

Orosz v Orosz

2012 NY Slip Op 33757(U)

April 2, 2012

Supreme Court, Westchester County

Docket Number: 1127/09

Judge: Francesca E. Connolly

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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 4-3 2012 WESTCHESTER COUNTY CLERK

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

MARGARET J. OROSZ,

Plaintiff,

-against-

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

Defendants.

FILED APR - 3 2012 TIMOTHY C. IDONI COUNTY CLERK COUNTY OF WESTCHESTER

SHORT FORM ORDER

Index No. 1127/09 Motion Date: Apr. 2, 2012

Seq. No. 5

CONNOLLY, J.

The following papers numbered 1 to 12 were read on this motion by plaintiff for (1) an order, pursuant to CPLR 3126, striking defendant William Man's answer and/or precluding defendant William Man from producing in evidence any items or testimony for failing to provide discovery pursuant to the Compliance Conference Order of the court; and (2) an order, pursuant to CPLR 3124, compelling defendant William Man to respond to plaintiff's combined discovery demands dated February 3, 2011.

Order to Show Cause - Affirmation in Support - Exhibits	1-11
Affidavit of Service	12

Upon the foregoing papers and the proceedings held on April 2, 2012, the motion 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 \$1,993,003.01¹, an order declaring

¹ 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.

mortgages on the real property purportedly taken by defendant William Sharrocks to be null and void, and monetary damages. Plaintiff alleges that defendant Maria Orosz conveyed the subject property to defendant William Man, a residential mortgage broker and friend of defendants Orosz, while plaintiff's underlying action against defendants Orosz for, inter alia, conversion and fraud was pending. Plaintiff alleges that defendant Man then transferred the subject property to defendant William Sharrocks.

Defendants Tibor Orosz and Maria Orosz failed to answer. By answer dated March 24, 2009, defendant Sharrocks denied all of the allegations, alleged lack of personal jurisdiction, and sought legal costs, expenses and punitive damages against plaintiff. By answer dated May 5, 2007, defendant Man also denied all of the allegations, alleged lack of personal jurisdiction, and sought legal costs, expenses and punitive damages against plaintiff.

On February 11, 2011, plaintiff filed, inter alia, an Affidavit of Service of Notice of Deposition and Combined Discovery Demands dated February 3, 2011 on defendant William Man by Federal Express on February 7, 2011. The combined discovery demands included Plaintiff's First Notice to Produce For the Purposes of Discovery and Inspection, Plaintiff's Demand for Witness Information, and Plaintiff's Demand for Statements. Defendant Man did not respond to the demands. Plaintiff's counsel asserts that he filed a request for a preliminary conference on or about March 17, 2011.

On May 3, 2011, a preliminary conference was held. Counsel for plaintiff, defendant Man and defendant American Home Mortgage Servicing, Inc. appeared. The court (Lefkowitz, J.), by Preliminary Conference Order of the same date, directed, in relevant part, all depositions be completed by September 30, 2011, demands for discovery be served by June 3, 2011, and responses to discovery demands served on or before July 15, 2011.

On October 26, 2011, a compliance conference was held. Defendant Man appeared at the conference by counsel. By Compliance Conference Order dated October 27, 2011, the court (Lefkowitz, J.) directed defendant Man to respond to plaintiff's discovery and inspection demands on or before November 18, 2011, and directed all party depositions be completed on or before December 2, 2011.

Counsel for plaintiff alleges that on or about November 18, 2011, he had a telephone conversation with defendant Man's counsel regarding settlement. Counsel for defendant Man advised counsel for plaintiff that if a settlement was not reached, defendant Man would be invoking his Fifth Amendment right against self incrimination and would not provide any discovery or appear for a deposition. Thereafter, two compliance conferences were adjourned.²

² By decision and order dated February 9, 2012, the court (Lefkowitz, J.) precluded defendant Sharrocks' from offering any evidence or testimony at trial in light of his willful failure to provide demanded discovery.

On February 27, 2012, a compliance conference was held. Plaintiff's counsel asserts that, at the conference, counsel for defendant Man represented that he would not be providing any response to plaintiff's discovery demands based upon Fifth Amendment grounds. The court directed counsel for defendant Man to provide a letter to plaintiff's counsel to that effect, but no letter was received by plaintiff's counsel. At the compliance conference, the court issued a Briefing Schedule for the present motion.

Plaintiff now moves for relief based upon defendant Man's alleged willful failure to provide discovery. Plaintiff asserts that the conclusory objection to the discovery demands by counsel for defendant Man at the compliance conference, which were based upon the Fifth Amendment, should be disregarded. Plaintiff contends that defendant Man has failed to demonstrate the grounds for invoking the privilege and his blanket refusal to provide discovery based upon the Fifth Amendment privilege is an attempt to forestall discovery. Plaintiff contends that since she has been prejudiced by defendant Man's willful failure to comply with court ordered discovery, his answer should be stricken or he should be precluded from offering evidence. Alternatively, plaintiff seeks an order compelling defendant Man to respond to plaintiff's combined discovery demands.

No opposition to the motion has been received by the court.

CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "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]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Under the circumstances of this case, defendant Man's failure to provide demanded discovery in contravention of a court order, in the absence of any excuse, warrants an order precluding him from offering evidence at trial. The court notes 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 [2d Dept 1989]). Moreover, 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 [2d Dept 2009]). Here, although counsel for

defendant Man orally asserted at a compliance conference that no discovery would be produced since defendant Man was invoking his Fifth Amendment right against self incrimination, defendant Man failed to provide a written response to plaintiff's discovery demands objecting to each discovery request on that ground. The blanket refusal to provide discovery on the basis of the Fifth Amendment was insufficient to invoke the privilege against self incrimination.

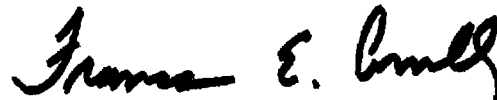
In view of the foregoing, it is

ORDERED that plaintiff's motion is granted to the extent that defendant Man is precluded from offering any evidence at trial; and it is further

ORDERED that counsel and pro se defendant Sharrocks are directed to appear for a conference in the Compliance Part, Courtroom 800, on April 17, 2012 at 9:30 A.M., as previously scheduled by the court.

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties within 10 days of entry of the order.

Dated: White Plains, New York
April 2, 2012



HON. FRANCESCA E. CONNOLLY, J.S.C.

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