

<b>McQuillan v Holy Land Art Co.</b>
2007 NY Slip Op 34523(U)
July 31, 2007
Supreme Court, New York County
Docket Number: 116134/06
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

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DOLORES JOAN McQUILLAN,

Index No: 116134/06

Plaintiff,

-against-

THE HOLY LAND ART COMPANY, CHRISTINE  
DEGHERI CLEARY, THE EDWARD O'TOOL  
COMPANY, THE THERESA AND EDWARD O'TOOLE  
FOUNDATION, THE BANK OF NEW YORK  
and BERNARD DEGHERI, CO-TRUSTEES,

Defendants.

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JOAN A. MADDEN, J.:

In motion sequence no. 001 defendant Bank of New York (the Bank) moves, by order to show cause, dated December 5, 2006, for a preliminary injunction barring plaintiff from continuing this action against the Bank, or from commencing any other action against it, without prior approval from Justice Richter, and for an order, pursuant to CPLR 5104, holding plaintiff and Donald Brown, who purports to be her attorney in fact, in contempt of court. In motion sequence no. 002, the Bank and defendants Bernard Degheri (Degheri), The Holy Land Art Company (the Art Company), and Christine Degheri Cleary (Cleary) move, by order to show cause, dated December 18, 2006, for relief similar to that requested by the Bank in motion sequence no. 001.<sup>1</sup>

Plaintiff cross-moves for an order vacating defendants' orders to show cause, removing the law firm of Leboeuf, Lamb, Greene & MacRae (LeBoeuf) from representing the Bank, the Art Company, Degheri, and Cleary; and imposing penalties and sanctions on LeBoeuf. Plaintiff also

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<sup>1</sup>Motion sequence nos. 001 and 002 are consolidated for disposition.

seeks an order compelling defendant the Theresa & Edward O'Toole Foundation (the Foundation) to serve an answer to the complaint.<sup>2</sup>

By order, dated April 13, 2003, in McQuillan v St. Vincent's Hosp. (Index No. 117364/02 [Sup Ct, NY County 2003], affd 8 AD3d 148 [1st Dept 2004]), Justice Richter reviewed the history of the litigation plaintiff has commenced during the last 20 years, and prohibited plaintiff from commencing any further litigation against any of the defendants named in that action without prior court approval. Defendants herein, the Bank and Degheri were among the defendants named in the action then pending before Justice Richter.

In brief, plaintiff has, since 1979, been litigating an alleged fraud that is purported to have occurred between 1923 and 1925. Plaintiff is the granddaughter of John O'Toole. John O'Toole had a number of children including plaintiff's uncle, Edward O'Toole, plaintiff's aunt, Catherine O'Toole Hennessey, and plaintiff's mother Mae O'Toole Peters. The alleged fraud concerns the disposition of John O'Toole's 50% ownership in the Edward O'Toole Company, Inc. (the Company), a company that sold religious goods. Plaintiff's principal allegation is that Edward O'Toole and his wife, Theresa O'Toole, deprived John O'Toole of his ownership interest in the Company and covered up their malfeasance by concealing or destroying all evidence of John O'Toole's ownership interest. John O'Toole died in 1925. The Company flourished until it was dissolved in 1970. Edward O'Toole died in 1967, leaving all of his estate to his wife. Theresa O'Toole died in 1979, leaving the bulk of her estate to the Foundation, which is a charitable trust created for the benefit of Catholic and other religious institutions. Degheri and the Bank are co-trustees of the Foundation. Cleary, who serves as a consultant to the Foundation, is the daughter of the late Chris Degheri, who, prior to his death in 1998, was a co-trustee of the Foundation. The Art Company is a religious goods store.

In 1987, when plaintiff appeared as power of attorney for her mother, Mae O'Toole Peters,

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<sup>2</sup> In this action, LeBoeuf represents the Bank, the Art Company, Degheri, and Cleary. The Bank and Degheri are co-trustees of the Foundation. No attorney has appeared on behalf of the Foundation or Edward O'Tool Company, which is defunct.

in an action against the Foundation, the Bank, the Estate of Theresa Degheri O'Toole, and Chris Degheri, Justice Santaella dismissed the action, noting that the issue of John O'Toole's ownership interest in the Company "has been the subject of family disputes over decades and two prior lawsuits<sup>3</sup>," and that, for the preceding 50 years, plaintiff's mother either had actual knowledge of John O'Toole's stock ownership in the Company, or could be charged with knowledge sufficient to raise a duty to inquire. McQuillan v The Theresa and Edward O'Toole Foundation, New York County Index No. 2351/88 (Sup Ct, NY County 1988), at 2-3. The decision was affirmed by the Appellate Division, First Department. See McQuillan v Theresa and Edward O'Toole Foundation, 151 AD2d 1057 (1st Dept 1989).

Since that time, plaintiff has commenced two other actions in addition to the instant one, in which she sought recourse from the courts on matters concerning her grandfather's stock ownership in the Company, as well as alleged frauds concerning the estate of her uncle, who died in 1967, and that of his wife, who died in 1979. In 1995, plaintiff filed an order to show cause seeking to depose certain individuals in order to preserve information. See McQuillan v. Magura; Index No. 111903/95. By decision and order dated September 8, 1995, Justice York held that the statute of limitations barred further resort to the legal system, including pre-action discovery as to the alleged fraudulent transfer of stock, as all issues had been raised in earlier lawsuits. Justice York's decision and order were affirmed by the Appellate Division First Department and a motion for leave to appeal to the Court of Appeals was denied. See McQuillan v. Magura, 233 AD2d 186 (1<sup>st</sup> Dept 1996), ly denied, 89 NY2d 812 (1997).

In 2002, plaintiff, appearing pro se, commenced an action before Justice Richter in which

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<sup>3</sup>The first of the lawsuits referred to by Justice Santaella was commenced in the Chancery Court of New Jersey in 1933 by some of John O'Toole's children. Plaintiff's mother later joined the action, which was dismissed, inter alia, as barred by the statute of limitations and for failure to establish John O'Toole's ownership interest. The second action was commenced by plaintiff in Surrogate's Court, New York County, on behalf of her aunt, Catherine O'Toole Hennessey, through a power of attorney, and sought to obtain information concerning John O'Toole's stock. Pursuant to court order the executors of the estate furnished access to "all available information" and the matter was withdrawn.

the Bank of New York and Degheri, among others were named as defendants. McQuillan v St. Vincent's Hosp. (Index No. 117364/02). In that action, plaintiff again alleged fraud concerning the ownership of John O'Toole's stock in the Company and also added allegations of legal malpractice, negligence, undue influence and breach of fiduciary duty. By decision and order dated April 11, 2003, Justice Richter dismissed the complaint as barred by the statute of limitations and the doctrines of res judicata and collateral estoppel. Furthermore, as indicated above, Justice Richter enjoined plaintiff from commencing any further litigation against the defendants without prior court approval.

She wrote that:

It is beyond dispute that plaintiff has spent decades unsuccessfully litigating these matters in state court, and has also filed unsuccessful disciplinary complaints against some of the attorneys involved in the current motions. Indeed, it appears that despite her efforts to keep litigating this matter, plaintiff has never persuaded any court or agency that any fraud or wrongdoing occurred. Plaintiff's repeated use of the courts, which is thoroughly documented in the multiple motions to dismiss filed here, has consumed enormous court time and resources of the various defendants....plaintiff must realize that she cannot continue to bring lawsuits and disciplinary complaints which raise issues that have already been resolved against her, both at the trial and appellate level. Accordingly, given the history between the parties, the Court hereby orders that plaintiff shall not commence any further litigation against any of the named defendants without prior court approval.

In 2005, plaintiff sought to re-open the 1995 action before Justice York by moving to renew based on newly discovered evidence. Justice York denied the motion and incorporated Justice Richter's decision and order in his decision.

This action, commenced by plaintiff by her "attorney-in-fact" Donald Brown, like her previous actions, arises out of the alleged fraudulent transfer of John O'Toole's stock in the Company.

While it appears to this court that plaintiff sincerely believes in the justice of her position, it is clear that in naming the Bank and Degheri as defendants in this action, plaintiff has directly and willfully violated the unambiguous order of Justice Richter. Such violation subjects plaintiff to civil and criminal contempt of court. See Judiciary Law §§ 753 (A) (1) and 750 (A) (3).

Donald Brown, who purports to represent plaintiff pursuant to a durable general power of attorney, executed by her on July 28, 2006, acknowledges that he is not an attorney. Judiciary Law § 478 makes it "unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state ... ." A person who "is not licensed to practice law in the State of New York pursuant to the Judiciary Law may not appear pro se in court on behalf of a litigant as an attorney-in-fact pursuant to a power of attorney." Whitehead v Town House Equities, Ltd., 8 AD3d 369, 370 (2d Dept 2004). While Mr. Brown states that he is acting out of a desire to assist plaintiff, the fact remains that he may not act as attorney-in-fact for plaintiff. In addition, Judiciary Law § 750 (B) empowers the supreme court "to punish for a criminal contempt any person who unlawfully practices or assumes to practice law."

At this time, the court is not inclined to hold plaintiff, or Mr. Brown, in contempt of court pursuant to Article 19 of the Judiciary Law. As this action was commenced against the Bank and Degheri without prior court approval, a sufficient sanction is to strike plaintiff's notice of cross motion, which Mr. Brown signed, and to dismiss the complaint as against the Bank and Degheri. See Whitehead v Town House Equities, Ltd., 8 AD3d 369, supra. However, the court warns that any further violation of Justice Richter's order, or of this court's instant order, by plaintiff, or of Judiciary Law § 478 by Mr. Brown, will subject the violator to penalties permitted by law, including fines, the imposition of sanctions, attorney's fees and costs.

The court notes that neither the Art Company, nor Cleary, is covered by Justice Richter's order, and that there is no basis for their participation in the motion of the Bank and Degheri. While Justice Richter stated, in a temporary restraining order that she issued in the instant action, that she would address, at a hearing on the return date, the issue of whether those defendants should be covered by the temporary restraining order, such a hearing has not been held.

Finally, while the moving defendants argue that this action should be dismissed as barred by the doctrine of collateral estoppel, for failure to state a cause of action against the Art Company, and on the grounds that no cause of action can be asserted against the Foundation, as a charitable

trust, or its trustees, the merits of these arguments cannot be reached in the absence of a dismissal motion.

Accordingly, it is hereby

ORDERED that plaintiff Dolores Joan McQuillan is permanently enjoined from commencing any further action against either defendant The Bank of New York or defendant Bernard Degheri without prior permission from Justice Richter or from this court; and it is further

ORDERED that branch of the motions that seeks to hold plaintiff and Mr. Brown in contempt of court is denied; and it is further

ORDERED that the cross motion is stricken; and it is further

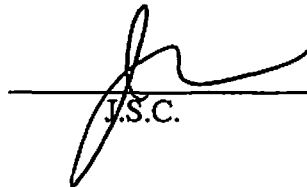
ORDERED that the complaint is severed and dismissed with prejudice as against defendants The Bank of New York and Bernard Degheri with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the rest of this action shall continue.

Dated: July 31 2007

ENTER:

  
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J.S.C.

**FILED**  
AUG 03 2007  
NEW YORK  
COUNTY CLERKS OFFICE