SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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ELIZABETH O'LEARY a/k/a ELIZABETH L. O'LEARY a/k/a BETTY LOU,

DECISION AND ORDER

Plaintiffs,

-against-

Index No. 110471/2009

JOANNA O'CONNOR a/k/a JOANNA O'CONNOR ALARCON a/k/a JO ANN O'CONNOR ALARCON a/k/a JOANNA INTORELLA a/k/a JO ANN INORELLA,

Defendants.

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O. PETER SHERWOOD, J.:

This is an action to recover damages based upon conversion, breach of fiduciary duty, and fraud. Defendant moves for an order, pursuant to section 202.21 (e) of the Uniform Rules for Trial Courts (22 NYCRR), vacating the Note of Issue and Certificate of Readiness, striking the action from the trial calendar and compelling plaintiff to respond to defendant's First Set of Interrogatories. Plaintiff opposes the motion. For the reasons that follow, the motion is denied.

Plaintiff Elizabeth O'Leary a/k/a Elizabeth L. O'Leary a/k/a Betty Lou ("plaintiff") commenced the instant action by filing the summons and verified complaint on or about July 23, 2009. The verified complaint, as amended on or about September 18, 2009, alleges that: (1) her sister, defendant Joanna O'Connor a/k/a Joanna O'Connor Alarcon a/k/a Jo Ann O'Connor Alarcon a/k/a Joanna Intorella a/k/a Jo Ann Inorella ("defendant") converted ten of twelve CD Totten Trust accounts which defendant, as agent-in-fact pursuant to a power of attorney for their mother, Theresa O'Connor Paplin, now deceased (the "decedent"), had established at HSBC Bank in the decedent's name with specified designees; (2) that Joanna breached her fiduciary duty by withdrawing funds from the HSBC accounts that would have passed to Elizabeth pursuant to the decedent's designation; and (3) that Joanna fraudulently used the power of attorney executed by the decedent naming her as attorney-in-fact to convert funds left in trust for Elizabeth for her own benefit. Plaintiff seeks compensatory damages of $146,125.00, with interest from August 20, 2006, costs and disbursements and punitive damages.

A request for judicial intervention ("RJI") was filed on October 30, 2009, for purposes of obtaining a preliminary conference. Pursuant thereto, the case was placed on a standard track with

a standards and goals date of October 30, 2010. A preliminary conference was held on December 23, 2009. In the preliminary conference order entered at such conference, the court ordered, in pertinent part, that: (1) the parties were permitted to serve interrogatories "per CPLR"; (2) defendant was to furnish to plaintiff within 30 days authorizations for all bank accounts "owned by decedent . . . on 11/3/03 to the time of her death"; (3) demands for bills of particulars were to be served by both parties by February 15, 2010, and responses thereto were to be provided by March 30, 2010; (4) witness exchanges were to be made by March 30, 2010; (5) depositions were to be taken on April 30, 2010; and (6) defendant was directed to serve her amended answer by January 30, 2010. The end date for disclosure was set as July 23, 2010, and the note of issue filing date was set as July 30, 2010. A compliance conference was scheduled for May 5, 2010.

Thereafter, on or about January 14, 2010, defendant served her amended answer. Plaintiff served her demand for a bill of particulars on or about February 11, 2010, and her witness disclosure on or about March 31, 2010.

At the time of the compliance conference on May 19, 2010, which had previously been adjourned due to the failure of defendant's counsel to appear, depositions had not yet been conducted pursuant to the date set in the preliminary conference order. In an order entered at that conference, a new date for the parties' depositions was set for June 17, 2010, and a status conference was scheduled for July 14, 2010. As of the July 14, 2010 status conference date, the parties' depositions had still not been conducted. According to plaintiff, the depositions had been rescheduled by defendant from the date of June 17, 2010 to June 24, 2010, and then cancelled by defendant due to her absence from the country. In the July 14, 2010 status conference order, a new date of August 19, 2010, was set for the depositions and the court directed that no adjournments were permitted without court approval. The note of issue filing date was extended to September 30, 2010, and marked final. A further status conference was scheduled for September 15, 2010.

Depositions of the parties went forward on August 19, 2010. Plaintiff served a post-deposition demand for discovery and inspection ("D&I") on September 14, 2010. Due to this outstanding demand, at the September 15, 2010 status conference, the note of issue filing date was again extended to October 15, 2010. After adjournments on October 13 and October 20, 2010, a further status conference was held on October 27, 2010, and another conference scheduled for November 3, 2010, which was adjourned to November 10, 2010, all due to defendant's failure to

serve her response to plaintiff's D&I or defense counsel's failure to appear (notably the case was now extending beyond the standards and goals date).

In a letter to plaintiff's counsel dated November 4, 2010, defendant's counsel indicated that defendant's supplemental response to plaintiff's D&I had been forwarded by mail under separate cover. Oddly, defense counsel also makes reference to the scheduling of plaintiff's deposition even though said deposition had been held. Apparently, the transcript of plaintiff's deposition had not been forwarded to defense counsel office by the court reporting service due to defense counsel's failure to pay for such transcript. Thereafter, under cover of letter dated November 8, 2010, and sent by regular mail, defense counsel sent defendant's affidavit responding to plaintiff's D&I, together with a first set of interrogatories. That same date, defense counsel also sent by facsimile to plaintiff's counsel a copy of defendant's affidavit responding to the D&I, and the first set of interrogatories. By letter dated November 10, 2010, plaintiff's counsel rejected the first set of interrogatories claiming that defendant's right to any outstanding discovery had been waived by counsel's failure to raise the matter at any prior conference. It is undisputed that counsel for the parties executed a stipulation dated November 9, 2010, which provided that "since plaintiff's counsel is now in receipt of defendant's affidavit, all discovery is now complete." The stipulation provided further that the parties would not be appearing for the scheduled status conference on November 10, 2010, and the plaintiff would file the note of issue. The note of issue and certificate of readiness were served and filed on November 12, 2010, and indicated that there were no outstanding discovery requests and all discovery was complete.

By notice of motion dated December 2, 2010, served December 3, 2010, and filed with the court on December 15, 2010, defendant seeks to vacate the note of issue and certificate of readiness claiming that the first set of interrogatories was properly served by facsimile and by regular mail on November 8, 2010, and that plaintiff failed to either seek a protective order with respect thereto or to serve responses. Accordingly, defendant contends that the certificate of readiness contains an erroneous statement that all discovery is complete. Notwithstanding the relief sought of vacatur, defense counsel in her supporting affirmation states that defendant has no objection to permitting the case to remain on the trial calendar while plaintiff responds to her interrogatories. Defense counsel avers that she "inadvertently" executed the November 9, 2010 stipulation "not realizing that pl [sic] would interpret that to mean that we are waiving responses to Interrogatories served one day

early [sic]. I was never def [sic] intention by executing the stipulation to forego this discovery" (Affirmation of Kristen N. Reed, Esq. in Support of Motion, ¶ 7).

Plaintiff opposes the motion. Although plaintiff acknowledges receiving the defendant's request for interrogatories one day prior to the note of issue filing deadline, she contends that service of such demand was untimely as they were served beyond the deadlines set for disclosure in the court orders and defendant had made no mention of her intent to serve interrogatories even though the position taken by defendant at numerous court conferences was that the only outstanding discovery was plaintiff's deposition (even though such deposition had been held) and counsel did not contest plaintiff's position at those same conferences that the only outstanding discovery was defendant's response to plaintiff's post-deposition D&I. Since defendant failed to exercise diligence in serving her request for interrogatories, plaintiff claims that defendant must be deemed to have waived such discovery.

Under section 202.21 (e) of the Uniform Rules for Trial Courts (22 NYCRR), any party to an action may move within twenty (20) days of service of a note of issue and certificate of readiness to vacate the note of issue upon an affidavit showing in what respects the case is not trial ready. "Where a party timely moves to vacate a note of issue, it need only show that 'a material fact in the certificate of readiness fails to comply with the requirements of . . . section [202.21] in some material respect'" [citations omitted] (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006]).

As a threshold issue, the court finds that defendant's motion to vacate the note of issue is untimely. Although defendant contends that the instant motion was filed on December 3, 2010, the appropriate fee therefor was not paid until December 15, 2010. Thus, the motion was not technically before the court until the motion filing fee was paid and, therefore, the motion may only be deemed filed as of the latter date. The 20-day period within which a motion to vacate the note of issue must be made is measured from the date of service of the note of issue and certificate of readiness, not the date of receipt (22 NYCRR § 202.21 [e]). Accordingly, defendant's motion, filed 33 days after the filing of the Note of Issue, must be deemed to be untimely.

A second method for obtaining post-note of issue discovery after expiration of the 20-day period of 22 NYCRR § 202.21 (e) is pursuant to the more stringent standard of 22 NYCRR § 202.21 (d) which permits the court to authorize additional discovery "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which

require additional pretrial proceedings to prevent substantial prejudice" (*see generally Tirado v Miller,* 75 AD3d 153, 157 [2d Dept 2010]; *Schroeder v Iesi NY Corp.*, 24 AD3d 180, 181 [1st dept 2005]).

Here, it is clear that this method of obtaining post-note of issue disclosure is not available to defendant. The requisite "unusual or unanticipated circumstances" have not been demonstrated. Moreover, defendant must be deemed to have waived her right to the discovery sought by having failed to serve her request for interrogatories at any time after the December 2009 preliminary conference until the eve of the filing of the note of issue, which had been extended several times and was ultimately extended, contrary to defendant's contention, beyond the standards and goals date for this action, and which was also four months beyond the date set for such filing in the preliminary conference order. Waiver of such discovery also stems from defendant's failure to claim during the numerous court conferences that this item of discovery was outstanding and from her counsel's execution of the November 9, 2010 stipulation, to the effect that all discovery was complete, without preserving defendant's right to responses to her request for interrogatories. The court will not now permit the defendant to escape the consequences of such stipulation and further extend the completion of discovery by claiming that her execution thereof was "inadvertent".

Accordingly, it is

ORDERED, that the defendant's motion to vacate plaintiff's Note of Issue and Certificate of Readiness and strike the case from the trial calendar is denied

This shall constitute the decision and order of the court.

DATED: 1/18/11

ENTER,

O. PETER SHERWOOD
J.S.C.