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# **Peg Streep-Weatherly, Plaintiff v. Craig Weatherly, Defendant, 304909/14**

February 2, 2015

Cite as: Weatherly v. Weatherly, 304909/14, NYLJ 1202716426255, at \*1 (Sup., NY, Decided January 6, 2015)

304909/14

Justice Laura Drager

[Read Summary of Decision](#)

Decided: January 6, 2015

The Defendant, represented by Kelly R. Fissell, Esq. , Berkman Bottger Newman & Rodd, LLP NY NY.

The Plaintiff, represented by Patricia Hennessey, Esq., Hennessey & Bienstock LLP NY NY

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Defendant (the "Husband") moves for an order dismissing this divorce action (1) pursuant to CPLR §3211 (a) (8), (9) for failure to acquire personal jurisdiction over the Husband; (2) pursuant to CPLR §3211 (a) (7) for failure to state a cause of action in that the Wife has not satisfied the residency requirement of DRL §230; and (3) pursuant to CPLR §327, forum non conveniens. Additionally, the Husband seeks an award of counsel fees from the Plaintiff (the "Wife") in the amount of \$15,000. The Wife opposes the Husband's motion and cross-moves for an award of counsel fees from the Husband in the amount of \$15,000. The Husband opposes the Wife's cross-motion.

The parties were married on December 10, 2005 in New York. There are no children of the marriage. The Husband, an attorney, has resided in Vermont since 1974. He is domiciled in Vermont where he maintains his solo practice. All of his property is located in Vermont. The Wife resided in New York at the time of the marriage, but moved to Vermont after her daughter

finished high school. The parties bought a condominium in Vermont where they lived together. Due to marital difficulties, the Wife left Vermont in 2010, and rented an apartment in New York.

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Although the Husband on occasion visited the Wife at her apartment after they separated, he never remained in New York for any significant period of time.

The Wife commenced the instant action for divorce on April 15, 2014 (the "New York Action"). The Husband was personally served with a Summons for Divorce on April 30, 2014. However, no complaint was attached to the summons served on the Husband. Moreover, the papers served were not designated "Summons with Notice" and contained no statement of the relief sought. CPLR §305 (a),(b). The Husband received a copy of the Wife's complaint via Federal Express delivery on May 2, 2014. (OSC, Husband's Aff., ¶12).

Subsequent to the filing of the New York action, the Husband commenced an action for divorce in Vermont (the "Vermont Action"). The Wife moved for an order dismissing the Vermont action. That motion was denied but the further proceedings in the Vermont Action were stayed pending this decision.<sup>1</sup>

## DISCUSSION

Initially, the court rejects the Husband's argument that the Wife failed to meet the residency requirement of DRL §230. From the undisputed facts, the court finds that the Wife is domiciled in Vermont. She is registered to vote in Vermont and pays taxes in that state. She maintains a Vermont driver's license. Nonetheless, the Wife has maintained a residence in New York since 2010. A person can have only one domicile but can have several residences. To meet

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the residency requirement of DRL §230, a party must show she has a significant connection with some locality in New York as a result of living there for some length of time during the year. The court finds that the Wife has resided in New York with a substantial degree of continuity and permanence, notwithstanding that she maintains her domicile elsewhere. *Wittich v. Wittich*, 210 A.D.2d 138 (1st Dept. 1994); *Unanue v. Unanue*, 141 A.D.2d 31 (2d Dept. 1988). Thus, the Husband's motion to dismiss for failure of the Wife to meet the residency requirement is denied.

However, the Husband's motion to dismiss is granted on other grounds. First, personal jurisdiction was not acquired over the Defendant. CPLR §305; DRL §232. An action may be validly commenced by the filing of a summons alone, without a complaint, so long as the summons bears "a notice stating the nature of the action and the relief sought". A summons which neither bears this notice nor is accompanied by a complaint is jurisdictionally defective. CPLR §305; (*Parker v. Mack*, 61 N.Y.2d 114, 472 N.Y.S.2d 882, 460 N.E.2d 1316). In a

matrimonial action, a judgment cannot be entered unless a complaint is personally served with the summons or a defendant is personally served with a summons with notice that bears a notation as to the nature of the action, and also specifies "the nature of any ancillary relief demanded." DRL §232.

In this action, the Husband was personally served with a document titled "Summons for Divorce" on April 30, 2014. Although the summons alluded to a complaint, the complaint was not simultaneously personally served on the Husband. (OSC, Husband's Aff., ¶2). Additionally, the Summons for Divorce served on the Husband failed to contain the requisite notice provisions to be considered a Summons with Notice. (OSC, Husband's Ex. A). On May 1, 2014, the Wife's

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counsel sent a package to the Husband via Federal Express delivery that contained the Verified Complaint and a proposed stipulation by which the Husband would acknowledge service of the complaint. (OSC, Husband's Ex. B). Although the Husband concedes that he received the package, he never signed the stipulation. In light of the incontrovertible facts, the court finds the court finds that it never acquired personal jurisdiction over the Husband.

In addition, the Wife fails to demonstrate any grounds on which the court could exercise personal jurisdiction over the Husband pursuant to CPLR §302 [b]. In order to obtain personal jurisdiction over the non-resident Husband, the Wife's claim for relief must have accrued under the laws of this state or this state must have been the domicile of the parties before or at the time of their separation. (*Klette v. Klette*, 167 A.D.2d 197 [1st Dept. 1990]).

Here, neither party disputes that Vermont was the marital domicile before the parties' separated in 2010. From 2005 through 2010, the parties continuously resided together in a condominium in Vermont, which was listed as their residence on Federal and State tax returns. (*Lipki v. Lipki*, 293 A.D.2d 344 [2002]). The parties registered to vote in Vermont and they both have Vermont driver's licenses. Moreover, the Husband's contacts with New York are so attenuated that a finding of personal jurisdiction exists would violate due process principles. In addition to residing and working in Vermont, all of the Husband's separate property as well as the marital property is located in Vermont. The fact that the Husband may travel to New York from time to time is insufficient to justify extending personal jurisdiction over him. (*Klette v. Klette*, 167 A.D.2d 197 [1st Dept 1990]). Having determined that the parties did not maintain a marital domicile in New York, it follows that the Wife's claim for maintenance, equitable

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distribution, and other ancillary relief did not accrue under the laws of this state. Moreover, insufficient minimum contacts exists for New York to exercise long-arm jurisdiction over the Husband. (*Senhart v. Senhart*, 18 A.D.3d 642 [2d Dept. 2005]).<sup>2</sup>

In addition to the lack of personal jurisdiction, the court dismisses this action on the basis of forum non conveniens. CPLR §327. The doctrine of forum non conveniens is a highly flexible concept, founded upon the equitable principles of justice, fairness, and convenience [Islamic Republic of Iran v. Pahlavi, 62 NY2d 474 (1984), cert denied 469 US 1108 (1985)]. Under this doctrine, a court, after considering and balancing several competing objective factors, may entertain or decline to entertain jurisdiction over an action (id.). Although no one factor is controlling (id.), factors include the "difficulties for defendant in litigating the claim in this State, the burden on the New York courts in entertaining the suit and the availability of another more convenient forum in which plaintiff may obtain redress" [Banco Ambrosiano, S.A. v. Artoc Bank & Trust Ltd., 62 NY2d 65, 73 (1984)].

The Husband is domiciled in Vermont. All of the marital property is in Vermont, including the marital condominium, the Husband's law practice, and the parties' joint bank account. The witnesses and the evidence necessary for trial of this action are located in Vermont.

Based on the evidence presented, the court concludes that the Wife is domiciled in

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Vermont. After the parties separated and the Wife moved to New York, she continued to file tax returns and pay taxes in Vermont claiming to reside in Vermont. As of the date of this motion, she has not filed a tax return in New York, resulting in the inference that she lives in New York less than six months each year. The Wife maintains a Vermont drivers licence, owns and registers her car in Vermont, maintains health insurance in Vermont, and is registered to vote in Vermont. Thus, there is no inconvenience to her in proceeding with the divorce action in Vermont.

Finally, the Husband commenced a divorce action in Vermont. The court there denied the Wife's motion to dismiss. Thus another, more appropriate, forum exists to hear the parties' divorce action. Accordingly, even if this court had jurisdiction over the Husband, this action would be dismissed on the grounds of forum non conveniens.

## **COUNSEL FEES**

The court declines to grant either party's application for an award of counsel fees. The court finds that neither party proceeded in bad faith. However, neither party submitted any financial information to enable this court to determine a basis on which to award attorney fees. DRL §237.

Accordingly, it is

ORDERED, that the Defendant's motion to dismiss this divorce action on the grounds of lack of personal jurisdiction (CPLR §3211) is granted; and it is further

ORDERED, the Defendant's motion to dismiss this divorce action on the grounds of forum non conveniens (CPLR §327) is granted; and it is further

ORDERED, that each party's application for attorney fees is denied; and it is further

ORDERED, that any relief not granted by this Decision and Order is denied.

Dated: January 6, 2015

ENTER:

1. The court has not received a copy of the written decision in the Vermont Action. Rather, both counsel advised the court of the status of that action during a conference call on December 19, 2014.

2. The Wife alternatively argues that this court can grant the divorce. She contends that New York has in rem jurisdiction over the status of the marriage since she resides here. CPLR §317. As this court previously noted, the Wife meets the residency requirement pursuant to DRL §230 that would enable this court to grant the divorce. However, as the court also noted, the Husband was not properly served in this action, thereby denying jurisdiction to this court to grant the divorce. Moreover, even if the court had jurisdiction over the Husband, it is more efficient of court resources to have all issues of this divorce heard in one jurisdiction. (See, *infra*).