

Burns v Burns
2015 NY Slip Op 32732(U)
December 2, 2015
Supreme Court, Kings County
Docket Number: 37327/07
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of December, 2015

P R E S E N T:

HON. RICHARD VELASQUEZ

Justice.

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LOUIS BURNS,

Plaintiff,

-against-

STEPHANIE BURNS, GAIL DAVIS, a/k/a GALE DAVIS,
MORTGAGE ELECTRONIC REGISTRATION SYSTEM,
AND BANK OF AMERICA,

Index No.:37327/07

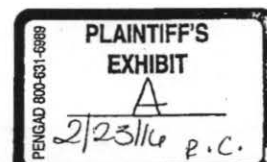
Defendants.

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The following papers numbered 1 to 15 read on this motion:

Interim Decision and Order

	<u>Papers Numbered</u>
Plaintiff's Notice of Motion Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)_____	4
Plaintiff's Notice of Cross-Motion (Affirmations) Annexed	5-6
Opposing Affidavits (Affirmations)	7
Reply Affidavits (Affirmations)	8
Plaintiff's Order to Show Cause Affidavits (Affirmations) Annexed	9-10
Opposing Affidavits (Affirmations)	11
Reply Affidavits (Affirmations)	12-13
Report from Guardian Ad Litem	14
Transcript August 6, 2015 Hearing	15

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After Oral Argument and a review of the submissions herein, the Court finds as follows:

Plaintiff Louis Burns moves the Court for a Hearing to punish Gayle Davis for Contempt of Court on the grounds that non-party Gayle Davis, a New York attorney, failed to obey a Judicial Subpoena requiring her deposition and the production of books, papers and documents in her possession, including her file for Louis Burns, and including correspondence, deeds, mortgages, power of attorney, agreements relating to 256 Decatur Street, Brooklyn, New York, 198 Clarkson Street, Brooklyn, New York, and 885A Putnam Avenue, Brooklyn, New York. Said Deposition date was February 3, 2015. Ms. Davis did not appear on the scheduled deposition date, did not communicate with Plaintiff's attorney as to why she did not appear, and her attorney, John J. Meglio, Esq. likewise did not appear on that date, nor did he communicate with Plaintiff's Attorney or Plaintiff. Plaintiff also contends that Ms. Davis was reminded of said date by letter of January 30, 2015.

Plaintiff Louis Burns Cross-Moves the Court for an Order vacating the Answer of the Defendant Stephanie Burns and directing judgment in favor of the Plaintiff and for sanctions and costs against the Defendant on the grounds that on March 9, 2015, Justice Larry Martin issued an **Order which was hand-delivered to Plaintiff and Defendant Burns on March 10, 2015**, directing Defendant Burns to respond to Plaintiff's Demands for Discovery and Inspection dated December 3, 2013, and August 14, 2014, within thirty days of the service of Justice Martin's Order (March 10, 2015) with a Notice of Entry. Plaintiff alleges that the Order was served by mail on March 11, 2015 and again on April 2, 2015. Copy of the Order was again served, with the Kings County Clerk's stamp on May 27, 2015.

On May 12, m 2015 JHO Schneier directed the defendant to "comply with documentary D & I as ordered by Judge Martin". Defendant Burns has also been served with a Notice To Take the Deposition of the Defendant Burns on January 21, 2015 and to bring to the deposition certain records and documents set forth in the Notice. When Defendant appeared at the deposition, she brought none of the records and/or documents set forth in the Notice, and claimed she had never seen said Notice and had not been informed that she needed to bring any items to the deposition.

Plaintiff Louis Burns moves the Court by Order to Show Cause to grant Plaintiff a Preliminary Injunction pursuant to Rule 6301 of the CPLR: (a) "directing the Defendant Stephanie Burns to provide exclusive possession of the first floor apartment at 256 Decatur Street, Brooklyn, New York without interference from the Defendant and her Mother, Lucille Williams, including exclusive possession of the bedroom, bathroom, kitchen, dining area, and sitting room, and (b) for such other relief, as to this court may seem just and proper."

Brief Background of this Matter

As virtually no discovery has been had in this matter, the facts relevant to the instant motions will be set forth from the affidavits provided.

The Court relies on an Affidavit from Plaintiff Louis Burns attached to Plaintiff's Order to Show Cause for the basic facts of this matter.

Mr. Burns' affidavit contains the following facts which to this Court's knowledge have not been disputed:

Mr. Burns is now 83 years old, unemployed and suffering from diabetes, hypertension, respiratory and kidney disorders, and has also been diagnosed with endocarditis and prostate cancer. His income consists of Social Security and a pension from employment as a Design Engineer for IBM for over 24 years. Mr. Burns has three daughters, the youngest named Stephanie Burns, the Defendant herein.

While employed at IBM Mr. Burns testified that he was able to gather savings with which to buy residential properties in Brooklyn, which are the subject of the instant lawsuit. He purchased 256 Decatur Street, Brooklyn, and then 198 Clarkson Avenue, Brooklyn with cash and a small mortgage. He bought Decatur street property in 1976, and Clarkson Avenue about 1963. He testified that he renovated both properties which included rewiring of electricity, installing piping for plumbing, renovating kitchens and bathrooms. He was able to perform these tasks as prior to his work for IBM, he worked in the building trades and was a member of the Plumbers Union, as well as having experience as a master carpenter, cabinet maker, framer, plasterer and painter.

He states that originally he occupied two apartments at Clarkson Avenue, using one as a residence, and one as a workshop. At Decatur Avenue he occupied the first floor, parlor floor, and basement. In 2000 he became ill, and was unable to manage his finances. He asked Defendant Stephanie Burns to help handle financial affairs, which included collecting rents from two multiple dwellings and paying the expenses. Plaintiff states that he added Stephanie's name to his bank account so that she could manage his finances. His Social Security check and pension benefits were also deposited in this account.

It appears, although the circumstances are not clear, that at some point non-party Gayle Davis became involved in Plaintiff's financial and property matters and advised him as to executing the deeds to his property to Defendant Burns in this matter. Plaintiff contends that Gayle Davis was a friend of Defendant Burns' and a cousin to Ms. Burns' Mother, Lucille Williams. Plaintiff Burns contends that Ms. Davis explained to him that by placing the deeds in Stephanie Burns' name, Plaintiff Burns would be protected because the deeds would each include that he had all of the benefits from both properties while he was alive, including the right to have it all given back to him whenever it was his wish to do so.

Plaintiff was "uneasy" after signing some "papers" as he did not understand that he was being asked to sign the deeds to his properties. He contends that he informed Ms. Davis that he wanted an agreement to protect him and to make sure his property rights were preserved. On February 25, 2002, Plaintiff and Defendant Burns signed an "Agreement" which stated that Stephanie "shall not mortgage, lease, sell, rent, encumber, transfer either property without the

express written consent of Louis Burns." Plaintiff also contends that the Agreement states that if Stephanie dies before me that I get both properties back." __

Plaintiff contends that Ms. Davis would not give Plaintiff copies of the deeds to the properties. Plaintiff went down to the Register's office and states that he discovered that Stephanie had deeded 256 Decatur Street to herself by deed dated January 11, 2005. After she transferred to herself, she used the property as collateral to obtain a mortgage loan against the Decatur Street property and purchased 885 Putnam Avenue, Brooklyn, New York for herself.

Plaintiff contends that Defendant Burns had him evicted from his apartment at Clarkson Avenue, sold all of the tools in his workshop, and put her mother, Lucille Williams, in charge of the Decatur Street property. He also contends that Defendant Burns' Mother was given occupancy of the first and second floor of Decatur street which Plaintiff had previously occupied with Lucille. He alleges that Lucille moved him to a room on the first floor where he sleeps on a cot, has no closets, and is allowed to use a bathroom at the end of the hall. He is not permitted to use a dining table and sitting room, or the kitchen to cook, store food in or eat in. He alleges that his personal belongings are piled in boxes because he has no dressers or closets.

Plaintiff also contends that his daughter, Defendant Burns, confines him to these areas and he is not permitted to have access to other parts of the home, or to decorate his own living area.

Defendant Burns' Objections to Plaintiff's Order to Show Cause

Defendant Burns' affidavit supporting her opposition to Plaintiff Burns' Order to Show Cause does not refute and/or deny any of Plaintiff's claims as to how Defendant obtained deeds to Plaintiff's properties. Defendant Burns' provides information about Plaintiff's relationship with her Mother, that Plaintiff previously lived with his wife Dorothy "who was murdered under suspicious circumstances at that property", and other information not particularly helpful in determining how Defendant Burns came to be in possession of the deed to Plaintiff's properties. While she discusses at length the layout of the living areas of the properties, contends that Plaintiff, himself, is now confining himself to the living areas he resides in, and that he enjoys the unfettered use on the ground floor of the kitchen, family room, and bathroom, and has access to the basement where his tools are stored, she does not provide any explanation for how she came to be in a position to restrain Plaintiff for using all of the property as he wishes.

Finally, the **sole opposition** to Plaintiff's "Cross-Motion" for sanctions and striking Defendant's Answer from Defendant is that Plaintiff's filing of a Cross-Motion to his own motion is not permitted by the CPLR. As the Court has discretion to overlook mistakes which do not affect the merits of a matter, or prejudice the adversary, the Court will overlook Plaintiff's mistake in filing a Cross-Motion as opposed to a Motion or Order to Show Cause. See, *MacLeod v. County of Nassau*, 75 A.D. 3rd 57, 903 N.Y.S. 2d 422 (2nd Dept. 2010).

Conclusion

The Court finds that critical facts are missing from the papers submitted with these three motions. Those facts can only be established if the various Orders mandating discovery are obeyed and quickly. For that reason, the Court is issuing this Interim Order grounded in the facts represented to the Court in the "REPORT OF THE GUARDIAN AD LITEM", Julie Clarke, Esq. Ms. Clarke was appointed *sua sponte* to provide the Court with information about the physical health of Plaintiff Burns. As both the Plaintiff and his attorney represented that Plaintiff was in fragile health, there was concern on the part of the Court that Plaintiff may be unable to testify at trial, or place the facts as he knows them on the record at a deposition.

In summary, the Guardian Ad Litem states in her report that Plaintiff was seen by her at his residence at 256 Decatur Street on October 9, 2015. She found him to be appropriately dressed, communicative, able to state his date of birth, and discuss family history. He informed Ms. Clarke that his daughter Stephanie and Gayle Davis, an attorney known to Stephanie and her Mother, had tricked him into signing over the deeds to his property located at 256 Decatur Street and 198 Clarkson Avenue, Brooklyn, New York. Plaintiff also told Ms. Clarke that the signing of the deeds over to his daughter, Stephanie, took place while he was in the hospital, and he never intended to sign the properties over to his daughter.

Ms. Clarke also found that Plaintiff is living in deplorable living conditions in that the ceiling in his bedroom has holes and his clothes are cramped in the room. He informed Ms. Clarke that he is not permitted to have access to the rest of the house.

The completion of discovery in this matter is a critical issue, and a priority for this Court. Accordingly, IT IS HEREBY ORDERED

1. That all discovery Ordered by Justice Martin and JHO Schneier be complied with no later than February 10, 2016, and both parties are to provide the Court with a schedule of compliance with these Orders no later than December 17, 2015. AND IT IS FURTHER ORDERED,

2. That the following parties and nonparty will be deposed no later than February 24, 2016: Plaintiff Louis Burns, Defendant Stephanie Burns, and any other witnesses who may have relevant information to provide this Court in this matter, and all shall attend their depositions bringing all documents, accountings, statements, copies of deeds, agreements, and any other relevant item requested. AND IT IS FURTHER ORDERED,

3. That the nonparty, Gayle Davis, Esq., having been already served with a Judicial Subpoena that requests certain items relevant to this matter be brought to the deposition of Ms. Davis by Ms. Davis, Ms. Davis shall attend her deposition and bring each of those items and she will also provide the Court all of the information she collected from Plaintiff, and detail in what capacity she was assisting Plaintiff. AND IT IS FURTHER ORDERED,

4. That as Defendant has already stated in her affidavit in opposition to Plaintiff's Order to Show Cause that Plaintiff has unfettered access to the Ground floor (also referred to as the

First Floor by Plaintiff), and basement, and Plaintiff shall enjoy unfettered access to all of those areas in quiet enjoyment; and that the Guardian Ad Litem shall have unfettered access to Plaintiff and to his living space, to determine whether the Defendant is complying with this Order. AND IT IS FURTHER ORDERED,

5. That upon the recommendation of the Guardian Ad Litem, the Court shall order an inspection of the subject premises for possible violations of the Housing Code. AND IT IS FURTHER ORDERED,

6. That should a dispute arise which may cause a delay in any of the Ordered proceedings, the Court is to be notified immediately so as to resolve the dispute and meet the deadlines So Ordered. AND IT IS FURTHER ORDERED

7. That Plaintiff's counsel shall serve a copy of this Order with Notice of Entry upon all parties and the Non Party Gayle Davis, Esq. within ten (10) days of receipt of this Order.

This constitutes the Interim Decision and Order of the Court.

ENTERED FORTHWITH:



RICHARD VELEASQUEZ, J.S.C