

Kestenbaum v Goldson
2012 NY Slip Op 30013(U)
January 5, 2012
Supreme Court, Queens County
Docket Number: 27898/2005
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

ALAN KESTENBAUM, ESQ. etc.,
Plaintiff,

Index
No. 27898 2005

- against -

Motion
Dates Nov. 29 & Dec. 13, 2011

ANDREW L. GOLDSON, et al.,
Defendants.

Motion
Cal. Nos. 17 & 21

Motion
Seq. Nos. 10 & 11

The following papers numbered 1 to 19 read on this motion by plaintiff for an order pursuant to CPLR 6513 extending the notice of pendency filed in this action on December 30, 2005, and extended for another three years pursuant to an order of this court entered on December 16, 2008; and on this cross motion by defendant RB Sunset, Inc., for an order dismissing the complaint for failure to prosecute pursuant to CPLR 3211 and 3216; and on this separate motion by plaintiff for an order temporarily extending the notice of pendency pending the determination of the aforementioned motion and cross motion (marked submitted on November 29, 2011: motion sequence number 10).

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Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This court, in the order to show cause dated November 23, 2011, granted plaintiff's motion to temporarily extend the notice of pendency filed in this action, pending the hearing and determination of the motion to extend the notice of pendency. Said order to show cause was served on all parties, and defendant RB Sunset, Inc., pursuant to a stipulation dated November 17, 2011, agreed that it would not oppose said order to show cause.

This action was commenced on December 30, 2005 and a notice of pendency was filed in the office of the Clerk of Queens County on said date. The original summons and complaint were later superceded by a supplemental amended summons and complaint, dated July 2, 2007 (*Goldson I*). Plaintiff commenced the action entitled *Kestenbaum, etc. v Malvia Walker, et. al.* (Index No. 11832/2007), on May 8, 2007 (*Goldson II*).

This court, in an order dated December 4, 2008, and filed on December 16, 2008, granted plaintiff's unopposed motion to extend the notice of pendency for another three years from the date of filing.

Goldson I and *Goldson II* were combined for joint trial pursuant to an order dated January 19, 2009. In *Goldson I*, the court appointed Alan Kestenbaum, Esq., as Guardian Ad Litem for plaintiff Percival Goldson, and amended the caption accordingly, pursuant to an order dated December 21, 2009 and entered on December 30, 2009. In *Goldson II*, this court again appointed Alan Kestenbaum, Esq., as Guardian Ad Litem for plaintiff Percival Goldson, and amended the caption accordingly, pursuant to an order dated December 24, 2009, and filed on January 6, 2010.

Plaintiff's motion to extend the notice of pendency is ostensibly opposed by a single defendant, RB Sunset, Inc., who has also cross moved in opposition, and seeks to dismiss the complaint for failure to prosecute pursuant to CPLR 3216. RB Sunset, Inc. served a demand to prosecute, dated August 3, 2011 on counsel for plaintiff which was delivered on August 8, 2011. The demand to prosecute was executed by Rod Biermann, Esq., of The Dorf Law Firm LLP.

RB Sunset, Inc., filed the within notice of cross motion and supporting affirmation and memorandum of law with the Clerk of the Court on November 9, 2011. The cross motion and supporting papers were served on counsel for plaintiff by regular mail on November 8, 2011. The cross motion and supporting papers were filed and executed by Rod Biermann, Esq., of The Dorf Law Firm LLP.

Both the demand to prosecute and the notice of cross motion contain the prior caption in this action and do not reflect Mr. Kestenbaum's appointment as Guardian Ad Litem for Percival Goldson.

Plaintiff is represented in this action by the St. Vincent DePaul Legal Program, Inc., Elder Law Clinic of St. John's University of Law (Elder Law Clinic). Upon receipt of the August 3, 2011 demand to prosecute, the Elder Law Clinic called Mr. Biermann, as it had not received a notice of substitution of counsel. The Dorf Law Firm LLP, in a letter dated August 26, 2011 enclosed a copy of an executed consent to change attorney form dated April 29, 2011, pertaining to another case involving Percival Goldson (Index No. 23903/05). The Elder Law Clinic mailed and faxed a letter to Mr. Biermann on September 1, 2011 informing him of this error. After making several telephone calls to Mr. Biermann, the Elder Law Clinic received a consent to change attorney form, which contained the prior caption in this action, and did not reflect Mr. Kestenbaum's appointment as Guardian Ad Litem.

On October 19, 2011, The Dorf Law Firm, LLP, sent plaintiff's counsel a second demand to prosecute, dated October 14, 2011, which also contains an incorrect caption.

Although a client may, as a matter of public policy, discharge an attorney at any time, with or without cause (*Demov, Morris, Levin & Shein v Glantz*, 53 NY2d 553, 556 [1981]), an attorney of record in an action may only withdraw or be changed or discharged by an order of the court or by filing with the clerk a consent form signed by the retiring attorney and acknowledged and signed by the party. (CPLR 321 [b]; *Hawkins v Lenox Hill Hosp.*, 138 AD2d 572 [1988]; *Moustakas v Bouloukos*, 112 AD2d 981 [1985]; *Hess v Tyszko*, 46 AD2d 980 [1974]). Until an attorney of record is discharged in the manner provided by law, the attorney of record continues to represent that party and, as to adverse parties, the authority of the attorney of record continues unabated (see *Hess v Tyszko, supra*).

The court's records reveal that the subject consent to change attorney form (albeit again with the incorrect caption) was not filed with the Clerk of the Court until November 14, 2011. There is no evidence that said form has been served on all of the parties in this action. Therefore, prior to November 14, 2011, Edward Kesselman, Esq., was the attorney of record for RB Sunset, Inc.

The August 3, 2011 demand to prosecute, the October 19, 2011 demand to prosecute, and the within cross motion were all served on plaintiff prior to the filing of the consent to change attorney. However, the mere mailing of the subject form to the Elder Law Clinic, which it received on October 4, 2011, could not effectuate a discharge of Mr. Kesselman as the attorney of record for RB Sunset, Inc. Therefore, as The Dorf Law Firm LLP was not the attorney of record at the time each of the demands to prosecute and the cross motion were

served, it lacked the authority to act on behalf of RB Sunset, Inc. Thus, these two demands to prosecute, as well as the cross motion herein, were unauthorized and without effect.

It is noted that defendant Michael Garber, in opposition to the cross motion, asserts that *Goldson I* was previously dismissed pursuant to CPLR 3404. This claim is rejected. When the note of issue has been vacated, the case reverts to its pre-note of issue status, and CPLR 3404 is not applicable (see *Pucar v L.H. Charney Assocs., LLC*, 79 Ad3d 996 [2010]; *Lane v New York City Hous. Auth.*, 62 AD3d 961 [2009]; *Andre v Bonetto Realty Corp.*, 32 AD3d 973, 974-975 [2006]; *Reitman v St. Francis Hosp.*, 2 AD3d 429, 430 [2003]; *Carte v Segall*, 134 AD2d 396, 397 [1987]).

Goldson I and *Goldson II* center around the same transaction, an alleged fraudulent power of attorney, deed transfer, and sale of the real property on September 16, 2005 to defendant Triclo, Inc., without the knowledge and consent of the owners, Percival Goldson and Andrew Goldson. Discovery in this action did not progress until 2008, due to a variety of reasons pertaining to the withdrawal of Percival Goldson's former counsel and a motion to dismiss by a former defendant. In 2007, plaintiff was not permitted to join certain defendants and was directed to commence a separate action, which resulted in *Goldson II*. In 2008, significant discovery and motion practice occurred in both actions prior to the first extension of the notice of pendency.

Since the first extension of the notice of pendency in December 2008, the parties have conducted a significant amount of discovery in this action and in *Goldson II*, including the deposition of RB Sunset, Inc.'s witness. Once these two actions were consolidated for the purposes of a joint trial on January 16, 2009, depositions and discovery continued, and the Elder Law Clinic served documents on the parties in both actions. Although *Goldson II* was stayed pending the appointment of the guardian ad litem, depositions proceeded in *Goldson I* in the Spring and Fall of 2009. Delays occurred in appointing a guardian ad litem due to events beyond the control of the parties, and the guardian ad litem was appointed in *Goldson I* in late December 2009, and in early January 2010 in *Goldson II*. Plaintiff's counsel thereafter took steps to lift a stay that had been imposed in *Goldson II* pending the appointment of the guardian ad litem, and a compliance conference was scheduled and held on April 13, 2010. Depositions in *Goldson II* were held throughout the remainder of 2010, and counsel for all parties attended most of the depositions. At the initiative of defendant Garber, depositions of non-parties were also held. In 2011, RB Sunset, Inc., apparently engaged new counsel, but did not effectuate this change in the manner provided in CPLR 321 (b). Some settlement discussions were also held with this defendant.

Since *Goldson I* and *Goldson II* have been combined for joint trial, a note of issue must be filed in each action. Counsel for plaintiff states that discovery is now substantially

completed in both actions, and that she is ready to file the notes of issue. However, following the vacatur of the note of issue in 2007 in *Goldson I*, this action was marked “disposed” in the court’s computer system. Plaintiff, therefore, is required to restore the action before filing a note of issue in *Goldson I*. Plaintiff’s counsel, in a letter dated November 15, 2011, informed counsel for all parties that the action could be restored pursuant to a stipulation with all of the parties consent and enclosed a copy of the stipulation. Counsel for defendant Garber, in a letter dated November 18, 2011 informed counsel for the parties that he would not sign the stipulation. On November 18, 2011, counsel for defendant Garber also served plaintiff’s counsel with a demand to prosecute the *Goldson I* action. As a result of defendant Garber’s refusal to sign the stipulation,¹ plaintiff may now be required to engage in motion practice to accomplish the restoration of *Goldson I*.

In *Goldson II*, the parties, pursuant to a stipulation dated September 2, 2010, and so-ordered by the Hon. Martin Ritholtz, are stayed from making any applications to the court pending all discovery, and are required to contact chambers upon the completion of all discovery to request that the stay be lifted and the action restored to active status, at which time the court will set a date for filing the note of issue and a time frame for motions for summary judgment. In view of this stipulation, the parties will, at the very least, need to conference this matter with Justice Ritholtz prior to the filing of a note of issue.

The court finds that plaintiff has sufficiently established that good cause exists for the successive extension of the notice of pendency.

Accordingly, plaintiff’s motion to extend the notice of pendency for another three years is granted. The previously filed notice of pendency, filed on December 30, 2005 and further extended for an additional three years by order of this court entered on December 16, 2008, shall be extended for an additional period of three years upon the filing, recording, and indexing of this order in accordance with CPLR 6513. The cross motion by defendant RB Sunset, Inc., is denied in its entirety. Plaintiff’s separate motion to temporarily extend the notice of pendency was granted by the signing of the order to show cause and by the granting herein of plaintiff’s separate motion, and no further relief is necessary with respect to said motion.

Dated: January 5, 2012

J.S.C.

1. If signed by all parties, the stipulation would still need to be so-ordered by the court in order to be restored.