

Curtis & Assoc., P.C. v Callaghan

2011 NY Slip Op 34116(U)

October 28, 2011

Sup Ct, Westchester County

Docket Number: 11831/2010

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 11-1 2011 WESTCHESTER COUNTY CLERK

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

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CURTIS & ASSOCIATES, P.C.,

Petitioner,

-against-

JANET T. CALLAGHAN,

Respondent.

FILED NOV - 1 2011 TIMOTHY C. IDONI COUNTY CLERK COUNTY OF WESTCHE

DECISION & ORDER

Index No. 11831/2010
Motion Date: Oct 17, 2011

Seq. No. 6

-----X
SCHEINKMAN, J.

The following papers numbered 1 to 6 were read on the instant motion by petitioner for an order compelling compliance with subpoenas:

Order to Show Cause, Affirmation, Exhibits 1-24	1-2
Reply Affirmation, Exhibit 1	3
Transfer Order	4
Affidavits of Service	5-6

Upon the foregoing papers, the motion is decided as follows:

In this CPLR article 52 proceeding to enforce a money judgment, petitioner seeks an Order compelling respondent to comply with subpoenas *duces tecum* and *ad testificandum* for, *inter alia*, petitioner's written answers to interrogatories, appearance at a videotaped deposition, and written authorization for the release of her federal and state tax records for the years 2003 through 2010.

This dispute has had a long and patience-trying procedural history. Respondent brought a prior underlying action against petitioner (*Callaghan v Curtis*, Index No. 20136/04) seeking recovery of damages for alleged legal malpractice and breach of fiduciary duty during the representation of respondent by petitioner and W. Robert Curtis, Esq. (hereinafter "Curtis"). Petitioner and Curtis asserted counterclaims to recover fees for professional services rendered to respondent, who had entered into retainer agreements engaging petitioner and Curtis to prosecute a legal malpractice action against her first counsel in a matrimonial action, and to act of counsel in such matrimonial action to defend against retaining and charging liens asserted by her second

matrimonial counsel. After respondent discharged petitioner and Curtis from representing her in the matrimonial action, petitioner and Curtis applied for a charging lien against respondent. That application was denied on a finding that the discharge was for cause, but the Appellate Division reversed and determined that petitioner and Curtis were entitled to a fee (*see Callaghan v Callaghan*, 48 AD3d 500 [2d Dept 2008]). After Callaghan discontinued several of her causes of action, the Appellate Division granted petitioner and Curtis summary judgment and dismissed Callaghan's complaint in its entirety (*see Callaghan v Curtis*, 48 AD3d 501 [2d Dept 2008]). Thereafter, by Decision and Order dated September 21, 2009, this Court (Scheinkman, J.) granted petitioner summary judgment on its counterclaims to recover fees for legal services rendered to Callaghan in the legal malpractice and matrimonial actions (*see Callaghan v Curtis*, 2009 WL 6666368 [Sup Ct Westchester Co 2009]). A money judgment in favor of petitioner in the amount of \$815,462.76 was entered on September 24, 2009, and the Appellate Division affirmed on appeal (*see Callaghan v Curtis*, 82 AD3d 816 [2d Dept 2011]).

Petitioner then commenced the instant CPLR article 52 proceeding to enforce the money judgment. By Decision and Order dated August 30, 2010, this Court (Scheinkman, J.) held that the underlying malpractice action and respondent's voluntary appearance therein vested in this Court continuing jurisdiction over respondent for purpose of the instant enforcement proceeding to collect on the counterclaims, notwithstanding respondent's relocation to Connecticut. On that basis, this Court directed that service of notices, motions, subpoenas and other process be effected on respondent through her New York counsel, Jeffrey Levitt, and on respondent at her Connecticut address, by overnight and first class delivery. By judgment entered October 22, 2010, this Court (Scheinkman, J.) granted petitioner's motion to effect expedient service of enforcement subpoenas on respondent via her New York counsel, and directed that petitioner serve on her and her New York counsel, by overnight and first class delivery, such enforcement subpoenas as necessary to obtain disclosure of potential assets pursuant to CPLR 5222, 5223 and 5225. Petitioner thereafter served subpoenas on respondent seeking written answers under oath to interrogatories, production of documents, appearance at a videotaped deposition, and authorization for petitioner to obtain respondent's federal and state tax returns for the years 2003 through 2010.

Asserting respondent's failure to comply with such subpoenas, Petitioner thereafter moved by Order to Show Cause to hold respondent in contempt. At that stage of the litigation, however, the subpoenas had not yet come before the Court for enforcement under judicial penalty for noncompliance. Because petitioner therefore could not demonstrate that respondent had failed to comply with a court order under CPLR article 52, and because petitioner had failed to serve the Order to Show Cause by the date specified therein, by Decision and Order dated August 9, 2011, this Court (Scheinkman J.) denied petitioner's motion and assessed sanctions against Curtis for a frivolous motion in the amount of \$250, payable to the Lawyers' Fund for Client Protection.¹

¹ This Court noted that "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

Petitioner now moves by Order to Show Cause to compel respondent to fully comply with the disclosure demands. In essence, the instant motion seeks to remedy the CPLR article 52 defect in petitioner's prior application by reducing the subpoena to an enforceable judicial order.

In support of this application, petitioner repeats the narrative of the prior application alleging respondent's systematic failure to comply with disclosure obligations. Petitioner avers and provides proof that respondent and Levitt were served with subpoenas pursuant to CPLR 5224 on September 20, 2010, in the manner specified in this Court's August 2010 order, directing respondent to provide written answers to 19 questions relating to employment, financial activities and assets within seven days of receiving the subpoena (*see* CPLR 5224[a][3]). The subpoena also required production of 18 classes of identified documents within 20 days (*see* CPLR 5224[a][2]). Petitioner asserts that respondent did not timely respond to the subpoena. Petitioner further asserts on October 1, Curtis sent a facsimile letter to Levitt inquiring as to petitioner's compliance, and received Levitt's reply that day indicating that Levitt had received no subpoena. Petitioner claims that Curtis thereafter sent to Levitt another complete set of identical subpoena documents by facsimile; petitioner's moving papers include a transmission receipt and an allegation that there was again no response.

Petitioner avers that petitioner served respondent and Levitt yet again on December 16, 2010, by first class and overnight mail at their respective addresses, setting new dates for compliance. Petitioner's moving papers include reply letters from Levitt dated December 22 and December 23, 2010, indicating, among other things, that respondent would not attend her then-scheduled deposition of January 3, 2011, on grounds of "inconvenience," and that respondent would assert a "Fifth Amendment privilege" not to answer questions. Levitt's letter did not indicate, however, when respondent might be available, or explicate the basis for invoking any privilege or the particular matters on which such privilege ostensibly would be invoked. In the moving papers, petitioner further produces an electronic mail message from Levitt to Curtis dated December 30, 2010, in which Levitt indicated that he was unavoidably detained out of state and could not return for the January 3 deposition.

Petitioner asserts that neither respondent nor Levitt thereafter made any attempt to re-schedule respondent's deposition or otherwise comply with the subpoenas in any respect. On the basis of the foregoing, petitioner asserts that a judicial order is necessary to compel discovery.

Respondent did not submit papers in opposition to the instant motion. The Court observes that petitioner did not timely submit an affidavit of service of the original Order to Show Cause and papers upon which it is based. Petitioner did submit a "Reply Affirmation" in further support of the instant motion, annexed to which petitioner included copies of overnight

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" (*see* 22 NYCRR [Rules of the Chief Administrative Judge] § 130-1.3).

and first-class mailers to respondent and Curtis dated August 25, 2011, one of them bearing a U.S. Postal Service stamp with such date; petitioner also provided an affirmation of service for the "Reply Affirmation." On October 27, 2011, petitioner submitted to the Court an affirmation of service dated that day, indicating that Curtis had served the Order to Show Cause and supporting papers to respondent and Levitt by overnight and first class mail on August 25, 2011, in the manner designated by the Order to Show Cause and this Court's August 2010 order. Because the Order to Show Cause designated overnight and first class delivery at such addresses on or before August 25, 2011, as good and sufficient service thereof, the Court is satisfied that petitioner timely effected service on respondent, and in its discretion, the Court accepts petitioner's late filing of the affirmation of service. Especially given this Court's prior Order levying sanctions for late delivery of papers, however, this Court reminds counsel and the parties that this Court reserves its prerogatives to disregard and/or levy sanctions for any papers hereafter filed or served untimely.

Inasmuch respondent did not oppose the instant motion and petitioner has demonstrated to the Court's satisfaction that respondent repeatedly has not complied with disclosure subpoenas absent judicial intervention, petitioner's application for judicial enforcement of the subpoenas is GRANTED. Accordingly, it is hereby:

ORDERED that, no later than 10 days after service of this Decision and Order on respondent in the manner specified herein, respondent shall (1) fully respond under oath to each written question contained in Exhibit 7 to petitioner's affirmation of support of this motion, such questions having been previously designated in the subpoena served on her on or about the dates specified in this Decision; (2) provide each and every document sought by the subpoena contained in Exhibit 8 to petitioner's affirmation of support of this motion, such documents having been previously designated in the subpoena served on her on or about the dates specified in this Decision; and (3) provide to petitioner, in the names of Janet T. Callaghan and Janet Turansky in a form acceptable to the Internal Revenue Service and New York State Department of Taxation and Finance, authorizations for petitioner to directly obtain petitioner's federal and state tax returns for the years 2003 through 2010, inclusive; and it is further


ORDERED that, not sooner than 20 days and not later than 30 days after service of this Decision and Order on respondent in the manner specified herein, respondent shall appear for a videotaped deposition at such location as petitioner shall designate by letter to petitioner, such letter to be served on respondent in the manner specified herein not later than 10 days after service of this Decision and Order; and it is further

ORDERED that if respondent shall fail to comply with this Order, petitioner may apply to this Court for further relief not later than 30 days after such failure to comply, such application to include a proper affidavit of service of this Order with proof of entry hereof, along with proof of service on respondent of such application; respondent may file with the Court any papers in opposition to such application and serve the same on petitioner no later than 14 days after service of such application on respondent; and no reply papers shall be permitted; and it is further

ORDERED that petitioner shall serve a copy of this Order with proof of entry, as well as any letters designating the time and place of respondent's deposition and any application and supporting papers seeking further relief pursuant to this Order, upon respondent by certified first class and overnight delivery to Jeffrey Levitt, Esq., at his office address of P.O. Box 306, Massapequa, New York 11758, and by certified first class and overnight delivery to Janet T. Callaghan at her Connecticut address of 40 Rugby Road, Unit 2, Fairfield, Connecticut 06824; and that respondent shall serve on petitioner papers in opposition to any application by petitioner for further relief hereunder by certified first class and overnight delivery to Curtis & Associates, P.C., 155 Duane Street, New York, New York 10013.

The foregoing constitutes the Decision and Order of this Court.

**Dated: White Plains, New York
October 28, 2011**



HON. ALAN D. SCHEINKMAN, JSC

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cc: Compliance Part Clerk