

Ewart v Ewart
2012 NY Slip Op 32170(U)
August 8, 2012
Supreme Court, Suffolk County
Docket Number: 37692/2007
Judge: Joseph Farneti
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 37692/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

JAMES L. EWART, JR., MARGARET
 LAMOUREE and PATRICIA A. EWART,

Plaintiffs,

-against-

JAMES L. EWART, III and DIANE TIMM,

 Defendants.

ORIG. RETURN DATE: AUGUST 25, 2011
 FINAL SUBMISSION DATE: JANUARY 12, 2012
 MTN. SEQ. #: 007
 MOTION: MOT D

ORIG. RETURN DATE: SEPTEMBER 15, 2011
 FINAL SUBMISSION DATE: JANUARY 12, 2012
 MTN. SEQ. #: 008
 CROSS-MOTION: XMOT D

ORIG. RETURN DATE: DECEMBER 15, 2011
 FINAL SUBMISSION DATE: JANUARY 12, 2012
 MTN. SEQ. #: 009
 MOTION: MG

ORIG. RETURN DATE: DECEMBER 22, 2011
 FINAL SUBMISSION DATE: JANUARY 12, 2012
 MTN. SEQ. #: 010
 MOTION: MD

PLTF'S/PET'S ATTORNEY:

JAMES D. REDDY, ESQ.
 873 SOUTH 7TH STREET
 LINDENHURST, NEW YORK 11757
 631-225-2846

DEFT'S/RESP ATTORNEY:

LAWRENCE H. SILVERMAN, ESQ.
 350 VETERANS MEMORIAL HIGHWAY
 COMMACK, NEW YORK 11725
 631-543-5434

Upon the following papers numbered 1 to 24 read on these motions and this cross-motion TO REMOVE PROCEEDING, TO TRANSFER ACTION, TO SUBSTITUTE PARTY, TO COMPEL, AND FOR PROTECTIVE ORDERS

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Notice of Cross-motion and supporting papers 6-8; Reply Affirmation in Further Support of Motion and in Opposition to Cross-motion 9; Reply Affirmation (Corrected) 10; Notice of Motion and supporting papers 11-13; Affirmation in Opposition and supporting papers 14, 15; Reply Affirmation and supporting papers 16, 17; Notice of Motion and supporting papers 18-20; Affirmation in Opposition and supporting papers 21, 22; Reply Affirmation and supporting papers 23, 24; it is,

CA

ORDERED that the Court, *sua sponte*, has consolidated the four applications at bar for the purpose of rendering the within decision and Order; and it is further

ORDERED that this motion (seq. #007) by plaintiffs for an Order:

(1) removing to the Supreme Court the landlord/tenant proceeding currently pending before the Fourth District Court of the State of New York, County of Suffolk under Docket SMLT 11-219 concerning the right to possession of 9 Branch Drive, Smithtown, New York ("Subject Premises"), upon the ground that pursuant to CPLR 325 (b), the lower court does not have jurisdiction to declare ownership of the Subject Premises; and/or consolidating, or trying together, such proceeding with the Supreme Court action pursuant to CPLR 602 (b), where cases are pending in different courts and there are common questions of law and fact within the meaning of CPLR 602 (a), to wit: ownership of the Subject Premises, and the right to possess the Subject Premises;

(2) staying all proceedings currently pending before the Fourth District Court of the State of New York, County of Suffolk under Docket SMLT 11-219 pursuant to CPLR 326 (a), 602 (a), 2201 and Article 63; and

(3) removing this Supreme Court action and the landlord-tenant proceeding to the Surrogate's Court where there is pending probate proceeding, pursuant to New York State Constitution Article 6, section 19 (a) and/or CPLR 325 (e),

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #008) by defendants for an Order:

(1) substituting the personal representatives of the decedent in place of James L. Ewart, Jr., and amending the caption of this action accordingly;

(2) pursuant to the oral directive of this Court during a telephone conference with the parties, directing plaintiffs to produce all originals and copies of documents which are the property of defendants in their possession and control which are relevant to the issues in this action;

(3) granting plaintiffs' motion for an immediate transfer of the landlord-tenant proceeding pending in the Smithtown District Court, awarding a

judgment of possession to petitioner, directing respondents to vacate the Subject Premises forthwith and granting reasonable use and occupancy for the period from March 25, 2011 to the date of judgment;

(4) vacating so much of the Order of this Court dated March 17, 2011 which enjoined defendants from entering onto the Subject Premises;

(5) vacating the Order of this Court dated April 27, 2011 extending for three years the lis pendens in this action upon the ground that by reason of the death of plaintiff JAMES L. EWART, JR. on March 25, 2011, this action was stayed as a matter of law;

(6) directing plaintiffs' counsel to provide copies of all exhibits marked at the deposition of defendant JAMES L. EWART, III ("defendant"); and

(7) directing plaintiffs' counsel to turn over copies of all subpoenas served upon, and documents received in response from non-parties,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this motion (seq. #009) by plaintiffs for an Order, pursuant to CPLR 3103, granting a protective Order denying, limiting, conditioning, or regulating the use of a videotaped deposition of non-party witness Joan Moessner for failure to comply with the notice requirements of 22 NYCRR § 202.15, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #010) by defendants for an Order:

(1) pursuant to CPLR 3103 (a), prohibiting the disclosure of confidential employment information of defendant based upon plaintiffs' abuse of the subpoena process and to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to defendant and the Court, upon the grounds that: (a) the documents sought are not material or relevant to the issues in the instant lawsuit and violates defendant's right to privacy; (b) the subpoena purporting to require the testimony of Edward Fitzmaurice, Vice President and General Manager of Anheuser-Busch Companies, Inc. is defective on its face as not returnable before a Judge or one qualified to take testimony; (c) no notice of deposition has been served upon counsel for defendants; and (d) the subpoena allegedly appears to have been calculated to avoid the sanctions of CPLR 3103 (c) for plaintiffs' alleged prior violation of defendants' right to notice

of, and discovery and inspection of responses to non-party subpoenas served by plaintiffs; and

(2) pursuant to CPLR 3103 (c), suppressing any evidence previously obtained by plaintiffs in violation of CPLR 3120 (2), and for costs and monetary sanctions,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter.

As recited in prior Orders in this matter, plaintiffs commenced this action asserting various claims against defendants sounding in fraud, conversion, and the imposition of constructive trusts on two parcels of real property including the Subject Property as well as 65 Stony Hill Path, Smithtown, New York. The plaintiffs herein are the father and sisters of defendant. The underlying complaint alleges, among other things, that defendant wrongfully converted funds from bank accounts held jointly by father and son, and utilized said funds towards the purchase of the Stony Hill property. Plaintiffs further allege that defendant exercised undue influence over his father and abused his confidential relationship with his father in connection with a deed dated June 23, 1999, in which the father transferred the Subject Property to defendant while reserving a life estate for himself.

The parties have now filed the instant applications seeking the relief described hereinabove. The Court will address the applications *seriatim*.

Initially, plaintiffs' motion (#007) is **GRANTED** to the extent that the landlord/tenant proceeding currently pending before the Fourth District Court of the State of New York, County of Suffolk under Docket SMLT 11-219, concerning the right to possession of the Subject Premises, is hereby removed to this Court and consolidated with the instant action for purposes of a joint trial, pursuant to CPLR 602. Defendants had conditionally consented to this relief, provided that there was no subsequent transfer to the Surrogate's Court. However, by correspondence dated February 6, 2012, plaintiffs withdrew that branch of their motion which sought to remove/transfer the consolidated action to the Surrogate's Court.

Next, defendants have made a cross-motion (seq. #008) seeking, among other things, to substitute the personal representatives of the decedent, JAMES L. EWART, JR., and to amend the caption accordingly; to vacate so much of the Order of this Court dated March 17, 2011, which enjoined defendants from entering onto the Subject Premises; and to vacate the Order of this Court

dated April 27, 2011, extending for three years the lis pendens in this action. By correspondence dated February 14, 2012, defendants withdrew those branches of this cross-motion that sought the turnover of defendant's personal documents, and the marked exhibits from the deposition of defendant.

With respect to the application to amend the caption, defendants inform the Court that plaintiff, JAMES L. EWART, JR., died on March 25, 2011. Plaintiffs MARGARET LAMOUREE and PATRICIA A. EWART were appointed Executors of the Estate of JAMES L. EWART, JR. by the Surrogate's Court of Suffolk County on June 22, 2011. Plaintiffs had not moved to amend the caption to account for his death, but now consent to the substitution and amendment. Accordingly, the caption shall now read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
MARGARET LAMOUREE and PATRICIA A. EWART,
as Executors of the Estate of JAMES L. EWART, JR.,
deceased, and MARGARET LAMOUREE and
PATRICIA A. EWART, individually,

Plaintiffs,

- against -

JAMES L. EWART, III and DIANE TIMM,

Defendants.

----- X

Regarding defendants' request to vacate so much of the Order of this Court dated March 17, 2011, which enjoined defendants from entering onto the Subject Premises, defendants argue that they only consented to stay away from the Subject Property while the father was alive. However, now that the father is deceased, defendant seeks to be restored to the Subject Property based upon his remainder interest derived from the June 23, 1999 deed at issue herein. Plaintiffs argue that given the substantial allegations of undue influence and the abuse of the confidential relationship alleged, the deed is presumptively void.

Within the Order dated March 17, 2011, this Court noted that plaintiffs had alleged that on multiple occasions defendant had damaged the

Subject Property, and had taken/removed/stolen items from the Subject Property, including dining room and living room furniture. Defendant had not denied such conduct. In addition, defendant indicated that he had no intention of returning to the Subject Property. The Court is aware that defendant is now the purported fee owner of the Subject Premises under the June 23, 1999 deed; however, in view of the alleged abuse of the relationship between defendant and his father, and the allegations in the complaint, defendant has the burden of establishing that the deed was not the product of undue influence (*see Alston v Gregory*, 281 AD2d 440 [2001]; *Hennessey v Ecker*, 170 AD2d 650 [1991]; *see also Gordon v Bialstoker Center & Bikur Cholim*, 45 NY2d 692 [1978]; *Allen v La Vaud*, 213 NY 322 [1915]). Furthermore, “[t]he purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (*Ruiz v Meloney*, 26 AD3d 485, 486 [2006]). “The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2011]).

In view of the foregoing, that branch of defendants’ motion seeking to vacate so much of the Order of this Court dated March 17, 2011, is **DENIED**.

Further, that branch of defendants’ motion to vacate the Order of this Court dated April 27, 2011 extending for three years the lis pendens in this action, is **DENIED**. It is well-settled that the death of a party divests a court of jurisdiction to conduct proceedings in an action as to that party until a proper substitution has been made pursuant to CPLR 1015 (a), and any Order rendered after the death of a party and before the substitution of a legal representative is generally deemed a nullity (*see e.g. Sample v Temkin*, 87 AD3d 686 [2011]). However, it has been held that the jurisdictional issue may be waived under special circumstances, where, as here, there has been active participation in the litigation by the personal representatives who would have been substituted for the decedent (*see Griffin v Manning*, 36 AD3d 530 [2007]; *Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.*, 112 AD2d 819 [1985]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d 59 [1985]). Based upon the foregoing, the Court finds that the action was not abated as to plaintiffs MARGARET LAMOUREE and PATRICIA A. EWART, who have been actively prosecuting this action, and the Order of April 27, 2011 extending the lis pendens protected the surviving plaintiffs’ claimed rights to the Subject Premises. Thus, the Court declines to vacate its prior Order.

Lastly, plaintiffs’ counsel has indicated to the Court that he will produce copies of subpoenas served and documents in the form received from non-parties, within thirty days. As such, plaintiffs are directed to produce such

discovery with thirty (30) days of the date of service of the instant Order upon plaintiffs with notice of entry, if plaintiffs' counsel has not produced such discovery already.

Plaintiffs subsequently filed a motion (seq. #009) for a protective Order, pursuant to CPLR 3103, denying, limiting, conditioning, or regulating the use of a videotaped deposition of non-party witness, Joan Moessner, for failure to comply with the notice requirements of 22 NYCRR § 202.15. Plaintiffs indicate that defendants served their opposition to this motion in violation of CPLR 2214, and thus it has not been considered by the Court. Plaintiffs argue that defendants' notice to take the deposition of Ms. Moessner failed to indicate that the deposition was to be videotaped, or the name and address of the videotape operator and of the operator's employer, if any (see 22 NYCRR § 202.15 [c]). Moreover, plaintiffs contend that pursuant to CPLR 3103 (b), service of this motion suspended disclosure of the particular matter in dispute, to wit: the videotaping of the deposition of Ms. Moessner. Plaintiffs served defendants with this motion on November 10, 2011, the noticed date of the deposition.

The Court has reviewed defendants' "Notice of Deposition of Witness" dated October 11, 2011, and finds that it does not comply with the notice requirements of a videotaped deposition pursuant to 22 NYCRR § 202.15 (c). The notice makes no mention that the deposition would be videotaped, or the name and address of the videotape operator and of the operator's employer, if any. Additionally, plaintiffs claim prejudice in that they would have "prepared completely differently" had they known the deposition was to be videotaped.

Based upon defendants' defective notice to take deposition in violation of 22 NYCRR § 202.15 (c), and upon the suspension of disclosure of the particular matter, pursuant to CPLR 3103 (b), when plaintiffs served this motion, plaintiffs' application for a protective Order is **GRANTED** to the extent that neither plaintiffs nor defendants may use the videotape of the deposition of Joan Moessner for any purpose in the instant action.

The final application at bar is motion (seq. #010) by defendants for an Order, pursuant to CPLR 3103 (a), prohibiting the disclosure of confidential employment information of defendant based upon plaintiffs' alleged abuse of the subpoena process, and to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to defendant. Defendants argue, among other things, that the documents sought are not material or relevant to the issues in the instant lawsuit and violate defendant's right to privacy. However, as this motion relates to disclosure, defendants were required

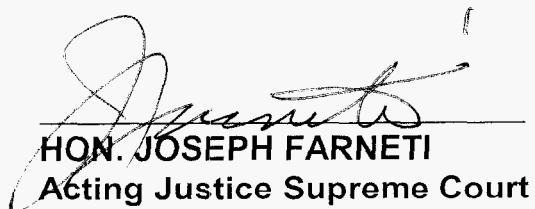
to submit an affirmation indicating that defendants' counsel has conferred with plaintiffs' counsel in a good faith effort to resolve the issues raised in the motion (22 NYCRR § 202.7 [a]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055 [2006]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [2006]; *Cestaro v Mun Yuen Roger Chin*, 20 AD3d 500 [2005]; *Diel v Rosenfeld*, 12 AD3d 558 [2004]). Such affirmation must indicate the time, place and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with plaintiffs' counsel was held (22 NYCRR § 202.7 [c]). Defendants failed to annexed such a good faith affirmation, and plaintiffs have raised this as an objection to the motion.

Accordingly, this motion by defendants for a protective Order is **DENIED** as procedurally defective.

Any relief requested by the parties but not specifically granted herein is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: August 8, 2012



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION