

Kings County
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SUPREME COURT
Auerbach vs. Auerbach

..is an action for divorce on the ground that the parties have lived separate and apart pursuant to a separation agreement for a period in excess of one year. The defendant moves to dismiss the complaint on the ground it fails to state cause of action in that the parties were divorced in the Dominican Republic in December, 1971, pursuant to a valid decree of the Dominican court.

The factual pattern is virtually identical to that of *Bohen vs. Bohem* decided simultaneously herewith. The parties were married in the State of New York in 1955 and have been residents therein for at least two years prior to the commencement of this action. A separation agreement was entered into on November 30, 1971, and modified on February, 1972. On December 3, 1971 on the basis of the personal appearance in the Dominican Republic of Barry R. Auerbach (defendant herein) and the power of attorney duly executed by Thelma Auerbach (plaintiff herein) the Dominican court granted a decree of divorce to the parties. The parties herein exchanged spouses with the parties in the *Bohem* case and remarried on December 12, 1971, in the State of New York, i.e., Thelma Auerbach married Sheldon Bohem and Barry R. Auerbach married Eleanor Bohem.

By, the instant action and for all practical purposes, plaintiff seeks to have the Dominican decree declared invalid contending that no residency or domicile had been set up in the Dominican Republic by the defendant herein and that it is against the public policy of the State of New York to recognize such decree.

Defendant's motion to dismiss the complaint is granted for the same reasons as set forth in the case of *Bohem vs. Bohem*, decided simultaneously herewith. Settle order on notice

BOHEM vs. BOHEM - This is an action for divorce on the ground that the parties have lived separate and apart pursuant to a separation agreement for a period in excess of one year. The defendant moves to dismiss the complaint on that the ground it fails to state cause of action in that the partes were divorced in the Dominican Republic in December, 1971, pursuant to a valid decree granted by the Dominican court.

The facts are not in dispute. The parties herein were married in the State of New York in 1955 and resided therein for at least two years prior to the commencement of this action. On November 30, 1971 they entered into a separation agreement which was modified in February 1972. On or about December 3, 1971, the defendant in the instant case, Eleanor Bohem personally appeared before the court in the Dominican Republic and petitioned said court for a divorce from Sheldon Bohem, the plaintiff herein. The latter pursuant to a valid written power of attorney was represented therein by a Dominican attorney and through such attorney submitted to the jurisdiction of the court. On December 3, 1971, the Dominican Court granted a divorce to the parties.

Simultaneously with the Bohem action in the Dominican court another case, which is interlocked with the case at bar, entitled Barry R. Auerbach vs. Thelma Auerbach, appeared on the divorce calendar in the

same Dominican Court. On December 3, 1971, on the basis of the personal appearance of Barry R. Auerbach in the Dominican court and the power of attorney executed by Thelma Auerbach, authorizing her representation, a decree of divorce was granted to these parties..

As a sequel to the Dominican divorce, the parties exchanged partners and remarried December 12, 1971, in the State of New York, i.e. Thelma Auerbach married Sheldon Bohen and Eleanor Bohen married Barry R. Auerbach. Now all four parties are in this court seeking New York divorces from their original spouses, claiming in substance, that the Dominican divorce decree heretofore obtained is invalid and not recognized in New York because, allegedly, one of the parties in each case was not a resident or domiciliary of the Dominican Republic and to recognize such decrees would contravene our public policy.

The court finds no merit to this contention. In the court's opinion, the plaintiff in the case at bar is stopped from claiming the invalidity of the Dominican divorce decree. The court notes that no issue, of fraud is raised by any party, or do the parties deny that they submitted to the jurisdiction of the Dominican court. Under the Dominican laws, no residence or domicile necessary in order to obtain divorce. On the strength of these bilateral divorces, the parties remarried. In the opinion of the court, under the circumstances, the public policy of this state is not offended by recognizing these decrees.

The leading case on subject is *Rosenstiel v. Rosenstiel* (16 NY 2d 64) wherein the court held that jurisdiction in the Mexican court was obtained by the husband journeying to the City of Juarez and signing the municipal register and by the wife appearing by power of attorney. In holding such Mexican divorce valid, the Court of Appeals states, page 73:

"A balanced public policy now requires that recognition of the bilateral Mexican divorce be given rather than withheld and such recognition as a matter of comity offends no public policy of this State."

On page 73, the court stated:

"The State or country of true domicile has the closest, real public interest in a marriage but, when a New York spouse goes elsewhere to establish a synthetic domicile to meet technical acceptance of a matrimonial suit, our public interest is not affected differently by a formality of one day than by a formality of six weeks.

(See also, *Kraham vs. Kraham*, 73 Misc. 2d 977).

Stated in another way, as the courts did in *Senor vs. Senor* (272 App Div. 306, 312 aff'd 297 NY 800r): It is no necessary concomitant of a public policy against stipulation; for divorce that those who have virtually succeeded in doing so have accommodated by our courts whenever it suits their convenience to retract. They do not have a call on that public policy as an escape from its violation. Rather, like being in part deicto the law leaves them where it finds them.

If the plaintiff in the case at bar wanted to contact the jurisdiction of the foreign court, the time to do so was when the case was before the court instead of submit himself to its jurisdiction and at this late date seeking to litigate the issue (see *Frost vs. Frost* 260 App. Div 694 696).

Under the circumstances, the plaintiff, who remarried on the strength of the Dominican divorce in which he participated is estopped from asserting its invalidity and has no standing to bring this action:

Accordingly, defendant's motion is granted and the complaint is dismissed.