

Lehrer v Lehrer

2010 NY Slip Op 30803(U)

March 31, 2010

Supreme Court, Nassau County

Docket Number: 2023/04

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ESTATE OF RAE LEHRER,

Plaintiff,

- against -

RICHARD LEHRER and HILLMAN HOUSING
CORPORATION,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 2023/04
Motion Seq. Nos.: 22, 23
Motion Date: 01/05/10
01/05/10

XXX

The following papers have been read on this motion:

	Papers Numbered
<u>Order to Show Cause, Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion, Affidavit, Exhibits and Memorandum of Law</u>	<u>2</u>
<u>Affirmation in Opposition to Cross-Motion and in Support of Order to Show Cause and Exhibits</u>	<u>3</u>
<u>Affirmation in Opposition to Cross-Motion, Exhibits and Memorandum of Law</u>	<u>4</u>
<u>Reply in Support of Cross-Motion and in Response to Opposition Papers of Defendant Richard Lehrer and Exhibits</u>	<u>5</u>
<u>Reply in Further Support of Cross-Motion and in Response to Opposition Papers of Defendant Hillman Housing Corp. and Exhibits</u>	<u>6</u>

Defendant, Richard Lehrer, moves (Motion Sequence No. 22), *pro se*, by Order to Show Cause, for an Order “forc[ing] Stanley Bogal as executor for the Estate of Rae Lehrer to sell Apartment 6C located at 550 H. Grand Street, New York, New York 10002.”

Plaintiff, Estate of Rae Lehrer, by attorney-executor, Stanley Edward Bogal (“Bogal”), cross moves (Motion Sequence No. 23) for an Order:

- (1) pursuant to CPLR 602: dismissing the Order to Show Cause granted December 11, 2009 (brought by the defendant, Richard Lehrer);

(2) pursuant to CPLR 325(b), removing to this Court and for consolidation, pursuant to CPLR 3211(a)(4) and 602(a), with pending proceedings in this Court, the non-payment of rent summary proceeding now pending in the Civil Court of the City of New York, New York County; and,

(3) pursuant to CPLR 325(e), the within action as consolidated with the above referenced non payment of rent summary proceeding now pending in Civil Court New York County be consolidated herewith, and be removed to Surrogate's Court Nassau County under the proceeding entitled "Estate of Rae Lehrer, Deceased" which proceeding has been pending in that Court since February 2004.

This is an action for a declaratory judgment to determine the rights of the parties and their interest in the stock certificate and proprietary lease of a cooperative apartment, located at 550 H. Grand Street, Apartment #6C, New York, New York 10002 (hereinafter referred to as the "Subject Apartment"). The action also seeks a judicial declaration as to the validity of an alleged side agreement, dated June 1, 2000, between plaintiff's testator, Rae Lehrer and defendant Richard Lehrer. In an attempt to untangle and sort the web of allegations and assertions being advanced herein, this Court notes the following facts and procedural outline of events:

In or about August 1954, Benjamin Lehrer, the father of defendant, Richard Lehrer (and former defendant Stuart Lehrer), became the registered owner of shares of stock in defendant Hillman Housing Corporation with respect to the subject apartment where he and his first wife, Bella and their two children lived. Thereafter, in January 1961, the subject shares were transferred from Benjamin to Benjamin and his wife Bella, as joint tenants with rights of survivorship. After Bella Lehrer's death on December 5, 1967, in June 1971, the shares, held by Benjamin, were transferred to Benjamin and his son, defendant Richard Lehrer as joint tenants with rights of survivorship. Eventually, Benjamin became involved in a relationship with plaintiff's decedent, Rae Lehrer nee Rae Bogal. Although Benjamin and Rae were not legally married until 1993, they lived together in the Subject Apartment from 1973 until Benjamin's death on November 25, 1996, after which Rae continued to reside there until her own death on December 4, 2003. Apparently, pursuant to a written request by Benjamin dated August 24,

1976, all of Benjamin's stock in Hillman was transferred to Richard Lehrer and Rae Lehrer as joint tenants with rights of survivorship. A new certificate was issued in the name of Richard Lehrer and Rae Lehrer as joint owners with rights of survivorship.

Plaintiff, Estate of Rae Lehrer (hereinafter referred to as the "Estate") maintains that, on or about November 1978, defendant Richard Lehrer transferred his interest in his shares to his brother, (former defendant) Stuart Lehrer, without the knowledge of Rae Lehrer.¹ Plaintiff, Estate, contends that, despite demands by Rae that it do so, defendant Hillman refused to issue a certificate in the name of Richard and Rae as tenants in common as opposed to joint tenants. To resolve this matter, on June 1, 2000, Rae and Richard purportedly entered into a written side agreement pursuant to which 1) Rae would continue to reside in the apartment; and 2) when she decided to move, or if the apartment were sold, the proceeds from the sale would be equally divided between the two. Pursuant to this agreement, the parties agreed to own the shares as tenants in common and that in the event of either's demise "the share in said apartment held by the deceased will pass to the decedents' heirs." Rae Lehrer died on December 4, 2003.

On or about April 12, 2004, plaintiff Estate, commenced this action on behalf of Rae Lehrer's Estate seeking a declaratory judgment that the Estate holds one-half interest as tenant in common with defendant Richard Lehrer. With respect to defendant Hillman, plaintiff alleges that the cooperative corporation maliciously refused to issue a certificate in the name of Richard Lehrer and Rae Lehrer as tenants in common as requested by Benjamin and subsequently by his wife, failed to properly record the transfer of stock ownership from Richard to his brother Stuart in November 1978, wrongfully accepted the January 20, 2004 affidavit for lost stock certificate by Richard Lehrer after Rae's death and negligently issued a new stock certificate in the name of Richard Lehrer in January 2004.

It must be noted at the outset that, as best as can be determined from the papers herein, there is a proceeding pending in the Surrogate's Court Nassau County under File No. 331069 entitled *Estate of Rae Lehrer, Deceased*. This proceeding apparently seeks to obtain information, as well as the recovery of damages, due to the "waste" committed by Richard Lehrer which

¹Stuart Lehrer is now deceased. His interests are apparently being represented by his wife, Ilene Lehrer, as Executrix of the Estate of Stuart Lehrer.

resulted in a diminution in value to the inheritance of the heirs of Rae Lehrer. Defendant herein, Richard Lehrer, has interposed his answer in said proceeding and notably, has not objected to the jurisdiction of the Surrogate's Court.

Additionally, there is a summary proceeding for the non payment of rent in the Civil Court of the City of New York, New York County, under Housing Court Index No. 93423/09 entitled *Hillman Housing Corporation, Petitioner (Landlord) v. Richard Lehrer to the extent of a 55% tenant-in-common interest, and Stanley Bogal as Executor of the Estate of Rae Lehrer, Deceased to the extent of a 45% tenant-in-common interest.*²

In his affirmation in support of the within motion (Motion Sequence No. 22), Richard Lehrer informs this Court that his brother, Stuart Lehrer, passed away in the past year - to wit, in 2009. Richard states that “[b]efore his death there was an agreement to give dollar proceeds to him or his surviving family.” See Affirmation in Support, ¶ 4. It is unclear to this Court as to the status of defendant Stuart Lehrer as his name no longer appears in the caption as presented by the parties. While the parties do not dispute that Stuart Lehrer's interests are being represented by his Executrix, his wife, Ilene Lehrer, this Court notes the absence of Ilene Lehrer's name in the caption.

Presently before this Court are Motion Sequences 22 and 23. By Order to Show Cause, defendant, Richard Lehrer moves (Motion Sequence No. 22) for an Order forcing Stanley Bogal, as Executor of the Estate of Rae Lehrer, to cooperate in selling the subject apartment. Richard appears *pro se* in this matter and as best as can be determined from his poorly drafted papers, bases his motion on the grounds that the parties herein, Bogal and Richard Lehrer, have apparently reached a settlement agreement which plainly and exclusively calls for a sale of the apartment.

Plaintiff opposes defendant's motion and in turn cross-moves (Motion Sequence No. 23) for an Order, *inter alia*, dismissing the Order to Show Cause granted by this Court on December 11, 2009. In its poorly drafted and inarticulate papers, plaintiff submits that the Order to Show

²It remains unclear to this Court as to why Hillman would refuse to an amended certificate in the name of Richard Lehrer and Rae Lehrer as tenants in common yet bring a proceeding against Richard Lehrer and the Estate of Rae Lehrer as tenants in common and further that it would apportion a specific percentage of the tenancy shares to each individual.

Cause should be dismissed for any or all of the following five reasons: (1) defendant has not complied with CPLR §321(a) in that defendant/movant Richard Lehrer has previously appeared in the action through Junge & Mele LLP yet advances this motion in a *pro se* capacity; (2) defendant has not complied with CPLR §2103(1) in that defendant himself served of the instant Order to Show Cause; (3) defendant has not complied with CPLR §2214(a) in that he has failed to set forth both the procedural rule utilized for bringing the instant application as well as the substantive law supporting the relief requested; (4) defendant has not complied with CPLR §2214(b) requiring the defendant/movant to bring such application upon a sworn affidavit and that a copy of such affidavit as part of the papers upon which the Order to Show Cause was granted be served upon the plaintiff, Estate; and (5) defendant has not complied with SCPA 1803(1) et. seq., which requires the defendant/movant to present his alleged claim to the Estate before seeking enforcement in a court of competent jurisdiction.

Plaintiff also seeks an Order, pursuant to CPLR §§325(b), 3211(a)(4) and 602(a), removing to this Court and consolidating with the pending proceedings in this Court, the litigation pending in the Civil Court, New York County and that upon said removal and consolidation, plaintiff further seeks an Order pursuant to CPLR §325(e), that the within declaratory judgment action, together with the above-referenced non payment of rent summary proceeding, be removed to the Surrogate's Court Nassau County.

In determining the instant motion and cross motion, motion sequence numbers 22 and 23, respectively, this Court aims at moving this action, commenced six years ago, to resolution.

On April 2, 2009, this Court (Honorable R. Bruce Cozzens, Jr.) "So-Ordered" a Stipulation of Settlement of Action between the plaintiff, Estate, appearing by Stanley Bogal, defendant Richard Lehrer, appearing through Junge & Mele, LLP, defendant Ilene Lehrer as Executrix of the Estate of Stuart Lehrer appearing through Zinker & Herzberg, LLP, and defendant Hillman Housing Corporation appearing through Perez & Varvaro, Esqs., as all of the parties in this action, and Martin C. Julius, Esq. solely as designated escrow agent.

"[S]tipulations of settlement are judicially favored and may not be lightly set aside." *See Will of Kanter*, 209 A.D.2d 365, 618 N.Y.S.2d 794 (1st Dept.1994). As the Court of Appeals stated in *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984), "strict enforcement [of

settlement agreements] not only serves the interest of efficient dispute resolution but is also essential to the management of court calendars and integrity of the litigation process.” There being no dispute, this Court finds that the parties herein entered into a valid settlement agreement. Moreover, based upon a plain and simple reading of the “So-Ordered” Stipulation of Settlement, it is clear to this Court that part and parcel of the parties’ settlement was their unequivocal agreement to sell the subject apartment. Specifically, the “So-Ordered” Stipulation stated in pertinent part, as follows:

- 12: It is the intention of the Estate of Rae Lehrer and Richard to forthwith market and sell (the “Final Sale”) the Apartment, for which provision is being made in the separate Stipulation for Sale of Apartment, which is being executed simultaneously by those parties. It is the intention of those parties that such separate Stipulation for Sale of Apartment shall be incorporated by reference to but shall not merge with this So-Ordered Stipulation of Settlement...

The Addendum to the “So-Ordered” Stipulation of Settlement of Action states in pertinent part as follows:

The following shall be added to paragraph “12.” of the “So-Ordered” Stipulation of Settlement and shall have the same force and effect as if originally set forth therein:

“12A. The separate “Stipulation for Sale of the Apartment” referred to in paragraph “12.”, supra, is between the Estate and Richard, only and it is in no way binding upon Hillman. Any sale of the Apartment must comply with the Proprietary Lease and Hillman’s By-Laws and Rules and Regulations.”

A stipulation will be enforced in accordance with its terms unless there is proof of fraud, duress, overreaching or unconscionability. *Shuler v. Dupree*, 14 A.D.3d 548, 789 N.Y.S.2d 197 (2d Dept. 2005); *Maury v. Maury*, 7 A.D.3d 585, 776 N.Y.S.2d 489 (2d Dept. 2004). An agreement that is clear and unambiguous will be enforced in accordance with its terms. *See*

South Road Associates, LLC v. International Business Machines Corp., 4 N.Y.3d 272, 793 N.Y.S.2d 835 (2005); *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 750 N.Y.S.2d 565 (2002).

The “So-Ordered” Settlement Agreement in this case is plain in its meaning to seek the sale of the Subject Apartment.

In light of the Court’s “[s]trong policy considerations favoring the enforcement of settlement agreements,” this Court herewith grants the defendant’s motion, by Order to Show Cause. *See Hallock v. State of New York, supra* at 230; *McCoy v. Feinman*, 99 N.Y.2d 295, 755 N.Y.S.2d 693 (2002).

Plaintiff’s arguments in opposing the enforcement of the Order to Show Cause and the “So-Ordered” Stipulation of Settlement do not defeat the enforcement of the Stipulation of Settlement. Frankly, this Court cannot help but notice that these arguments appear to be nothing more than an attempt by the plaintiff to prolong this litigation.

Plaintiff’s first argument centers around CPLR §321(a) which provides, in general, that a party may appear in an action either through an attorney or *pro se* except that if a party appears by an attorney, such party may not act in person in the action except by consent of the court. Once an attorney has appeared in an action there are two ways he or she can get out of the case, excluding such obvious causes such as death, incapacitation or disbarment; first, the attorney can serve on the other appearing attorneys and *pro se* parties and file with the court a consent to change attorneys, signed by the retiring attorney and signed and acknowledged by the party, and second, an attorney of record may withdraw by order of the court upon motion on notice to the client and other appearing attorneys and *pro se* parties. *See CPLR 321. See also Sweet v. Sweet*, 177 Misc.2d 454, 676 N.Y.S.2d 853 (Fam. Ct. Albany 1998).

Defendant maintains in his affirmation in support of his Order to Show Cause that he is “*pro se*...because to have retained my counsel would only mean that I would continue to have to accrue onerous legal fees. This decision to end our relation was agreed by both me and Mr. Mele, Esq. who agreed that enough time effort and money have been spent and that our having to appear in recent days in N.Y.C. Landlord Tenant Court...and now in your Court was enough.” *See Affirmation of Richard Lehrer*, ¶3.

A client has the absolute right to discharge his or her attorney at any time, with or without cause. *See Byrne v. Leblond*, 25 A.D.3d 640, 811 N.Y.S.2d 681 (2d Dept. 2006); *Wingate, Russotti & Shapiro, LLP v. Friedman, Khafif & Associates*, 41 A.D.3d 367, 839 N.Y.S.2d 469 (1st Dept. 2007). In light of defendant's sworn statements that the Law Offices of Junge and Mele no longer represent him (*Affirmation in Opp to Cross Motion*, ¶4), and in light of the fact that the parties herein have already reached a Settlement Agreement, which Settlement was "So-Ordered" by this Court on April 2, 2009, this Court is persuaded that the attorney client relationship came to an end well before the making of this motion by the defendant. Therefore, the fact that the defendant advances this motion, *pro se*, is not a basis on which to deny the relief requested.

Plaintiff's second argument is equally meritless. Plaintiff submits that the Order to Show Cause granted by this Court on December 11, 2009 be dismissed because by serving the instant Order to Show Cause personally, the defendant has failed to comply with CPLR 2103(1) which requires that the service of papers can be made only by a person - not a party in the said action. It is true that pursuant to CPLR 2103(a), a party is generally prohibited from serving any papers (from the summons through post judgment notices) in an action or special proceeding; only a nonparty who is at least 18 years old may serve papers on behalf of the party. However, the failure to serve routine interlocutory papers in strict compliance with CPLR 2103(a), in the absence of any prejudice is an irregularity that can either be corrected or ignored by the Court pursuant to CPLR 2001.

While in this case, it is the service of the Order to Show Cause that is in dispute (as opposed to the traditional interlocutory papers), it nevertheless cannot be overlooked by this Court that the Order to Show Cause is marked Motion Sequence No. 22; thus, in this case, the jurisdiction of this Court is no longer in dispute. *Cf. Bruno v. Ackerson*, 51 A.D.2d 1051, 381 N.Y.S.2d 522 (2d Dept. 1976), *aff'd* 39 N.Y.2d 718, 384 N.Y.S.2d 765 (1976). Moreover, even assuming that service of the Order to Show Cause is defective as the plaintiff suggests, plaintiff's appearance and opposition before this Court in opposing said motion (by Order to Show Cause) constitutes a waiver of jurisdiction or objections. *See DeSantis v. Pedone*, 61 A.D.2d 1136, 402 N.Y.S.2d 886 (4th Dept. 1978) *aff'd* 45 N.Y.2d 799, 409 N.Y.S.2d 10 (1978).

Furthermore, the service of an order to show cause is governed by the Order itself. The court determines the method by which the order is to be served. *See Robinson v. Robinson*, 24 A.D.2d 138, 264 N.Y.S.2d 816 (1st Dept. 1965). In this case, in its Order, this Court did not specify as to whether the defendant, *pro se*, was precluded from serving the Order to Show Cause upon counsel for the plaintiff.

Plaintiff's third argument in support of its motion to dismiss the Order to Show Cause is that defendant failed, pursuant to CPLR 2214(a), to specify the procedural rule and the substantive law utilized for bringing the instant application. This argument is entirely meritless.

CPLR 2214(d) states, in pertinent part, as follows:

(d) Order to show cause. The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein.***

Plainly, this provision does not set forth that the support and grounds for the relief demanded be also spelled out in the application. On the contrary, CPLR 2214(a) dealing with the traditional "Notice of Motion" states, in pertinent part, as follows:

(a) Notice of motion. A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor. Relief in the alternative or of several different types may be demanded.

Based upon a plain reading of the two provisions, it is obvious that unlike a Notice of Motion, for an Order to Show Cause, the Order need not specify the procedural rule and/or the substantive law supporting the relief requested. An order to show cause is a product of judicial discretion. *See Mallory v. Mallory*, 113 Misc.2d 912, 450 N.Y.S.2d 272 (Sup. Ct. Nassau County 1982). Since an order to show cause is an application for *ex parte* relief, the order must be accompanied by an affidavit setting forth the basis for granting the order and stating whether any previous application for similar relief has been made. *See* CPLR 2217[b]. Other than that, this type of order to show cause is not regarded as a finding or opinion by the court on the merits of the application, nor does it do away with the obligation of establishing the allegations on which

it is based or shift the burden of proof. See *Sullivan v. McFetridge*, 55 N.Y.S2d 511 (Sup. Ct. New York County 1945). Accordingly, the fact that the defendant did not specify the procedural rule or the substantive law supporting the relief requested does not defeat defendant's application herein.

Plaintiff's fourth argument is entirely meritless. Plaintiff argues that the defendant Richard Lehrer has not complied with CPLR §2214(b) which requires him to bring such application upon a sworn affidavit. Not only does the plaintiff confuse the fact that CPLR 2214(b) deals with applications brought as Notice of Motions but the fact is that the defendant does submit a sworn and notarized affidavit in support of his Order to Show Cause.

Finally, plaintiff argues that the defendant has not complied with SCPA §1803(1), et. seq. in that the defendant has failed to present his alleged claim to the Estate before seeking enforcement in this Court. This argument misses the mark in that based upon a plain and simple reading of the instant Order to Show Cause defendant does not seek to enforce any claim against the Estate. Rather, defendant seeks "to force Stanley Bogal, as executor for the Estate of Rae Lehrer to sell Apartment 6C - 550 H. Grand St. NY, NY 10002." This relief is predicated upon the fact that the parties reached a settlement agreement to this effect. Thus, in essence, defendant is seeking nothing more but to enforce the settlement agreement. As stated above, in light of the fact that the parties reached a Settlement Agreement that was "So-Ordered" by this Court and in light of the fact that there is no claim against the Estate herein, plaintiff's final basis on which to dismiss the Order to Show Cause is entirely meritless.

Therefore, defendant's motion is granted.

Insofar as plaintiff's motion also seeks an Order, pursuant to CPLR 325(b), removing to this Court and for consolidation, pursuant to CPLR 3211(a)(4) and 602(a), with pending proceedings in this Court, the non-payment of rent summary proceeding now pending in the Civil Court of the City of New York, New York County; and, upon removal and consolidation, pursuant to CPLR 325(e), the matter be removed to Surrogate's Court Nassau County under the proceeding entitled "Estate of Rae Lehrer, Deceased" which proceeding has been pending in that Court since February 2004, that part of the motion is also denied.

CPLR 325 states in pertinent part as follows:

§325. Grounds for removal.

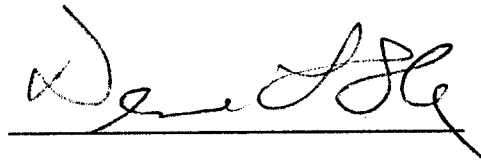
(b) From court of limited jurisdiction. Where it appears that the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled, a court having such jurisdiction may remove the action to itself upon motion. A waiver of jury trial in the first court is inoperative after the removal.

(e) From supreme court to surrogate's court where decedent's estate affected. Where an action pending in the supreme court affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court, the supreme court, upon motion, may remove the action to such surrogate's court upon the prior order of the surrogate's court. The right of jury trial shall be preserved in the subsequent proceedings.

The plaintiff has failed to present any valid reasoning or grounds for the relief requested. This matter has been settled by and among the parties and such settlement has received the blessing of this Court. There is no basis on which this Court should consolidate this matter with the pending landlord tenant proceedings in New York County or to remove this matter to Surrogate's Court.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.
XXX

Dated: Mineola, New York
March 31, 2010

ENTERED
APR 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE