

Curtis & Assoc., P.C. v Callaghan

2011 NY Slip Op 34115(U)

August 9, 2011

Sup Ct, Westchester County

Docket Number: 11831/10

Judge: Alan D. Scheinkman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this Order, with notice of entry, upon all parties.

FILED AND ENTERED ON 8-10 2011 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
CURTIS & ASSOCIATES, P.C.

Petitioner,

-against-

JANET T. CALLAGHAN,

Respondent.

-----X
SCHEINKMAN, J.

DECISION and ORDER

Index No. 11831/10

Motion Dates: July 18, 2011
July 25, 2011

FILED

Seq. Nos. 4 and 5

AUG 10 2011

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers numbered 1 to 13 were read on (1) motion by petitioner, Curtis & Associates, P.C., for an order granting, inter alia, the following relief: citing respondent/judgment debtor, Janet T. Callaghan, for criminal contempt; compelling respondent to provide certain discovery; finding Jeffrey Levitt, Esq. engaged in frivolous conduct in violation of subpart 130-1.1 of the Rules of the Chief Administrator of the Courts (22 NYCRR); and imposing sanctions against Jeffrey Levitt, Esq. in the amount of \$10,000 for each offense for a total of \$30,000; and (2) motion by respondent/judgment debtor, Janet T. Callaghan, for an order granting renewal of the court's order entered August 30, 2010 and judgment entered October 22, 2010, and imposing sanctions against W. Robert Curtis, Esq. pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) subpart 130-1.1.

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Upon the forgoing papers, these motions are decided as follows:

In a prior action (*Callaghan v Curtis*, Index No. 20136/04) (hereinafter "underlying action"), respondent/judgment debtor, Janet Callaghan (hereinafter "Callaghan"), sought to recover damages for, inter alia, alleged legal malpractice and breach of fiduciary duty during the representation of respondent in various matters by petitioner and W. Robert Curtis, Esq. In the underlying action, petitioner, Curtis & Associates, P.C., and W. Robert Curtis, Esq. asserted counterclaims to recover fees for professional services rendered to Callaghan. Callaghan had entered several retainer agreements with petitioner and W. Robert Curtis, Esq. engaging them to

prosecute a legal malpractice action against her first counsel in her matrimonial action and to act of counsel in her matrimonial action to defend against a retaining and charging liens asserted by her second matrimonial counsel. Callaghan eventually discharged petitioner and W. Robert Curtis, Esq. from representing her in the matrimonial action, and they made an application for a charging lien. A referee in the matrimonial action determined that they had been discharged for cause and denied the application.

While the underlying action was pending, the Appellate Division, Second Department, reversed the determination of the referee in the matrimonial action, determined that petitioner and W. Robert Curtis, Esq. were entitled to a fee, and remitted the matter for a hearing and determination as to fair and reasonable value of the services rendered (*Callaghan v Callaghan*, 48 AD2d 500 [2d Dept 2008]). After remittal from the Appellate Division, the court presiding over the matrimonial action (Scarpino, J.), by decision and order dated December 22, 2008, ordered that the hearing to determine the value of the legal services in the matrimonial action be conducted with any trial in the underlying action on the counterclaims to recover fees for legal services (*Callaghan v Callaghan*, Sup Ct, Westchester County, Dec. 22, 2008, Scarpino, J., index No. 3094/01).

In the underlying action, Callaghan discontinued her breach of fiduciary duty claim with prejudice (*see Callaghan v Curtis*, Sup Ct, Westchester County, July 3, 2001, Bellantoni, J., index No. 20136/04). By Decision and Order, the Appellate Division, Second Department, dismissed Callaghan's remaining causes of action in the underlying action and granted petitioner and W. Robert Curtis, Esq. summary judgment dismissing the complaint (*Callaghan v Curtis*, 48 AD3d 501 [2d Dept 2008]). What remained were counterclaims to recover fees for legal services rendered to Callaghan in the legal malpractice action and matrimonial action. By Decision and Order filed and entered on August 7, 2009 in the underlying action, this court granted petitioner and W. Robert Curtis, Esq. summary judgment on (1) the counterclaims to recover legal fees in the legal malpractice action in the sum of \$257,978.85 together with statutory interest, and (2) the counterclaims for breach of contract, which were related to fees for legal services provided to respondent during a 28-day quantum meruit hearing to determine the value of services provided by Callaghan's second matrimonial counsel, in the sum of \$282,829.52 together with statutory interest from May 31, 2003. A money judgment in favor of petitioner in the amount of \$815,462.76 was entered on September 24, 2009 (Petitioner's exhibit 1). The judgment was affirmed by the Appellate Division, Second Department (*Callaghan v Curtis*, 82 AD3d 816 [2d Dept 2011]).

Petitioner then commenced this Article 52 proceeding to enforce the money judgment against Callaghan, who resides in Connecticut. By Order to Show Cause dated May 28, 2010, petitioner sought an order of the court directing service of the petition, any enforcement subpoenas, notices or motions in the Article 52 proceeding upon Callaghan's New York counsel. Through counsel, non-resident Callaghan opposed the petition on the basis that jurisdiction could not be obtained over her since she resided outside New York State and had not designated her attorney as her agent for the service of process.

By Decision and Order entered August 30, 2010, this court granted petitioner's application and directed service of enforcement subpoenas, as well as notices and motions, upon Callaghan's New York counsel, Jeffrey Levitt, Esq., by overnight delivery and regular mail, and upon Callaghan at her address in Connecticut by overnight delivery and regular mail. In permitting service in this proceeding upon Callaghan's counsel, this court determined that it continued to exercise personal jurisdiction over Callaghan which it had obtained in the underlying action and Callaghan maintained a presence in New York. This court noted that Callaghan had voluntarily appeared in the New York court by counsel and was subject to the jurisdiction of the court in the underlying action.

By Judgment entered October 22, 2010, this court, inter alia, granted petitioner's motion to effect expedient service of the enforcement subpoenas upon Callaghan through her New York counsel, and directed that petitioner serve her with the enforcement subpoenas necessary to obtain disclosure pursuant to CPLR 5222, 5223 and 5225, as well as notices and other relevant motions, by overnight delivery and regular mail upon New York counsel, Jeffrey Levitt, Esq., and upon Callaghan at her residence in Connecticut by overnight delivery and regular mail.

Petitioner's Motion for Criminal Contempt, Costs and Sanctions

By Order to Show Cause, petitioner now seeks an order citing Callaghan for "criminal contempt of this Court's mandate under C.P.L.R. [sic] § 750," determining that the appropriate punishment to be imposed on Callaghan to be imprisonment if she fails to purge her contempt on or before the return date of the motion, finding Jeffrey Levitt, Esq. repeatedly violated subpart 130-1.1 (c) of the Rules of the Chief Administrator of the Courts (22 NYCRR) due to frivolous conduct and imposing costs, as well as sanctions in the amount of \$10,000 for each offense for a total of \$30,000 to be paid to the funds of the court. The Order to Show Cause, as drafted by petitioner, required petitioner to serve the order, with the papers upon which it was granted, upon Jeffrey Levitt, Esq. and Callaghan on or before June 29, 2011 by first class and priority mail. In support of the motion, petitioner submits an Affirmation of Service wherein W. Robert Curtis, Esq. affirms that the Order to Show Cause was served by first class and priority mail on June 30, 2011.

Mr. Curtis, on behalf of petitioner, alleges that Callaghan committed "repeated civil and criminal contempt ... beginning in her matrimonial case, spanning through a counterfeit malpractice action allegedly arising from the matrimonial case, and now into this Article 52 Proceeding" (Reply Affirmation of W. Robert Curtis, Esq. at 2, para. 4). Mr. Curtis contends that Callaghan failed to comply with discovery orders in the underlying action, specifically the order of this court dated February 18, 2010, which, inter alia, directed Callaghan (plaintiff in the underlying action) to appear for a deposition and produce records at her deposition. Mr. Curtis also asserts that Callaghan made false accusations against her husband in her matrimonial action, which she later recanted in an effort to gain custody of her children, submitted a false Net-Worth Statement in the matrimonial action, ignored the court's supervised visitation order in her

matrimonial action, and falsely stated that petitioner had been discharged for cause for “reckless indifference.” Mr. Curtis further asserts that Callaghan commenced a “counterfeit” legal malpractice action against petitioner, and commenced a “bogus” Article 78 action against this court seeking to have the judgment in the underlying action vacated.

Petitioner also contends that Callaghan failed to respond to a subpoena served in the present proceeding pursuant to this court’s order dated August 26, 2010, which permitted expedited service upon Callaghan by service on New York counsel and to Callaghan in Connecticut. The subpoena sought, *inter alia*, answers to written questions, the production of documents, and attendance at a videotaped deposition. After Mr. Levitt denied receiving the subpoena, Mr. Curtis alleges he faxed “a complete set of disclosure instruments” on November 2, 2010. After receiving no response, an identical subpoena was served on December 16, 2010. According to Mr. Curtis, Mr. Levitt objected to the subpoena on various grounds, including that the deposition date was inconvenient, objected to the deposition being videotaped despite prior order permitting the videotaped deposition to proceed, demanded the “usual stipulations” be “resolved in advance”, stated that Callaghan would raise her “Fifth Amendment” objections, and claimed that the service on him did not include two copies of the written questions with a self-addressed envelope. Mr. Curtis alleges that days before the deposition and after the written answers were due, Mr. Levitt informed him that he was stuck in Phoenix and was unable to return to New York in time for the deposition. Mr. Curtis asserts that, thereafter, Mr. Levitt has failed to reschedule the deposition, provide written answers, or identify documents. Petitioner asserts that Callaghan’s conduct, as a whole, warrants a finding of civil and criminal contempt. Petitioner does not contend that this court previously issued an order directing Callaghan to comply with the subpoena.

As to Jeffrey Levitt, Esq, petitioner contends that Levitt “supported” Callaghan’s contempt with frivolous conduct by filing numerous motions supported only by Callaghan’s false affidavits. Petitioner further contends that Mr. Levitt’s “repeated creation of false evidence and his repeated frivolous conduct” may constitute criminal contempt because he willfully resisted court orders.

Jeffrey Levitt, Esq. opposes the motion on behalf of himself and Callaghan on the ground that the court has no in personam jurisdiction since petitioner failed to serve the present Order to Show Cause by June 29, 2011 as directed in the order. The Affirmation of Service submitted by W. Robert Curtis, Esq. on behalf of petitioner states that the Order to Show Cause was served on June 30, 2011. Mr. Levitt asserts that he refused to sign a stipulation provided to him by Mr. Curtis excusing the late service since Mr. Curtis would not agree to provide him with additional time to make a cross motion. Additionally, Mr. Levitt contends that the service of the Order to Show Cause failed to comply with the court’s prior order directing service by overnight delivery and regular mail upon both Mr. Levitt and Callaghan. Mr. Levitt notes that despite the prior court order directing service by overnight delivery and regular mail, petitioner drafted the Order to Show Cause to provide service by priority mail and regular mail, which are one in the same. Mr. Levitt further contends that the present Order to Show Cause is jurisdictionally defective

since it was supported by an affirmation and not an affidavit of W. Robert Curtis, the real party in interest. As to the merits of the motion, Mr. Levitt contends, inter alia, that no court order was violated in the present action, and petitioner is improperly seeking contempt in the present proceeding based upon alleged conduct in the underlying action.

In reply, Mr. Curtis does contest Mr. Levitt's assertions that the Order to Show Cause was served after the date provided in the Order to Show Cause. Moreover, in opposition to Callaghan's motion, Mr. Curtis concedes that service was made by priority mail and regular mail, but contends that such service was proper since the Order to Show Cause provided for such service. Mr. Curtis does not address the fact that the service provided for in the Order to Show Cause, which he drafted, was not in compliance with this court's prior order directing service by both overnight delivery and regular mail.

In view of petitioner's failure to serve the Order to Show Cause by the date directed in the Order to Show Cause, petitioner's motion for contempt, costs and sanctions must be denied. In any event, this court notes that Mr. Levitt correctly contends that a finding of contempt cannot be based upon violations of court orders in other actions, and petitioner has failed to demonstrate that either Mr. Levitt or Callaghan failed to comply with a court order in the present Article 52 proceeding. Therefore, petitioner's remedy is to seek an order compelling Callaghan to comply with the subpoena served on September 20, 2010 in this proceeding.

Accordingly, petitioner's motion seeking an order finding Callaghan in contempt and awarding costs and sanctions against Mr. Levitt, Callaghan's counsel, is denied.

Before turning to the next motion, the Court observes that Mr. Curtis, in his reply affirmation, characterizes Mr. Levitt's jurisdictional objection as "frivolous", while, later in the same document, he acknowledges that service was made one day late. The Court further observes that Mr. Curtis has not offered any excuse (reasonable or otherwise) for not having made service in accordance with the Order to Show Cause nor has he offered any excuse for why he did not seek an amended Order to Show Cause once the service date was missed.

Callaghan's Motion Seeking to Renew the Court's Order and Judgment, and for Sanctions Against W. Robert Curtis, Esq.

By Notice of Motion, Callaghan seeks an order granting renewal of this court's order entered August 30, 2010 and judgment entered October 22, 2010, which both permitted service in this proceeding upon Mr. Levitt, as Callaghan's counsel, and upon Callaghan in Connecticut. Callaghan also seeks the imposition of sanctions against W. Robert Curtis, Esq. pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) subpart 130-1.1.

In the Affirmation in Support of the motion, Mr. Levitt asserts that the motion for renewal is based on new facts not offered on the prior motion and there was a reasonable justification for the failure to present the facts on the prior motion. However, Mr. Levitt fails to

state the new facts necessitating renewal. Instead, Mr. Levitt argues that petitioner created a false contempt application, submitted false statements, and presented confidential information provided by Callaghan during his representation of her in the matrimonial action. Mr. Levitt continues to present opposition to petitioner's motion for contempt, costs and sanctions, but fails to demonstrate any new facts which would entitle Callaghan to renew this court's prior order and judgment with respect to service of papers on Callaghan in proceedings to enforce a prior judgment of this Court which has been affirmed on appeal.

With respect to the conduct of W. Robert Curtis, Esq., Mr. Levitt contends that his motion is abusive and his method of maligning Mr. Levitt and Callaghan is unprofessional and constitute grounds for sanctions. Mr. Levitt notes that petitioner now seeks contempt and sanctions based upon Callaghan's failure to respond to the first demand, which Mr. Levitt characterizes as incomplete and not in proper form, and asserts that it was later replaced by petitioner. Mr. Levitt also asserts that petitioner improperly seeks contempt and sanctions based upon Callaghan's failure to appear for a deposition on October 10, 2010, which was a Sunday, and failed to reschedule until January 3, 2011, which Mr. Levitt advised was an inconvenient date. Mr. Levitt contends that, in total, petitioner's motion for contempt and sanctions, which include "outrageous attacks" on his former client, and the use of confidential information from the matrimonial action was frivolous and intended to harass Callaghan. Mr. Levitt seeks sanctions against W. Robert Curtis, Esq. in the amount of \$10,000 payable to the Lawyers' Fund for Client Protection.

Petitioner opposes Callaghan's motion and contends that Callaghan has failed to demonstrate any merit for the application to renew. Additionally, petitioner asserts that the motion and Mr. Levitt's Affirmation in Support constitute frivolous conduct. Petitioner also appears to contend that Mr. Levitt's motion in the underlying action to renew and vacate this court's prior order granting petitioner and W. Robert Curtis, Esq. (defendants in the underlying action) summary judgment was frivolous.

"On a motion to renew under CPLR 2221, a party must show new facts to support the motion, as well as a justifiable excuse for not initially placing such facts before the court" (*Lansing Research Corp. v Sybron Corp.*, 142 AD2d 816, 819 [3d Dept 1988]; *see*, CPLR 2221 [e] [2]; *Spectrum Painting Contrs.*, 54 AD3d 748, 749 [2d Dept 2008]; *Shapiro v State*, 259 AD2d 753 [2d Dept 1999]; *Foley v Roche*, 68 AD2d 558, 568 [1979]). Here, Callaghan failed to offer any new facts which existed at the time of the prior motion, but were not presented to the court, which would warrant renewal. Accordingly, that branch of Callaghan's motion for leave to renew the court's prior order and judgment is denied.

Conduct is frivolous and can result in an award of costs or the imposition of sanctions under the Rules of the Chief Administrator of the Courts (22 NYCRR) subpart 130-1.1 if it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (Rules of the Chief Administrator of the Courts [22 NYCRR] § 130-1.1[c][2]).

There is no dispute but that petitioner's Order to Show Cause was not timely served and that Callaghan's counsel declined to stipulate to waive the defect, as was his right. Petitioner, notwithstanding Mr. Curtis' awareness of the service defect and of Mr. Levitt's refusal to stipulate to waive it, failed to seek an amended order to show cause or to seek to withdraw the motion. To this extent, the conduct of petitioner and its counsel was frivolous and created an unnecessary burden on the Court. While the defect in service was glaring and unremedied, the Court still had to wade through petitioner's thick set of papers (including a 28 page principal affirmation with 33 exhibits, and a reply affirmation with 15 more exhibits) and spend the time preparing this Decision. Accordingly, the Court will impose sanctions of \$250 against W. Robert Curtis, Esq., payable to the Lawyers' Fund for Client Protection (see Rules of the Chief Administrator of the Courts [22 NYCRR] § 130-1.3).

The Court declines to make any award, either of attorneys fees or even motion costs, in favor of Callaghan. Callaghan is not an entirely innocent party for several reasons. First, Callaghan, rather than just confining her papers to opposition of the defective motion, made a cross-motion for renewal, without even identifying what the supposed new facts were. Second, it would be anomalous, under the circumstances now present, to grant Callaghan any financial relief against Petitioner and Mr. Curtis when there is a substantial unsatisfied judgment against her in their favor. And thirdly, and most important, both Mr. Curtis and Mr. Levitt have engaged, and not for the first time, in conduct which reflects a complete lack of civility. The submissions on both sides are replete with name-calling and unnecessary and inappropriate invective, mostly aimed against one another. Thus, this is a circumstance where both parties and both counsel are equally blameworthy for the lack of civility and respect for the judicial process reflected in these papers. However, the Court's patience is nearing its end and all involved are warned that, in the event that the Court finds that any future conduct by any of these parties or attorneys is frivolous, the Court will not hesitate to make a significant monetary award payable to the Lawyers' Fund for Client Protection.

In view of the foregoing, it is

ORDERED that petitioner's motion seeking an order finding Janet Callaghan, respondent/judgment debtor, in contempt, and awarding costs and sanctions against Jeffrey Levitt, respondent/judgment debtor's counsel, is denied; and it is further

ORDERED that the branch of Janet Callaghan's motion seeking leave to renew this court's order entered August 30, 2010 and judgment entered October 22, 2010 is denied; and it is further

ORDERED that the branch of Janet Callaghan's motion seeking an imposition of sanctions against W. Robert Curtis, Esq. is granted to the extent herein set forth; and it is further

ORDERED that W. Robert Curtis shall pay the sum of \$250.00 to the Lawyers' Fund for Client Protection within fifteen (15) days of the date of this Decision and Order.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 9, 2011



HON. ALAN D. SCHEINKMAN, J.S.C.

To:

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