

Nyman v Nyman

2009 NY Slip Op 30608(U)

March 24, 2009

Supreme Court, Greene County

Docket Number: 08-0522

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT
PETER JOHN NYMAN,

COUNTY OF GREENE

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 08-0522
RJI NO. 19-08-3698

ANA V. NYMAN a/k/a ANA
VALERIA DORNELLES NYMAN,

Defendants.

Supreme Court Greene County All Purpose Term, March 11, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Donald M. Zolin, Esq.
Attorney for Plaintiff
61 Broadway, Suite 1105
New York, New York 10006

Law Office of Demostene Romanucci
Joseph A. Glazer, Esq., of counsel
Attorney for Defendant
950 Loudon Road, Suite 103
Latham, New York 12110

TERESI, J.:

On March 31, 2008, plaintiff commenced this divorce action with a complaint that set forth a single cause of action sounding in defendant’s adultery. Defendant answered, denying the complaint’s allegation of adultery, and counterclaimed for divorce. Plaintiff’s reply denied defendant’s counterclaims, and purportedly added two causes of action without court order.¹ Discovery has been conducted and is now complete, with a note of issue filed and a trial date set to begin within two weeks.

¹“A reply should not be used by the plaintiff to amend the complaint or to set forth new matter.” (Siegel, NY Practice §229, at 379 [4th ed]).

Defendant now moves for summary judgment. Plaintiff opposes the motion and moves to amend his complaint by adding an additional cause of action sounding in annulment. Because defendant demonstrated her entitlement to judgment as a matter of law, and no issues of fact exist, her motion for summary judgment dismissing the complaint is granted. Plaintiff, however, failed to establish his entitlement to amending his complaint, and his motion is denied.

“[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). It is well established that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). With the burden shifted, the opponent of the motion must “assemble, lay bare and reveal his proofs in order to show that the allegations in the complaint are real and capable of being established upon a trial”. (Manculich v. Dependable Auto Sales and Service, Inc., 39 AD3d 1070 [3d Dept. 2007]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Zuckerman, supra at 562).

DRL §107(4) provides that: “[a]n action for divorce may be maintained... to procure a judgment divorcing the parties [for] [t]he commission of an act of adultery... adultery... is hereby

defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant...” “Adultery... is very specific, requiring proof of actual sexual intercourse or deviate sexual intercourse as defined in the Penal Law.” (Hunter v. Hunter, 206 AD2d 700 [3d Dept. 1994]; see also Golub v. Ganz, 22 AD3d 919 [3d Dept. 2005]).

Here, defendant demonstrated her entitlement to judgment as a matter of law.

Defendant’s answer denied the existence of any adulterous relation. Then, at her deposition, defendant again denied any adultery during the marriage. Defendant also supported this motion with a copy of plaintiff’s deposition, who admitted that he had no specific tangible proof that defendant committed an act of adultery. On this record, defendant has demonstrated, as a matter of law, that she did not commit an act of adultery during the parties’ marriage.

With the burden shifted to plaintiff, he failed to raise a triable issue of fact. The sole items of proof plaintiff “lays bare” are twelve e-mail communications between defendant and the individual she allegedly had an adulterous relation with. Not one of the e-mails specifically indicated that any act of adultery occurred. Rather, the e-mails are written in general non-specific terms, without any discussion of physical contact or an adulterous act. These e-mails can be understood as “love letters”, not as admissions of adultery, and fail to provide sufficient proof for the grant of a divorce or raise an issue of fact. (Hunter, supra, Golub, supra). Without sufficient proof of an “adultery”, plaintiff has failed to demonstrate a material issue of fact exists, and defendant’s motion for summary judgment is granted.

Plaintiff also seeks to amend his complaint to add a cause of action sounding in “annulment”. While leave to amend, under CPLR §3025(b), should be freely granted where

there is no prejudice to the nonmoving party, “denial of a motion to amend is appropriate when there is prejudice to the opposing party and no showing of a satisfactory excuse for the delay”. (Ciarelli v Lynch, 46 AD3d 1039, 1040 [3d Dept. 2007]).

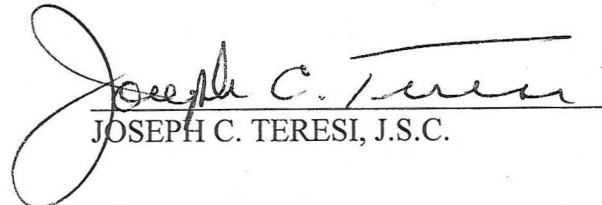
Here, because there is both prejudice to the defendant and no reasonable excuse offered for the late amendment, it is denied. Plaintiff candidly admits to knowing the facts underlying his annulment claim beginning “in June of 2006”, and offers no excuse for the delay. Moreover, plaintiff’s amendment would prejudice the defendant because it would allow an entirely new legal theory into this action on the eve of trial, and prevent defendant from conducting any discovery thereon. Plaintiff’s motion must also be denied because he failed to “provide a copy of [his] proposed amended complaint” with his moving papers. (Chang v. First American Title Ins. Co. of New York, 20 AD3d 502 [3d Dept. 2005]).

Accordingly, defendants’ motion for summary judgment is granted and plaintiff’s motion to amend the complaint is denied.

All papers, including this Decision and Order, are being returned to the attorney for the defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 24, 2009
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated February 27, 2009, Affirmation of Joseph Glazer, dated February 27, 2009, with attached and unattached unnumbered exhibits.
2. Notice of Cross Motion and Opposition, dated March 6, 2009, Affirmation of Donald Zolin, dated March 6, 2009, with attached Exhibits "A" - "G".