NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 12, 2019

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Re: *B.B. v. T.B.*[1]
Case No. CL-2018-0744

Dear Counsel:

This matter came before the Court on February 8, 2019 on Defendant's Second Motion to Compel, in which the Defendant requests that the Court reject Plaintiff's claim of privilege against self-incrimination and compel him to disclose any acts of adultery that may have occurred during marriage.

[1] Proper names will not be used in light of the nature of the allegations in this case and the subject of the motion before the Court.

BACKGROUND

The Parties were married in1996. On January 17, 2018, the Plaintiff filed his complaint for divorce alleging constructive desertion and multiple acts of adultery by the Defendant. The complaint for divorce includes the following paragraph:

> *14. Throughout the marriage Mr. B[ ] has conducted himself as a dutiful husband, and at all times has done all within his power to contribute to the financial security and domestic happiness of Ms. B[ ]. Mr. B[ ] has done nothing that justifies Ms. B[ ]'s conduct.*

The complaint was signed by Plaintiff's then-counsel, who has since withdrawn from this case. B.B. did not sign the complaint. The complaint seeks equitable distribution of the parties' assets and liabilities, among other relief. T.B. filed a counterclaim for divorce on February 9, 2018, on the grounds of cruelty and desertion. The counterclaim does not allege any act of adultery by B.B.

On February 20, 2018, a hearing was held before Judge Bellows on the Plaintiff's Motion to Sequester the File. B.B. testified during that hearing and was asked whether the complaint included the statements that he was a dutiful husband and that he had done nothing to justify T.B's conduct during the marriage. B.B. answered that the complaint included those statements.[2] In July 2018, B.B. objected to discovery propounded by counsel for T.B. that included the following interrogatory:

> *8. Identify all persons other than the Defendant with whom you have engaged in sexual intercourse, sodomy and/or buggery during your marriage to Defendant. Include specific facts, actions, date and locations of occurrence, identity and contact information for the persons involved, identity of other persons with knowledge of such events. Identify any relevant documentation related to such events and the evidence you will present with regard thereto.*

B.B. objected and declined to answer this interrogatory, invoking his right against self-incrimination.[3] The Defendant also propounded the following request for admission

[2] Judge Bellows denied the Motion to Sequester the File.

[3] B.B. also objected on the ground that the information sought was not relevant or material because T.B. had not alleged adultery in her counterclaim, and that the interrogatory was posed "solely for harassment[.]" At the hearing on the Motion to Compel, the Court orally overruled this objection. The Court need not decide whether adultery is a relevant issue for discovery in every divorce case. *See* Va. Sup. Ct. R. 4:1("In any proceeding (1) for separate maintenance, divorce, or annulment of marriage . . . , discovery shall extend only to matters which are relevant to the issues in the proceeding." By making the assertion in the complaint that he "conducted himself as a dutiful husband" – a claim which is unnecessary to obtain the relief

("RFA"): "Admit that during your marriage, you have had sexual intercourse with a person other than Defendant." B.B. objected "on the ground that the 22-year timeframe referenced in the request (i.e. 'during the marriage') is overly broad in light of Virginia Code Section § [*sic*] 20-94.... This request is not limited to said 5-year time frame and therefore any response outside of said time frame would be irrelevant."[4]

T.B. argues that the Plaintiff's claim of privilege against self-incrimination should be overruled because 1) B.B. cannot claim the privilege because there is no reasonable likelihood that he would be prosecuted for any act of adultery[5] and 2) B.B. waived any claim of privilege by making the statements in Paragraph 14 of the complaint, and by his testimony at the hearing on his Motion to Sequester the File.

ANALYSIS

In Virginia, adultery is a Class 4 misdemeanor, punishable by a fine of up to $250, unless such adultery involves another whom the person is forbidden to marry, in which case it is a Class 1 misdemeanor with a penalty of up to 12 months in jail and/or a fine of up to $2500. If the adultery occurs with another who is the person's son, daughter, grandson, granddaughter or parent (including all step-relatives), the offense is a felony punishable by up to 5 years' imprisonment. If the relative is between the ages of 13 to 17, the offense is punishable by up to 20 years' imprisonment plus a fine of up to $100,000. Code §§ 18.2-365; 18.2-366; 18.2-10; 18.2-11. A one-year statute of limitations applies to misdemeanor adultery offenses. Code § 19.2-8. There is no statute of limitations for felony offenses.

The Fifth Amendment to the Constitution of the United States[6] and Article I, Section 8, of the Constitution of the Commonwealth of Virginia[7] guarantee a person's right against self-incrimination. This protection affords a person the right "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Husske v. Commonwealth*, 252 Va. 203, 214, 476 S.E.2d 920, 927 (1996) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

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requested – the Plaintiff injected the issue of his conduct into this case. Insofar as adultery is a criminal offense, is a ground for dissolution of the marriage, and is a basis for denial of spousal support, there can be little doubt that Virginia law recognizes fidelity as a duty of marriage.

[4] The relevance objection is overruled for the reasons stated in note 3.

[5] This argument is not included in the Defendant's written motion, but it was presented orally at the hearing on the Motion to Compel and addressed by Counsel for the Plaintiff at that hearing.

[6] "No person ... shall be compelled in any criminal case to be a witness against himself ...'

[7] "[I]n criminal prosecutions a man ... shall not ... be compelled in any criminal proceeding to give evidence against himself ..."

It is well-settled that "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule [protecting the witness from compelled self-incrimination] ceases to apply." *Brown v. Walker*, 161 U.S. 591, 597 (1896); *Zebbs v. Commonwealth*, 66 Va. App. 368, 377–78, 785 S.E.2d 493, 497–98 (2016). "[I]f a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer." *Brown* at 598. *Zebbs,* at 378, 785 S.E.2d at 498.

Thus, the Court finds that any answer by the Plaintiff to Interrogatory 8 or the RFA that discloses misdemeanor acts of adultery that occurred in Virginia more than one year prior to the date of the discovery response could not be used as a basis for a criminal prosecution of B.B under Virginia law. The Plaintiff has not identified any federal law that could form a basis for prosecution of these acts. Neither does the Plaintiff claim or attempt to show that the disclosure of such acts would "furnish a link in the chain"[8] that would aid in the prosecution of another offense that is not time-barred. Therefore, the Court holds that B.B. cannot claim a privilege against self-incrimination with respect to any *misdemeanor* acts of adultery that occurred in Virginia more than one year prior to the date of his response.

The Defendant claims that any valid claim of privilege that B.B. might have for other acts of adultery was waived as a result of the statements included in Paragraph 14 of the complaint and by B.B.'s testimony at the hearing on the Motion to Sequester the File. The Court does not agree.

In *Travis v. Finley*, 36 Va. App. 189, 548 S.E.2d 906 (2001), the Court of Appeals summarized the law of waiver:

> The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege. A waiver may be generally defined as a voluntary abandonment of some known legal right, advantage, or privilege, or such conduct as warrants an inference of the abandonment of such right, or the intentional doing of an act inconsistent with claiming it, all of which is usually dependent upon the peculiar circumstances of the case. The essential elements of waiver are knowledge of the facts basic to the exercise of the right and intent to relinquish that right. Waiver of a legal right will be implied only upon clear and unmistakable proof of the intention to waive such right for the essence of waiver is voluntary choice. It is clear that the constitutional rights are those of the individual and can only be waived by that person.

[8] *See Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Travis v. Finley, 36 Va. at 199-200, 548 S.E.2d at 911 (internal citations and edits omitted). The Court held that "the letter from [Travis]'s counsel indicating the discovery answers would be forthcoming is not a waiver of [Travis]'s privilege against self-incrimination. *Id.* at 200, 548 S.E.2d at 911.

Applying these principles, it is clear that the statements made in the complaint – which was signed only by counsel and not by B.B. – cannot constitute a waiver of the privilege against self-incrimination because B.B. did not make those statements.[9] Although B.B. testified at the hearing on the Motion to Sequester the File, his testimony does not constitute a waiver. At that hearing, Defendant's counsel asked B.B. if the complaint included the statements that appear at Paragraph 14 of the complaint. B.B.'s answer admitting that certain language exists in the complaint does not rise to the level of an intentional relinquishment or abandonment of his privilege against self-incrimination. Thus, the Court finds that B.B. has not waived any valid claim of privilege that he may have.

CONCLUSION

Defendant's Second Motion to Compel is granted in part and denied in part. B.B. shall answer Interrogatory 8 and the RFA, but only with respect to any misdemeanor acts of adultery that occurred in Virginia more than one year before the date of his responses. The motion is otherwise denied.

Sincerely yours,

[redacted]

Michael F. Devine
Circuit Court Judge

[9] Defendant relies upon *Leitner v. Leitner*, 11 Va. Cir. 281 (1988), in which Judge Bach found that a party waived his privilege against self-incrimination by stating in his cross-bill of complaint for divorce that he had been a "faithful and dutiful" husband. The opinion does not state whether Mr. Leitner signed the cross-bill himself or by counsel, leading the undersigned judge to believe that such was not important to Judge Bach's analysis. The subsequent decision by the Court of Appeal in *Travis v. Finley*, however, compels a conclusion on this point different than that in *Leitner*.