

**Orosz v Orosz**

2012 NY Slip Op 33756(U)

February 8, 2012

Supreme Court, Westchester County

Docket Number: 1127/09

Judge: Joan B. Lefkowitz

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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 2-8 2012  
WESTCHESTER  
COUNTY CLERK

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

-----X  
MARGARET J. OROSZ,

Plaintiff,

DECISION & ORDER

-against-

Index No. 1127/09

TIBOR OROSZ, MARIA OROSZ, WILLIAM  
MAN, WILLIAM SHARROCKS, NATIONAL  
CITY BANK, HSBC BANK USA, NATIONAL  
ASSOCIATION, and AMERICAN HOME  
MORTGAGE SERVICING, INC.,

FILED

FEB - 8 2012

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHE

Defendants.

-----X  
LEFKOWITZ, J.

The following papers numbered 1 to 6 were read on this application by plaintiff for an order striking defendant William Sharrocks' answer based upon his failure to provide a sufficient response to plaintiff's combined discovery demands as directed by court order dated December 5, 2011.

Notice of Submission of Order - Affidavit of Noncompliance	
-Proposed Order - Exhibits	1-5
Letter by defendant William Sharrocks in Opposition	6

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

In this action, plaintiff seeks, inter alia, to set aside fraudulent conveyances of certain real property allegedly transferred by defendants Tibor Orosz and Maria Orosz to prevent plaintiff from enforcing a judgment against them in the amount of \$1,993,003.01<sup>1</sup>, an order declaring mortgages on the real property purportedly taken by defendant William Sharrocks to be null and void, and monetary damages. Defendants Tibor Orosz and Maria Orosz failed to answer. By answer dated March 24, 2009, defendant William Sharrocks denied all of the allegations, alleged lack of personal jurisdiction, and sought legal costs, expenses and punitive damages against

<sup>1</sup> Plaintiff was awarded judgment against defendants Tibor and Maria Orosz in *Margaret Orosz v Tibor Orosz, Maria Orosz, 22 Huntington Street LLC, Loyalty Investors LLC, Loyalty Management LLC, Spring Street LLC and Westland Street Investors LLC* (Index No. 11889/01) by the Court (Giacomo, J.) by Decision and Order entered December 19, 2007.

plaintiff. By answer dated May 5, 2007, defendant William Man also denied all of the allegations, alleged lack of personal jurisdiction, and sought legal costs, expenses and punitive damages against plaintiff.

By order dated December 5, 2011, this court, inter alia, (1) denied that branch of plaintiff's motion which sought to strike the answer of defendant Sharrocks or preclude him from offering evidence or testimony at trial, (2) granted that branch of plaintiff's motion seeking an order compelling defendant Sharrocks to respond to plaintiff's combined discovery demands and directed defendant Sharrocks to provide a response on or before December 23, 2011, and (3) directed plaintiff to file an affidavit of noncompliance and a proposed order striking defendant Sharrocks' answer in the event defendant Sharrocks failed to provide a response to plaintiff's combined discovery demands. Therein, this court directed defendant Sharrocks to provide the following if discovery demanded was not in his possession: "[D]efendant Sharrocks shall provide plaintiff with an affidavit setting forth whether the documents requested were in his possession at one time and the nature of those documents, the details of the search made for the requested documents, and any knowledge as to the whereabouts of the documents not in his possession." This court further noted that "[a] party has an obligation to exercise due diligence by making reasonable inquires and consulting available sources of information in order to provide requested documents (*see 9H Realty Corp. v Zurich Ins. Co.*, 89 AD2d 584 [2d Dept 1982] [checking of own records does not constitute due diligence]; *Creekmore v PSCH, Inc.*, 26 Misc3d 1217 [A] [Sup Ct, New York County 2010])."

On or about December 23, 2011, plaintiff's counsel received a document from pro se defendant Sharrocks titled "Defendant Sharrocks answer to discovery request of Plaintiff." No documents were attached to the response. Defendant Sharrocks asserted that he was not in possession of any documents relating to the mortgages or financing of the subject property, and that he had given all documents in his possession to defendant Tibor Orosz for the purposes of resolving the foreclosure on the subject property. Defendant Sharrocks objected to the remaining document demands by (1) claiming his rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments since plaintiff has alleged defendant Sharrocks was involved in a criminal conspiracy against her, (2) asserting that plaintiff had no right to his tax returns, other documents relating to his income, or information as to his assets, and again invoke his rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments, and (3) the demands constitute a fishing expedition.

Plaintiff has now submitted an affidavit of noncompliance and a proposed order striking defendant Sharrocks' answer. Plaintiff contends that defendant Sharrocks' response was in direct contravention of this court's order dated December 5, 2011, since he had not provided any documents and has asserted baseless objections for the first time. With respect to defendant Sharrocks' invocation of his right against self incrimination, plaintiff asserts that defendant Sharrocks' blanket refusal to provide discovery without demonstrating the grounds for the invocation of the right is an insufficient response. Accordingly, plaintiff submits a proposed order striking defendant Sharrocks' answer.

By letter, pro se defendant Sharrocks opposes the application. In his letter, defendant Sharrocks addresses issues raised on plaintiff's original motion and asserts that he has steadfastly

maintained his right to invoke his rights under the 5<sup>th</sup> Amendment. As to his 5<sup>th</sup> Amendment claim, defendant Sharrocks apparently asserts that he is entitled to invoke his 5<sup>th</sup> Amendment right against self incrimination since plaintiff has alleged that he is involved in “the issuances of fraudulent mortgages, and other nefarious acts, perpetrated to defraud the Plaintiff.” Defendant Sharrocks further states in his letter that he is not in possession of “any of these documents” which he gave to Tibor Orosz, plaintiff’s brother. Defendant Sharrocks states he is willing to attend a hearing on his 5<sup>th</sup> Amendment rights. Defendant Sharrocks also asserts that he has not seen the records in plaintiff’s possession and that plaintiff has failed to show the validity of her claims. Therefore, defendant Sharrocks asserts that plaintiff does not have a right to invade his privacy and finances until plaintiff makes a legitimate showing of the need for that information.

Although defendant Sharrocks’ letter is not in evidentiary form as it was not sworn to before a Notary Public, the court has considered his opposition to the present application contained therein insofar as defendant Sharrock is appearing pro se.

Plaintiff correctly contends that “a blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances, and ... the privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer” (*Chase Manhattan Bank, Natl. Assn. v Federal Chandros, Inc.*, 148 AD2d 567, 568). “[W]hen the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate” (*State of New York v Carey Resources*, 97 AD2d 508, 509). Therefore, to “invoke the protections of the Fifth Amendment, a party must make a particularized objection to each discovery request” (*Chase Manhattan Bank, Natl. Assn. v Federal Chandros, Inc.*, 148 AD2d at 568; *see Matter of Astor*, 62 AD3d 867, 869).

Contrary to the contention of defendant Sharrocks, plaintiff’s allegations of conspiracy do not give rise to “unique circumstances” permitting a blanket invocation of their Fifth Amendment privilege against self-incrimination under the circumstances of this case. Notably, defendant Sharrocks has failed to allege that a criminal investigation relating to the underlying facts of this matter are currently pending or that criminal charges against him are currently pending. Additionally, defendant Sharrocks has failed to demonstrate a factual predicate for his invocation of the privilege against self-incrimination or offered any particularized objections to the discovery demands. Accordingly, defendant Sharrocks has failed to demonstrate the validity of his assertion of his privilege against self incrimination.

Moreover, contrary to defendant Sharrocks’ contention, the allegations set forth in plaintiff’s complaint are sufficient to demonstrate a need for discovery as to his personal finances, including his tax returns and information as to his assets.

Finally, defendant Sharrocks’ response that the documents regarding the mortgages are not in his possession since he gave them to Tibor Orosz is also insufficient. Although defendant Sharrocks made an attempt to comply with this court’s prior order, the order also directed defendant Sharrocks to provide specifics with respect to any documents not in his possession,

including “the nature of those documents, the details of the search made for the requested documents, and any knowledge as to the whereabouts of the documents not in his possession.”

“The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party’s failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). Under the circumstances of this case, it is not clear that pro se defendant Sharrocks’ invocation of the privilege against self-incrimination and failure to produce any of the demanded documents was an intentional effort to thwart discovery or merely based upon a misinterpretation of the privilege against self-incrimination and his obligation to produce the demanded discovery. Preclusion is, nevertheless, appropriate since defendant Sharrocks failed to provide plaintiff with demanded discovery and it would, therefore, be unfair to allow defendant Sharrocks to offer evidence at trial.

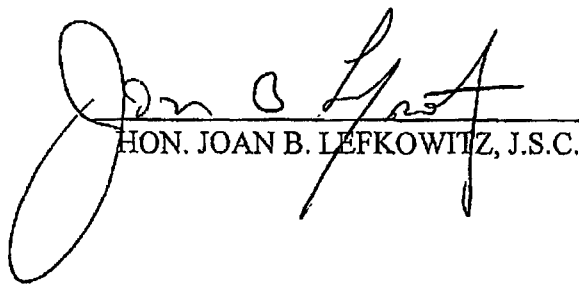
In view of the foregoing, it is

ORDERED that defendant William Sharrocks is precluded from offering any evidence or testimony at trial; and it is further

ORDERED that counsel and defendant Sharrocks shall appear for a conference in the Compliance Part, Courtroom 800, on February 27, 2012.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York  
February 8, 2012

  
HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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