

**Clark v Clark**

2010 NY Slip Op 32155(U)

August 4, 2010

Supreme Court, Nassau County

Docket Number: 005514/2008

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T :**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 8**

\_\_\_\_\_  
WINIFRED CLARK, Individually and on behalf of  
TRUST U/W/O William P. Clark,

Plaintiff,

INDEX NO.: 005514/2008  
MOTION DATE: 05/6/2010  
MOTION SEQUENCE: 004 and 005

- against -

Action No. 1

JAMES CLARK, JR.,

Defendant.

\_\_\_\_\_  
WINIFRED Q. CLARK,

Plaintiff,

INDEX NO.: 019481/2009

- against -

Action No. 2

JAMES CLARK, JR.,

Defendant.

\_\_\_\_\_  
JAMES P. CLARK, JR.,

Plaintiff,

INDEX NO.: 005941/2010  
MOTION DATE: 05/06/2010  
MOTION SEQUENCE: 001 and 002

- against -

Action No. 3

WINIFRED Q. CLARK and RICHARD QUINN,

Defendants.

The following papers read on these motions:

*Index No.: 005941/2010 (former Queens County Action Index No.: 22734/2009)  
Motion Sequence Nos. 001 & 002*

Order to Show Cause to Reverse Priority of Depositions, strike affirmative defenses of lack of personal jurisdiction, and compel compliance with subpoena for in camera review as to “attorney-client” or “work product” privilege. .... 1

Cross-Motion by Butler, Fitzgerald, Fiveson & McCarthy to Amend Answer (Counsel to Winifred Clark in 1<sup>st</sup> Cause of Action in Action No.3) ..... 2

Affirmation of Ronald Rosenberg in Opposition to Motion and in Support of Cross-Motion to Amend Answer ..... 3

Reply Affidavit of Ronald Offendrantz in Further Support of Motion ..... 4

Affidavit of Ronald Offenkrantz in Opposititon to Cross-Motion ..... 5

Reply Affirmation of David K. Fiveson ..... 6

*Index No.: 005514/2008*  
*Motion Sequence No.: 004 and 005*

Motion to compel defendant James Clark, Jr. to Restore plaintiff’s Name on Chase Bank Accounts; enjoining Defendant from interfering with plaintiff’s rights in 58-87 55<sup>th</sup> Street, Queens, NY; provide a key to 127 Nassau St., Brooklyn; provide plaintiff with combination for safe at 127 Nassau Street; strike pleadings of defendant for failure to reply to interrogatories; alternatively, compelling defendant to respond to interrogatories and appear for deposition; granting leave to amend complaint ..... 7

Cross-Motion to Vacate Subpoena Duces Tecum issued to JPMorgan Chase Bank, Alan Willinger, and John J. Breslin, Jr. .... 8

Memorandum of Law in Opposition to Motion and in Support of Cross-Motion ..... 9

Reply Affirmation in Further Support of Motion and Opposition to Cross-Motion ..... 10

**PRELIMINARY STATEMENT**

There are a series of four motions. Motion No. 1 was originally brought on by Order to Show Cause in Queens Count on February 24, 2010, and subsequently transferred to this Court under Nassau Index No. 005514/10. It is brought on behalf of plaintiff in Action No. 3, James P. Clark, Jr., and requests reversal of the priority of depositions as between plaintiff and defendant, and directing defendant to appear for a deposition. It also requests the Court to strike the affirmative defense of lack of personal jurisdiction because no motion to dismiss for lack of personal jurisdiction was made in the time required by CPLR § 3211 (e), and to compel counsel for defendants to produce the documents allegedly subject to “attorney-client” or “attorney work product”, and documents referred to as “estate documents” for, at a minimum, an in camera review by the Court.

Counsel for defendants in Action No. 3, appearing at the behest of title insurers, cross-move by Motion No. 2 for leave to amend their answer to assert a ten-year Statute of Limitations within which to bring an action to quiet title. This action involves three parcels in Queens: 10-32 47<sup>th</sup> Road; 59-05 56<sup>th</sup> Street; and, 58-29 — 33 57<sup>th</sup> Drive. Cross-movant alleges that plaintiff has testified that he has owned 100% interest in these properties since no later than 1963, but that he has no documentation evidencing his receipt of title.

Motion No. 3 is brought on behalf of plaintiff Winifred Clark to compel restoration of her name on Chase Bank accounts on which she was a prior joint owner and to restore her co-signing privileges on those accounts, which were allegedly improperly removed between July 27 and July 30, 2009. The motion further seeks to restrain defendants from interfering with plaintiff's property rights in 58-87 55<sup>th</sup> Street, Queens, which she contends is owned by Trust Under Will of William Clark, of which plaintiff is a trustee and sole income beneficiary, as well as the following:

access to 127 Nassau Street, the office in which the records of the properties are maintained and the combination to the safe maintained at that location;

striking of pleadings of defendant based upon willful failure to respond to plaintiff's interrogatories and document demands; or alternatively, direction to defendants requiring response to interrogatories and document demands within 20 days;

leave for plaintiff to amend her complaint to add new causes of action; and, vacating of the 90-day notice in the certification order of August 18, 2009, and extending the time for discovery by eight months.

Motion No. 4 is a cross-motion by defendant to quash subpoenas and dismissing claims based upon Statute of Limitations. Plaintiff argues that the motion to quash was based upon fact that case had been certified for trial and discovery concluded, but that this is no longer a valid argument since the Court has joint trial of the three cases and that the statute of limitations motions have already been decided in 2008.

Motion No. 5 is by plaintiff to vacate the note of issue. Plaintiff asserts that this motion was previously granted from the bench on March 31, 2010.

### **DISCUSSION**

#### **Motion No. 1**

This motion seeks a determination that plaintiff James P. Clark is entitled to priority of deposition by virtue of the rejection of the earlier dated notice to take deposition served by defendants. The November 18, 2009 notice to take the deposition of James P. Clark was rejected because it was improperly venued in Nassau, and because of a technical defect in the caption. Even if the notice was not defective, plaintiff requests priority of deposition because the information concerning the transfer of title to the three premises in question is exclusively within the knowledge of defendant Winifred Q. Clarke.

Plaintiff in Action No. 3 served a notice to take deposition of the defendant on November 24, six days after defendants served notice for taking the deposition of the plaintiff. Priority belongs to the party who first serves the notice, unless it is fundamentally defective and a nullity. Such is not the case. The notice for the deposition of James P. Clark was returnable in Nassau County, his place of residence according to the verified complaint. CPLR 3110 provides in pertinent part that “(a) deposition within the state on notice shall be taken: 1. When the person to be examined is a party or an officer director, member or employee of a party, within the county in which he resides or has an office for the regular transaction of business in person or where the action is pending; . . . “. The notice to take deposition upon oral questions was properly returnable in Nassau County. The purported clerical error in the caption is not specified, and

there is no evidence that it was of such significance as to vitiate the effect of the notice.

The motion to declare that plaintiff has priority in depositions in Action No. 3 is denied.

The request to strike the affirmative defense of lack of personal jurisdiction is granted. The verified answer in which it is interposed is dated November 18, 2009. CPLR § 3211 (e) provides in pertinent part that “an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship”. Defendants have not moved, or requested an extension of time within which to move, and more than sixty days have passed since they raised the issue as an affirmative defense.

The last aspect of this motion calls upon the Court to either strike the pleadings of defendants or, alternatively, to produce, at least for in camera viewing by the Court, those documents which are claimed to be subject to an “attorney client” or “attorney work product privilege”. They are identified in the Privilege Log at Exh. “D” to the affidavit of Ronald Offenkrantz, Esq., and are referred to as “estate documents”. They primarily relate to communications between Winifred Clark and attorneys at Rosen and Reade and John Barnosky, Esq. of Farrell Fritz, relating to the probate of the Estate of William Clark.

The Estate of William Clark is the embodiment of the individual. (*In the Matter of the Estate of Mark J. Power, Deceased*, 2010 WL 2776340 Surr. Ct., Dutchess Co., 2010). Under such circumstances, matter constituting confidential communications or attorney work product can be released only with the consent of the estate representative, in this case Winifred Clark.

The purpose of the privilege is to encourage candor in communications between attorneys and their clients so as to “promote broader interest in the observance of law and administration of justice”. (*Upjohn Co. v. United States*, 449 U.S. 383, 389 [1981]). Because the privilege can constitute a hurdle to the ascertainment of truth, it should be “strictly confined within the narrowest possible limits consistent with the logic of its principle”. (*Fisher v. United States*, 425 U.S. 391, 403 [1976]).

The privilege is not designed to prevent discovery of underlying facts, or documents which pre-exist the communication between the client and attorney. (*Colton v. United States*, 306

F.2d 633, 639 [2d. Cir. 1962], cert. den., 371 U.S. 951 [1963]). Of the items contained in the Privilege Log, the vast majority appear to constitute communications made contemporaneously with the representation of the Estate of William Clark, and thereby constitute privileged material. The items which are very likely to contain underlying information contained in an otherwise protected communication, are two in number, and identified as Bates No. 266 — 274, and Bates No. 409 — 410. In the former, Winifred forwarded a covering letter to Rosen and Reade with a schedule of the summary of final appraised values of industrial buildings in which William Clark had an interest, and “additional information which Mr. Michaels had requested”.

These items may well constitute independent facts which are not entitled to the protection of the attorney/client or attorney work-product privilege. The Court denies the motion to strike the pleadings of defendants in Action No. 3, but grants the motion to the extent that it directs counsel for defendants to provide to the Court for in camera review the enclosures which accompanied the correspondence of Winifred Clark in the two identified items. The production is to occur within 20 days of receipt of a copy of this Order with Notice of Entry.

As to the balance of the items on the Privilege Log, counsel for Plaintiff indicates that during the course of a deposition of Phillip Michael, Esq., he testified that he would be unable to justify a claim of privilege, since the documents were sent to independent accountants in connection with the probate of the Estate of William Clark, thereby waiving the privilege. The Court agrees. The claim of privilege is rejected. Counsel for defendants are directed to provide copies of these documents to plaintiff’s counsel within twenty (20) days of the receipt of this Order with Notice of Entry.

*Cross Motion by Defendants on First Cause of Action in Action No. 3 to Amend Answer*

This motion is by counsel who represent defendants in Action No. 3 to the extent that it seeks to quiet title to three properties in Queens County. It requests leave to amend the answer to add the affirmative defense that the claims to quiet title are barred by the ten-year Statute of Limitations to discharge an encumbrance on title, as well as the requirement of the Statute of Frauds which requires a writing which establishes the essential elements of a transfer of interest in real property. The claimed basis for the motion is the testimony of James P. Clark that he has no documentary evidence substantiating his claimed 100% interest in the properties, but that he

acquired full ownership of the properties no later than in the 1960's, more than 10 years prior to the 2009 commencement of this action.

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides as follows:

**Rule 3025. Amended and supplemental pleadings**

**(a) Amendments without leave.** A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

**(b) Amendments and supplemental pleadings by leave.** A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

**(c) Amendment to conform to the evidence.** The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

**(d) Responses to amended or supplemental pleadings.** Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed. (*Lucida v. Mancuso*, 49 A.D.3d 220, 230 [2d Dept.2008]).

CPLR § 212 provides that a party is precluded from bringing an action to quiet title unless they were seized or in possession of the property within 10 years of the commencement of the action. Defendants contend that James P. Clark was not seized or in possession of the property within 10 years of the commencement of the quiet title action in 2009.

**§ 212. Actions to be commenced within ten years**

**(a) Possession necessary to recover real property.** An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action.

This is the statute of limitations within which a property owner must seek to eject a person who claims title by adverse possession. This is not the circumstance in this action. Plaintiff claims title to the entire premises, alleging that they never were part of his father's estate. He is at the very least, seized of a 50% interest in the property, as reflected in the deeds into Winifred of one-half interest on January 29, 2009 (58-16 57<sup>th</sup> Rd., Maspeth [2673/58]), November 14, 2008 (10-32 47<sup>th</sup> Road, LIC [45/36]), and January 29, 2009 (59-05 56<sup>th</sup> St., Maspeth [2631/12]). The source of the title is stated to be through James P. Clark, Sr., and to Reverend James P. Clark, Jr. and William P. Clark as devisees under the will of James P. Clark, Sr. Plaintiff is therefore presently seized or possessed of the property within 10 years prior to the commencement of the action in 2009. He has also exercised control vis a vis collection of rental and payment of bills.

The cross-motion to amend the Answer so as to include the affirmative defense of statute of limitations is denied.

*Motion to compel restoration of plaintiff's name on Chase Bank Accounts; enjoin defendant from interfering with plaintiff's rights in 58-87 55<sup>th</sup> St., Queens, NY; provide a key to 127 Nassau St., Brooklyn; provide defendant with a combination for safe at 127 Nassau St.; strike pleadings of defendant for failure to reply to interrogatories, or; alternatively, compelling defendant to respond to interrogatories and appear for deposition; grant leave to amend complaint.*

This motion by plaintiff in Action No. 1 was originally returnable in September 2009

before another Justice of this Court. Since that time there have been a number of conferences and agreements among the parties with respect to some of the issues addressed in this motion. The Court will deal with each request individually:

*Restoration of Plaintiff Winifred Clark's name on Chase Bank Accounts*

The Court declines to direct the restoration of Winifred Clark's name to the Chase Bank Accounts at this time. The entitlement to the contents of the account is effectively the relief sought in the action, given the stated fact that the accounts at one time contained \$2,000,000. The Court does grant relief to the extent of restricting distributions from the account for other than the normal course of business of managing the buildings owned by James Clark, Winifred Clark, Trust Under the Will of William Clark, and equal distributions to the parties.

*Enjoin defendant from interference with rights of Winifred Clark to premises 58-87 55<sup>th</sup> St.*

There are two recorded deeds to this parcel, both dated October 16, 1996. The first is by James P. Clark, residing at 176 Washington Avenue, Island Park, to Winifred Q. Clark, as Executrix of the Estate of William P. Clark. The second is from Winifred Q. Clark, as Executor to "Winifred Q. Clark, Winifred C. Curry (f/k/a Winifred Clark and James P. Clark as Trustees u/a Fourth u/w/o William P. Clark f/b/o Winifred Q. Clark, party of the second part". It appears from the various records that this property is considered to be 100% owned by Winifred, and there is no reason why she should not be authorized to undertake the management of the property.

With respect to the request for disgorgement of \$14,000 of rent for two months in 2009, the Court denies the motion at this time pending renewal in conjunction with a final accounting as to monies due and payable during the balance of the proceedings. To render fragmentary decisions as to pecuniary responsibility will, in the Court's opinion, lead to confusion in final calculations.

The motion to enjoin defendant from interfering with the operation and maintenance of 58-87 55<sup>th</sup> Street is granted.

*Provide plaintiff with a key to 127 Nassau Street and combination to Safe*

Pursuant to the direction of the Court, plaintiff and counsel were authorized to conduct an

audit of ledger books maintained at the premises and to inspect the contents of the safe deposit box. Through the Estate of William Clark, Winifred is a 50% owner of the premises, and should not be denied access. Defendant is directed to provide her with a key to the premises and the combination for the safe deposit box, if they have not already done so.

As a practical matter, the Court strongly suggests that the parties advise one another of their plans to be at the premises on regular basis, so as to avoid unnecessary confrontation.

Strike defendant's pleadings for failure to comply with interrogatories.

It seems clear to the Court that in the almost one year since this motion was made, there has been a voluminous production of books and records by defendant in response to demands of the plaintiff. The inquiry by plaintiff should be primarily focused on the income, expenses and distribution of funds realized from the operation of the more than 40 buildings, as well as a discernment of the legal ownership of them.

The motion to strike defendant's pleadings in Action No. 1 is denied. To the extent that plaintiff can identify unanswered interrogatories in the light of the interaction and correspondence between the parties over the past year, they are directed to produce an itemization of such documents within 20 days of the receipt of a copy of this Order. Defendant is directed to respond within 30 days of receipt of such a demand. While plaintiff claims that defendant has not respond to interrogatories, these accusations are now some nine months old.

Unless there are additional items produced which require further elaboration in the form of a deposition, the request for further deposition of defendant is denied.

*Cross-motion No. 5*

Defendant moves to vacate the subpoena duces tecum for the testimony of JPMorgan Chase Bank, Alan Willinger and John J. Breslin, Jr. on the ground that discovery was closed by the filing of the Note of Issue. Of course, after the filing of the Note of Issue, the newest action by Winifred Clark was instituted, thereby mooting the request for leave to serve an amended complaint. The remaining questions relate to whether or not plaintiff is entitled to the depositions of JPMorgan Chase Bank, Alan Willinger and John J. Breslin.

The Court believes that there is little to be gained by a deposition of JPMorgan Chase. The bank records will undoubtedly reflect the deposits and disbursements made during the

requisite period. To the extent that the bank records may inadequately reflect the income, expenses and disbursement of funds involving the various properties, a deposition of JPMorgan Chase is authorized. Special circumstances need not be alleged or established. (*Kooper v. Kooper*, 74 A.D.3d 6 [2d Dept. 2010]): Civil Practice Law and Rules § 3101 (a)(4).

The same holds true for the long-standing accountant, Alan Willinger, and the real estate valuation expert, John J. Breslin. Tax returns and analyses of property values may well shed light on the status of title among James J. Clark, William Clark, Winifred Clark and Trust Under the Will of William Clark. To the extent that uncertainties still exist at the conclusion of a review of such documents, testimony pursuant to a subpoena is authorized on the ground that the information sought is material and necessary to the prosecution of the action.

The motion to quash the subpoenas is denied.

Defendant also seeks to limit plaintiff's claims to the six years subsequent to 1994, when he contends that she was fully aware of the extent of her husband's interests in the more than 40 properties. Plaintiff asserts that was not aware of the extent of his interests until long after, in 2007, and that the statute only began to run upon discovery. Counsel for plaintiff also contends that the statute is tolled during that period of time during which a party fails to file, where the failure is induced by fraud, misrepresentation or deception. (*Simcuski v. Sacli*, 44 N.Y.2d 442 [1978]).

The issue as to plaintiff's knowledge or lack thereof of her potential claims against defendant are fundamentally questions of fact which cannot be decided on the papers alone. There are conflicting interpretations of responses to questions taken during the course of depositions, on both sides, which will ultimately require a trial to resolve.

To the extent defendant seeks to limit the plaintiff's claims to six years from 1994, and subject to prior orders of the Court on this subject, the motion is denied.

This constitutes the Decision and Order of the Court.

Dated: August 4, 2010

  
J.S.C.

