

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF STEUBEN

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S. A,

Plaintiff,

**DECISION AND  
ORDER  
INDEX NO.**

-vs-

F K,

Defendant.

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PRESENT:           HON. ALEX R. RENZI  
                          JUSTICE OF THE SUPREME COURT

**DECISION AND ORDER**

The Plaintiff/husband moves under CPLR 602(b) for consolidation of actions pending in Supreme Court sitting in Steuben County and Queens County, respectively. By Cross Motion, the Defendant/wife seeks an order under CPLR 3211(a)(4) to dismiss the divorce action pending in Supreme Court, Steuben County on the grounds that another action, having priority, is pending in Supreme Court, Queens County. In the alternative, the Defendant seeks consolidation of the two actions, and for venue to be designated in Queens County.

The Plaintiff opposes these applications arguing that the Plaintiff initiated the action by filing a Summons with Notice in Steuben County, and that other factors link the parties to Steuben County which should result in that county having priority over the action and establishing it as the proper venue for this proceeding.

Both sides have submitted supplemental affidavits. While the motions and cross motions seek various relief on issues pertaining to custody, maintenance, child support and attorneys fees, this decision will be confined to the issues of jurisdiction, venue, and consolidation.

For the reasons set forth below, the Defendant's motion to dismiss the Steuben County action

pursuant to CPLR 3211(a)(4), and the motion to consolidate the actions into one proceeding in Queens County, are denied. Furthermore, the Plaintiff's motion to consolidate the actions into a single action, with venue in Steuben County, is granted.

## **FACTS**

On November 17, 2005 the Plaintiff filed a Summons with Notice in Supreme Court, Steuben County (the "Steuben County action") seeking divorce from the Defendant on grounds set forth in DRL § 170(1) as well as seeking ancillary relief addressing custody, support, residency and property issues. The Defendant was properly served with that Summons with Notice. In reaction to the Steuben County action, and prior to filing any answer or seeking a written demand for the complaint under CPLR 3012(b) in Steuben County, the Defendant, on December 8, 2005, filed a Summons with Verified Complaint in Supreme Court, Queens County (the "Queens County action") seeking divorce from the defendant on multiple grounds, as well as seeking ancillary relief. On December 15, 2005, the Plaintiff filed a verified Complaint in Steuben County.

The parties were married on August 9, 2002 in Queens, New York, and a child was born on February 24, 2004. During the years of marriage both parties admit that minimal time was spent residing with one another. The Plaintiff is a medical doctor, and employed since early 2005 at a hospital in, Steuben County, New York. Since March 2005 the Plaintiff, Defendant and the child lived together for periods of time in Steuben County, although the precise number of days, weeks or months residing together is in dispute. Additionally, at times the family traveled together during attempts at reconciliation. The record reflects that the parties separated on or about September 11, 2005.

Not in dispute, however, is the fact the Plaintiff is a resident of Steuben County, and employed as a doctor there. Moreover, the Plaintiff has been the primary source of financial support for the family. The Plaintiff's residency, employment, and income were established prior to and during this litigation.

In the Steuben County action, the Plaintiff seeks divorce and ancillary relief including, among other things, joint custody of the child (with primary residence to be with the Defendant), distribution of marital assets pursuant to DRL § 236B, joint coverage of the child's medical expenses, and declaration of the Plaintiff's separate property. In the Queens County action the Defendant seeks divorce and ancillary relief including, among other things, sole custody of the child, distribution of various marital assets, and for the Plaintiff to be responsible in total for maintenance, child support, and medical coverage of the Defendant and child.

### **DISCUSSION**

An action is commenced by the filing of a summons and complaint or a summons with notice. CPLR § 304. Generally venue for the trial shall be in the County where one of the parties resided at the time the action was commenced. CPLR § 503 (a). A party may move to dismiss a cause of action on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state . . . ." CPLR 3211(a)(4). Upon motion, the Supreme Court may remove actions pending in another court and consolidate those actions. CPLR 602 (b).

Here, the Plaintiff commenced the action by the filing a summons with notice in Steuben County. While the Defendant was the first party to file a complaint, she did so in Queens County, and in apparent reaction to the Steuben County proceeding. Thus, at issue is whether the Steuben

County action is subject to dismissal due to the presence of the Queens County complaint, and whether these actions constitute “the same cause of action” mandating dismissal.

While the timing of the filing of a summons with notice (when juxtaposed with the timing of the filing of a summons and complaint by the opposing party) is an important factor in determining the priority of actions, the Court enjoys “broad discretion when considering an application to dismiss an action on the ground that another action is pending between the same parties dealing with a similar issue.” *Jordan Int’l Trading, Inc. v. Yang*, 2 Misc. 3d 1010 (Slip Op., Sup. Ct., New York County, April 6, 2004).

In *San Ysidro Corp. v. Robinow*, 1 A.D.3d 185 (First Dept., 2003), the trial court dismissed a New York action, commenced on summons with notice, where the defendant subsequently filed a summons with complaint in California. In reversing the trial court, the Appellate Division stated “. . . while such technical priority in the commencement of actions is a factor to be considered, it is not necessarily dispositive, particularly where both actions are at the earliest stages of litigation, where one forum’s connections clearly predominate and where such priority was achieved by such duplicity as occurred here.” *San Ysidro at 186*.

“While it has often been stated that, generally, the venue of a consolidated action should be placed in the county where the first action was commenced . . . that rule is not inflexible.” *McCall v. Berman*, 201 A.D. 2d 709 (Second Dept., 1994).

In *Varney v. Edward S. Gordon Co., Inc.*, 139 A.D.2d 973 (Fourth Dept., 1988), where a declaratory judgment action was commenced in New York County by Gordon by service of a summons with notice, but followed several days later by Varney’s service of a summons and complaint in Onondaga County, the Appellate Division ruled that the trial court erred in placing

venue in Onondaga County. In finding that New York County (where commencement of the action was on summons with notice) was the proper venue, the Court stated “generally, the proper venue is in the county in which the first action was commenced, absent proof of circumstances compelling trial in another venue. . . .” *Varney at 973*.

In support of her 3211 (a)(4) motion, the Defendant relies primarily on *Harrison v. Harrison*, 16 A.D.3d 206 (First Dept., 2005), where a subsequent filing in New York County of a summons and complaint by the wife in a divorce action was judged to be the “first-filed action” over a summons with notice filed seven days earlier by the husband in Warren County. There, the Court held that venue was properly placed in New York County where the first complaint was filed.

However, even in *Harrison*, the Court found that determining the priority of actions required analysis beyond the “temporal priority” of whether a summons and notice predated a summons with complaint. “Special circumstances”, including the presence of evidence, the convenience of witnesses, the location of the marital residence, and the location of the Defendant/husband’s “main income producing enterprise” warranted the Court holding that the totality of evidence supported removal of that action to New York County. *See Harrison at 207-208, and Varney v. Edward S. Gordon Co., Inc., supra, at 973*.

Here, the Plaintiff resides and is employed in Steuben County. In addition to working as a medical doctor at a in Steuben County, tax records submitted as part of the record reflect that the Plaintiff maintains a business with a Steuben County address. The support and maintenance sought by the Defendant from the Plaintiff will accrue from the income earned by the Defendant in Steuben County. The husband, wife and child stayed or resided together for certain periods of time in Steuben County after the Plaintiff/husband established residence there.

For her part the Defendant states in her cross notice of motion that she has “basically” resided and worked in Queens during the marriage and that she is “temporarily” residing with her parents. While she notes that the Plaintiff owns property in Queens, she admits that such was acquired by the Plaintiff prior to the marriage. Hence, the property does not constitute “marital property”. DRL § 236 B (1)( c). The Defendant emphasizes their child’s contacts with Queen’s County as grounds for giving that action priority. However, the child is an infant (26 months old), not attending school, and not of sufficient age to have established relevant friendships.

In her affirmation of May 3, 2006, the Defendant’s attorney cites *Kosmicki v. Salzer*, 252 A.D.2d 972 (Fourth Dept., 1998) and *Lawrence v. Lawrence*, 258 A.D.2d 966 (Fourth Dept., 1999) as authority for finding that the inconvenience of one of the parties dictates that venue should rest in the state where the party most inconvenienced lives. However, *Kosmicki* dealt primarily with the New York court’s application of the Uniform Child Custody Jurisdiction Act (UCCJA) where the mother and child resided in Florida, and then Germany. In *Lawrence*, the child lived in the State of Washington while the husband/father, a Coast Guard officer, was not even living in New York State. Both cases involve parties and witnesses separated by thousands of miles. Hence, the facts of those cases make them inapplicable to the instant litigation.

Based on the above, the Defendant/wife has failed to demonstrate to this Court that the parties possess a greater nexus to Queens County than the county where the Plaintiff/husband commenced this action. While courts will consider a wide variety of circumstances which may necessitate the fixing of venue in one county over another, “rough equality of factors in favor of both counties will not warrant a reversal of the trial court’s exercise of discretion.” *Israel v. Hirsh*, 81 A.D.2d 694, 694-95 (Third Dept., 1981).

Thus, this Court holds that the Plaintiff commenced this action in Steuben County by filing the summons with notice. In addition, this Court finds that the Plaintiff's ties to Steuben County as set forth above, as well as the Defendant's failure to present facts which show that the ties of the parties to Queens County outweigh the ties of the parties to Steuben County, warrant the conclusion that Steuben County is the proper venue for this action.

In addition this Court must further determine whether the matter pending in Queens County is for the "same cause of action" or for "the same or similar relief" under CPLR 3211 (a)(4) as the Steuben County proceeding.

On their face, the two actions request similar forms of relief. Each party seeks a divorce from the other. However, while the result of the actions may be the same (the legal termination of a civil union freeing each party to remarry), the causes of action differ. In Steuben County, the Plaintiff seeks divorce grounded in cruel and inhuman treatment. In sum and substance the Plaintiff alleges that the Defendant's behavior, her failure to spend any consistent time with the Plaintiff, and her failure to take steps to save the marriage caused the Plaintiff to suffer emotional pain, distress, embarrassment and humiliation.

In Queens County, the Defendant seeks divorce grounded in several causes of action, including cruel and inhuman treatment and adultery. The Defendant alleges that the Plaintiff physically abused her, financially neglected the Defendant and their child, and that the Plaintiff engaged in adultery with another woman.

It has been held that "the action by one spouse for divorce on one set of grounds is not an action 'for the same cause of action' . . . as an action by the other spouse based on different grounds". *Graev v. Graev*, 219 A.D.2d 535 (First Dept., 1995), *citing Kevorkian v. Harrington*, 158

Misc. 2d 464 (Sup. Court, New York County, July 28, 1993), *at* 468.

The Court has reviewed the divorce complaints filed by each party in the two counties and finds that these actions are facially not for the same cause of action. In the two actions the legal grounds for divorce and the facts alleged to support those grounds differ substantially when compared with one another. Thus it cannot be said these two divorce proceedings are “for the same cause of action.”

Lastly, based on many of the factors set forth above this Court grants the Plaintiff’s motion for removal of the Queens County action to Steuben County. Seeing as the actions involve identical parties, issues, and common questions of law and fact, as well as the Defendant’s failure to demonstrate that granting the Plaintiff’s motion would prejudice a substantial right of the Defendant’s, this Court finds that the precept of judicial economy justifies consolidation and removal to Steuben County. *See Rist v. Comi*, 260 A.D.2d 890 (Third Dept., 1999).

Accordingly, the motion by the Defendant to dismiss the instant action pursuant to CPLR § 3211(a)(4) is denied. Similarly, the motion by the Defendant to consolidate the instant action by transferring it to Queens County pursuant to CPLR 602(b) is likewise denied. The motion by the Plaintiff to remove and consolidate the Queens County action to Steuben County is granted.

The foregoing constitutes the decision and order of the Court.

Dated:

Rochester, New York

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ALEX R. RENZI  
Acting Justice of the Supreme Court