STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

G. C., Plaintiff,

DECISION

v.

Index #: 09/13452

G. C., Defendant.

APPEARANCES:

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Dollinger, J.

The Court is asked whether it will permit an amendment to a divorce complaint to add new causes of action under the Domestic Relations Law if the claims arose after the filing of the complaint. *See* CPLR 3025(b).

The plaintiff brought a divorce action prior to October 10, 2010. He alleged that his wife had engaged in cruel and inhuman treatment toward him. N.Y. DOM. REL. LAW §170(1). The wife answered the complaint, denying the specific allegations. After the commencement, the parties lived apart. The wife moved to Ohio. During discussions over

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the status of the case, the wife made it clear that she would contest the grounds for the divorce.

The husband moved to amend the complaint to assert two new grounds: a ground under Section 170(2) for abandonment and a claim under Section 170(7) for an "irretrievably broken" marriage. The wife opposes the abandonment amendment, claiming that the husband can not allege abandonment when it occurred during a year after the filing of complaint and that its assertion, now, after the action has been pending for more than two years, is untimely and prejudicial. The wife opposes the amendment on the grounds of Section 170(7), arguing that this recently-enact statutory amendment can not be asserted in this action because the complaint was filed prior to the effective date of the change. She claims that the husband, in order to pursue this claim, needs to file a new complaint. The husband considers this step unnecessary, arguing that if he files the new complaint with a Section 170(7) cause of action, he could then move for consolidation under CPLR 602(a) and the cases would likely be consolidated because they involve the same facts. He argues that judicial economy and prudent use of a litigant's legal fees dictate that this Court should simply grant the amendment.

The amendments are both made pursuant to CPLR 3025(b), which provides that amendments should be freely given or a complaint may be supplemented "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." CPLR 3025(b). An avalanche of authority directs that the leave to amend a complaint should be "freely granted" unless the proposed amendment is clearly and patently insufficient on its face. *Williams v Ludlow's Sand & Gravel Co.*, 122 A. D. 2d 612 (4th Dep't 1986). The

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history of CPLR 3025(b) demonstrates the wisdom of "freely granting" amendments in matrimonial matters:

> In some instances a plaintiff will commence an action for separation and then seek to add a cause of action for divorce in a supplemental pleading, or vice versa. In the early cases, the courts generally did not allow the plaintiff to change the nature of the actions. Accordingly, supplemental complaints were not allowed for this purpose.
>
> After enactment of the CPLR, it was held that when the original action was for separation, a cause of action for divorce based on adultery could be added in a supplemental pleading, if the adultery of the defendant was not discovered at the time the separation action was commenced.
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> Under CPLR 3025(b) an action for separation can be amended to request a judgment for an absolute divorce where both actions are based on the same grounds, and where the factual allegations are similar.

2-29 New York Civil Practice: Matrimonial Actions § 29.02, NEW YORK CIVIL PRACTICE: MATRIMONIAL ACTIONS, Matthew Bender & Company, Inc. (2011), *see also* Goris v. Goris, 22 AD3d 265 (1st 2005)(permitting amendments to add causes of action after the filing of the original complaint); Smith v. Smith, 254 AD2d 788 (4th 1998)(can amend complaint to include abandonment based on facts that arise during the pendency of the action); Taplinger v. Taplinger, 55 Misc 2d 103 (Sup. Ct. New York Cty 1967)(granting amendment to add new cause of action based on the same facts alleged in the original compliant); Fitzpatrick v. Fitpatrick, 55 Misc 2d 7 (Sup. Ct. Westchester Cty 1967)(interpreting Section 3025(b) to grant amendment because of the possible avoidance of two actions and ends of justice will be better served); Herzog v. Herzog, 43 Misc 2d 1062 (Sup. Ct,. Monroe County 1964)(noting that revised CPLR gave courts "widest possible discretion" to amend pleadings if pleader acquired cause of action after filing

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original complaint).[1]

CPLR 3025(b), by its express language, envisions that other causes of actions, based on developing facts that occur during the pendency of the action, can be the subject of a proposed amendment to the original compliant. The statute uses the terms "subsequent transactions or occurrences" as the basis for a proposed amendment. The statute also permits an amendment "at any time." CPLR 3025(b). The legislative proponents of CPLR 3025(b) stated that a new cause of action may be the subject of an amended or supplemental pleading "even if the pleader had no cause of action at the time of the original pleading but subsequently acquired and stated one in a supplemental pleading." *See* 1st Report, Legis. Doc. No. 69, p. 78, cited in *Fitzpatrick v. Fitzpatrick*, 55 Misc 2d 7 (Sup. Ct. Westchester Cty, 1967). Given these instructions, it seems incontestible that the Legislature intended that claims which arose during the pendency of an action could be heard simultaneously with those that existed at the time of the filing of the original complaint. Therefore, the fact that either cause of action accrued during the pendency of the action is not a rationale to deny the application.

A cause of action under Domestic Relations Law § 170 (2) requires allegations that a spouse's actual physical departure from the marital residence for one year is unjustified, voluntary, without consent of the plaintiff spouse, and with the intention of the departing spouse not to return. *See* *Davis v Davis*, 71 AD3d 13 (2d Dep't 2009); *Kaplan v Kaplan*, 46 AD3d 628 (2d Dep't 2007). The amended complaint, on its face, meets this minimal

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[1] On a personal note, the Court notes one of the attorneys in *Herzog v. Herzog* was former state Supreme Court Justice Richard Rosenbaum, the father of my current colleague Supreme Court Justice Matthew Rosenbaum.

pleading requirement: it alleges that the wife left the marital residence in 2009, has not returned and her leaving was without justification. The pleading states the cause of action.

Under the weight of cases favoring "freely granting" amendments to complaint, the cause of action for abandonment, although it has accrued while this action has been pending, is properly pleaded and does not lack merit.

The motion to add a cause of action under Section 170(7) arrives in a different posture before this Court. In October, 2010, the Legislature added a statutory change to the Domestic Relations Law which created "no-fault divorce" and permitted one party to be granted the divorce upon a sworn declaration that the marriage was "irretrievably broken for a period in excess of six months" and the parties had agreed on all the issues related to support and equitable distribution. N.Y,. DOM. REL. LAW § 170(7).

The wife correctly notes that the statutory amendment states that the "act . . . shall apply to matrimonial actions commenced after the effective date." It is undisputed that the effective date was October 12, 2010. The clear intention of the Legislature, based on this language, was to not allow litigants to simply amend their complaints, after the amendment took effect, and allow those claims to proceed to adjudication on the basis of the new "no-fault" allegations by claiming that the six months of "irretrievable breakdown" included time before the effective date of the amendment.

However, in seeking this amendment, the husband is not seeking any relief other than that sought in the original complaint: a divorce and accompanying property distribution. By virtue of the statutory change, the husband, having waited six months after its effective date, can now meet the time requirement of six months because all of the time

accrued after the amendment took effect.

When the husband moves to amend his complaint to add a cause of action under Section 170(7), he does not violate the language of the statute or the intention of the Legislature. Instead, he seeks to invoke what the Legislature extended to him: a cause of action that has ripened because more than six months have passed since the date of the amendment and during that time, the husband swears that his marriage has been irretrievably broken.

In arguing against the amendment, the wife directs the Court to the early 1980s, when equitable distribution became law and several New York courts, including the Court of Appeals, considered various procedural strategies brought by parties to avoid or apply claims under the recently-enacted equitable distribution laws. The wife cites *Goding v. Goding*, 106 Misc 2d 423 (Supt. Ct. Nassau Cty 1980) but the Court of Appeals considered many of the same issues. See *Valladares v. Valladares*, 55 NY 2d 388(1982)(amendment to pending complaint to assert equitable distribution claim was denied but the court allowed an amendment to include a new claim for divorce); *Motler v. Motler*, 60 NY 2d 244 (1983)(allowing a party to discontinue an action and file a separate action to obtain the benefits of equitable distribution). Recently, other New York courts have permitted litigants to commence separate actions after the effective date and assert a "no-fault" claim. *Heinz v. Heinz*, 31 Misc 3d 601 (Sup. Ct. Nassau Cty 2011)(pendency of an action by one spouse does not, by itself, bar an action by the other spouse on a different ground); *Granger v. Granger*, 31 Misc 3d 1201A (Sup. Ct. Queens Cty. 2011)(while not addressing consolidation, permitted the husband to asset a no-fault claim even though the original

action was filed before no-fault).

In this Court's view, these recent cases permitting assertion of the new no-fault claim in pending actions find further support in Judge Meyer's persuasive dissent in *Valladares v. Valladares* in which he described the failure to allow a party to take advantage of legislative changes because of procedural hurdles as "wholly unreasonable as a matter of both procedure and substance." 55 NY 2d at 394 (1982)(Meyer J., dissenting). This Court also looks to another Court of Appeals precedent which dealt with a similar question: whether a litigant could assert a recently-enacted statute and have that newly-established ground for a divorce be applied to a separation agreement signed before its enactment. In *Gleason v. Gleason*, 26 NY2d 28 (1970), the Court held that a statutory amendment, which added subdivision (4) to Section 170 of the Domestic Relations Law, could be used to permit an uncontested divorce to incorporate a separation agreement signed before the effective date of the statutory change. The Court of Appeals, in resolving the issue of the application of a new ground for divorce to an agreement, signed before the effective date of new statute, could not ignore the beneficial aspect of the statute and its goal of reducing tensions in obtaining final judgments in matrimonial cases.

In this case, the change created by the addition of Section 170(7) parallels the statutory change in *Gleason v. Gleason*: it simply provides another ground for a divorce. The new statute does not create greater rights for a spouse in a divorce, as the equitable distribution statute did in *Valladares v. Valladares*. The no-fault change provides a speedy method for establishing the grounds and does not obviate the wife's right to insist on a trial regarding any and all financial issues related to the couple. The new change gives neither

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party any greater property rights. *Palermo v. Palermo*, NYLJ, October 28,2011 (Dollinger, J.). For these reasons, the language of CPLR 3025(b), the lack of any prejudice to the wife's property rights and the judicial command to "freely grant" such applications weigh heavily in favor of granting this motion.

In her responsive papers, no where does the wife suggest that the husband does not have a cause of action or that his amended complaint, served as part of the motion, does not properly plead a cause of action under Section 170(7). Instead, she simply suggests that this cause of action can not be appended unto the current complaint. She does not dispute that if the husband files a separate complaint and alleges a claim under Section 170(7), he could then move to consolidate this action with the new action, a motion that would have substantial legal merit as it would prevent two actions and serve judicial economy. *See Haskell v Haskell*, 145 AD 2d 465 (2d Dep't 1988)(since action for fraud and action for divorce involved common questions of fact, they would be consolidated); *Moor v. Moor*, 39 AD3d 507 (2d Dep't 2007)(motion to consolidate pursuant to CPLR 602 (a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion and common questions of law and fact exist). The mere fact that the wife opposes the divorce should not prevent her husband, who wants the divorce, from asserting a new statutory right, extant at the time he moves to amend the complaint.

Finally, the wife's claim of prejudice by granting either amendment is unavailing. This case is still in the pretrial stage and the facts necessary to establish abandonment or "irretrievable breakdown" are clearly within the scope of testimony from the husband and wife alone. There is no need for further discovery or depositions. There are no documents

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required for either side to prove its case. No one has suggested that there are any third-party witnesses who would be needed if the amendments are granted. There is no suggestion that granting the amendments will delay or extend the trial. Under these circumstances, the wife has made no showing that adding the proposed causes of action would cause her cognizable legal prejudice. *Edenwald Contracting Co. v. New York*, 60 NY2d 957(1983)(to deny an amendment requires significant prejudice to the other side and the lack of witness was not enough); *Inter-Community Mem. Hosp. of Newfane v Hamilton-Wharton*, 2012 NY App. Div. LEXIS 1989; 2012 NY Slip Op 1901 (4th Dep't 2012)(leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit); *Giuffre v. DiLeo*, 90 AD3d 602 (2d Dep't 2011)(no prejudice if discovery is ongoing and the plaintiff may still discover relevant information); *U.S. Bank, Natl. Assn. v Sharif*, 89 AD3d 723 (2d Dep't 2011)(the plaintiff failed to demonstrate the existence of any prejudice or surprise that would result from the amendment); *Duane Reade v Cardinal Health Inc.*, 21 AD 3d 269 (2d Dep't 2005). Simply put, the wife suffers no prejudice because her husband seeks to use the no-fault statute – and its simpler pleading requirements – to end his marriage.

This Court will not exalt form over substance and force the husband to file another complaint and then seek to consolidate them. The extra filing fees and motion practice are unnecessary.

The motion to amend to add claims under Section 170(4) and 170(7) is granted. The amended complaint may be filed and then served under CPLR 3025(b). An answer is due within 20 days after service of the entered order and the amended complaint.

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SUBMIT ORDER ON NOTICE.

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Dated: April 16, 2012

Richard A. Dollinger, AJSC

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