At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 12th day of January, 2007

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

HUSBAND,

Plaintiff,

vs.

WIFE,

Defendant.

DECISION AND ORDER

Index No. 2006-XXXX
RJI No. 2006-XXXX-C

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

The parties in this matrimonial action each seek relief by order to show cause. By order to show cause dated January 8, 2007, the plaintiff HUSBAND seeks leave to file an amended complaint. By order to show cause also dated January 8, 2007, the defendant WIFE seeks an order striking Mr. XXXX's pleadings, dismissing this action or granting judgment by default, and precluding testimony on any issues on which Mr. XXXX failed to provide responses to disclosure, a conditional order of preclusion on matters on which Mr.XXXX failed to provide responses to discovery demands, and an award of attorney's fees and the expenses incurred in bringing the order to show cause.

The parties were married in 1983 and, as of the date of the preliminary conference, continue to reside in the marital residence. Mr. XXXX is a manager of a XXXX plant earning more than $40,000.00 per year. Mr. XXXX reports that he has been diagnosed as having multiple sclerosis. Mrs. XXXX is a computer lab assistant employed by the XXXX Central School district earning $752.58 bi-weekly.[1] The parties have two children, ages 20 and 18.

At the preliminary conference held on October 16, 2006, December 16, 2006 was set as the date for completion of all discovery, a trial note of issue was to be filed by January 4, 2007, and the date for trial was January 18, 2007.

A Law Guardian was appointed for the parties' 18 year old daughter, as it appeared there

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[1] It is not clear if this is paid every two weeks all year or just during the school year. The parties' relative incomes are not relevant to the determination of the issues raised by either party in their orders to show cause.

was an issue about her desire to continue to reside in the marital residence.[2] A conference with the Law Guardian and the attorneys for both parties was held on December 18, 2006.[3] After addressing those issues, Mrs. XXXX's attorney stated that the allegations of the complaint and Mr. XXXX's responses to Mrs. XXXX's discovery demands were weak and did not support granting a divorce in this matter. Mr. XXXX's counsel was given one week to disclose additional allegations supporting grounds for divorce.[4] Mrs. XXXX's counsel was given an additional week thereafter to serve any additional discovery demands.

The orders to show cause referenced above ensued. At the January 12, 2007 return date of the orders to show cause, the January 18, 2007 trial date, which was scheduled for a mere six days later, was adjourned.[5]

The central issue raised by both orders to show cause is how lenient the court should (or must) be when a party seeks to amend a complaint shortly before trial after not having availed himself of the opportunity to comply with pending disclosure requests. To plaintiff, the point

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[2] Despite the fact that she was not then living in the marital residence.

[3] This conference resulted in the Law Guardian stating on behalf of her client that there was no particular need or desire for her client to reside in the marital residence. As neither party challenged that assertion, the Law Guardian's service was complete and she was released from any further role in this action.

[4] I also stated that failure to do so could result in Mr. XXXX being precluded from offering proof on any undisclosed allegations supporting his claim for divorce. This was not put in the form of an order.

[5] Mrs. XXXX's counsel objected to the adjournment.

is that leave to amend should be freely granted.[6] To defendant, plaintiff should not have to defend against claims that plaintiff could have disclosed, but did not.

It has been held that where there is a variance between a pleading and proof admitted at trial, even in a matrimonial action, "this court may take it upon itself to amend the pleadings to conform to the proof so long as no prejudice has been demonstrated" (*Dougherty v. Dougherty*, 256 AD2d 714, 715 [3d Dept 1998]). Also, in a matrimonial action, it has been held that it is an improvident exercise of discretion to deny a motion to amend a complaint where there is neither an inordinate delay in moving to amend nor a showing of significant prejudice to the defendant (*Levine v. Levine*, 286 AD2d 423 [2d Dept 2001]).

This action was commenced in August of 2006 and has moved forward at a very reasonable pace. Part of plaintiff's excuse for failure to amend the complaint is the hope that settlement discussions would be more fruitful.

There has been no showing of real prejudice to the defendant. At this point in this action, and given the adjournment of the January trial date, there is sufficient time for the parties to address any issue that might be raised if the complaint is amended.

For the foregoing reasons, the motion to amend the complaint is granted.

However, there has been a failure on the plaintiff's part to respond promptly to the defendant's legitimate discovery demands. It appears that defendant has a sincere belief that plaintiff cannot establish grounds for divorce in his favor. In addition, plaintiff was given the opportunity to amend the complaint within one week from the December 18, 2006 conference.

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[6] At the return date of the orders to show cause, Mr. XXXX's counsel pointed out that pleadings can be amended during trial to match proof produced at trial.

The amended complaint, which was verified by Mr. XXXX on December 26, 2006 and filed with the Broome County Clerk on December 27, 2006, did materialize.[7]

At some point, plaintiff's failure to follow through on opportunities to fully respond to defendant's discovery demands cannot be condoned. Defendant should not have to wait anxiously or contemplate when a motion will be necessary to compel plaintiff to file a complaint or respond to discovery demands. Defendant has already had to expend too much time and effort in this regard. It is clear that in this long term marriage, grounds for divorce are hotly contested.

Discovery is allowed in this Department regarding grounds for divorce (*Nigro v. Nigro*, 121 AD2d 833 [3d Dept 1986]). As both parties are now clearly on notice that this appears in all respects to be a case where a full trial on grounds for divorce will be held, full and complete compliance with the outstanding discovery demands will be necessary.

For example, Mr. XXXX alleges in his complaint that Mrs. XXXX "has engaged in an ongoing course of conduct where she has been financially irresponsible." The discovery demands request that he identify and detail the instances of such conduct. To the extent Mr. XXXX fails to identify and detail such conduct, he will be limited to this general allegation. He will not be allowed at trial to testify or offer evidence of such conduct that has not been sufficiently identified in the responses to the discovery demands.

Plaintiff shall provide any additional responses to defendant's discovery demands on or before March 12, 2007. **In the event the parties cannot resolve the outstanding discovery**

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[7] While the affidavit in support of plaintiff's Order to Show Cause states that a proposed amended complaint is attached, there is no such attachment to the affidavit received by this Court. A copy of an amended complaint was delivered to the Court on January 3, 2007.

disputes before then, a conference will be held on XXXX, 2007 at XXXX in Room XXXX at the Broome County Courthouse in Binghamton, New York. At the conference, plaintiff will not be permitted to submit any additional discovery responses or documentation. The only purpose of the conference is to hear defendant on any remaining deficiencies in plaintiff's responses to the pending discovery demands and to consider any requests for preclusion as to the issues on which plaintiff can submit proof at trial as a result of those deficiencies. **A trial on the issue of grounds for divorce will be held on XXXX, 2007 beginning at XXXX at the Broome County Courthouse in Binghamton, New York.**

Mrs. XXXX requests attorney's fees as a sanction for Mr. XXXX's failure to comply with her discovery demands and her need to make this motion to compel compliance. It is only where the failure to comply with a discovery request is willful and contumacious that an award of attorney's fees should be made (*Anthony v. Anthony*, 24 AD3d 694 [2d Dept 2005]). While Mr. XXXX's failure to respond to the discovery demands with explicit or more detailed information may be less that conscientious, it cannot be said that it is willful and contumacious. The record simply does not show the type of improper conduct that will justify an award of attorney's fees as a sanction. For that reason, the motion for attorney's fees is denied.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date

below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: February 16, 2007
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice