

Kondratick v Orthodox Church in Am.

2009 NY Slip Op 32594(U)

October 21, 2009

Supreme Court, Nassau County

Docket Number: 022717/07

Judge: Daniel Martin

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SCAN

SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

ELIZABETH KONDRATICK.

TRIAL/IAS, PART 30
NASSAU COUNTY

Plaintiff.
- against -

Sequence No.: 008 & 009
Index No.: 022717/07

ORTHODOX CHURCH IN AMERICA
and THEODOSIUS LAZOR.

Defendants.

THE ORTHODOX CHURCH IN AMERICA.

Plaintiff.
- against -

Sequence No.: 001
Index No.: 009111/08

ROBERT S. KONDRATICK and ELIZABETH
KONDRATICK.

Defendants.

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

In a consolidated action, the defendant in action #1, and the plaintiff in action #2 makes a motion for a protective order with respect to discovery demands of the Kondraticks. By separate motion, the same party moves for an order in action # 2 (motion seq #8) striking the Kondradick's answer in action #2) for failing to timely answer the ceratin outstanding discovery demands. The Kondradicks oppose both motions. By separate motion, the Plaintiff in action #1 seeks an order declaring the defendant Theodosius Lazor in default and denying any extension of time for said defendant to answer. There is technically no opposition to that motion, but see discussion, supra.

The underlying actions were previously described by the court in its decision of April 23,

2009 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 ... The plaintiff is the “due and proper owner and holder” of the note and it appears that her husband (Robert Kondratick, a defendant in action #2) had assigned his interest in said note to (her)...

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 (predicated on an alleged misappropriation of church funds over a period of time)..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.” Decision dated April 23, 2009 at p 2.

The motion for a protective order seeks relief from a demand of the Kondraticks that seeks the minutes of the Holy Synod of Bishops of the Orthodox Church of America and private meeting minutes of the Bishops from 1998-to date. The movants claim that such demand is over broad and to comply with it will disclose confidential information which has no bearing on the litigation. The Kondratick maintain that they need to review all the records to demonstrate that the accounting methods used by the Church were deficient. The Kondraticks are unable to cite any judicial authority for such broad and unrestricted right to discovery of over 20 years of financial records, and rely on the broad language of CPLR §3101 mandating discovery of all material and relevant material. The demands to inspect all the records on the grounds that it may enable the Kondraticks to show slipshod record keeping is too vague or conclusionary to be deemed material or relevant to the issues that are germane to the litigation, and it would be more appropriate to either have the church produce only those portion of the minutes that pertain to the financial transactions and contractual relationships to the parties to this litigation. See, e.g., The Rector Church Wardens and Vestrymen of St. Bartholomew’s Church in the City of New York v. Committee to Preserve St Bartholomew’s Church Inc., 84 A.D.2d 516, 443 N.Y.S.2d 233 or to shield the Church from providing any material which is not identified with particularity or otherwise restricted in time and scope (i.e material not related to the financial relations between the parties to this litigation). See, Taji Communications v. Bronxville Towers Apt Corp., 48 A.D.3d 551; Knights of Columbus of Ravena v. Frank M. Stolz Agency Inc., 147 A.D.2d 841 537 N.Y.S.2d 937.

Turning to the second motion, the court notes that the Church seeks to compel certain disclosure items which allegedly were the subject of the parties court ordered stipulation of June

3, 2009 requiring compliance with outstanding demands of June 15, 2009. Other than herein indicated, the movant does not particularize the discovery which it seeks to compel and the necessity thereof. The movant does claim that the Kondradicks did not provide proof of payment of improvements to the property in question. The Church is endeavoring to demonstrate that payments were made by the Kondradick which duplicated expenses the Church had already paid. In response, the Kondradicks maintain that they had great difficulty retrieving ancient records from their own resources or indeed even the financial institutions they dealt with. At this juncture, the court cannot even discern what materials are sought and there appears to be no wilfulness demonstrated that might warrant a striking of pleadings. In this regard, the court reiterates the observations contained in its decision of April 23, 2009, to wit:

“... both counsel have endeavored to engage in extensive motion practice for what would appear to be tactical and strategic advantage rather than to avail themselves of alternative dispute resolution mechanisms despite numerous conferences with the court.”

Under such circumstances, the court is authorized to delegate the supervision of discovery to a referee or judicial hearing officer. See, CPLR §3104. If necessary, the court will utilize that authority if the parties continue to engage in unnecessary or vexatious demands or fail to comply with valid demands that are capable of facile responses thereto. The parties are reminded that given the fact that items sought by both sides are documents that are extremely dated and not the type of documents that would be preserved in the normal course of an individual's experience, the court will not tolerate the misuse of discovery procedures to convert a non-willful failure to comply with meritless discovery demands into a substitute for a determination on the merits. At this juncture, the motion to compel discovery is denied without prejudice to renew provided said motion is made within 15 days of this order and the movant provides the court with each demand tendered, why the response heretofore tendered is inappropriate, the necessity thereof; which shall include a representation that the information sought is not otherwise available to the movant.

As to the cross-motion, which in essence seeks a default against a named defendant to, wit; Theodosius Lazor, the court notes that it received a phone call from a Pennsylvania attorney purporting to act on Mr. Lazor's behalf seeking an adjournment to enable Mr. Lazor to obtain New York counsel. The court declined to entertain the application. Instead the attorney was directed to put such request in writing on notice to all parties appearing to date. Pursuant to that direction, the court has received a letter from John Cavicchio, III of Moon Township, Pa. an attorney who writes the court on behalf of Mr. Lazor. The letter states in pertinent part that in discussion with the Kondraticks' attorney were ongoing in an attempt to procure a release on behalf of Mr. Lazor, a person who allegedly is impoverished and incapacitated by two strokes and does not possess the physical or financial means to defend the action. The counsel for the church agreed to the requested adjournment. Counsel for the Kondraticks not only declined to adjourn the motion, but has alleged that Mr. Cavicchio's is guilty of the unauthorized practice of law. The court calls to the parties' attention the provisions of CPLR §§1201- 1203, which

prohibit the entry of a default judgment against a person incapable of defending his interest and grants the court broad authority in deciding whether a fiduciary shall be appointed for such a person. The court notes that an application for the appointment of such fiduciary can be made by a "friend" or on the court's own motion. The court does not construe Mr. Cavicchio's communication to be anything more than an attempt to preserve Mr. Lazor's interest until he either obtains legal counsel or the court has had an opportunity to ascertain his ability to defend his own interest. In view of the foregoing, the court will treat the Cavicchio communiques as an application by a friend to appoint a guardian-ad-litem. Said motions as well as the motion for a default are adjourned until November 30, 2009 for the sole purpose of supplementing the application for medical and such other proof as may be necessary to evaluate the whether Mr. Lazor has he capacity to defend his own interest, and if not to entertain a list of possible guardians-ad-items for Mr. Lazor or alternatively, to ascertain if it is possible for Mr. Lazor to have his interest otherwise defended by someone authorized to practice law in New York.

So Ordered.


A.J.S.C.

Dated: October 21, 2009

ENTERED

OCT 28 2009

**MASSAU COUNTY
COUNTY CLERK'S OFFICE**