

Cellino & Barnes, P.C. v Law Office of Christopher J. Cassar, P.C.
2016 NY Slip Op 31542(U)
July 21, 2016
Supreme Court, New York County
Docket Number: 811964/2014
Judge: Tracey A. Bannister
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**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

CELLINO & BARNES, P.C.,

Plaintiff

v.

**LAW OFFICE OF CHRISTOPHER J. CASSAR, P.C.
AND CHRISTOPHER J. CASSAR,**

Defendants.

Memorandum Decision

Index No.: 811964/2014

Appearances

**Attorney for Plaintiff
Cellino and Barnes, P.C.
Gregory J. Pajak, Esq.
350 Main Street
2500 Main Place Tower
Buffalo, New York 14202**

**Attorney for Defendant
The Law Offices Of Christopher J. Cassar, P.C.
Christopher J. Cassar, Esq.
13 East Carver Street
Huntington Village, New York 11743**

Bannister, J.

This matter comes before the court by way of defendant's Motion to Settle the Record on Appeal. Plaintiff submitted an Affidavit in response to defendants' Motion.

The Appeal at issue in this matter relates to two Orders, both dated

December 4, 2013, the first denying defendants' Motion to Transfer Venue and the second denying defendants' Motion to Dismiss the Complaint. Both Orders were appealed by defendants and the appeals were consolidated.

Defendant Christopher Cassar, alleges in his motion that he was attempting to compile what would be the Record on Appeal, however was unable to come to agreement with plaintiff as to it's contents. Defendants assert that the record on Appeal should consist of the following documents:

1. Notice of Appeal dated December 14, 2014 appealing to the Appellate Division, Fourth Department an Order of the Honorable Tracey A. Bannister dated December 4, 2014, which denied the Defendants' Motion to Dismiss the Complaint;
2. Order of the Honorable Tracey A. Bannister dated December 4, 2014, which denied the Defendants' Motion to Dismiss the Complaint;
3. Notice of Appeal dated December 14, 2014, appealing to Appellate Division, Fourth Department an Order of the Honorable Tracey A. Bannister dated December 4, 2014, which denied the Defendants' Motion to Change Venue;
4. Order of the Honorable Tracey A. Bannister dated December 4, 2014, which denied the Defendants' Motion to Change Venue;
5. Notice of Motion to Dismiss the Complaint by the Defendant, dated November 4. 2014;
6. Defendant's Affidavit by Christopher J. Cassar in Support of the Motion to Dismiss dated November 4, 2015 and supporting Exhibits;

7. Plaintiff's Affidavit in Opposition by Dylan Brennan dated November 18, 2014 and supporting Exhibits in Opposition to the Motion to Dismiss the Complaint;

8. Defendants' Notice Pursuant to CPLR §511 dated November 3, 2014, that this action be tried in Suffolk County;

9. Plaintiff's Affidavit of Stephen E. Barnes, dated November 4, 2014, in Opposition to Defendants' Notice Pursuant to CPLR §511, that this action be tried in Suffolk County;

10. Defendants' Notice of Motion to Change Venue, dated November 13, 2014;

11. Defendant's Affidavit by Christopher J. Cassar dated November 13, 2014, in Support of Motion to Change Venue and supporting Exhibits;

12. Plaintiff's Affidavit in Opposition by Dylan Brennan dated November 24, 2014 and Exhibits in Opposition to the Motion to Change Venue; and

13. A letter to Honorable Bannister dated December 5, 2014, by the Defendants' requesting the Court to provide the legal and factual basis in the decisions; and

Plaintiff has agreed that the above referenced items should be in the Record but has also asserted that the following additional items should also be included in the Record:

1. Order staying the "fee hearing" in Suffolk County for the *Povenzano v. Miller* action (Order of Judge Baisley dated February 10, 2015); and

2. Plaintiff's Motion to Vacate dated January 8,

2015, which served in-part, the basis of Judge Baisley's February 10, 2015, decision staying the fee issue.

Defendants oppose including these two items in the Record on Appeal stating that they were not submitted to the court for consideration in the current Motion.

DISCUSSION

It is the obligation of the appellant to assemble a proper record on appeal, which must contain all of the relevant papers that were before the Supreme Court (see CPLR 5526). However, the court is aware that in addition to the records submitted to the court in support of a Motion, the court may take judicial notice of its own records, including prior Orders (*Caudill v. Rochester Institute of Technology*, 125 A.D.3d).

In this matter, although the court was aware of the proceedings in the *Provenzano v. Miller* action, and the existence of Motions before and an Order issued by Judge Baisley on February 10, 2015, copies were never submitted to this Court in support of this motion or for any other purpose. In that this is an "e-file" the file was reviewed and revealed that the Orders of Judge Baisley were never uploaded to the Erie County file of *Cellino & Barnes, P.C., v. The Law Offices of Christopher J. Cassar, P.C., and Christopher J. Cassar*.

The records plaintiff has requested were not submitted to the court at any time therefore, the court has not reviewed the Motion or Order staying the proceeding before Judge Baisley. Accordingly, they were not relied on in the

court's Orders at issue here. Plaintiff's request that they be included in the Record on Appeal is denied. The record shall be comprised of the fourteen documents listed above and agreed to by the parties. The record shall not include plaintiff's Motion to Vacate or the Order staying the fee issue from the Suffolk County case.

Tracey A. Bannister

Hon. Tracey A. Bannister
Supreme Court Justice

Dated: July 21, 2015
Buffalo, New York

ENTER

GRANTED

JUL 21 2015
BY *[Signature]*

RITA J. VENTURA
COURT CLERK