plaintiff-wife MK is suing the defendant-husband MP for divorce on the grounds of cruel and inhuman treatment (DRL § 170(1)) and adultery (DRL § 170(4)). She is also seeking a monetary award in the form of maintenance and equitable distribution of all marital property.

Defendant moves to dismiss the complaint on several grounds: (1) lack of personal jurisdiction over the defendant (CPLR 3211(a)(8)) by reason of the failure to meet the requirements of long arm jurisdiction under CPLR § 302(b); (2) failure to state a cause of action (CPLR 3211(a)(7)) as a result of plaintiff's noncompliance with the durational residency requirements of DRL § 230; and (3) *forum non conveniens* (CPLR 327). Plaintiff opposes and cross-moves for *pendente lite* relief including monthly spousal maintenance.

**Factual Background**

Based upon the affidavits submitted by the parties, certain facts are agreed upon while others, which are in dispute, will be detailed more fully below. It is undisputed that the parties

were married on July 29, 2000 in Finland. Defendant, a Finnish citizen, is sales director for an international airline, which sent him to Singapore after their marriage. The couple lived in Singapore until February 2005 when defendant was transferred to Talinn, Estonia where they lived until the beginning of October 2005. The airline then sent defendant to London where the parties separated almost immediately on October 25, 2005. Plaintiff, who holds dual U.S.-Swiss citizenship, returned to New York State where she grew up and her parents resided.

She commenced this matrimonial action on February 14, 2006, a few days before defendant commenced a divorce action in Talinn. During their marriage, plaintiff returned to New York State at least twice a year to visit family and friends for several weeks at a time while defendant came to New York randomly on business or to stay with plaintiff and her family. The parties never owned or maintained a residence in New York.

### **Long-Arm Jurisdiction Pursuant to CPLR § 302(b)**

The court obtains personal jurisdiction generally over an individual non-domiciliary defendant by personal delivery of the summons on that defendant in New York State or by the operation of the long-arm provisions of CPLR § 302(a) or (b). None of the exceptions of CPLR § 302(a) dealing with conducting business, tortious acts or owning property within New York State apply here. CPLR § 302(b) specifically provides for long-arm jurisdiction over monetary matters in a matrimonial action.<sup>1</sup>

The instant defendant is concededly a non-domiciliary who was served with the

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<sup>1</sup> CPLR § 302(b) reads in part: A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state.

summons outside of New York State. The question, therefore, is whether personal jurisdiction may be exercised over the defendant under CPLR § 302(b) so as to enable plaintiff to obtain monetary relief from the defendant in the form of *pendente lite* maintenance as sought in the cross-motion as well as maintenance and equitable distribution upon dissolution of the marriage as demanded in the complaint.

Plaintiff is currently a resident of New York State and was so at the time the demand for support was made, the initial prerequisite for the invocation of CPLR § 302(b). However, no one other necessary condition of the three alternatives identified in the statute is met. New York State was not the matrimonial domicile of the parties before their separation; defendant did not abandon plaintiff in this state; and, the claim for support, maintenance and distributive awards did not accrue under the laws of this state or under an agreement executed in this state. While the parties visited plaintiff's parents in New York and defendant made business trips here, there is simply no evidence that they established a matrimonial domicile, or even a matrimonial residence, in New York State. *See Staron v. Staron*, 215 A.D.2d 646 (2d Dep't 1995); *Klette v. Klette*, 167 AD2d 197 (1<sup>st</sup> Dep't 1990). Accordingly, in the absence of any bona fide factual dispute, the Court finds as a matter of law that it has no personal jurisdiction over defendant and grants defendant's motion to dismiss plaintiff's claim for ancillary monetary relief pursuant to CPLR 3211(a)(8). As a result, plaintiff's cross-motion for *pendente lite* relief is denied.

#### ***In Rem* Jurisdiction Over the Marital Res Pursuant to CPLR § 314(b)**

In the absence of *in personam* jurisdiction, a court still has authority to affect the marital status by way of *in rem* jurisdiction over the marital res as provided in CPLR § 314(b) as long as one of the parties is a domiciliary of New York State at the time action is commenced. *Carr v. Carr*, 46 N.Y.2d 270, 272 (1978) ("Long ago the notion developed that a divorce proceeding is

an action *in rem*, with the marital status of the parties being fictitiously deemed an intangible res. While the analytical value of the *in rem* label has been questioned, status adjudications nonetheless possess a different quality than that of the typical *in personam* action”) (Citations omitted).

Defendant has not sought to dismiss the complaint seeking the dissolution of the marriage on the ground that the court lacks subject matter jurisdiction over the marital res. Accordingly, the Court retains jurisdiction over the status of the parties’ marriage.

### **Durational Residency Requirements Pursuant to DRL § 230**

Defendant’s argues that plaintiff has failed to meet the durational residency requirements mandated by DRL § 230<sup>2</sup> and that, therefore, the complaint must be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7). These continuous residency requirements of DRL § 230 are not a limit on the subject matter jurisdiction of the court, but are substantive elements of a matrimonial cause of action which must be alleged and proven. *Lacks v. Lacks*, 41 N.Y.2d 71, 73 (1976) (“The requirements of section 230 . . . go only to the substance of the divorce cause of action, not to the competence of the court to adjudicate the cause”); *Unanue v. Unanue*, 141 A.D.2d 31, 340 (2d Dep’t 1988) (“The durational residency requirements [of DRL § 230] are not a limitation upon the subject matter jurisdiction of the Supreme Court, but are

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<sup>2</sup>An action to annul a marriage, or to declare the nullity of a void marriage, or for divorce or separation may be maintained only when:

1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or
2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or
3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or
4. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or
5. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action.

merely ‘substantive elements’ of the matrimonial cause of action, which the plaintiff must allege and prove”).

The purpose of these durational requirements is to protect the New York courts from being utilized by litigants in matrimonial proceedings who have little or no connection to New York. *Unanue*, 141 A.D.2d at 34 (“Concerned that spouses with no real connection to New York would flock here for the sole purpose of obtaining marital relief unavailable in the States that had substantial interests in the marital relationship, the Legislature imposed the durational residence requirements to deter such conduct and to ensure against use of our courts in matrimonial proceedings by outsiders”) (Internal punctuation omitted).

In opposing the motion to dismiss, plaintiff relies on DRL § 230(5) arguing that she has maintained her domicile in New York for a continuous period in excess of two years immediately preceding the commencement of the action. While defendant establishes that plaintiff did not reside in New York State for more than a few months before commencing this action, plaintiff correctly argues that domicile is an acceptable alternative to actual physical residence under DRL § 230. *Capdevilla v. Capdevilla*, 149 A.D.2d 312, 313 (1<sup>st</sup> Dep’t 1989) (“Proof of either domicile or residency will suffice to show compliance with Domestic Relations Law § 230”).

Domicile ordinarily requires that “there must be physical presence and the requisite *intention* to make the locality one’s fixed and permanent home.” 1 Foster, Freed and Brandes, Law and the Family New York § 5:11 [2d ed]. Moreover, “once a domicile is established in New York, it is not lost merely by temporary absences from the State, provided there is a corresponding intention to retain New York as one’s domicile.” *Unanue*, 141 A.D.2d at 40. That is, a person can change his residence without necessarily changing his domicile. *See*

Scheinkman, Practice Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 230, at 25. It is also presumed that a domicile of origin continues until it is superceded by a new one. *See generally* 25 Am. Jur. 2d Domicil § 55; *Unanue*, 141 A.D.2d 31; *Delvaille v. Delvaille*, 87 Misc. 2d 726, 728 (Sup Ct Special Term, Kings County 1976) (“There is a presumption in the law that a domicile, once fixed, is retained until a new one is actually required”).

Further, there is an especially strong presumption that a person living in a foreign country intends to retain his United States domicile. *Dupuy v. Wurtz*, 53 N.Y. 556, 569 (1873) (“Her long residence abroad, upon which the contestants rely, is not very significant in this case, as during by far the greater part of that time, in fact during all except about two and a quarter years before her death, she was clearly shown to be a mere sojourner in Europe). *Dupuy v. Wurtz* holds that “in view of the important results flowing from a change of domicil[e], the intention to make such a change should be established by very clear proof, especially when the change is to a foreign country.” 53 N.Y. at 562. This presumption can, of course, be overcome by proof establishing a change of domicile. *In re Appleby's Estate*, 106 N.Y.S.2d 294, 300 (Sup Ct NY County 1951) *aff'd* 279 A.D. 993 (1<sup>st</sup> Dept 1952) (“The domicile once acquired continues until there has been not only an abandonment of the old domicile but the acquisition of a new one”). The burden of proof is on the party, in this case the defendant, asserting such a change. *Id.* at 299.

Relying on these well-accepted principles of law, plaintiff argues that the objective evidence establishes that New York has always been her domicile and that she never intended to abandon it as her permanent home. She points to the evidence that she was born and raised here, that her residences abroad were necessitated by the demands of her husband's employment

and that she has continuously maintained her contacts with New York throughout the marriage and expressed her intention to return to live here. In the latter regard, she emphasizes her returning to New York for weeks at a time to see family and friends, her maintaining a New York Driver's License and New York Voter Registration Card and her payment of United States taxes in 2002, the last year she claims to have earned income.

Defendant responds that plaintiff's claims, even if accepted as true, establish only a tenuous connection to New York and that her leaving New York and relocation to Europe evidenced a clear intention to abandon New York and acquire a new domicile. In particular, defendant refers to plaintiff's having lived in Switzerland and San Francisco even before their marriage; their having lived together for approximately 5 years in Singapore where plaintiff obtained permanent residence status; their relocation to Estonia for about 7 months where plaintiff obtained a work and residency permit; and, their never having owned and maintained a residence in New York. Further, defendant contends that, while plaintiff may have filed United States taxes in 2002, she listed her Singapore address as her home on IRS Form 1040 and, more importantly, there is no claim on her part that she ever filed New York State income taxes. Finally, while she may be registered to vote in New York State, she never contends that she was actually physically present to vote in any New York State election nor that she voted there by absentee ballot since the marriage.

From even this brief recitation of the parties' respective contentions, it is clear that there are contested issues of fact as to whether plaintiff has been domiciled in New York State for two years preceding the commencement of the action as mandated by DRL § 230(5). Plaintiff refers to the evidence of continuing contacts with New York State while she lived and traveled abroad and the absence of evidence that she established a permanent domicile anywhere else. By

contrast, defendant points to the permanence of her contacts in Europe and Asia and what he claims to be the superficiality of her connections to New York State.

The remaining issue is whether the sufficiency of the evidence with respect to plaintiff's compliance with DRL § 230(5) should be determined as a threshold matter at a pre-trial hearing or simultaneously with all contested issues at trial. At one time, the law regarded the issue of plaintiff's continuous residence or domicile as a jurisdictional issue and mandated a hearing in advance of trial. *See Usher v. Usher*, 41 A.D.2d 368 (3d Dep't 1973). However, the logic of *Usher* was explicitly rejected by the holding in *Lacks, supra*, that DRL § 230 did not implicate the competence or subject matter jurisdiction of the court, but rather concerned a substantive element of a divorce cause of action which had to be alleged and proven.

Relying on *Lacks*, the First Department in *Rubin v. Rubin*, 73 A.D.2d 148 (1<sup>st</sup> Dep't 1980) declined to bifurcate the proceedings and held that the issue of plaintiff's continuous residence was one for trial. Since the *Rubin* plaintiff did not seek alimony or monetary relief and thus was not entitled to any pretrial financial discovery, the interest of judicial economy and management mandated a single proceeding. 73 A.D.2d at 151. In *Wilson v. Wilson*, 176 A.D.2d 115 (1<sup>st</sup> Dep't 1991), where the plaintiff sought alimony and equitable distribution, the First Department distinguished *Rubin* and directed an immediate pre-trial hearing on the substantive issue of plaintiff's residence in order to avoid possibly unnecessary, protracted and expensive pre-trial discovery with respect to the parties' substantial assets. In light of this Court's ruling that plaintiff is not entitled to any monetary relief against the defendant because no personal jurisdiction was obtained over him pursuant to CPLR § 302(b), the Court will follow the logic of *Rubin* and order that the issue of plaintiff's domicile be reserved for trial.

*Forum Non Conveniens* Pursuant to CPLR 327

Finally, defendant's application to dismiss the complaint on *forum non conveniens* grounds is denied. "The wife's residence in New York provides a substantial nexus to this State." *Bourbon v. Bourbon*, 259 A.D.2d 720, 722 (2d Dep't 1999). Additionally, none of the other jurisdictions where the parties had contacts appear to be a better jurisdiction to hear this case. The couple left Singapore 20 months ago and Estonia, where they only lived less than eight months, one year ago. There is no reason to defer to the later-commenced action in Estonia under those circumstances. They arrived in London together, but separated within days of getting there.

#### Conclusion

For all the foregoing reasons, defendant's motion to dismiss for lack of personal jurisdiction pursuant to CPLR § 302(b) is granted and his motions to dismiss for failure to comply with the durational requirements of DRL § 230 and on *forum non conveniens* grounds are denied.

A Preliminary Conference on this action shall be held on Monday, December 11, 2006 at 10:30 AM in Room 304, 71 Thomas Street.

**This constitutes the decision and order of the Court.**

**DATE:           October 26, 2006**

**ENTER :**

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**HAROLD B. BEELER, J.S.C.**