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

PRESENT: **HON.** JOAN A. MADDEN **PART** 11

Justice

Kathryn Jordan

Plaintiff,

- v -

John C. Dixon

Defendant.

INDEX NO.: 106636/07

MOTION DATE: 7/28/11

MOTION CAL. NO. 0

MOTION SEQ. NO. 013

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

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

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that the this motion is decided in accordance with the annexed Memorandum Decision + Order.

Dated: September 14, 2011

_____ **J.S.C.**

Check one: [X] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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KATHRYN JORDAN,

Plaintiff,

- against -

JOHN C. DIXON,

Defendant.

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Index No. 106636/07

JOAN A. MADDEN, J.:

In this action in which plaintiff Kathryn Jordan ("Jordan") alleges that defendant John Dixon, her former boyfriend, breached an agreement to support her for life, Jordan, appearing *pro se*, moves, by order to show cause, for recusal of this court (motion seq. nos. 013). Jordan previously moved to vacate this court's decision and order confirming the Referee's report (motion seq. 006), and the court, by interim decision and order January 12, 2011, granted the motion only to the extent of finding that the Special Referee erred in denying Jordan's application for discovery and directed that Dixon to provide certain discovery. At this juncture, the only issue remaining on this motion concerns the sufficiency of Dixon's response, and it is consolidated for disposition with Jordan's recusal motion.

Background

This action, which was commenced in 2007, is based on allegations that in 1994 and 1999, the parties entered into an oral agreement which provided in part, that Dixon would provide Jordan "with lifetime support in the style in which they had been living..." The complaint alleges that "in or about mid-2001...Dixon and Jordan reaffirmed and agreed again to the terms of their agreement..." While no written agreement is alleged in the complaint, during discovery, an undated "Partnership Agreement" was produced by Jordan, which Jordan maintains was given

to her by Dixon in or about July 2001.

The Partnership Agreement provides that proceeds from a "Fund" or future investment activities would be divided equally between Jordan and Dixon, and that "if for some reason the Fund is not launched or successful, that [Dixon] will provide [Jordan] with an equal share of any income [Dixon] receive[s] and recognize[s] that this is in consideration for [Jordan's] significant contributions to the advancement of [Dixon's] career and the sacrifices [Jordan] ha[s] asked [Jordan] to make."

Dixon moved for summary judgment on various grounds, including that his signature on the Partnership Agreement is a reproduction of a signature from another agreement. Dixon argued that since an agreement to support another person for life must be in writing and signed by the party charged to be enforceable (General Obligations Law § 5-701(a)(1), a finding that Partnership Agreement was not signed by him would bar Jordan's claim.

In his decision and order dated July 30, 2008, Justice Michael Stallman referred the issue of whether Dixon "affixed or caused his signature to be affixed to the Partnership Agreement" to a Special Referee noting that the resolution of this issue "would dispose of the entire controversy." Justice Stallman also referred any discovery issues related to the issue to the Special Referee. Jordan, who at the time was represented by counsel, did not appeal[1] or move for reargument of Justice Stallman's decision, and did not object to the reference to the Special Referee at the hearing.[2] After Justice Stallman referred the matter to the Special Referee, he

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[1]An order referring a matter to a Special Referee is appealable. Gottesman Business Brokers, Inc. v. Goldman Fire Prevention Corp., 238 AD2d 250 (1st Dept 1997).

[2]As noted in the court's decision and order dated June 17, 2011, as Jordan, who was represented by counsel, did not object to the reference to the Special Referee and participated in

recused himself and the matter was assigned to this court.

Counsel for Jordan made an application before the Referee for the production of certain documents demanded in discovery, and the Referee denied this application. At the hearing, Dixon called John Osborn ("Osborn") to testify as an expert witness on his behalf. Osborn testified that Dixon's signature on the Partnership Agreement and his signature on a June 30, 2001 agreement[3] were identical, and that the signatures on the two relevant documents were reproductions of the same signature. When asked which was the manipulated signature, he stated that if the smaller signature on the Partnership Agreement had been enlarged and reproduced on the June 30, 2001 document "the increase in size would have significantly diminished the quality of the reproduction to a noticeable degree and that is not the case. So while I can't opine without an original, which is the manipulation, certainly the evidence would suggest it was [the Partnership Agreement]." ((Transcript from November 28, 2008 Referee hearing, at 20-21). Jordan did not call her own expert to refute Osborn's opinion.

Dixon also testified at the hearing and denied any recollection of drafting or signing the

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the hearing, she waived any argument that the issue relating the genuineness of Dixon's signature should not have been before the Special Referee. See Winopa International Ltd v. Woori American Bank, 59 AD3d 203 (1st Dept 2009)(holding that plaintiffs' contention that the court improperly referred the matter to a Special Referee to hear and report on contested issues of fact was waived by their failure to object to the reference and their willing participation in the resulting hearing); Law Offices of Sandford A. Rubenstein v. Shapiro Baines & Saasto, 269 AD2d 224 (1st Dept), lv denied 95 NY2d 757 (2000)(holding that the argument by defendants that the court improperly referred contested issues of fact to the referee thus denying them a right to a jury trial was waived when defendants only objected on the ground that the court had not ruled on their summary judgment motion)

[3]The June 30, 2001 agreement was in the form of a letter to Jordan from Dixon and listed various conditions that Dixon was to agree to in order to continue living with Jordan in her apartment. Dixon testified during the hearing that he did not recall signing this agreement.

Partnership Agreement. Jordan testified that Dixon gave her a copy of the Partnership Agreement and asked her to sign it and that Dixon signed it later and gave her a copy of the agreement

> On April 9, 2009, the Referee filed his report in which he wrote that:
>
> I have considered all of the relevant evidence, and I find that the defendant established, by a fair preponderance of the evidence that he did not affix his signature nor cause his signature to be affixed to [the Partnership Agreement] which [Jordan] purports bears [Dixon's] signature on the second page....I also find that Osborn testified credibly with regard to his conclusion that the signature appearing on the such document was a reproduction of [Dixon's] genuine signature....I find that the various documents admitted into evidence corroborate Osborne's testimony. Moreover, I find that [Dixon] testified credibly that he co-habited with [Jordan] "off and on" during the summer of 2001 but that he did not recall ever drafting or signing such document. Conversely, I find that [Jordan] was not credible with regard to her testimony that [Dixon] drafted and signed [the Partnership Agreement]

Report, at 9-10.

Jordan then moved to reject the Report on various grounds, including that Osborne's testimony did not definitively establish that the signature on the Partnership Agreement was taken from another document, and that the Referee erred in refusing to permit her to put into evidence a newly discovered signature page to the Partnership Agreement. Dixon countered that the Report should be confirmed and summary judgment granted dismissing the complaint.

In its decision and order dated April 28, 2010, this court confirmed the Report finding, *inter alia*, that the record supported the Referee's decision that Dixon established by a preponderance of the evidence that he did not affix his signature or cause his signature to be affixed to the Partnership Agreement. Based on the Referee's finding that Dixon did not sign the Partnership Agreement and therefore that the purported agreement to support Jordan for life was

not evidenced by a writing signed by Dixon as the party charged, the court found that its enforcement was barred by the Statute of Frauds since, by its terms, the agreement could not be fully be performed prior to the end of Jordan's lifetime. GOL § 5-701(a)(1); See Williams v. Lynch, 245 AD2d 715, 717 (3d Dept 1997), appeal dismissed, 91 NY2d 957 (1998)(alleged oral contract between home owner and long time co-habitant under which home owner purportedly promised co-habitant that she could use the home for the rest of her life was barred by the Statute of Frauds). Accordingly, the court granted Dixon's motion for summary judgment dismissing the complaint.

Jordan then moved to vacate the court's April 28, 2010 decision pursuant to CPLR 5015(a)(2)(3)& (5) (motion seq. no. 006) on the grounds of newly discovered evidence, fraud on the adverse party, and denial of her Fourteenth Amendment right to due process. By an eleven-page interim decision and order dated January 12, 2011, the court denied the motion to vacate to the extent of finding that Jordan pointed to no "newly discovered evidence" or fraud, and that there was no apparent basis for relief from the judgment pursuant to CPLR 5015(a)(5) which relates to the "reversal, modification or vacatur of a prior judgment or order upon which it is based."

However, as to Jordan's argument the Referee improperly rejected her request for discovery, the court found that the Referee erred insofar as he denied the application by Jordan's counsel for certain discovery that was relevant and material to the issue before him concerning the authenticity of the Partnership Agreement. The court thus directed that Dixon provide Jordan with responses to certain discovery requests and gave Jordan an opportunity "to serve any papers regarding the impact of the discovery responses on the issue before the court as to whether the decision should be vacated."

After the court issued its interim decision and order dated January 12, 2011, Jordan made five motions for various relief, including two motions for the court to recuse itself (motion seq. nos.008 and 011). By decision and order dated June 17, 2011, the court denied the motions, including the recusal motions, writing, in part that:

> Jordan's complaints of bias are grounded solely on her disagreement with court's rulings which rejected her position. Moreover, this court has no bias or prejudice against Jordan and has carefully considered the issues before it. Furthermore, the recusal motion, when considered in light of Jordan's numerous attempts to have this court revisit issues, and her clear dissatisfaction with the court's determinations raises concerns with respect to judge shopping. Accordingly, the court finds that given the number and nature of the motions made by Jordan, and the lack of any grounds for recusal, and the interest in protecting the integrity of the judicial process, that the recusal motion should be denied.

On or about June 30, 2011, Jordan submitted the proposed order to show cause which was signed by the court and is at issue here seeking to have the court recuse itself, asserting her disagreement with the court's decision and order dated June 17, 2011 and its previous rulings, including those denying her previous two recusal motions. Attached to the order to show cause is a June 30, 2011 letter from Jordan to Chief Administrative Judge Ann Pfau requesting that another judge be assigned to this action.

Discussion

When, as here, there is no statutory basis for the court's recusal under Judiciary Law § 14, the court is the sole arbiter of whether recusal is warranted.[4] Best v. Best, 302 AD2d 295 (1st Dept 2003); Schwartz v Schwartz & Schlacter, 188 AD2d 285 (1st Dept 1992); see also, EECP

[4]Jordan incorrectly relies on two federal statutes governing recusal (28 USC §§ 144, 455).

Centers of America, Inc. v Vasomedical Inc., 277 AD2d 349 (2d Dept 2000). Here, the court finds that there is no basis for recusal.

First, this court has no bias against Jordan and, as was the case with the previous two recusal motions, Jordan's claim of bias is grounded in her disagreement with the court's determinations in this action. Moreover, the record belies any assertion by Jordan that court has treated her unfairly[5] and, instead, shows that the court has made every effort to address the issues raised by Jordan. As noted in the court's earlier decision denying Jordan's two previous motions for recusal, Jordan's numerous attempts to relitigate the issues in this action and her evident dissatisfaction with the court's decisions raise concerns with respect to judge shopping, and therefore impact on the integrity of the judicial system. In light of these concerns and in the absence of any grounds warranting recusal, Jordan's motion for the court to recuse itself must be denied.

The remaining issue concerns the sufficiency of Dixon's discovery response. As indicated above, after Jordan sought to vacate the court's determination confirming the award, the court determined that the Referee erred in denying the discovery sought by Jordan's counsel prior to the hearing,[6] and ordered that Dixon respond to this discovery as it was relevant to the issues before the Referee.

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[5]While Jordan asserts in the June 30, 2011 letter to Justice Pfau that the court has been disrespectful to her and insisted that she stand while addressing the court, the transcript regarding the relevant court appearance belies this assertion. While the transcript shows that in accordance with court procedure, Jordan was asked to stand when speaking, the court then added that Jordan could remain seated if it was difficult for her to stand and repeated that she could remain seated several times during the proceeding. (Transcript of April 27, 2011 Proceeding, at 2, 3).

[6]Contrary to Jordan's apparent misunderstanding, once Judge Stallman ordered the hearing before the Special Referee, the record shows that her counsel did not seek full discovery, including the deposition of Dixon, but rather sought only those items that were ordered by the court in its interim decision and order dated January 12, 2011.

In particular, the court determined that the Referee should have required Dixon to respond to item nos. 1 and 17 of plaintiff's first request for documents which sought, respectively, "all documents including emails concerning any agreement or partnership or communication between Dixon and Jordan," and "all documents concerning any promise Dixon made to Jordan, including all documents concerning whether the promise was honored." In response to item no. 1, Dixon responded that he

> has made every effort to locate any and all documents including emails in his possession, custody or control relating to any agreement or partnership with [Jordan]. No such document exist, as no agreement or partnership existed. Dixon has made every effort to locate any and all communications in his possession, custody or control relating to any agreement or partnership with [Jordan]. No such communications exist, as no agreement or partnership existed.

In response to item no. 17, Dixon responded that he:

> has made every effort to locate any and all documents including emails in his possession, custody or control concerning any promise made to [Jordan]. No such document exist, as no promise was made to [Jordan]. Dixon has made every effort to locate any and all communications in his possession, custody or control concerning whether any promise, if such promise existed, was honored by Dixon. No such documents exist, since Dixon is unaware of any promises made with [Jordan] he has made no effort to honor what he believes does not exist

The court also directed that Dixon answer interrogatory no. 13 of plaintiff's first interrogatories which asks that Dixon state whether he "has made any efforts to honor any agreements, partnerships or promises that he had with Jordan, and for each, state in detail what those efforts were." In response, Dixon responds that he is "unaware of any efforts to honor any agreements, partnerships or promises made with [Jordan] and, as such, he has made no effort to honor what he believes does not exist."

Dixon also submitted his affidavit in which he stated that since the court issued its interim decision and order he has "endeavored to look for any and all documents including emails in [his] possession relating to any agreements, partnerships or promises with [Jordan]" and that he is not in possession of such documents and that as he "is unaware of any agreements, partnership or promises made with [Jordan], I have made no effort to honor what I believe do not exist." (Dixon Aff., ¶2-5).

In its decision and order dated decision and order dated June 17, 2011, the court found that Dixon's affidavit was insufficient to show that a good faith effort was made to locate the documents as it provides no details regarding the nature of his search and the steps taken to locate such documents. The court then directed Dixon to respond to the relevant document requests or to provide an affidavit detailing the efforts he made to search for documents responsive to such requests, and delineating the location where Dixon maintains documents of the kind demanded, the nature of the records he maintains, including the types of documents, the method of organization and the length of time of retention, and the nature and extent of his search. As to emails, the court required that the affidavit detail the computer(s) used by Dixon during the period at issue, whether the emails were stored, transferred or saved, the location of the computer(s), and the nature and extent of the search conducted by Dixon.

The court also directed that Jordan to serve any papers regarding the impact of the discovery responses on the issue of whether the court should vacate its original decision on or before July 28, 2011, and permitted Dixon to reply on or before August 11, 2011.

In response to the court's order Dixon has submitted a further affidavit in which he states that he took no documents from the residence that he shared with Jordan from 2000 to 2002, that

any documents from Jessup & Lamont (J&L) where he was employed from 2003 to 2010 remained with J&L, and that any emails he sent or received during his employment at J&L remain in the possession of J&L. He further states that before his employment at J&L, he would have used the email system at his prior employer, Bloomberg, but that upon information and belief, Jordan did not have that email address. Dixon also states that the emails or documents from other computers used at the workplaces where he was employed after he left J&L were all business related and are no longer available for him to access.

Dixon also states that he searched his gmail account (which was set up after his relationship with Jordan ended) and found no relevant documents. He also states that he has not corresponded with Jordan by email since this action began. As for his personal files, Dixon states that "they almost exclusively related to my personal finances, such as tax returns and supporting documents" and that he "has gone through the documents he can locate and has found nothing responsive at issue and particularly nothing in any way relating to the purported 'partnership agreement.'" (Dixon Aff. ¶ 9).

Dixon further states that he never kept any documents or files relating to Jordan in his business offices, and that no such documents exist "with the exception of a capital introduction document on the letter head of Harmonic Research wherein Ms. Jordan would have been compensated to the extent she introduced capital [and that] [s]ince she introduced no capital, she was paid nothing." (Id, ¶ 10).

In response, Jordan submits an affidavit in which she states that contrary to Dixon's statements she sporadically exchange emails with him from 2005-2008, and that Dixon communicated with her via his corporate emails from 1994 and 2002 when "they regularly

discussed the Partnership Agreement." Jordan also requests in her affidavit for additional time for medical reasons and due to the hot weather.

In its second interim order dated July 19, 2011, the court directed that Dixon serve any reply by August 11, 2011 and also gave Jordan an opportunity to submit a surreply on or before August 18, 2011.

In reply, Dixon submits a brief affirmation from counsel restating his position.

Jordan responds by affidavit notarized on August 16, 2011, requesting more time to respond due to her medical condition[7], and arguing that the court should not accept the statements in Dixon's affidavit and reasserting various arguments previously rejected by the court.

CPLR 3120(1)(i) permits discovery of "designated documents which are in the possession, custody or control of the party." However, a party may not be "compelled to produce information that does not exist or which he does not possess (citation omitted)." Corriel v. Volkswagen of America, Inc., 127 AD2d 729, 731 (2d Dept 1987). Here, as Dixon's assertion that he does not have the relevant documents is supported by his affidavit detailing his efforts to locate the documents and emails at issue, he cannot be required to produce them. See Melcher v. Apollo Medical Fund Management LLC, 52 AD3d 244, 245 (1st Dept 2008)(holding that court improperly directed the cloning of plaintiff's computer hard drive in absence of evidence that plaintiff intentionally withheld or destroyed evidence and where assistant to plaintiff testified that she searched for the information on the computers); Compare Fugazy v. Time Inc., 24 AD2d 443 (1st Dept 1965)(requiring plaintiff to produce documents where objection that he did not

[7]In support of this request, Jordan submits a letter dated January 10, 2011 from a physician stating that Jordan "has been ill recently and has been unable to complete tasks at her usual pace."

have the requested documents was not supported by an affidavit from plaintiff or a person with knowledge).

Furthermore, Jordan's statements that she exchanged relevant emails with Dixon is not to the contrary, as there is no evidence that the emails existed, or were in Dixon's possession, at the time that Dixon was directed to produce them. Banigan v. Hill, 57 AD3d 463, 463-464 (2d Dept 2008)(finding that trial court should have denied motion to compel production of documents where there was no showing that documents were in existence at the time that the motion was made).

Finally, Jordan's request for additional time to submit further papers is denied as she has failed to identify any relevant issues that have not already been addressed in her previous submissions which would warrant granting her such an extension, and the court already extended Jordan's time to serve a sur-reply.

Conclusion

In view of the above, it is

ORDERED that Jordan's motion for this court to recuse itself (motion seq. no. 011) is denied; and it is further

ORDERED that Jordan's motion to vacate this court's decision and order confirming the Referee's report (motion seq. no. 006) is denied.

DATED: September 15, 2011

J.S.C.