

NEW YORK SUPREME COURT : QUEENS COUNTY
MATRIMONIAL PART 52

P R E S E N T :

HON. JEFFREY D. LEBOWITZ,
Justice.

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D.A.,

DECISION AFTER TRIAL

Plaintiff,

-against-

Index No. 15965/04

B.E.,

Defendant,

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LEBOWITZ, J.

D.A. has filed for divorce based upon the grounds of cruel and inhuman treatment against his wife, the defendant, B.E.A., (see DRL Section 170(1)). Mr. and Mrs. A. were married on June 21, 2001, and testimony established that they lived together for a number of years prior to that date. When the couple married, Mr. A was already suffering from asbestosis. By 2003, he was diagnosed with emphysema and by September of that year was found to have lung cancer which necessitated surgery and the removal of one lung. (Subsequent to the September 3rd surgery, he remained on Percocet every four hours and in November, 2004, because of the increasing pain, switched to a morphine derivative.)

Both parties testified that the marital home in New York was a basement apartment which required entry through the use of stairs or through an adjacent garage which required use of a sloped driveway for entry.

The gravamen of Mr. A.'s request for a dissolution of this marriage under DRL Section 170(1) is that Mrs. A.'s lack of care given his ever increasing deteriorating condition, created a situation where continued living together would be inimical to his physical well being. To establish his claim, Mr. A. testified that subsequent to his September surgery following discharge from the hospital, he remained in a rehabilitation facility until November, 2003. From early November until mid December, subsequent to the discharge from the rehabilitation facility, Mr. A. resided with his daughter, Donna. Mr. A. testified, that although invited to reside with his daughter, Mrs. A. refused this request.

Mr. A stated he lived with his daughter because the stairs made it difficult to continue to live in the basement apartment, and during the period of time that he lived with his daughter, the only calls made to him by his wife involved bills, money and only an occasional inquiry about his health. Returning to the couple's marital residence in December of 2003, Mr. A. said that he made weekly visits to the doctor but that his wife did not accompany him. Mr. A testified that it was either his brother or daughter that went with him to the doctor. While Mr. A. conceded that his wife asked him "do you want me to go", he felt under the circumstances that she really did not want to go and therefore, he did not want her to accompany him during these medical visits.

Eventually in June of 2004, Mr. A. permanently left the marital home to reside with his daughter, D. Mr. A. indicated that from December, 2003 to June, 2004 he was left alone every day for a period of time by his wife. He indicated that an aide was assigned to him for only a brief period of time in May to early June of 2004.

On cross-examination, Mr. A. conceded that while he had gone to his daughter's house because the air quality was better, he had lived in the Howard Beach apartment for a number of years prior to the marriage despite his declining health. While conceding that there was an entry into the basement apartment without the use of the stairs through the garage, he stated that the garage still required entry through an elevated plane which was difficult for him due to his continued breathing problems.

In addition, Mr. A. testified to an incident in April, 2004 where he felt that he was embarrassed by his wife when she referred to him as a "pain in the ass" in front of his son. While complaining that his wife engaged in daily errands which often left him alone, he conceded that she did not have a car and these errands often included food shopping and picking up his medication. He further conceded that when she was out, his wife left him with a list of people he could contact if there was a problem, though he felt none of the people were readily available in case of an emergency.

Mr. A indicated that there were two incidents where he had bleeding from the nose, the second of which precipitated a 911 call when his wife was not at home. Mr. A. stated that it was his brother who came over with his daughter, and that as the ambulance was leaving, Mrs. A. returned from her errands but did not accompany the family members to the emergency room.

During the marriage, Mr. A. testified that he complained continuously about the air quality in the marital residence as well as the fact that his wife preferred an abundance of heat which made it difficult for him to breath, and that when he asked her to turn the heat down, her response was that he could do it himself.

J.W., a nurse affiliated with Jamaica hospital, testified for the plaintiff. Her agency was assigned by Medicare to assist Mr. A. after his May nose bleeding incidents. After initial evaluation by another visiting nurse, Ms. W took over supervision of Mr. A.'s case on May 26, 2004. She testified that she would visit the home two or three times a week for approximately thirty minutes to check Mr. A.'s status, the condition of the house and to teach him about infection as related to his lung condition. She testified that during the period of time she attended to Mr. A., he appeared to be in chronic respiratory distress. That he used oxygen all the time and that it was unlikely that he would be able to walk upstairs or a ramp. He had been taking pain medication since the surgery of September, 2003. Indeed, Mrs. A. inquired as to whether or not her husband was taking too much pain medication and as to why he was not trying to walk more to alleviate his breathing condition. Ms. W indicated that it was her belief that Mr. A. should not be left alone. Her care for Mr. A. ended when he moved out to Nassau County to live with his daughter, D.

On cross-examination, Ms. W. indicated that beyond her visits there was a regular home health aide whose visits also ended when the plaintiff moved to Nassau County.

The defendant, B.E.A., testified that the parties lived together for approximately seven years prior to the June 21, 2001 marriage. That prior to the marriage, her husband had purchased a condominium in Florida that was for use by both of them. Already diagnosed with asbestosis when the parties married, Mrs. A., who had stopped smoking eighteen or nineteen years prior, never smoked in the house, and continuously admonished her husband that he should also stop smoking. She testified, contrary to Mr. A.'s statements, that he suffered from emphysema prior to the marriage. In May of 2003, Mrs. A. encouraged her husband to see a doctor while they were still in Florida, and again encouraged a doctor's visit when they returned to Queens in June of that year. However, plaintiff resisted on both occasions and only relented in September of that year, when a pet scan resulted in a diagnosis of lung cancer and subsequent surgery for removal of his left lung.

Mrs. A. said that the couple had spent many winters in Florida. That she and Mr. A. drove to Florida from New York every year, and that when in Florida, they spent much of their time

together. Mrs. A. said that sometimes she accompanied her husband to the doctor though sometimes he did not want her to go with him. She was clear in her testimony that following his surgery and hospitalization, she visited her husband every day. She was driven to the hospital by a combination of her husband's daughter and her grown son from a previous marriage. Prior to her husband's 2003 surgery, Mrs. A. said she did most of the errands, kept the house and cooked the meals.

From November to December of 2003, while in rehabilitation, Mrs. A. visited her husband with the help of his daughter, his brother, or would take a car service. When Mr. A. returned to the marital home in January of 2004, Mrs. A. continued to do the household chores, make food, often offering him breakfast or lunch though his appetite had been declining because of his failing health. Because he felt the steam from the shower affected his breathing, Mrs. A. brought a basin to the dining room table to allow her husband to wash. Mrs. A. said she went out almost every afternoon to do errands that included food shopping three to four times a week. She conceded that she went to beauty parlor and nail salon once a month.

With regard to the incident in April, 2004, where allegedly pejorative remarks about Mr. A. were made in the presence of his son, Mrs. A. said that in fact she had come to the defense of her stepson after remarks were made to him by his father. In attempting to play down the situation, Mrs. A. indicated to her stepson "you know he's a pain in the ass", to which the stepson allegedly replied "I know". Mrs. A. stated that despite Mr. A.'s testimony that he was embarrassed by what she said, he in fact never made an issue of the statement at the time it was made by his wife.

Mrs. A. confirmed that she left a list of neighbors her husband could call if something happened while she was out, including a thirty-seven year old woman who lived in the three family house also occupied by the As, and the landlord and his wife, who were in their early seventies. Mrs. A. said that she did not go out if her husband did not want her to leave the house. She said her errands never exceeded one and a half to two hours, and that she had some experience as a care giver because her daughter had previously died of cancer. She conceded that the situation was not an easy one and most of her free time occurred in the evening when she would watch television.

She confirmed that she expressed concerns to the nurse regarding her husband's use of pain killers and her belief that he was not walking enough to assist his breathing condition. She

stated that she preferred not to go with her husband to the doctor when her stepdaughter drove as she believed that her stepdaughter had some hostility toward her. However, she always inquired about the results of the doctor visits when her husband returned home.

On cross-examination, Mrs. A. contradicted the testimony of her husband by saying she was the one who called 911 both times in May for the nose bleeding incidents. She testified that she went out with a friend usually on her errands and that sometimes she had the groceries delivered instead of shopping for them herself.

Lastly, A.C., who identified herself as a friend of the defendant, was called to testify. Ms. C. said she shopped three or four times a week with Mrs. A. She stated that Mrs. A. often called to see how her husband was doing or if she had forgotten to buy anything that day. It was Ms. C.'s belief that Mrs. A. seemed attentive to her husband's needs and often encouraged her husband to walk. She testified the marital home was neat and that Mr. A. appeared to be in acceptable attire and sufficiently groomed. On cross examination, she said she and Mrs. A. shopped four or five times a week.

It is axiomatic that to establish grounds for divorce under Domestic Relations Law 170(1) cruel and inhuman treatment, it is the plaintiff's burden to prove that the conduct of his wife so endangered his physical or mental well being as to render it unsafe or improper for him to continue to cohabit with her. See, Brady v. Brady, 64 N.Y.2d 339.

A plaintiff seeking a divorce on the grounds of cruel and inhuman treatment must show serious misconduct and not just mere incompatibility. See, Stroke v. Stroke, 283 A.D.2d 992 (4th Dept., 2001). It has been said that the conduct needs to constitute a "calculated cruelty" that would render cohabitation unsafe or improper, see, Feeney v. Feeney, 241 A.D.2d 510, and that mere strained, unpleasant relations or incompatibility is insufficient to justify a divorce on the grounds of cruel and inhuman treatment. See, Wikera v. Wikera, 233 A.D.2d 896.

While it is true that this is not a marriage of long duration in which a high degree of proof of cruel and inhuman treatment is required and the conduct must be viewed in the context of the entire marriage, see, Bradley v. Bradley, 298 A.D.2d 485, 2nd Dept., 2002), the conduct must nonetheless be of sufficient quality or character as to seriously affect or impair the plaintiff's physical or mental condition. See, Bradley (supra) and Wilson v. Wilson, 244 A.D. 2d 646.

While medical evidence is not a necessary prerequisite to obtaining a divorce on these grounds, there must nonetheless be a preponderance of credible evidence that the defendant engaged in a course of conduct which was harmful to plaintiff's physical or mental health rendering cohabitation unsafe or improper. In the instant matter, it is plaintiff's contention that the evidence establishes that the lack of care for this seriously ill plaintiff by his wife and the periods of time when she left him alone were sufficient to establish a course of conduct that was detrimental to his well being. Plaintiff relies almost exclusively on Siczewicz v. Siczewicz, 92 A.D.2d 915, (2nd Dept., 1983) wherein the Court stated "[the] fact that defendant failed to provide assistance or emotional support when her mother died, as evidenced by the fact that he did not attend the funeral, could be classified as unsympathetic or unsupportive, however, defendant's attitude toward plaintiff when she was in the hospital for cancer surgery and his leaving her without assistance when she returned home, as well as the type of comments attributed to him, suggests an insensitivity and indifference which can only be equated with calculated cruelty." Taken out of context, these statements might at least provide the plaintiff with appellate precedent for his argument, however, even if the defendant's conduct in terms of sympathy and support rose to a level that could be considered calculated cruelty, the Siczewicz case must be viewed within its entire fact pattern in which the defendant engaged in a course of "deliberately hostile and rude conduct calculated to create unhappiness and suffering to the plaintiff." In that case there is testimony that defendant refused to eat with the plaintiff, made callous comments to plaintiff in front of his children, refused to provide heat in the winter, and engaged in a continuous course of psychological torture. The testimony included the fact that while plaintiff had cancer, the defendant physically struck her causing a black eye, on another occasion he kicked her out of bed, and on another occasion he closed a drawer on her hand causing her great pain and bleeding.

When the defendant's conduct is examined in the light of these additional factors, the Court is hard pressed to believe that unsympathetic or unsupportive behavior in and of itself is sufficient to establish calculated cruelty so as to grant the divorce on these grounds, especially given the litany of appellate cases which reinforces the duty of the Court in these circumstances to insure that mere incompatibility or unhappiness or so called "irreconcilable differences" does not justify a divorce under Domestic Relations Law 170(1). Also, see Practice Commentaries to DRL 170(1).

However, the Court does not find that Mrs. A.'s actions rose to a level of unsympathetic or unsupportive conduct that

created an environment that was unhealthy for her husband's well being. Mrs. A.'s unchallenged testimony included the fact that the parties had lived together for several years before the marriage in June, 2001. She had stopped smoking many years before their relationship began, never smoked in the house because of the husband's emphysema and often encouraged him to give up smoking as a way of preserving his rapidly declining health. The wife testified that she encouraged her husband to have a cat scan in May, 2003 while they were still in Florida, and again encouraged him to do the same when they returned to Queens, but it was the husband who ultimately refused to undergo such procedure until he had a pet scan and surgery in September, 2003.

Mrs. A. further testified that she did not have a driver's license and relied on other people to chauffeur her around when her husband was in the hospital and in a rehabilitation institute following his discharge from Flushing Hospital.

With regard to leaving her husband alone, Mrs. A. said that she always asked her husband whether or not it was alright to go out, that her errands lasted no more than two hours, that she used three or four of those daily errands to buy food and in fact stated, which was verified by her friend A.C., that she called numerous time when she was out to see how her husband was feeling.

In addition, as testified to by Ms. W., the Jamaica Hospital nurse, Mrs. A. questioned why her husband continued to be on pain medication long after his surgery and was concerned that his unwillingness to walk would be inimical to his well being and recovery. Also insightful into this case is the fact that Mr. A. indicated that his unhappiness with his wife began almost immediately after they were formally married in 2001 and long before his lung cancer was diagnosed and he underwent surgery to arrest the disease. In addition, the fact that she may have also used these errands for her own benefit is not unreasonable given the small marital apartment in which they lived and difficult living conditions which they both endured, much of which emanated from her husband's ill health. It should also be pointed out that Mrs. A. stated that prior to the deterioration of Mr. A.'s health, the parties spent much of their time together both in New York and in Florida.

The Court finds, therefore, that even if it were to accept Siczewicz as controlling precedent, in the instant case there was a lack of similar conduct which suggests insensitivity or indifference that could be equated with calculated cruelty. See, Feeney (supra).

Accordingly, having found that the plaintiff failed to sustain his burden of establishing grounds under Section 170 (1) of the Domestic Relations Law, plaintiff's action for divorce is dismissed, and any ancillary relief heretofore granted or under consideration by the Court is rendered academic by this determination.¹

This constitutes the decision and order of the Court.

JUSTICE JEFFREY D. LEBOWITZ

DATED: Queens, New York
January 27, 2005

¹ The open motion under CPLR 4401 is rendered academic by this decision but for appellate purposes is denied.