

Linger v Linger

2010 NY Slip Op 33342(U)

December 2, 2010

Supreme Court, Greene County

Docket Number: 10-1170

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

MICHELLE LINGER,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 10-1170
RJI NO. 19-10-5319

CHRISTOPHER LINGER,

Defendant.

Supreme Court Greene County All Purpose Term, November 19, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Bixby, Crable & Stiglmeier, PLLC
Carol Stiglmeier, Esq.
Attorney for Plaintiff
19 Dove Street, Suite 301
Albany, New York 12210

O'Connell and Aronowitz
Richard Weiskopf, Esq.
Attorneys for Defendant
54 State Street
Albany, New York 12207

TERESI, J.:

Plaintiff commenced this divorce action via summons with notice. Prior to serving the summons with notice, Plaintiff moves for an Order authorizing an alternative method of service, for custody, child support, maintenance and attorney's fees. Although Defendant submits no opposition papers to Plaintiff's motion, Defendant affirmatively moves to dismiss the action "pursuant to DRL §230 [claiming] there is no subject matter jurisdiction in this Court to consider this matter." Plaintiff opposes Defendant's motion to dismiss. Because Defendant's motion to dismiss is premature, it is denied.

Considering first Defendant's motion to dismiss, he wrongly asserts that this Court lacks subject matter jurisdiction in this action because of Plaintiff's alleged non-residence in New York. DRL §230(1) provides, in pertinent part, that "[a]n action... for divorce... may be maintained only when... [t]he parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding." Despite Defendant's contention to the contrary, a Plaintiff's non-compliance with DRL §230's residence requirement does not affect this Court's subject matter jurisdiction. (Lacks v. Lacks, 41 NY2d 71 [1976]). Rather, such residence requirement is merely an element of Plaintiff's divorce action, an element which she must plead and prove. (Id.)

Although Defendant failed to specify the CPLR §3211 ground for his motion to dismiss, because Defendant's motion challenges an element of Plaintiff's divorce action, as per the above, it seeks dismissal for Plaintiff's alleged "failure to state a cause of action." (CPLR §3211[a][7]).

"When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff ... 'the benefit of every possible favorable inference' "

(Bordeleau v. State, 74 AD3d 1688 [3d Dept. 2010], quoting AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 NY3d 582 [2005][quotation marks omitted]). Additionally, because of the above burden, a CPLR §3211(a)(7) motion is premature before Plaintiff files and serves her complaint. (Fomkin v. Fomkin, 2002 WL 31359430 [Sup Ct, Queens County, July 19, 2002, Gavrin, AJ]; Petrova v. Investors Capital, 24 Misc3d 977 [Sup Ct, Kings County 2009]; NGH Associates, Ltd. v. United Parcel Service, Inc., 17 Misc3d 746 [Sup Ct, Nassau County 2007]).

Here, because Plaintiff has not filed and served a complaint, Defendant's motion to dismiss is premature. On this record it is uncontested that Plaintiff commenced this action with a summons with notice. Neither party alleges service of a complaint or attaches a copy of Plaintiff's complaint to their papers. As such, "[b]ecause a complaint has not been served, th[is] court has no factual allegation to review so as to permit it to determine whether plaintiff [has] any cognizable causes of action... [and Defendant's] motion to dismiss pursuant to CPLR § 3211 is pre-mature." (Petrova v. Investors Capital, supra).

Accordingly, Defendant's motion to dismiss is denied.

The Plaintiff wife also moves for:

(1) An Order granting her primary physical and legal custody of the parties' two (2) children, Kathryn Linger, DOB: June 3, 1994 and Keily Linger, DOB: March 15, 1997 directing that so long as Makayla Linger resides with her father, he shall provide the Plaintiff wife all of the child's residence information, access to all educational, medical and related personnel and records, and further directing that Makayla Linger travel to and stay at the mother's residence during all school recesses in excess of three (3) days;

(2) An Order directing the Defendant husband Christopher Linger to pay child support to the mother Michele Linger in conformance with the Child Support Standards Act, including maintaining any and all health insurance as is currently available through him in his capacity in the United States Navy, and, to bear in proportion to the parties' respective incomes, any and all unreimbursed and/or uncovered medical and related expenses;

(3) An Order directing husband Christopher Linger to pay spousal support in an amount sufficient to permit Plaintiff to meet her ongoing needs during the pendency of this action;

(4) An Order directing Christopher to pay attorneys' fees on behalf of Michele Linger so as to permit Michele Linger to have proper and sufficient representation.

In view of the fact that a portion of the remaining motion of the Plaintiff mother concerns the children, this Court, in an exercise of discretion, will appoint an Attorney for the Children. Counsel are to immediately provide that Attorney with a complete copy of motion papers for both parties. Upon receipt of those motion papers, the Attorney for the Children will have thirty (30) days to file and serve any affidavit or documentation in respect to the position of his clients concerning the motions which apply to the children.

The Court hereby appoints John Winans, Esq. 331 Main Street, Catskill, New York 12414 (518) 943-4330 as Attorney for the Children in this case. The parties and their attorneys shall cooperate with the Attorney for the Children in every way possible. Neither the parties nor the attorneys shall in anyway attempt to influence the children in respect to their responses to the Attorney for the Children.

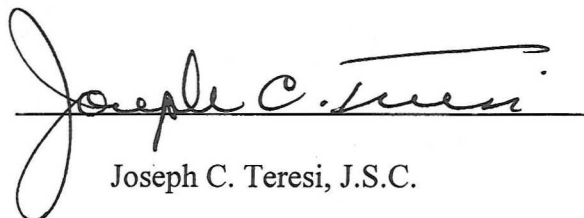
Further, pursuant to the Uniformed Rules of the Trial Court, §22NYCRR 202.16(f), the Court, is scheduling a preliminary conference in this case to be held in Albany, on Wednesday, January 5, 2011 at 9:00 a.m. at the Albany County Courthouse, Lodge Street entrance, Room 256, Albany, New York.

In the meantime, the Court will maintain all motion papers.

A copy of this Decision and Order is filed with the Greene County Clerk. The original of this Decision and Order is returned to plaintiff's counsel for filing and service pursuant to CPLR 2220.

So Ordered.

Dated: December 2, 2010
Albany, New York



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated October 10, 2010; with attached Affidavit of Michelle

Linger, and Affirmation of Carol R. Stiglmeier, Esq. both dated October 7, 2010; with attached Exhibits A-E.

2. Notice of Motion, dated October 28, 2010; with attached Affidavit of Christopher Linger, dated October 27, 2010 and Affidavit of Richard H. Weiskopf, Esq. dated October 28, 2010.
3. Affidavit of Michelle Linger, dated November 15, 2010 and Affirmation of Carol R. Stiglmeier, Esq. dated November, 15, 2010, with attached Exhibits A-E.
4. Reply of Richard H. Weiskopf, Esq. dated November 19, 2010.