

Neilson v 6D Farm Corp.
2013 NY Slip Op 33816(U)
May 8, 2013
Supreme Court, Westchester County
Docket Number: 20314/05
Judge: Linda S. Jamieson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
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.

Disp _____ Dec x Seq. Nos. 9-10 Type misc.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED

PRESENT: HON. LINDA S. JAMIESON

MAY 16 2013

-----X
VERNA B. NEILSON, Individually and as
a Shareholder of 6D Farm Corporation
Suing in the Right of 6D Farm
Corporation,

**TIMOTHY G. IDONI
COUNTY CLERK
COUNTY OF WESTCHE**

Plaintiff,

-against-

Index No. 20314/05

DECISION AND ORDER

6D FARM CORPORATION, DIANE S. BENEDICT,
ELENA BENEDICT-SMITH, ANTONIO F. PINELLI,
BENEDICT DAIRY FARMS and PATRICK J. CARR,
as Preliminary Executor of the Estate of
ELENA DUKE BENEDICT, Deceased,

Defendants.

-----X

The following papers numbered 1 to 10 were read on these motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Affirmation in Opposition and Exhibit	3
Memorandum of Law	4
Affirmation and Exhibits in Opposition	5
Reply Affirmation and Exhibits	6
Reply Memorandum of Law	7
Notice of Motion	8
Affirmation	9

There are two motions before the Court. The first motion, brought by plaintiffs, seeks (1) to hold both Mr. Carr, the Preliminary Executor of the Estate of Elena Duke Benedict, and Anne S. Penachio, the Guardian for Ms. Benedict (until she was discharged by Ms. Benedict's death), in contempt for failing to comply with a Decision and Order of this Court dated January 24, 2013 (the "Decision"); (2) an order directing Mr. Carr and Ms. Penachio to turn over immediately to 6D Farm Corporation ("6D") all assets, books and records of Benedict Dairy Farms ("BDF") in their possession, custody and control; and (3) sanctions. The second motion, filed by Ms. Penachio, seeks (1) to strike plaintiffs' reply in motion Sequence Number 9; or (2) permission to allow Ms. Penachio to submit a sur-reply.

At the outset, the Court must express its disappointment at the tone and level of civility used in these papers and in the letters sent to the Court. Counsel are directed to review the Standards of Civility, Appendix A to the Disciplinary Rules, before filing another motion with this or any other court.

Background

In the Decision, the Court held that "Pursuant to Partnership Law § 62(4), upon the death of a partner, a partnership dissolves, as a matter of law. The remaining partnership property 'vests in the surviving partner,' pursuant to Partnership Law § 51(2)(d)." The Court further stated that

"As the Second Department held in the case of *Fogel v. Neiman*, 288 A.D.2d 429, 733 N.Y.S.2d 482 (2d Dept. 2001), 'It is well established that the representative of a deceased partner is not entitled to participate in or interfere with the continuation or winding up of the partnership by the surviving partners. The representative's only right is to demand an accounting from the surviving partners upon completion of the winding up of the partnership affairs.'"

The Decision concluded with the Court finding that "There is no basis for anyone other than 6D to wind up the affairs of BDF. Accordingly, 6D shall commence the winding up of BDF immediately. The winding up must also include an accounting, which shall be served on all parties to this action." The Court further noted that "Once the accounting has been finalized, then the Court may, if necessary, appoint a referee to calculate the amounts owed to any of the parties."

The Motions

The Court denies the motion for contempt. While it was, as plaintiffs state, "implicit" in the Decision that as the sole partner with the responsibility to wind up BDF, 6D needs all of BDF's books, records and assets, it was certainly not stated explicitly. There is, then, no basis for a finding of contempt, which requires a clear and unequivocal mandate from the Court. *Smith v. De Paz*, 962 N.Y.S.2d 631 (2d Dept. 2013). Similarly, there is also no basis for sanctions at this juncture.

That being said, the Court now hereby clearly and unequivocally states that Mr. Carr does not represent BDF, and orders Mr. Carr and Ms. Penachio to turn over to 6D all documents, records or other things in either of their possession, custody or control relating to BDF. This must be done on or before June 28, 2013. Mr. Carr and Ms. Penachio shall keep a log of all items turned over to 6D, which 6D shall check, item by item, and sign off on before taking possession. This check shall be done in the presence of Mr. Carr, Ms. Penachio, or a third party designated by them. Should the parties wish, the Court will appoint a referee to oversee this turnover, the cost of which shall be split equally among them. (If this is the parties' desire, they may submit a proposed Order to the Court on or before June 3, 2013.) Because of the level of distrust present here, the Court does not want to create any opportunities for any misunderstandings or accusations.

To the extent that there are documents in Mr. Carr or Ms. Penachio's possession, custody or control which may be the subject of a sealing order that belong to or relate to BDF, the Court orders that Mr. Carr or Ms. Penachio produce a log (akin to a privilege log) listing the following information: author(s); recipient(s); date of creation; date(s) of distribution; a description of the document and its subject; and a brief analysis of why the document meets the parameters of the sealing order. Alternatively, Ms. Penachio may seek to have the sealing order

lifted for the sole purpose of complying with this Court order. Any previously-sealed documents produced hereunder shall be kept strictly confidential by 6D, its counsel and any accountants or other professionals used by 6D.

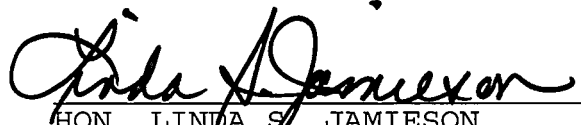
To the extent that there are funds and other assets of BDF in Mr. Carr or Ms. Penachio's possession, custody or control, they shall be turned over to 6D on or before June 28, 2013 directly into an account (or safety deposit box, if there are tangible items) to be opened by 6D entitled "BDF Assets Held Pursuant to Court Order." These assets belong to BDF, to be distributed only after the accounting and a determination of the rights of all parties.

As for Ms. Penachio's request to have plaintiffs' reply struck, it is moot. There was nothing in the reply papers that affected the outcome of Motion Sequence No. 9.

All other requests for relief are denied. Plaintiffs, the only ones who submitted an envelope to the Court, shall send copies of this Decision and Order by overnight mail to Ms. Penachio and Mr. Carr within two business days of receipt.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
May 8, 2013


HON. LINDA S. JAMIESON
Justice of the Supreme Court