

Arcara v Levin

2010 NY Slip Op 32426(U)

August 18, 2010

Sup Ct, NY County

Docket Number: 104628/08

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PART 15

PRESENT.

Index Number : 111261/2008
ARCARA, SANDRA A. MOLEN
vs
LEVIN, LINDA
Sequence Number : 003
STRIKE

INDEX NO. 111261-08
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

| PAPERS NUMBERED | |
|-----------------|---|
| _____ | 1 |
| _____ | 2 |
| _____ | 3 |
| _____ | 4 |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

NYS SUPREME COURT
RECEIVED
AUG 20 2010
MOTION SUPPORT OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/18/10


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

SANDRA A. MOLEN ARCARA, as Trustee under the
Andrew William Molen Trust made December 31, 1992
and as Trustee of the Andrew William Molen Trust
Agreement made as of January 1, 1994,

Index No.
104628/08

**DECISION
and ORDER**

Plaintiff,

Mot. Seq.
003

- against -

LINDA LEVIN, a/k/a LINDA LEVIN CARMINE, as
Executor under the Last Will and Testament of William
A. Levin, deceased,

Defendant.

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X

HON. EILEEN A. RAKOWER

Plaintiff Sandra A. Molen Arcara ("Arcara") brings this action as sole trustee of two trusts: the Andrew William Molen Trust, made December 31, 1992 ("the 1992 Trust"); and the Andrew William Molen 1994 Trust Agreement ("the 1994 Trust") (collectively "the Trusts"). Defendant Linda Levin Carmine ("Carmine") is the Executor of the Estate of William Levin ("Levin"). Arcara brings this action for breach of fiduciary duty and seeks an accounting based on Levin's alleged mishandling and misappropriation of proceeds from the Trusts.

According to the complaint, Levin was involved in a romantic relationship with Arcara over the course of thirty years. In 1981, during the course of this relationship, Arcara bore a son, Andrew Molen ("Andrew"). Levin was settlor of the 1992 Trust, which named Arcara and an individual by the name of Nathiel Weisler as co-trustees. Weisler subsequently resigned as trustee, leaving Arcara sole trustee of the 1992 Trust. Levin and Andrew were the co-settlors of the 1994 Trust, which named Arcara as the sole trustee. The Trusts were both irrevocable inter vivos trusts established for the benefit of Andrew, Levin's son.

003

The complaint alleges that, although Arcara was nominally the Trustee of the Trusts, Levin maintained all actual control over the Trusts and acted as *de facto* trustee. All bank account records pertaining to the Trusts were sent to Levin's New York City office, and Levin maintained control of all Trust records. Arcara further alleges that, in addition to the records for the relevant Trusts, Levin controlled all of her personal finances as well - even after their relationship ended in 2003, when Arcara was diagnosed with advanced metastasized breast cancer and was not expected to survive. It was not until September of 2006, Arcara claims, that Levin provided her with her own financial records, including financial records of the Trusts.

During the lifetime of the Trusts, Arcara claims that Levin mishandled and mismanaged the Trusts, treating their respective bank accounts as if they were his own funds. According to the complaint, Levin withdrew an aggregate total of \$888,014 from the Trusts' accounts without authorization of any kind. Levin often did this by signing his name as the purported trustee of the Trusts, despite the fact he was not a trustee of either Trust. On other occasions, Arcara's name was forged by Mary Ann Stark, Levin's secretary, at Levin's direction. On or around January 26, 2008, Levin died. According to the complaint, of the \$888,014 that Arcara can ascertain, a total of about \$650,000 was deposited into bank accounts owned by Levin.

Presently before the court is Carmine's motion to strike Arcara's complaint pursuant to CPLR §3126 based upon Arcara's alleged failure to comply with her discovery obligations. Alternatively, Carmine moves pursuant to CPLR §3124 for an order compelling compliance therewith. Carmine states that, on May 7, 2009, she served her First Notice of Discovery and Inspection ("D&I"). Arcara served her Response to Carmine's D&I on June 22, 2009, wherein Arcara represented that she would produce all existing responsive, non-privileged documents in her care, custody and control with respect to sixteen out of eighteen demands in the First D&I. However, according to Carmine, Arcara has failed to produce anything other than a single two-page letter. Carmine states that two separate attempts were made to obtain the requested discovery from Arcara by letters dated December 23, 2009 and February 12, 2010. Carmine further states that, on February 17, 2010, she served a Revised Second D&I. As of the date of Carmine's affirmation in support, Carmine states that Petitioner has failed to provide any response to the Second D&I.

In addition to document discovery, Carmine asserts that Arcara's complaint should be stricken based upon Arcara's failure to appear for deposition.

Arcara opposes Carmine's motion to strike, and cross-moves to compel disclosure from Carmine, and to extend discovery deadlines. Arcara states that, contrary to Carmine's assertions, she has been complying with her discovery obligations and producing responsive discovery as it becomes available. As evidence of her compliance, Arcara submits cover letters from document productions dated July 1, 2009 (documents received from accountant Kenneth Schuster), December 10, 2009, and February 19, 2010 (documents produced by J.P. Morgan Chase Bank, N.A., and Valley National Bank in response to subpoenas served on them by Arcara). Arcara states that these documents are being produced as they became available, and that she has not yet received all documents from Valley National Bank. Arcara claims that it is Carmine who has failed to comply with her discovery obligations and has, as a consequence, unnecessarily delayed the litigation. Arcara states that her refusal thus far to appear for deposition is due to Carmine's failure to produce relevant and necessary discovery, and that she is willing to appear for deposition once document discovery is complete.

With respect to Arcara's cross-motion to compel discovery, Arcara states that Carmine has failed to produce all discovery responsive to her first and second requests for documents. Specifically, Arcara seeks an order compelling:

- all documents evidencing loans to and from the Trusts, including Levin's tax returns;
- that Carmine produce Ms. Stark for deposition, as well as any responsive documents within her custody and control, arguing that she is still employed by Levin's estate;
- all financial and accounting records relating to Arcara and Andrew, and all financial statements of Levin's assets;
- production of all powers of attorney given by Levin to any third party;
- all documents regarding allegations that Levin engaged in money laundering or financial impropriety, Levin's indictment and conviction regarding his role as Chairman of the New York State Thoroughbred Breeding and Development Corporation, and his December 2, 2005 guilty plea; and
- Records of Levin's mental condition, neurological treatment records, documents concerning the use of Aricept by Levin, and any other documents concerning a memory disorder Levin had.

On May 4, 2010, the parties appeared in court for a compliance conference. At said conference, the parties agreed to narrow the issues in their respective motions by providing affidavits as to which requested items were not in their possession, custody or control.

In Carmine's opposition to the cross-motion, Carmine provides, *inter alia*, an affidavit attesting to the following:

- that Ms. Stark has never worked either for Levin's estate or Carmine individually;
- that all documents in her possession from Levin's office - which was closed in October 2005 - have been provided;
- that after closing the office in 2004, Carmine's father requested that existing Trust records be sent to his new home in Westhampton, New York, and that Trust records were sent to his home in Westhampton until April 30, 2007, when Arcara demanded that trust records be sent directly to her address;
- that Carmine went to the Westhampton house in response to the cross-motion, where she uncovered "some additional banking records from Valley National Bank, including transfer notifications and receipts for transfer requests for the period 2003-2005," which counsel "will immediately produce to plaintiff;"
- that, according to Stark, when Levin moved out of his house in Harrison, New York in 2004, some of Levin's personal records "were accidentally left behind and were shredded at his direction," but that "the balance of his personal financial documents" was forwarded to the Westhampton house;
- that there are no further personal financial records of Levin in the Westhampton house;
- that all personal records of Arcara and Andrew maintained at Levin's office were delivered to Arcara in September 2006 and not to Levin's house; and
- that Carmine does not have any additional documents in her possession, custody, or control with respect to
 - Arcara or Andrew's financial records;
 - records of Levin's personal accounts at Valley National Bank and JP Morgan Chase Bank;
 - Carmine's affirmative defenses;

- any powers of attorney executed by Levin¹;
- Levin's mental condition, memory disorder, treatment by a neurologist, or use of Aricept; or
- Levin's indictment, conviction, and guilty plea, or any financial improprieties as Chairman of the New York State Thoroughbred Breeding and Development Fund Corporation.

Arcara submits reply papers in further support of her cross-motion. In her reply, she submits, *inter alia*, an affidavit attesting to the fact that she has produced all responsive documents in her possession, custody, or control.

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). The moving party must show "conclusively that failure to disclose was willful, contumacious or due to bad faith." (*Dauria v. City of New York*, 127 AD2d 416[1st Dept. 1987]).

Here, the record before the court does not indicate that either party has engaged in willful and contumacious conduct such that the striking of pleadings is warranted. With respect to Carmine's motion to compel, the court grants Carmine's motion to the extent that Arcara shall appear for deposition within 45 days of receipt of a copy of this order with notice of entry thereof. Carmine's motion, insofar as it seeks the production of discovery as set forth therein, is denied based upon Arcara's affidavit, which establishes that Arcara has no further responsive documents in her possession, custody, or control.

Arcara's motion to compel is likewise denied. With respect to that part of Arcara's motion which seeks Levin's mental health records, the court finds that such records are irrelevant to this accounting action. As for the portion of Arcara's motion which seeks the production of additional documents, that portion is rendered moot by Carmine's affidavit attesting to the fact that Levin's estate has produced all responsive documents within its possession, custody, or control.

¹Carmine states in her affidavit that Levin had signed a power of attorney naming Carmine as attorney-in-fact; however, she states that she does not have that document.

Similarly, to the extent that Arcara seeks to obtain document discovery and/or deposition testimony from Stark, she may do so by way of a subpoena.

Lastly, Arcara's argument that Carmine's answer should be stricken due to spoliation of evidence was raised for the first time on reply, and thus is not addressed by the court in this decision.

Wherefore it is hereby

ORDERED that Carmine's motion is granted to the extent that Arcara shall appear for deposition within 45 days of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that Carmine's motion is denied in all other respects; and it is further

ORDERED that Arcara's cross-motion is denied; and it is further

ORDERED that the parties shall appear for a compliance conference on Tuesday, November 9, 2010 at 9:30 a.m. at 80 Centre Street, Room 308.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 18, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
AUG 24 2010
NEW YORK
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