Kondratick v Orthodox Church In Am.
2009 NY Slip Op 31036(U)
April 23, 2009
Supreme Court, Nassau County
Docket Number: 022717/07
Judge: Daniel Martin
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 30
NASSAU COUNTY

ELIZABETH KONDRATICK.

Plaintiff.

- *against* -

ORTHODOX CHURCH IN AMERICA.

Defendant.

Sequence No.: 004, 005, 006 & 007
Index No.: 022717/07

The following named papers have been read on this motion:	Papers Numbered
Notice of Motions and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Four motions are brought herein. Unless otherwise indicated, all motions are brought under what will be designated as action #1. Action #1 is an action on a promissory note. Previously, the plaintiff had moved for summary judgment pursuant to CPLR 3213. That application was denied and the plaintiff was directed to serve formal pleadings per order dated June 18, 2008. Thereafter, action #2 was commenced by the defendant church against the plaintiff in action #1 and her husband (heretofore a non-party). Motion #4 seeks an order in effect quashing the depositions of a non party witness taken outside the presence of opposing counsel. That motion is opposed by the defendant in action #1. Motion # 05 is motion by the defendant in action #1 to consolidate the two actions alleging that common issues of law and fact exist. That application is strenuously opposed by the plaintiff in action #1 who notes that the events involved differ and do not involve identical parties. Motion #6 seeks an order granting an open commission for the taking of the deposition of a witness in the State of Florida. That motion is opposed by the plaintiff in action #1. Motion #7 seeks a protective order seeking an order quashing the subpoena served by the defendant seeking financial information from a banking institution.

The facts are somewhat simple. However, both counsel have endeavored to engage in extensive motion practice for what would appear to be tactical and strategic advantage rather than

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to avail themselves of alternative dispute resolution mechanisms despite numerous conferences with the court. The facts are as follows. In action #1, plaintiff alleges that on April 19, 2002 defendant Orthodox Church in America (hereinafter "Church") executed and delivered to plaintiff and Robert Kondratick a promissory note in the sum of $250,000.00 pursuant to which defendant agreed to pay the amount due in three equal payments on the first week of September 2002, 2003 and 2004. Robert Kondratick is the husband of the plaintiff and initially was a co-owner of the note in question, but has not sued on the note in question. The plaintiff is the "due and proper owner and holder" of the note and it appears that her husband had assigned his interest in said note to plaintiff. The defendant is in default in payment of same in the entire amount of $250,000.00. After the court denied the 3213 motion, more formal pleadings were served. In addition to the action on the note, the plaintiff asserted the following five actions (unjust enrichment, breach of contract, quantum meruit, deceptive business practices, attorneys fees)- all stemming from the original default on the note. Curiously omitted is the initial action on the promissory note. In response to the complaint, the defendant asserts an answer asserting no less than fifteen affirmative defenses (most of which allege in on one theory or the other, that the note is void due to the lack of authority of the person executing said note) and three counterclaims which are difficult to comprehend when viewed as interposed against the plaintiff, but more readily discernible if viewed against the non-party husband of the plaintiff. In essence, the counterclaims seek an accounting of church funds which the church claimed were misappropriated and utilized to benefit the plaintiff.

Action # 2 is a multi-faceted action by the church against Elizabeth and Robert Kondratick seeking a judgment in the sum of $1,500,000. Eleven causes of action were asserted, two actions requesting an accounting, an action for breach of fiduciary duties, two actions for aiding and abetting a breach of fiduciary duties, an action for unjust enrichment, two actions for monies had and received two actions for conversion, and an action for civil conversion. Not to be out pled, the defendants in action #2 assert no less than fourteen defenses none of which is particularly pertinent (especially those alleging the affirmative defense of contributory negligence when no negligence action has been pled or at least no negligence can be gleaned).

Notwithstanding the verbosity and complexity of the pleadings, the facts as indicated above are relatively facile. Robert Kondratick was a priest and Chancellor employed by the Russian Orthodox Church of America from 1989-2006. During the years 1991-2006 he lived with his wife on premises owned by the Church. The Kondraticks claim that during the time they lived on these premises they made substantial improvements to the premises, and pursuant to an alleged agreement they were to be reimbursed by the Church for said enhancement of the Church's property. The promissory note was executed per said alleged agreement. After Mr. Kondratick was discharged by the Church, the Kondraticks moved to the State of Florida. Thereafter, the instant litigation ensued.

The Church has taken the position that in his official capacities with the Church, Robert Kondratick had virtual (if not actual) control over the Church's finances. The Church claims that he abused his powers and misappropriated in excess of one million dollars in cash withdrawals.

Additionally, the Church claims that he misused a certain credit card for which the Church was responsible. The Church alleges charges of $132,000 were improperly applied to Mr. Kondratick's own personal use.

Whether or not to consolidate two or more actions lies within the sound discretion of the court. Mattia v. Food Emporium, Inc., 259 A.D.2d 527, 686 N.Y.S.2d 473. In the instant case, given the allegations contained in the various claims and counterclaims in each action, it appears that similar, if not identical, relevant admissible evidence will be utilized in both actions. Although the actions are not identical, there are some common questions of law and fact, which a provident use of scarce judicial resources would warrant the granting of consolidation for the purposes of a joint trial. See, Megyesi v. Automotive Rentals, Inc., 115 A.D.2d 596, 496 N.Y.S.2d 473. In so ruling, the court observes that the completion of discovery in both actions within a reasonable time frame is likely. Accordingly, motion #5 is granted.

In motion #4, the defendant in action #1 alleges, without contradiction, that the parties had appeared at a court conference and scheduled the remaining discovery. Thereafter, on January 7, plaintiff's counsel e-mailed the defendant's counsel stating his intent to depose two non-party witnesses. On that same date defendant's counsel advised that he had no authority to accept service on their behalf. On January 19, the defendant alleges that counsel discussed the depositions in question and agreed that it would be done by telephone. Defendant's counsel advised the plaintiff's counsel of his unavailability from January19-23, 2009. On Saturday January 20, 2009 the plaintiff's counsel notified the defendant's counsel of its intent to proceed with the depositions as noticed. Moments before the depositions were to begin the defendant's counsel faxed a letter to the plaintiff's counsel objecting to the depositions indicating that the depositions were not properly or timely noticed and further indicating that if the depositions were pursued, appropriate action would be forthcoming. Motion #4 ensued. The critical factor on a motion of this nature is whether a substantial right of the opposing party has been prejudiced. See, In Re Jones, 47 A.D.3d 931, 851 N.Y.S.2d 216. In the instant case, while the moving papers do not explicitly address such issue nor specify how the depositions would be prejudicial to its rights, nonetheless the tenor of the various correspondence demonstrates that the defendants thought such depositions were extremely important- so much so that the before the depositions started plaintiff's counsel knew that the instant relief would be sought. Neither party explains why court intervention was not sought at that juncture via telephone which is especially significant since the only excuse offered by the plaintiff's counsel is that the court had set an inflexible deadline for such discovery. Under the circumstances, such an approach to discovery cannot lightly be condoned. The best palliative under the circumstance is to make such efforts unavailing. Accordingly, motion #4 is granted to the sole extent that in the event the defendant feels it is necessary to question said witnesses further, than upon service of proper notices, said witnesses shall be deposed again, in which event the prior depositions may be utilized solely to impeach the testimony given at the new depositions and for no other purpose in this litigation. Otherwise, the motion is denied.

Motion #6 which seeks an order for commissions to take the deposition of Robert

Kondratick, heretofore a non-party witness, in action #1 has been rendered moot by the granting of motion #5. Robert Kondratick is now a party to these proceedings. Accordingly, motion #6 is denied as moot, but the parties are hereby directed to cooperate on arranging for any expeditious discovery that may be needed as to said party.

Lastly, motion #7 seeks a protective order quashing two information subpoenas served on J.P. Morgan Chase. The primary objection is that the information sought is very extensive and allegedly exceeds the time period upon for which recoupment could be had. Additionally, the court observes that the primary objective of the defendant in action #1 is to compel the Kondraticks to account. Generally, financial disclosure of the nature sought herein cannot be had in an accounting action until an interlocutory order directing the accounting has been issued. King v. Olsen, 178 A.D.2d 512 577 N.Y.S.2d437; Krauss v. Putterman , 51 A.D.2d 551, 378 N.Y.S.2d 434. The defendant has, therefore, not established its right to the discovery at this juncture of the proceedings. Accordingly, motion #7 is denied without prejudice to renew upon the entry of an interlocutory order directing the accounting sought. The motion is premature as no application for the granting of an interlocutory order has been made.

So Ordered.

A.J.S.C.

Dated: April 23, 2009

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