

Williams v Suttle

2016 NY Slip Op 32975(U)

January 25, 2016

Supreme Court, Westchester County

Docket Number: 64437/2014

Judge: Joan B. Lefkowitz

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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.

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

JAMES WILLIAMS, SARAH LAWREY and
PEARL OWENS,

Plaintiffs,

-against-

DECISION and ORDER
Index No. 64437/2014
Motion Date: Jan. 25, 2016
Seq. No. 5

ELLA MAE SUTTLE,

Defendant.
-----X

LEFKOWITZ, J.

The following papers were read on defendant's motion for an order dismissing plaintiffs' complaint based on their violations of multiple discovery orders directing them to complete depositions; attorneys' fees in the amount of \$5,000; costs and disbursements of this motion; and, for such other and further relief as this court deems just and proper.

- Order to Show Cause dated December 21, 2015; Affirmation in Support; Exhibits A-I
- Memorandum of Law
- Affirmation in Opposition; Exhibits A-C

Upon the foregoing papers and proceedings held on January 25, 2016 this motion is determined as follows:

Factual and Procedural Background:

Plaintiffs and defendant are siblings. Plaintiffs commenced this action on or about September 11, 2014. In their complaint plaintiffs alleged that on or about December 12, 2003 Walter Williams (their brother) conveyed property located in Peekskill, New York, to them and defendant, as tenants in common, and seized in fee simple, while reserving a life estate for himself. Plaintiffs further alleged that Walter Williams died on March 17, 2004. They alleged that since that date defendant has occupied the subject premises and excluded them. They further alleged that defendant has neglected the property and refused to pay them the fair market rental value for her exclusive use of the property and that defendant has failed to assist in marketing and selling the subject property. Plaintiffs are seeking to have the subject property sold with the

proceeds to be divided amongst the parties according to their respective rights and interests. Plaintiffs are also seeking an accounting for the fair market rental value and an accounting of the value of the deterioration of the fair market value of the property caused by defendant's failure to reasonably maintain the property.

On or about January 21, 2015 defendant moved for an order, inter alia, dismissing the complaint due to plaintiffs' failure to allege facts sufficient to establish that the matter is not barred due to a defense founded upon documentary evidence.

By decision and order dated March 12, 2015 the court (Lefkowitz, J.) denied defendant's motion in its entirety. In that decision the court stated that plaintiffs and defendant were siblings who were named beneficiaries under the will of their mother, Beatrice Thomas Williams. The court found that the will devised the right to use the premises to the children "during the terms of their lives" and bequeathed the residue of the estate to the children in equal shares. The court noted that the will was the subject of a Surrogate's Court proceeding in 2007. The court found that in that proceeding, plaintiff James Williams and defendant settled their competing claims to be named executor of the estate and that, as part of that settlement the parties agreed to discontinue a prior action for a partition of the premises.

Defendant filed an answer with the court on April 3, 2015 denying the essential allegations asserted against her and asserting affirmative defenses including unjust enrichment, unclean hands, accord and satisfaction, lack of standing to sue, collateral estoppel and res judicata, and laches. By notice dated May 5, 2015 plaintiffs moved to dismiss these affirmative defenses. Defendant cross-moved for an order enforcing an oral stipulation of settlement. In her affirmation in support of the cross motion defense counsel stated that the parties have a binding contract that was set forth on the record on or about March 13, 2007 and then so-ordered by the surrogate's court. Defense counsel stated that plaintiffs (in this action) agreed in the prior surrogate's court proceeding to discontinue their partition action against defendant.

A preliminary conference stipulation, so-ordered by this court (Lefkowitz, J.) was executed on April 27, 2015. Among other disclosure it provided for the completion of the parties' depositions on or before September 9, 2015.

By decision and order dated August 12, 2015 the court (Lefkowitz, J.) granted the motion dismissing the affirmative defenses (two through seven) and denied the cross motion. The court noted that the stipulation of settlement to discontinue the prior action was without prejudice to commencement of the present action. The court further noted that defendant failed to provide the written stipulation discontinuing the action and failed to provide the index number of the prior action so that the court could research the record of the purported prior action.

The parties appeared for a conference. The Compliance Conference Referee Report & Order dated October 14, 2015 and so-ordered by this court directed defendant to designate a witness to depose on behalf of plaintiff on or before October 30, 2015 and further directed that

the parties' depositions be completed by November 23, 2015.

Defendant's notice to depose the three plaintiffs is dated October 22, 2015.

On November 23, 2015 plaintiffs filed with this court a consent to change attorney dated November 12, 2015. Russell A. Smith (former counsel) was substituted as plaintiffs' counsel by Richard J. O'Keefe (present counsel).

The parties appeared for another conference. The Compliance Conference Referee Report & Order dated November 25, 2015 and so-ordered by this court directed that the parties' depositions be completed by December 15, 2015.

Defendant's second notice to depose the three plaintiffs on December 3, 2015 is dated November 25, 2015.

On or about December 3, 2015 plaintiffs filed a proposed order to show cause seeking leave to amend their complaint and stay discovery. By email dated December 10, 2015 the court attorney referee advised plaintiffs' counsel to withdraw that motion and then to move by notice of motion solely for that part of the motion seeking leave to amend the complaint. Regarding the second part of the motion to stay discovery, plaintiffs' counsel had failed to follow protocol which requires a pre-motion conference before filing a discovery motion. The proposed order to show cause was withdrawn on December 14, 2015.

The discovery motion briefing schedule relating to the present motion is dated December 9, 2015. That schedule provided for defendant's motion to dismiss plaintiffs' complaint for their failure to appear for depositions and further provided for a cross motion by plaintiffs to stay discovery.

On January 14, 2016 plaintiffs moved by notice of motion for an order to amend their complaint. The return date of that motion is January 29, 2016. The proposed amended complaint states that defendant has wrongfully occupied the subject premises since the date of Beatrice Thomas Williams' death on May 11, 2004. Plaintiffs seek to have the subject property sold, an evaluation of the rental value of the subject premises for each year defendant has exclusively occupied it, and an accounting as to the interest of each of the three plaintiffs and defendant. In his affirmation in support of the motion for leave to amend the complaint plaintiffs' counsel states that regarding the complaint and the proposed amended complaint, the parties are identical and the relief sought is substantially the same.

Parties' Contentions:

Defendant asserts that plaintiffs have willfully violated discovery orders directing their depositions. Defendant seeks dismissal of the complaint as well as an award of \$5,000 for expenses and attorneys' fees reasonably incurred due to plaintiffs' frivolous conduct.

Defendant asserts that although plaintiffs' counsel may now argue that he intends to seek leave to amend the complaint (thereby making it pointless to depose the elderly and out-of-state plaintiffs at this time), plaintiffs' counsel expressed his intent not to produce plaintiffs even before this. Defendant asserts that plaintiffs are simply attempting to stall and frustrate the discovery process in this matter.

Plaintiffs oppose this motion. Plaintiffs' present counsel notes that he was substituted as counsel on November 12, 2015 and he has no personal knowledge as to any actions taken by prior counsel to postpone or avoid plaintiffs' depositions. Plaintiffs' counsel notes that previously, on or about December 3, 2015, he attempted to move for an order to stay discovery pending a motion for leave to amend the complaint but due to procedural requirements the proposed order to show cause was withdrawn. Plaintiffs' counsel states that plaintiffs have presently moved for an order granting them leave to amend the complaint and, if that motion is granted a new discovery schedule can be established. Plaintiffs contend that defendant has failed to show any significant injury resulting from the delay of depositions in this matter. Plaintiffs note that they are all in their eighties, two of them reside out of state and all are in varying degrees of health.

Analysis:

In the preliminary conference stipulation so-ordered by this court, dated April 27, 2015, and in two Compliance Conference Referee Report & Orders, dated October 14, 2015 and November 25, 2015, respectively, plaintiffs were directed to appear for depositions. CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may issue 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]). Plaintiffs have been directed on several occasions to appear for depositions and their excuses for failing to do so are inadequate. It is clear that defendant will be prejudiced if plaintiffs do not appear for depositions.

Furthermore, when a party to the action is to be deposed, the deposition should take place within the county where the action is pending (CPLR 3110[1]). Although plaintiffs' counsel asserts that plaintiffs are old, two of them reside out of state and they are in varying degrees of health, plaintiffs have not demonstrated undue hardship in having the depositions in Westchester County (compare *LaRusso v Brookstone, Inc.*, 52 AD3d 576 [2d Dept 2008]).

Defendant's request for reasonable attorneys fees in the amount of \$5,000 and for the costs

and disbursements of this motion was made in violation of the Westchester Supreme Court Differentiated Management Protocol, Part Rules. On this record it is not clear that defendant addressed this issue at the pre-motion conference and the relevant briefing schedule dated December 9, 2015 does not address the issue. Accordingly, this court declines to consider the issue of awarding reasonable attorneys' fees, costs and disbursements to defendant.

The court notes that notwithstanding the arguments presently asserted by plaintiffs' counsel in opposition to the present motion, plaintiffs' counsel himself has stated, in support of his pending motion to amend the complaint, that the parties are identical and the relief sought is substantially the same. Moreover, plaintiffs have not cross-moved for a stay of discovery in this matter.

In view of the foregoing, it is:

ORDERED that the branch of defendant's motion seeking an order striking plaintiffs' complaint is granted unless plaintiffs appear for their deposition at the office of defendant's counsel. Their depositions are to be completed on or before February 29, 2016; and it is further,


ORDERED that in the event plaintiffs fail to comply with the herein above directive, defendant shall upload to the NYSCEF website a detailed affidavit/affirmation of non-compliance and a proposed order with notice of settlement striking the complaint, on or before March 4, 2016; and it is further,

ORDERED that all other branches of defendant's motion are denied; and it is further,

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on March 10, 2016 at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
January 25, 2016


HON. JOAN B. LEFKOWITZ, JSC