

**Matter of Seaman**

2011 NY Slip Op 33231(U)

October 31, 2011

Sur Ct, Nassau County

Docket Number: 348202/C

Judge: III., Edward W. McCarty

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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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Proceeding to Discover Property and Obtain Information in  
the Possession of the Coalition of Landlords, Homeowners &  
Merchants, Inc., in the Estate of

File No. 348202/C

HENRY BOGART SEAMAN,

Dec. No. 27460

Deceased.

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In this SCPA 2103 discovery proceeding, the petitioner Bank of America, N.A., as executor of decedent's estate, alleges that the respondent The Coalition of Landlords, Homeowners & Merchants, Inc. (hereinafter referred to as respondent or The Coalition), collected over \$123,000.00 from the decedent, purportedly for its representation of the decedent in, among other things, litigation involving the use of his real property in Nassau County. Petitioner contends that it appears that the services provided to the decedent may have been for legal services which the respondent is not licensed to provide and, therefore, any such fees collected should be returned to the estate.

The original petition in this proceeding was filed December 15, 2008; an amended petition was filed on August 3, 2009. The proceeding has been fraught with vexatious litigation from the outset as The Coalition has vigorously resisted petitioner's discovery demands and succeeded in delaying the progress of the proceeding. The court's decision herein of June 30, 2010 found that the affirmative defenses, cross-claims, and counterclaims contained in The Coalition's answer to the petition were either without merit or were interposed primarily to delay or prolong the resolution of the proceeding. As a result, the court imposed a sanction of \$1,000.00 against The Coalition's attorney.<sup>1</sup>

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<sup>1</sup>An order on the court's June 30, 2010 decision was entered on August 4, 2010.

On March 30, 2011 the court granted the petitioner's motion for an order directing The Coalition to respond to petitioner's interrogatories. Rather than comply, and apparently undeterred by the sanction imposed by the August 4, 2010 order of the court, The Coalition made a motion for reargument. The court denied the motion for reargument by decision and order dated October 25, 2011, finding that the motion papers failed to establish that the court overlooked or misapprehended the facts or the law when it decided the prior motion. While that motion was pending, The Coalition made its second motion for summary judgment, even though it was obviously aware that the court had already determined that discovery in the proceeding was not complete as it had ordered The Coalition to comply with the petitioner's discovery demands.

The petitioner now moves the court for an order granting: (1) a continuance of The Coalition's motion for summary judgment pursuant to CPLR 3212(f); (2) the lifting of any automatic stay resulting from the filing of the motion for summary judgment; (3) compelling the respondent to provide the disclosure previously ordered by the court in its March 30, 2011 decision and order; (4) enjoining The Coalition from making any further motions in this proceeding without prior court approval; and (5) imposing sanctions on The Coalition and its attorney for frivolous conduct and an award of attorneys' fees and costs.

The Coalition opposes the petitioner's motion arguing, among other things, that the court does not have jurisdiction to decide the motion because service of the order to show cause was not in compliance with the terms of the order to show cause. The order to show cause directed that it be served on The Coalition's counsel by overnight delivery on or before the 8th day of June, 2011. The papers were served by FedEx. Service by FedEx or other special mail service

provider is complete upon receipt by the provider of the envelope containing the process (SCPA 309[2][b]). The FedEx receipt provided by petitioner's counsel indicates the package was received by FedEx on June 7, 2011 at 6:17 p.m. Service was therefore complete on or before June 8, 2011 and counsel's contention that the court lacks jurisdiction is therefore rejected.

Regarding the substance of the instant motion, where, in the context of a motion for summary judgment it appears that there are essential facts to oppose the motion that cannot then be stated, CPLR 3212(f) permits the court to deny the motion or to order a continuance thereof to permit further discovery to be conducted. Where an application for a deposition is pending when the adversary moves for summary judgment, the court may order a continuance (Weinstein-Korn-Miller, NY Civ Prac ¶ 3212.18, 2d ed.). Where there are outstanding discovery orders pending at the time a motion for summary judgment is made, an order for a continuance is not only proper, but the failure to grant a continuance may be reversible error (*Cassevah v Mack*, 51 AD3d 1132 [3d Dept 2008]; *Hobbs v Enprotech Corp.*, 12 AD3d 1063 [4th Dept 2004]).

That branch of petitioner's motion seeking a continuance of The Coalition's summary judgment motion is therefore granted. Because the court is granting the first branch of the motion in order to permit further discovery, the second branch of the motion, seeking the lifting of any automatic stay, is also granted, as is the third branch of the motion which seeks yet another order compelling The Coalition to comply with this court's March 30, 2011 order.

The fourth branch of the petitioner's motion seeks the extraordinary relief of enjoining The Coalition from making any further motions in this proceeding without the further order of the court. Although the court's patience with the tactics employed by The Coalition and its counsel in delaying the ultimate determination of this proceeding has worn extremely thin, the

court declines to grant this branch of the petitioner's motion, hoping that the sanction being imposed will be a sufficient deterrent to any further delaying tactics.

In pertinent part, 22 NYCRR §130-1.1, provides:

“(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part...

“(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

“Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party...

“(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.”

The court concludes that The Coalition's filing of the summary judgment motion, made at a time when the court had recently ordered it to comply with petitioner's discovery demands and while its own motion to reargue was still pending was undertaken primarily to delay or prolong the resolution of the litigation, or to harass the petitioner and its counsel. Had this transparent

effort to prolong this litigation been an isolated incident, the court would be reluctant to impose a sanction. However, as mentioned above, the court has previously sanctioned The Coalition's counsel for such conduct, apparently without effect. Accordingly, the court imposes a sanction of \$10,000.00 on The Coalition and an additional \$5,000.00 on its counsel, personally, both payable to The Lawyers' Fund for Client Protection pursuant to 22 NYCRR §130-1.3 within 30 days after entry of the order herein.

In addition, the court finds that the petitioner should be awarded costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from having to oppose The Coalition's summary judgment motion. Petitioner's counsel is directed to file and serve a detailed affirmation describing the legal services it provided in opposing the motion for summary judgment and to do so by November 17, 2011. The Coalition may file opposing papers on or before November 28, 2011 when the issue will be submitted for decision without hearing (*Matter of Guattery*, 278 AD2d 738 [3d Dept 2000]).

The Coalition shall provide the disclosure previously ordered by the court's March 30, 2011 decision and order by November 15, 2011.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: October 31, 2011

EDWARD W. McCARTY III  
Judge of the  
Surrogate's Court