NEW YORK SUPREME COURT : QUEENS COUNTY
MATRIMONIAL PART 52

P R E S E N T :
HON. JEFFREY D. LEBOWITZ,
Acting Justice.

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S.C.,

DECISION AFTER TRIAL

Plaintiff,

-against- Index No. 19650/02

A.C.,

Defendant,
----------X
LEBOWITZ, J.

Plaintiff moves for a divorce on the grounds of cruel and inhuman treatment pursuant to D.R.L. Section 170 (1).

Facts:

Plaintiff, S.C., and Defendant, A.C., were married for over thirty years, and resided at the same residence for twenty nine of those years. Three adult children were the product of their marriage. In 2003, Plaintiff Wife permanently moved out of the marital residence. Plaintiff Wife was a teacher for twenty two years. Defendant Husband has been employed for thirty five years as a photographer.

Based upon prior rulings, the sole grounds upon which the divorce was sought was based on cruel and inhuman treatment. In keeping, Plaintiff testified to several events in an attempt to establish these grounds. Without going into unnecessary detail, in reviewing these instances seriatim, the Court makes the following findings of fact.

In April, 1999, Plaintiff testified that while away at a baby shower she received a phone call from her daughter that their marital home had been ransacked. Upon returning, Plaintiff

discovered a sewing machine, which had sentimental value as it was a gift from her parents, turned on its side. A dining room chair, also a gift from Plaintiff's parents, was broken. Fabric was strewn outside the house. When confronted with the condition of the home, the Defendant stated "he used to do this kind of thing all the time as a kid".

Later that day when Plaintiff was in the bedroom, Defendant came in on numerous occasions and continuously slammed the door, turned the lights on and off, and allegedly screamed and cursed at his wife.

In May, 2000, Plaintiff wanted to buy a new car. Defendant allegedly stated that "if you buy the car, you are going to have to move out". He took the bill of sale for the car and threw it out. He then placed a chain saw in front of the living room couch, another gift from Plaintiff's mother, and allegedly threatened the Plaintiff that if she bought the car "he would cut up the couch".

On cross examination, Plaintiff admitted that Defendant never did anything with the chain saw and that she did in fact buy a new car.

In the summer of 2001, Defendant was looking for photography equipment, frustrated that he could not find what he needed, he yelled at Plaintiff for help. Plaintiff was then sitting at the kitchen table. Defendant threw a picture frame on the kitchen table and the glass shattered. Some of the glass fell on the Plaintiff, who was not injured. Defendant testified that he was clearing out his basement and merely threw the frame onto a pile of items to be discarded when the frame shattered on the floor.

In May of 2002, after Defendant's daughter's college graduation, apparently annoyed that there was insufficient food, Defendant spewed forth a series of obscenities at his wife and told her to get out of the house. Plaintiff testified that it was not unusual for Defendant to utter obscenities. Forced to categorized the frequency of such obscenities, she stated twice a month.

In October of 2002, an argument ensued over the Plaintiff leaving in her car. Defendant grabbed the Plaintiff's elbow and

took the keys away from her and blocked her car with his own in the driveway of the family home. When Defendant said Plaintiff should call the police if she didn't like his actions, she in fact called the police who appeared after Defendant left. Plaintiff ultimately admitted that she was able to drive away without further incident.

In December of 2002 Defendant presented Plaintiff with a "collage" of nude pictures of her, which she thought had been destroyed. Defendant ostensibly stated that he had additional pictures which he was prepared to show to friends.

In 2003, during a Passover seder, Defendant allegedly made sexually inappropriate remarks in the presence of the Seder guests.

In the summer of 2003, Plaintiff discovered urine on her car. Defendant denied engaging in such conduct on his cross-examination.

Plaintiff stated that she had been depressed and suicidal. She had received medication for her condition and was often unable to concentrate. On direct she testified that her medication began in 2001, though she did admit that while depressed about the difficulties in her marriage, she was also despondent when her daughter left for college.

On cross-examination Plaintiff admitted that her mother's death was also a cause for her depression. As a result, she attended bereavement groups and saw a therapist as early as 1998. Contrary to her testimony on direct, she admitted that she had been taking medication, at least since that year. She again reiterated that the troubles in her marriage and her daughter leaving for college were also causes for her depression. Her father's death subsequent to that of her mother, while leaving her in a sad state, did not depress her. Lastly, she indicated that she was diagnosed as having cancer in October, 2001.

Defendant consensually left the marital bedroom in 2001. In 2002, he returned to the bedroom only as an accommodation to allow their son, Jason, to have his own room when he temporarily moved back in with his parents.

Plaintiff candidly admitted that she engaged in consensual third party sex with the Defendant but had stopped engaging in such activity in 1998, though Defendant had asked her to continue for about six months afterwards at which time he ended such requests.

With regard to the 1999 incident, Defendant testified that it was precipitated by his concern over the condition of the car which Plaintiff used to drive to New Jersey. He admitted to damaging the dining room chair and subsequently on cross also admitted to throwing the sewing machine over on its side.

With regard to the May, 2000 incident involving the chain saw, he admitted that he brought the chain saw into the house, which he claimed he often did, but had no intention of damaging any of the furniture.

With regard to his alleged threat to display nude photos of the Plaintiff to his friends, he admitted to only showing the collage to one friend. He then stated that the Plaintiff had shown similar photos to at least one individual while at the Sunnyrest Nudist Camp. He said that he stopped going to sex clubs when Plaintiff expressed a desire to cease such activity. He indicated that he did in fact show the nude photos to Plaintiff after the matrimonial action commenced so as to illustrate that there was sufficient blame attributable to both parties.

R. T. testified that he had been a friend of the Defendant for fifty years. Depressed about his marital situation, the Defendant visited R.T. and his wife in Brazil in December of 2002 after commencement of the matrimonial action. R.T. testified that the Defendant visited a red light district in Brazil and on a second occasion visited a brothel in Vinyado, a suburb of R.T.'s home. It was R.T.'s testimony that the Defendant admitted having sexual relations with a prostitute, though on cross he admitted that he never actually observed the Defendant having sexual relations with anyone. While not personally observing this alleged sexual contact between Defendant and other women, he did indicate that Defendant had expressed some concern after one such incident and had described in some detail his conduct in Vinyado. R.T. indicated that while he had also taken nude pictures of his wife and that they had attended a swing club in the past, he and his wife had never engaged in any of the club's activities.

Law:

It is axiomatic to note that where the marriage is one of long duration, such as in the instant case, the courts have consistently required a high degree of proof of cruel and inhuman treatment. See Bradley v. Bradley, 298 A.D.2d 485 (2nd Dept., 2002). To establish this high degree of proof Plaintiff must show by a preponderance of the evidence that the conduct complained of so endangered her physical and mental well being as to render it unsafe or improper for her to continue to cohabit with the Defendant. See Brady v. Brady, 64 N.Y.2d 339,343, 486 N.Y.S.2d 891, 476 N.E.2d 290; Davey v. Davey, 293 A.D.2nd 444,(2nd Dept., 2002).

In determining whether the Defendant's conduct justifies the granting of divorce on these grounds the conduct must be viewed in the context of the entire marriage including its duration. See Bradley (supra), and must withstand a heightened scrutiny by the Court. See Shortis v. Shortis, 274 A.D.2d 880 (3rd Dept., 2000). Acts complained of during a short term marriage may lose much of their vitality when viewed within the context of one of much longer term.

While individual incidents in and of themselves may not rise to the level of proof required, a cumulative review of the incidents may form the basis for establishing a course of conduct which is harmful to the Plaintiff's physical or mental well being.

However, in this regard it is important to note that in determining what constitutes cruel and inhuman treatment, incompatibility and irreconcilable difference, See, Jacob v. Jacob, 2004 W.L. 1207908 (3rd Dept., 2004); Bigeleisen v. Bigeleisen, 253 A.D.2d 474, (2nd Dept., 1998), have been specifically rejected as basis for divorce. Indeed the practice commentaries to Section 236 of the D.R.L. indicate that what is required is a showing of serious misconduct. See, also in this regard Palin v. Palin, 213 A.D.2d 707, (2nd Dept., 1995).

It has been noted that the conduct complained of by the Plaintiff must constitute calculated cruelty that renders cohabitation inappropriate. See Feeny v. Feeny, 241 A.D. 2nd 510, 661 N.Y.S.2d 26,(2nd Dept., 1997).

Thus in reviewing the testimony, the Court must determine whether the Defendant has engaged in a course of conduct of

sufficient character as to seriously affect the physical or mental well being of the Plaintiff.

In turning to the instant matter, the Court notes that none of the incidents complained of by the Plaintiff in and of themselves would justify the granting of the requested relief. With regard to incidents of physical contact between the parties, even accepting Plaintiff's testimony at face value, none of them seem to be other than minor and incidental to the behavior complained of on those specific dates.

With regard to the sexual activities engaged in by both parties, it should be noted that the grounds of adultery were not litigated at trial. While adultery may form the basis for a divorce predicated on cruel and inhuman grounds, see, Guneratnes v. Guneratnes, 214 A.D.2d 871 (3rd Dept., 1995), in the instant matter where the conduct complained of is acquiesced in by both parties, and there is no evidence that the Plaintiff engaged in such behavior under force or duress the Court cannot find given the consensual nature of the sexual activities that such conduct could properly form the basis for the granting of the requested relief. cf. Hammer v. Hammer, 34 N.Y.2d 545, Relyea v, Relyea, 2 A.D.3d, 1176 (3rd Dept., 2003).

As to the somewhat generalized allegations involving the Defendant's behavior in Brazil, it does not appear that this conduct was brought to the attention of the Plaintiff before this action was commenced, See, Haydock v. Haydock, 222 A.D.2d 554 (2nd Dept., 1995); Rauchway v. Kotyuk, 255 A.D.2d 885 (4th Dept., 1998). Nor does it appear that the allegations were sufficient to establish exactly what kind of sexual activity, if any, was engaged in by the Defendant.

Thus is it up to the Court to determine whether or not the incidents complained of, in cumulative fashion, may render cohabitation so unsafe or improper to the Plaintiff's well being as to justify the granting of the requested relief. Keeping in mind that in this case the marriage was one of very long duration, it cannot be said that the Defendant engaged in a course of conduct that rises to the level of calculated cruelty. It appears that many of the incidents were predicated upon disagreements between the parties and that while at times the response by the Defendant may have seemed somewhat inappropriate, the Court cannot say that Defendant's conduct, under a heightened scrutiny requiring a high degree of proof, establishes sufficient proof of cruel and inhuman treatment. See, Practice Commentaries to D.R.L. Section 236. See, also, Jacobs v. Jacobs,(supra) and Brady v. Brady, (supra).

It should also be noted that no medical proof was adduced by the Plaintiff to show that the conduct of the Defendant endangered her mental well being. While it is true that medical proof is not necessary and the testimony of the Plaintiff may be sufficient, see, Levine v. Levine, 2 A.D.3rd 498 (2nd Dept., 2003), the absence of such evidence is a relevant consideration in evaluating the sufficiency of the proof. Omahen v. Omahen, 289 A.D.2d 890, (3rd Dept., 2001). It is clear from the testimony that Plaintiff's well being suffered not only from the conduct of the Defendant but other incidents in her life, in particular the loss of her mother and subsequently her father, and her daughter leaving for college, and that her psychiatric treatment predated the incidents complained of at trial. Thus the Court cannot say that a sufficient nexus has been established that Defendant's conduct, in and of itself, endangered Plaintiff's mental well being so as to render it unsafe for the parties to continue to cohabitate as husband and wife. See, Wachtel v. Wachtel, 114 A.D.2d 952 (2nd Dept., 1987); Breckinridge v. Breckinridge, 103 A.D.2d 900 (3rd Dept., 1984).

The Court, however, does wish to address the question raised by Plaintiff in her brief. The Plaintiff states that ..."the Plaintiff should not remain tied to a man... the legal tie between the parties should be severed to permit her to go forward and live in peace". While this is more of an emotional than a legal argument, it is a statement that deserves a response by this Court. New York, while long in the forefront of resolving economic issues between married parties, has lagged far behind the rest of the country in the manner in which Courts are allowed to dissolve marriages. The provisions of D.R.L. Section 170 are specific and must be proven before any divorce will be granted. Given that the grounds for divorce are gender neutral, "fault" creates unnecessary burdens to both husbands and wives who seek to dissolve marriages under circumstances in which it is clear the parties should no longer reside together as a family unit.

It is not the role of this Court to enact legislation but to interpret and apply the applicable statutes to the best of its ability. It is for the legislature to review and determine whether or not, as complained of by the Plaintiff in this case, individual parties should be required to remain together in a marriage that one of the parties is so clearly desirous of ending. It is, however, helpful to at least review briefly where New York stands with regard to fault in comparison to the remainder of the country. It appears that virtually every jurisdiction in the United States save New York has some type of no fault divorce statute. Indeed a recent survey of divorce in the 50 states, Puerto Rico, the U.S. Virgin Islands and the District of Columbia indicates that 35

jurisdictions recognize some form of irreconcilable differences or irretrievable breakdown of the marriage as a basis for ending the marital relationship. Six jurisdictions recognize incompatibility as a basis for ending marriage and eleven permit living separate and apart without legal proceedings or the finding of fault as the basis of divorce. Only New York requires the finding of fault or living apart pursuant to a legal document as a basis for divorce.

In reviewing responses to a questionnaire drafted by the New York State Bar Association's Family Law section, approximately 700 responses were returned from over 3,000 surveys distributed to matrimonial attorneys across the state. Over 50% of the responses came from attorneys who have handled at least 100 matrimonial actions and over 20% have handled between 500 and 1,000 cases. Therefore the responses were to a significant extent completed by veteran matrimonial practitioners. Interesting to note was that the respondents felt approximately 50% of the objections to the grounds were driven by economic concerns. Most counsel felt that less than 10% of the cases involved women contesting grounds for divorce and that when fault was in fact litigated that additional counsel fees to resolve fault ranged from anywhere from $2,000 to $15,000 as a component of the matrimonial matter. In addition, the use of fault, the survey disclosed, seemed to favor the parties with the greater economic assets. Fault was used by the monied party as a way to control the marital assets. Fault was less of a problem to a monied spouse who could move to a nearby state, i.e., New Jersey or Connecticut and meet the residential requirements in states where fault is not a necessary predicate for dissolution of marriage. And, of course, fault often forces one party to stay married if he or she is unable to establish the grounds required by the state.

In this Court's own experience, parties are often troubled by the concept of fault with regards to grounds for the dissolution of their marriage. This Court has taken pains to utilize the term "grounds" in lieu of fault and explain to the parties that absent egregious fault, it often makes little difference to the resolution of the remaining issues which ground and which litigant is granted the divorce by the Court.

Indeed it has been contended that in allowing the parties to dissolve the marriage without blame being placed on either one of them, especially where children are involved, allows the post divorce relationship between the parties to be less contentious and in fact more harmonious. (See, The Case for Amending the Statutes of New York State to Permit No Fault Divorce, by Lawrence M. Rothbart).

In the instant matter, in finding that Defendant's conduct in this long term marriage does not rise to a level sufficient to grant a divorce, the ultimate result is that there are no winners. The Plaintiff may be forced to remain in a marriage she clearly is desirous of ending, or may be required at her own personal and financial sacrifice to relocate and set up residence outside of the state so as to take advantage of the no fault divorce laws offered by sister jurisdictions. Defendant may have won the battle but in fact have lost the war as he will remain in a marriage with a partner who is no longer desirous of continuing the relationship.

This Court is clearly sympathetic to the situation but does not believe that its sympathy should outweigh the proper application of existing law. However, as the instant fact pattern is not unique and is repeated frequently throughout the matrimonial courts of this state, this Court believes sufficient reason exists so as to call upon the legislature to review the status of fault in this state, and after serious and appropriate inquiry determine whether the best interests of the parties are served by an amendment to D.R.L. Section 170.

The Court, therefore, finds that the Plaintiff has failed to establish grounds for divorce under D.R.L. Section 170 (1). Accordingly, the complaint is dismissed and all ancillary claims are rendered academic.

This constitutes the decision and order of the Court.

DATED: Jamaica, New York
June 17, 2004

JEFFREY D. LEBOWITZ, A.J.S.C.

June 21, 2004

Mr. Patrick C. O'Reilly
American Academy of Matrimonial Lawyers
42 Delaware Avenue
Suite 300
Buffalo, New York 14202-3857

Dear Mr. O'Reilly:

Enclosed find a copy of my recent decision on the matter of S.C. v. A.C.

As you can tell from the opinion, the information you forwarded to my chambers was of great assistance in the crafting of this opinion.

If I can be of any further assistance, please do not hesitate to contact me.

Kindest personal regards,

JDL:lq
Encl.

HON. JEFFREY D. LEBOWITZ