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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA  
Justice.

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CHERIAN MOOLAKKAL,

Index No.: 26932/99

Plaintiff,

Motion Date:

- against -

JYOTHIMOL CHERIAN,

Motion No:

Defendant.

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The following papers numbered 1 to 48 on this motion:

Papers Numbered

Plaintiff's Notice of Motion-Affid(s)-Exh(s)	1-38
Defendant's Cross Motion Answering Affidavit(s)-Exh(s)	1-7
Plaintiff's Replying Affidavit(s)-Exh(s)	1-3

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Plaintiff by Notice of Motion seeks an order allowing him to amend his complaint, striking defendant's first affirmative defense and striking defendant's demand for interrogatories.

Defendant by Notice of Cross Motion seeks an order dismissing plaintiff's complaint for failure to state a cause of action.

Upon all of the foregoing papers, plaintiff's motion and defendant's cross motion are decided as follows:

a) Plaintiff's motion to amend the complaint is denied.

b) Plaintiffs' motion to strike defendant's first affirmative defense, partially strike defendant's second affirmative defense, and striking defendant's demand for interrogatories is denied.

c) Defendant's motion for an order dismissing plaintiff's complaint is granted.

The parties to this action were married in a religious ceremony in India in 1993. Upon coming to the United States the parties resided together in Martinez, Georgia. Sometime in March 1997 plaintiff says he was "thinking" of moving to New York. Plaintiff admits in his affidavit that he actually "moved" to New York on December 27, 1997, staying first with his cousin in Ridgewood, then with his brother in New City and finally back at his cousin's apartment in July 1999.

There are no children of this marriage. Plaintiff commenced the action by filing the summons and complaint on December 6, 1999, some twenty-one days short of the statutory residency requirement of DRL §230(5).

Plaintiff seeks an absolute divorce claiming cruel and inhuman treatment. The incidents upon which plaintiff seeks an absolute divorce include three occasions when defendant excluded plaintiff from the marital bedroom, two in 1996, one in 1997; two occasions in 1997 when defendant refused to have sexual intercourse with plaintiff; and several occasions when defendant verbally abused defendant. Defendant denies the allegations, claims the court lacks jurisdiction to decide the matter, and

claims affirmative defenses of provocation, condonation, forgiveness and justification where applicable.

DRL §230 provides in relevant part: "An action.... for divorce... may be maintained only when: 5) Either party has been a resident of the state for a continuous period of a least two years immediately preceding the commencement of the action."

The Court of Appeals in Lacks v. Lacks (41 NY2d 71 (1976)) held that the residency requirements of DRL §230 are statutory substantive elements of a cause of action that must be proved like any other element. Id. At 76. Failure to prove residency as required by the statute would not deprive this Court of subject matter jurisdiction sufficient to set aside a final judgment under CPLR §5015. Id. At 77.

Nevertheless, plaintiff must prove residency as an element of his cause of action (supra.). Plaintiff concedes that in his originally filed complaint that element, that he has... "lived in New York State for a continuous period in excess of two years immediately preceding the commencement of this action." (plaintiff's complaint for Divorce, Second), is in error and could not be proved, since he affirms that he did not begin to reside in New York State until December 27, 1997.

Plaintiff prays, then, that he be granted leave to amend his complaint to allege two years of continuous residency prior to April 7, 2000. Plaintiff relies on CPLR §3025 as authority for allowing leave to amend being granted freely (CPLR §3025(b)).

Defendant contends that leave should not be granted, but

that even if plaintiff is allowed to amend his complaint (CPLR §203(e)) requires that any amended pleadings relate back to the original date of commencement (see, CPLR §203(e) "A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions or occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.")

CPLR §203((e) abrogated the previous rule, that claims asserted for the first time in an amended complaint do not relate back to the original summons and complaint (Harris v. Tams, 258 NY 229 (1932)). This usually inures to the benefit of the plaintiff in the litigation. In this circumstance, however, plaintiff suffers the consequence of a rule meant to assist those parties faced with a statute of limitations problem.

Accordingly, this Court holds that the plain language of CPLR §203(e) requires that plaintiff's proffered amendment must relate back to the date of the original filing. Plaintiff, therefore, can not on this action ever satisfy that necessary element of proof; that he resided in New York State at least two years prior to the commencement of this action.

For all of the foregoing reasons, plaintiff's motion is denied in its entirety. Defendant's motion is granted, the complaint is dismissed.

Dated: Jamaica, New York  
July 17, 2000

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JOSEPH P. DORSA  
J.S.C.