

**Grinshpun v Borokhovich**

2016 NY Slip Op 30114(U)

January 20, 2016

Supreme Court, New York County

Docket Number: 651846/2012

Judge: Kelly O'Neill Levy

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

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ARON GRINSHPUN, SAM ZELTSER,  
ZELIG SELTSER, and THREE STAR CAPITAL, LLC,

Plaintiffs,

- against -

GENNADY (a/k/a EUGENE) BOROKHOVICH,  
ELENA BOROKHOVICH, BOROKHOVICH & SONS  
MANAGEMENT GROUP LLC, 2824 EMMONS LLC,  
LAVANDA & BLUES LLC, 2814 EMMONS LLC,  
2814-2824 EMMONS ACQUISITION LLC, 2148  
OCEAN AVE LLC, 2752-2756 OCEAN AVENUE  
LLC and DENIKA MANAGEMENT GROUP, INC.,

Defendants.

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DECISION AND ORDER

Index No. 651846/2012

Mot. Seq. 010, 011, 012

**KELLY O'NEILL LEVY, J.:**

The court issues the following consolidated decision on three motions in this action alleging fraudulent conveyance under Debtor and Creditor Law § 273 *et seq.* In the amended complaint, plaintiffs seek, among other things, a judgment setting aside the transfer and conveyance of certain real property from certain defendants to others. The court will address each motion in turn.

***Motion to Reopen Hearing (Mot. Seq. 010)***

In motion sequence 010, defendants Gennady (a/k/a Eugene) Borokhovich, Elena Borokhovich, Borokhovich & Sons Management Group LLC, 2824 Emmons LLC, Lavanda & Blues LLC, 2814 Emmons LLC, 2148 Ocean Ave LLC, 2752-2756 Ocean Avenue LLC and Denika Management Group, Inc. (collectively "Borokhovich Defendants") seek an Order to reopen a completed sanctions hearing held on September 9, 2015 so as to enable defendant Elena Borokhovich to present evidence of her mental condition. Plaintiffs oppose the motion.

It is undisputed that Ms. Borokhovich's deposition in this proceeding was delayed on multiple occasions over a number of months due to Ms. Borokhovich's alleged medical condition.

By status conference order of December 17, 2014, the court (Singh, J.) directed that the defendants' depositions occur on March 4-6, 2015 and that there would be no further adjournments without the consent of the court. On March 13, 2015, the date of her deposition, Ms. Borokhovich went to the emergency room and failed to appear for her deposition. The deposition of her husband, defendant Gennady Borokhovich was completed on that day. Plaintiffs' counsel requested that Ms. Borokhovich's deposition take place before the next conference date of March 25, 2015. On March 13, her counsel notified opposing counsel that Ms. Borokhovich had been admitted to the emergency room that morning and attached a "To Whom It May Concern" letter from Dr. July Gaysynsky noting that Ms. Borokhovich, then age 43, was seen at her office on March 13, 2015 for evaluation and treatment of DVT/PE.<sup>1</sup> On March 19, 2015, Ms. Borokhovich's counsel informed plaintiffs' counsel that in light of his client's condition, it appeared unlikely that Ms. Borokhovich's deposition would take place prior to March 25, 2015. He attached another "To Whom It May Concern" letter from Dr. July Gaysynsky dated March 19, 2015 stating that Ms. Borokhovich had been seen in her office on the same date and was undergoing cardiac workup due to chest pain and was advised to avoid stress and physical activity until the evaluation was complete.

Counsel appeared for status conference before Justice Singh on March 25, 2015. On that date, the court so-ordered a stipulation stating that Ms. Borokhovich would be deposed by April

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<sup>1</sup> This letter was unsigned and unsworn. Further, it attached only a page from Ms. Borokhovich's emergency room discharge which simply states that she must follow up with her primary care doctor.

25, 2015 on dates to be agreed upon. The stipulation further stated “In the event that the parties’ counsel shall not agree upon a date, they shall contact the court for a conference.” The matter was adjourned to May 20, 2015 for status conference.

On April 22, 2015, Ms. Borokhovich’s counsel again contacted opposing counsel forwarding a letter from Dr. Gaysynsky of same date identical to the one dated March 19, 2015, again unsigned and unsworn.

On May 19, 2015, the eve of the status conference, Ms. Borokhovich’s counsel sent counsel another “To Whom It May Concern” letter from Dr. Gaysynsky, this one stating that Ms. Borokhovich had been seen at her office for chest pain and had completed cardiac workup for chest pain. She went on to state that “Based on the results of the tests she started treatment and was advised to avoid stress and physical activity until re evaluation on August [sic] 19<sup>th</sup>, 2015.”

The next day, this court held a conference and after hearing of delays in holding the deposition, ordered that Ms. Borokhovich be deposed on July 22, 2015 and set a conference date of August 5, 2015. On July 15, Ms. Borokhovich’s counsel emailed opposing counsel attaching a letter from Dr. Gaysynsky concerning her patient’s condition. By another “To Whom It May Concern” letter dated July 10, 2015, Dr. Gaysynsky stated that cardiologist Dr. Joseph Minadeo found her stress test and echo to be within normal limits. The letter further stated that Ms. Borokhovich had been sent to neurologist Dr. Starkman for evaluation, “in order to rule out cerebrovascular insufficiency or partial seizure as the etiology of her symptoms.” The deposition again did not go forward because Ms. Borokhovich declined to participate and at the status conference on July 22, the deposition was rescheduled to August 17, 2015.

On August 17, 2015, counsel telephoned the court from Ms. Borokhovich’s rescheduled deposition for a ruling on a question concerning her personal bank accounts. After the court

ruled that the questions related to her personal bank account were relevant, counsel continued the deposition. Minutes later, Ms. Borokhovich's husband, defendant Gennady Borkohovich, interrupted the deposition stating that his wife looked pale and "has a bad condition." Thereafter, her counsel requested that they take a break. After the recess, Ms. Borokhovich stated that she could not continue with the deposition and that she could not concentrate after taking Clonazepam.

Counsel then called the court back to inform it that Ms. Borokhovich could not continue the deposition because she felt ill. The court inquired of plaintiffs' counsel whether he would be making an application for fees as a result of the delays. Plaintiffs' counsel requested that sanctions be imposed on Ms. Borokhovich based on her repeated delays in appearing for and completing her deposition. After consulting with her client, Ms. Borokhovich's attorney stated that her client was aware that there may be costs involved but that she decided that she was not feeling well enough to continue the deposition. The court scheduled a hearing on attorneys' fees on September 9, 2015. Counsel agreed to continue the deposition on September 4, 2015 and agreed that if Ms. Borokhovich finished her deposition, it would go towards militating an imposition of fees. Ms. Borokhovich once again refused to go forward with her deposition.<sup>2</sup>

The hearing on attorneys' fees went forward on September 9, 2015 with plaintiffs presenting evidence of several court orders directing that Ms. Borokhovich's deposition take place on certain dates and the numerous times the deposition was rescheduled at the last minute at her counsel's request based on his client's alleged medical condition. Plaintiffs requested that

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<sup>2</sup> Counsel for Ms. Borokhovich correctly asserts in opposition to Plaintiffs' motion to strike Ms. Borokhovich's answer that pursuant to CPLR 3103(b), "service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute." However, the motion for protective order was not made until on or about September 30, 2015, several weeks after the agreed-upon date to continue the deposition.

sanctions be imposed against Ms. Borokhovich for her willful failure to attend and complete her deposition. Plaintiffs submitted documentation showing the fees and costs associated with preparation for the deposition that was postponed on numerous occasions. Plaintiffs' requested that \$8,280.00 in sanctions be imposed against Ms. Borokhovich solely as a result of delays in going forward with Ms. Borokhovich's deposition. Defendants' counsel cross-examined attorney Melvin B. Berfond on the content of his documentation in support of fees but did not present any testimony or question the work performed.

Counsel for Ms. Borokhovich submitted an affidavit from July Gaysynsky, M.D. dated August 12, 2015. Dr. Gaysynsky, not a cardiologist but a general practitioner licensed to practice family medicine, stated in her affidavit that Ms. Borokhovich is her patient and that on March 13, 2015, Ms. Borokhovich appeared at her office and was sent to the emergency room at Mercy Hospital. The admitting physician suspected a blood clot, tests for which came back negative. After she was discharged, Ms. Borokhovich visited Dr. Gaysynsky who referred her to a number of specialists. Dr. Gaysynsky states that she "advised Mrs. Borokhovich to avoid stress at all costs. On the basis of the tests conducted by various specialists, and my personal knowledge of my patient's medical history, it is my professional opinion that stress of a deposition is particularly counter-indicated in Mrs. Borokhovich's current condition." The affidavit is largely duplicative of the letter which Ms. Borokhovich's counsel submitted in July. All of these written submissions that defendant purports to demonstrate his client's medical condition are vague and ambiguous but most importantly, inadmissible hearsay. At no time has defendant ever provided competent evidence to demonstrate that his client is not able to be deposed. In addition, there has never been any evidence that her condition has interfered with

her work in the real estate industry and defense counsel did not deny that his client participated as a plaintiff and appeared in Federal Court in a separate action.

Having failed to proffer any admissible evidence of his client's purported heart condition at the sanctions hearing, Ms. Borokhovich's counsel makes the late breaking claim that he should be allowed to reopen the sanctions hearing to offer psychiatric evidence that his client cannot testify because she suffers from anxiety. Defendant seeks to enlarge and expand her menu of excuses for avoiding her deposition. The court noted that it was already holding a hearing and that it was counsel's decision on who they wished to call at the hearing. The hearing was deemed complete and the court reserved decision on whether to impose sanctions.

As the court stated on September 9, 2015, if Ms. Borokhovich's counsel wanted to call witnesses to testify, he had the opportunity to do so at the hearing. The court declines to reopen the hearing and denies the motion.

### ***Sanctions***

Based on the evidence produced at the September 9, 2015 hearing, the court finds the imposition of sanctions appropriate pursuant to 22 NYCRR 130-1.1. *See Kahre-Richardes Family Foundation v. Village of Baldwinsville*, 219 A.D.2d 826, 826 (4th Dep't 1995). Here, due to numerous postponements of the deposition, counsel for plaintiffs were forced to unnecessarily spend billable hours to prepare for a deposition that did not go forward on multiple occasions. Despite the many opportunities that Ms. Borokhovich has been given to appear for deposition, she refused. The court finds the time spent reasonable for the work performed. The court therefore orders defendant Elena Borokhovich to pay to plaintiffs' counsel the sum of \$8,000 for the legal fees associated with Ms. Borokhovich's failure to appear and complete her examination before trial. Should she fail to make this payment within 14 days of service of this

decision/order with Notice of Entry, Mr. Berfond may make application to the Clerk for entry of a judgment in the sum of \$8,000 against Elena Borokhovich and in favor of Melvin B. Berfond and the Clerk is directed to enter same.

***Motion for Protective Order (Mot. Seq. 011)***

The Borokhovich Defendants further move for a protective order, pursuant to CPLR 3103, (i) denying, limiting, conditioning and regulating the scope of Ms. Borokhovich's deposition; (ii) suppressing information allegedly improperly obtained from her by plaintiffs; and (iii) granting them legal fees, costs, and disbursements incurred for the motion. The court denies the motion.

When Ms. Borokhovich was asked during her deposition on August 17, 2015, "Do you personally have any bank accounts at any bank other than TD Bank?," her attorney objected to questions about any bank accounts she has as "palpably improper" and directed her not to answer. When telephoned for a ruling on the issue immediately thereafter, the court found that questions related to Ms. Borokhovich's personal bank account were relevant to the fraudulent conveyance issue.

CPLR 3101 requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." "The words 'material and necessary' as used in section 3101 must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Kapon v. Koch*, 23 N.Y.3d 32, 36 (2014) [(citing *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968))]. The court finds that the inquiry in question is relevant to the fraudulent conveyance claims. *See generally Gromoll v. Bertolino*, 4 A.D.3d 759, 759 (4th Dep't 2004)(motion court erred in granting protective order where information elicited by

questions in dispute were relevant to the action), *de Velutini v. Velutini U.*, 151 A.D.2d 300, 300 (1st Dep't 1989)(protective order improperly granted), *Moskowitz v. 277 D&D Rest. Corp.*, 223 A.D.2d 437, 437-38 (1st Dep't 1996)(protective order in fraudulent conveyance action properly denied). Accordingly, the motion is denied.

***Motion to Strike Answer (Mot. Seq. 012)***

Plaintiffs move to strike Ms. Borokhovich's answer pursuant to CPLR 3124 and 3126 for her willful failure and refusal to complete her examination before trial, and sanctioning Ms. Borokhovich for the costs of the motion, including attorneys' fees. The Borokhovich Defendants correctly assert that pursuant to CPLR 3103(b), the service of motion papers for a protective order suspends disclosure of the particular matter in dispute.

"[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith." *McGilvery v. N.Y.C. Trans. Auth.*, 213 A.D.2d 322, 324 (1st Dep't 1995). The court has addressed Ms. Borokhovich's failure to comply with discovery orders through the imposition of sanctions in the form of attorneys' fees pursuant to Rule 130.

The court denies the motion to strike Ms. Borokhovich's answer without prejudice to renew should Ms. Borokhovich not submit to a continued deposition on or before January 29, 2015. *See Figueroa v. City of New York*, 129 A.D.3d 596, 597 (1st Dep't 2015)(holding that "trial court providently exercised its discretion in denying motion to strike [defendants' answer] and warning defendants that failure to appear at depositions could result in additional sanctions"). In imposing this deadline, the court has considered the affidavits submitted stating that Ms. Borokhovich suffers from stress-related anxiety, including Ms. Borokhovich's affidavit

dated September 28, 2015, stating that she expects to recover and resume her deposition, and that several months have passed since the hearing.

The court has considered the remainder of the arguments and finds them to be without merit.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to reopen the hearing (mot. seq. 010) is denied and defendants' cross-motion is denied; and it is further

ORDERED that defendant Elena Borokhovich is to pay to plaintiffs' counsel, Melvin B. Berfond, the sum of \$8,000 for the legal fees associated with Ms. Borokhovich's failure to appear and complete her examination before trial; and it is further

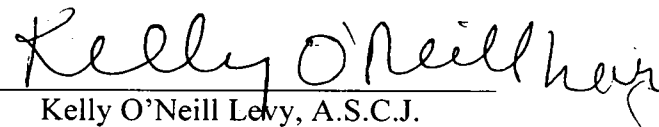
ORDERED that should Elena Borokhovich fail to make this payment within 14 days of service of this decision/order with Notice of Entry, Mr. Berfond may make application to the Clerk for entry of a judgment in the sum of \$8,000 against Elena Borokhovich and in favor of Melvin B. Berfond and the Clerk is directed to enter same; and it is further

ORDERED that plaintiffs' motion for a protective order (mot. seq. 011) is denied; and it is further

ORDERED that plaintiffs' motion to strike defendant Elena Borokhovich's answer (mot. seq. 012) is denied.

This constitutes the decision and order of the court.

Date: January 20, 2016  
New York, New York

  
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Kelly O'Neill Levy, A.S.C.J.

**HON. KELLY O'NEILL LEVY**