

**Williams v Owens**

2016 NY Slip Op 32976(U)

August 1, 2016

Supreme Court, Westchester County

Docket Number: 64437/14

Judge: Joan B. Lefkowitz

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NYSCEF DOC. NO. 141

RECEIVED NYSCEF: 08/02/2016

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-

ELLA MAE SUTTLE,

Defendant.

-----X  
LEFKOWITZ, J.

**DECISION and ORDER**

Index No. 64437/14  
Motion Date: June 6, 2016

Seq. Nos. 7 & 8

The following papers were read on (1) defendant's motion for an order dismissing plaintiffs' complaint based on their willful violations of multiple discovery orders directing them to complete depositions, an award of attorneys' fees in the amount of \$5,000, and for such other and further relief as this court deems proper with costs and disbursements of this motion; and (2) plaintiffs' motion for an order directing the deposition of plaintiff Sarah Lawrey by defendant be taken via video, granting plaintiffs priority in taking the depositions, and for such other and further relief as this court may deem just and proper.

Seq. No. 7

Order to Show Cause dated May 4, 2016 - Affirmation in Support - Exhibits A-T  
Memorandum of Law  
Affirmation in Opposition; Exhibits A  
Correspondence dated May 31, 2016 "regarding typo in Affirmation in Opposition"

Seq. No. 8

Order to Show Cause dated May 9, 2016 - Affirmation in Support - Exhibit A  
Affirmation in Opposition - Exhibits A-B -

Upon the foregoing papers and proceedings held on June 6, 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, which was later amended, plaintiffs alleged that on or about December 12, 2003, Walter Williams, their brother, conveyed real property located at 123 High St., Peekskill, New York to them and defendant, as tenants in common, and seized in fee

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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 sought, inter alia, to have the subject property sold with the proceeds to be divided amongst the parties according to their respective rights and interests.

Plaintiffs' original summons and complaint was signed by Russell A. Smith, Esq. and e-filed by William J. Florence, Jr., Esq., who is listed as counsel of record for plaintiffs on the NYSCEF website.

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 letter dated March 9, 2015, Russell A. Smith, Esq., on letterhead of William J. Florence, Jr., Counselor at Law, advised the court that the parties had consented to adjourn the pending motion. The letter was e-filed on the NYSCEF website by William J. Florence, Jr., Esq.

By Decision and Order dated March 12, 2015 the court (Lefkowitz, J., as IAS Part Justice) denied defendant's motion in its entirety. Therein, the court held that the documentary evidence relied upon by defendant failed to resolve all the factual issues as a matter of law. Moreover, the court held that defendant was not entitled to dismissal of the present action on the ground that the prior partition action was dismissed insofar as that dismissal was not on the merits. The court further set forth the following facts: (1) plaintiffs and defendant were siblings who were named beneficiaries under the will of their mother, Beatrice Thomas Williams; (2) 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; (3) the will was the subject of a Surrogate's Court proceeding in 2007; and (4) in the Surrogate Court 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 the 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 herein had agreed in the prior Surrogate's Court proceeding to discontinue their partition action against defendant.

A preliminary conference stipulation was executed and so-ordered by this court 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 this court granted the motion dismissing the affirmative defenses two through seven and denied the cross motion seeking to enforce an oral stipulation of settlement.

The parties appeared for a compliance conference on October 14, 2015. By Compliance Conference Referee Report & Order of the same date, this court directed defendant to designate a witness to be deposed on behalf of plaintiff on or before October 30, 2015, and further directed that the parties' depositions be completed by November 23, 2015.

By letter to plaintiffs' counsel dated October 19, 2015, defense counsel advised that defendant intended to depose the plaintiffs on November 13, 2015 in defense counsel's office located in White Plains, New York. Thereafter, defense counsel served plaintiffs' counsel with a Notice of Deposition Upon Oral Questions dated October 22, 2015, which noticed the deposition of plaintiffs for November 13, 2015 at 11:00 A.M. at defense counsel's office located in White Plains.

Plaintiffs served defendant with a Notice to Take Deposition Upon Oral Examination dated October 22, 2015, which also noticed the deposition for November 13, 2015 at 11:00 A.M. at plaintiffs' counsel's office located in Peekskill, New York.

On November 10, 2015, counsel for the parties had a telephone conversation regarding the depositions. It is uncontroverted that defense counsel informed plaintiffs' counsel that defendant was ready, willing and able to be deposed on November 13, 2015. Defense counsel asserts that plaintiffs' counsel then advised that he would not be producing plaintiffs for depositions or deposing defendant as he intended to amend the complaint and set a new schedule for depositions.

No depositions took place on November 13, 2015.

By email dated November 18, 2015, plaintiffs' counsel sent defense counsel a proposed Amended Complaint.

On November 23, 2015, William J. Florence, Jr., Esq. filed a Consent to Change Attorney dated November 12, 2015 on the NYSCEF website. Therein, Richard J. O'Keeffe, Esq., was substituted in as counsel for plaintiffs in place of Russell A. Smith, Esq. Mr. O'Keeffe appeared as "Of Counsel" to William J. Florence, Jr. on Mr. Smith's letter dated March 9, 2016, which was also e-filed by Mr. Florence and advised the court that the parties consented to an adjournment of defendant's motion to dismiss the complaint. Mr. Florence, however, continued to appear and still continues to appear on the NYSCEF website as counsel of record for plaintiffs.

On November 24, 2015, counsel for the parties appeared for a scheduled conference on November 24, 2015. Both William J. Florence, Jr., Esq. and Richard O'Keeffe, Esq. appeared on behalf of plaintiffs according to the Compliance Conference Referee Report & Order entered on November 30, 2015.

Defense counsel contends that, at the conference, when asked by the Court Attorney-Referee why discovery had not been completed, plaintiffs' counsel stated that "they did not have to do discovery because they had a new action pending" (Affirmation in Support of Cindy N. Brown, Esq., dated May 3, 2016 ¶ 28), and were seeking leave to amend the complaint. According to defense counsel, the Court Attorney-Referee then informed plaintiffs' counsel that discovery was not stayed and that plaintiffs must make themselves available for depositions. Plaintiffs do not refute the foregoing contentions by defense counsel.

By the Compliance Conference Referee Report & Order entered on November 30, 2015, this court directed that the parties' depositions be completed by December 15, 2015.

By Notice of Deposition upon Oral Questions dated November 25, 2015, defendant noticed plaintiffs' depositions for December 3, 2015 at 11:00 A.M. at defense counsel's office in White Plains, New York.

On or about December 3, 2015, plaintiffs filed a proposed order to show cause seeking leave to amend their complaint and stay discovery.

A compliance conference was held on December 9, 2015. At the conference, the Court Attorney-Referee inquired as to the status of the discovery and plaintiffs' counsel stated that he would not produce plaintiffs for depositions before plaintiffs were granted leave to amend their complaint. The Court Attorney-Referee again advised plaintiffs' counsel that discovery was not stayed and that depositions had to be completed by December 15, 2015, as previously ordered.

On December 10, 2015, a briefing schedule was issued to defendant for a motion to dismiss plaintiffs' complaint for failure to appear for depositions in violation of court orders. The return date of the order to show cause was set as January 15, 2016 in the briefing schedule.

Plaintiffs' proposed order to show cause seeking leave to amend the complaint and for a stay of discovery, which was filed on December 3, 2015, was withdrawn on December 14, 2015 as it was procedurally defective.

On December 17, 2015, defendant filed a proposed order to show cause seeking to dismiss plaintiffs' complaint and for an award of attorney's fees, costs and disbursements for the motion. The executed order to show cause was entered by the court on December 21, 2015 with a return date of January 15, 2016.

On January 14, 2016, plaintiffs moved by notice of motion for an order granting them leave to amend their complaint by withdrawing the cause of action initially pleaded and asserting

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a new cause of action seeking the same relief. The Notice of Motion had a return date of January 29, 2016. In his affirmation in support of the motion, Richard J. O’Keeffe stated that, the parties in the original complaint and proposed amended complaint are identical and the relief sought is substantially the same.

The proposed amended complaint alleged that Beatrice Thomas Williams, the parties’ mother, died on May 11, 2014, at which time she was the sole owner of the subject premises known as 123 High Street, Peekskill, New York. The proposed amended complaint further alleged that Beatrice Thomas Williams left a Will which granted use of the subject premises to each of her children during their lives and said Will was probated in Surrogate’s Court of Westchester County. The proposed amended complaint alleged that since the date of Beatrice Thomas William’s death, defendant has occupied the subject premises exclusively, wrongly prevented plaintiffs from entering or occupying the subject premises, and has refused to agree to sell the subject premises. As in the original complaint, the proposed amended complaint sought the sale of the subject premises, an accounting as to the rental value of the subject premises for each year defendant has had exclusive possession of the subject premises, an Estate accounting to be filed in the Surrogate’s Court, Westchester County, and the moneys from the Estate Account be paid in accordance with the accounting.

By Decision and Order dated January 25, 2016, this court granted that branch of defendant’s motion to dismiss plaintiffs’ complaint unless plaintiffs appeared for their depositions at defense counsel’s office on or before February 29, 2016. The Decision and Order directed defendant to, on or before March 4, 2016, upload to the NYSCEF website an affidavit of noncompliance and a proposed order with notice of settlement striking the complaint in the event that plaintiffs failed to appear for their depositions. The remaining branches of defendant’s motion were denied.

By Decision and Order dated and entered February 22, 2106, the court (Lefkowitz, J., as IAS Part Justice) granted plaintiffs’ unopposed motion seeking leave to file an amended complaint, and deemed the proposed amended complaint annexed to the motion served. As noted above, the amended complaint seeks essentially the same relief as sought in the original complaint, namely the sale of the subject premises, an accounting and the distribution of the proceeds amongst the parties. The amended complaint, unlike the original complaint, however, alleges that the parties obtained their interest in the subject premises through their mother’s Will, which granted each party a life estate in the subject premises. The amended complaint continues to allege that defendant has wrongfully occupied the subject premises, excluded plaintiffs, and refused to agree to sell the subject premises.

Plaintiffs failed to appear for their depositions on or before February 29, 2016.

On March 1, 2016, defendant uploaded an affidavit of noncompliance and a proposed order striking the complaint with notice of settlement for March 4, 2016. The affidavit of noncompliance, however, was never forwarded to the Court Attorney-Referee assigned to the case.

After a compliance conference was held on March 17, 2016, a Compliance Conference Referee Report & Order was entered on March 21, 2016, which directed the depositions of all parties be completed on or before April 19, 2016.

On March 21, 2016, defendant served and filed an answer to plaintiffs' amended complaint.

On March 30, 2016, plaintiffs served defendant with a Notice to Take Deposition Upon Oral Examination noticing the deposition for April 12, 2016. On the same date, defendant served plaintiffs with a Notice of Deposition Upon Oral Questions noticing the depositions for April 8, 2016.

By letter dated March 31, 2016, plaintiffs' counsel rejected defendant's deposition notice and claimed chronological priority in conducting the depositions since he had served plaintiffs with a notice of deposition prior to the service of defendant's notice of deposition. In the letter, plaintiffs' counsel further stated that he would produce plaintiff James Williams for a deposition on April 12, 2016, after defendant's deposition was completed that day, but had not yet made arrangements for the depositions of the other two plaintiffs.

By letter dated April 4, 2016, defense counsel informed plaintiffs' counsel that defendant had previously noticed several depositions of plaintiffs and plaintiffs' counsel had repeatedly failed to produce plaintiffs in compliance with the notices. Defense counsel further claimed first priority in taking the depositions and asserted that plaintiffs' counsel's attempt to disregard the past notices was ineffective. Defense counsel further reminded plaintiffs' counsel of his duty to produce all plaintiffs prior to the deadline of April 19, 2016.

By letter dated April 7, 2016, plaintiffs' counsel asserted that defendant did not have priority as to deposition since defendant served an answer to the amended complaint on March 21, 2016 without a Notice to Depose and plaintiffs then served the first Notice to Take Deposition. Plaintiffs' counsel again asserted priority and stated they would be prepared to depose defendant on April 12, 2016.

Plaintiffs did not appear for depositions on April 8, 2016. By letter of the same date, defense counsel noted plaintiffs' failure to appear for their depositions and offered plaintiffs' counsel the opportunity to produce plaintiffs on April 12, 2016, before defendant's deposition.

By letter dated April 11, 2016, plaintiffs' counsel asserted that defendants were in default in answering the amended complaint on March 17, 2016, when a compliance conference was held and the court directed depositions be completed on or before April 19, 2016. Plaintiffs' counsel further asserted they had priority of deposition since defendant failed to timely serve an answer to the amended complaint and did not serve a notice to deposition plaintiffs with the answer to the amended complaint. Accordingly, plaintiffs' counsel argued that defendant's priority as to depositions terminated since defendant made no effort to schedule plaintiffs'

depositions on the date defendant served the answer to the amended complaint. Therein, plaintiffs' counsel stated the intent to move forward with defendant's deposition on April 12, 2016, and offered to produce plaintiff James Williams on that day after the conclusion of defendant's deposition. Plaintiffs' counsel further informed defense counsel that plaintiff Pearl Owens was not physically or mentally capable of being deposed and that he was waiting for a letter from plaintiff Sarah Lawrey's doctor indicating that she could not travel.

Plaintiffs' counsel also enclosed with the letter a facsimile from an attorney for the State of New Jersey Department of Human Services, Division of Aging Services, Office of the Public Guardian for Elderly Adults, which indicated that a guardian had been appointed for plaintiff Pearl Owens and that she is neither physically nor mentally capable of being deposed. Specifically, the facsimile stated that plaintiff Owens suffered from severe Alzheimer's dementia, is entirely non-communicative and largely bedbound. A judgment of the Superior Court of New Jersey, Chancery Division, dated October 12, 2011, was annexed to the facsimile. The judgment declared plaintiff Owens to be an incapacitated person by the reason of unsoundness of mind and appointed the Public Guardian for Elderly Persons of New Jersey.

Defendant did not appear for a deposition on April 12, 2016.

On April 22, 2016, a compliance conference was held and a briefing schedule for the parties' present motions was issued.

### **The Parties' Contentions**

#### **Defendant's Motion to Dismiss:**

Defendant again seeks the dismissal of the complaint, as well as an award of \$5,000 for attorney's fees reasonably incurred due to plaintiffs' frivolous conduct, as well as costs and disbursements for the present motion. Defendant asserts that plaintiffs have willfully violated discovery orders directing their depositions and plaintiffs' counsel deliberately misrepresented the ability of plaintiffs to be deposed. Defendant specifically asserts that plaintiffs were given six opportunities to appear for their depositions and failed to appear. Defendant argues, inter alia, that plaintiffs' counsel, at first, asserted that the depositions of plaintiffs would not take place since plaintiffs were elderly and two of the three plaintiffs lived out of state. Thereafter, defendant asserts that plaintiffs' counsel refused to produce plaintiffs for depositions since plaintiffs' motion to amend the complaint was pending, even though counsel had been informed by the Court Attorney-Referee supervising discovery on multiple occasions that discovery was not stayed and deadlines for the depositions were set forth in multiple court orders. Further, defendant notes that plaintiffs failed to appear for depositions after this court directed defendant to upload an affidavit/affirmation of noncompliance with a proposed dismissal order if plaintiffs failed to appear for deposition on or before February 29, 2016. Finally, defendant asserts that plaintiffs' counsel asserted for the first time that plaintiff Pearl Owens was incapacitated and that Sarah Lawrey could not travel by letter dated April 11, 2016, after indicating that he was making arrangements for dates for their depositions in his letter of March 31, 2016.

Defense counsel also asserts that defendant was not produced on April 12, 2016 for a deposition as it was clear that plaintiffs' counsel had no intention of producing all of the plaintiffs for deposition. Defense counsel further contends that plaintiffs' counsel knew all along that he could not produce at least one of the plaintiffs.

Defendant also contends that plaintiffs and their counsel should be ordered to pay attorney's fees, sanctions and costs in light of their repeated failure to schedule plaintiffs' depositions, willful violation of court orders and misrepresentations to defense counsel, which have increased defendant's litigation costs.

Plaintiffs oppose defendant's motion to dismiss. Plaintiffs contend that, "as a matter of law," the court order dated February 22, 2016, which granted plaintiffs' motion to amend their complaint to substitute a new cause of action for their original cause of action, "superseded and nullified any prior discovery demands or directives, since issue had not yet been joined in the newly pleaded cause of action" (Affirmation in Opposition of Richard J. O'Keeffe, Esq. at ¶ 3). Plaintiffs further contend in opposition that despite the short time within which to complete depositions as directed by the court's March 18, 2016 compliance order, defendant failed to timely serve a notice to depose plaintiffs, such that plaintiffs, in an effort to comply with the order, served a notice to depose defendant on April 12, 2016 prior to defendant serving notice to depose plaintiffs. Plaintiffs, therefore, contend that they have priority to take defendant's deposition.

Plaintiffs further contend that defendant in support of the motion to dismiss erroneously relies upon facts arising under the original complaint, which has been superseded by the amended complaint. Plaintiffs also asserts that defendant had an opportunity to raise those issues in opposition to the motion to amend the complaint, but failed to oppose the motion and cannot now raise those issues.

#### Plaintiffs' Motion to Allow the Deposition of Plaintiff Sarah Lawrey be Taken by Video:

Plaintiffs seek a video deposition of plaintiff Sarah Lawrey based upon her inability to travel due to her physical condition. Plaintiffs' counsel, Richard J. O'Keeffe, who was substituted in as counsel for plaintiffs in November, 2015, contends the following as to plaintiff Sarah Lawrey: She is 81 years old and lives in Augusta, Georgia, who must be driven into town. She has high blood pressure, diabetes and severe asthma, and takes seven prescription medications. She is able to walk only short distances without help.

Plaintiffs' counsel relies upon the letter of Dr. Luther Thomas, plaintiff Lawrey's physician, who he contends opines that plaintiff Lawrey is unable to travel to Westchester to have her deposition taken because of her physical condition. In the letter, which is attached as Exhibit A to plaintiffs' counsel's affirmation, Dr. Thomas states the following: "I have advised Ms. Lawrey to avoid travel due to her current medical conditions."

Plaintiffs' counsel further asserts that the video deposition format is simple and the questioning would be conducted exactly the same as if plaintiff Sarah Lawrey was present in

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White Plains. Plaintiffs are willing to pay all “tv expenses” with defendant responsible for the stenographic expenses. Accordingly, plaintiffs contend that defendant will not be prejudiced by the video deposition.

Defendant opposes the motion for video deposition. Defendant again asserts that plaintiffs’ complaint should be dismissed because of plaintiffs’ willful failure to comply with multiple court orders and appear for depositions. Defendant also contends that plaintiffs’ counsel has withheld material information from the court and defendant’s counsel regarding plaintiff Sarah Lawrey’s alleged ailments which preclude her from traveling or providing any documentary evidence to that effect. In essence, defendant contends that plaintiffs waited too long to seek the video deposition and have shown a complete disregard for the court by waiting until after two motions to dismiss to seek the relief.

#### Oral Argument

At oral argument, William J. Florence, Esq. appeared and stated that he was counsel for the Estate of Beatrice Thomas Williams (herein after “the Estate”), the parties’ mother. Richard J. O’Keeffe, Esq. also appeared and stated that he was now counsel for plaintiffs as he had been substituted in as plaintiffs’ counsel.

Mr. O’Keeffe, on behalf of plaintiffs, contended that plaintiffs’ filing of the amended complaint was the equivalent of commencing a new action. Mr. O’Keeffe, however, failed to provide any authority for the proposition that the court’s order permitting plaintiffs to file an amended complaint superseded the prior court orders directing discovery and rendered the prior court orders void. In support of the contention that plaintiffs had priority as to depositions since they filed the first notice to take deposition after the order which deemed the amended complaint served, Mr. O’Keeffe again argued that the amended complaint was the equivalent of commencing a new action.

In response to this court’s questions regarding when Mr. O’Keeffe, plaintiffs’ counsel, learned that plaintiff Pearl Owens was incapacitated and unable to appear for a deposition, Mr. O’Keeffe stated that he learned she was incapacitated three to four days before the scheduled deposition in the “new action.” After the amended complaint was deemed served, defendant had noticed plaintiffs’ depositions for April 8, 2016 and then rescheduled the depositions to April 12, 2016, when plaintiffs did not appear on April 8, 2016. Defendant’s counsel, however, challenged that assertion and argued that Mr. O’Keeffe had been working with Mr. Florence “all along.”

With respect to plaintiff Sarah Lawrey, Mr. O’Keeffe stated that he first learned that she could not travel for her deposition immediately before her scheduled deposition when he called her. When asked about plaintiff Lawrey’s ailments which allegedly prevent her from traveling, Mr. O’Keeffe read the ailments listed in his Affirmation in Support, namely: high blood pressure, diabetes and severe asthma. Mr. O’Keeffe, however, when asked if plaintiff Lawrey could walk answered that she could

Initially, defendant's counsel argued that Mr. O'Keeffe had been working with plaintiffs' counsel before being substituted into the case, and that he cannot claim he did not have certain knowledge. Defendant's counsel also argued that the complaint should be dismissed as plaintiffs failed to comply with court orders by failing to appear for depositions. Defendant's counsel asserted that, as directed by the most recent court order directing plaintiffs appear for depositions, an affirmation of noncompliance had been filed when plaintiffs failed to appear for depositions.

### Analysis

CPLR 3126 provides that if any party "wilfully 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 (*Flynn v City of New York*, 101 AD3d 637, 638 [2d Dept 2012]; *Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without an adequate excuse (*Brandenburg v County of Rockland Sewer Dist. #1*, 127 AD3d 680 [2d Dept 2015]; *Flynn v City of New York*, 101 AD3d at 638; *Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]).

Plaintiffs have been directed on several occasions to appear for depositions. Plaintiffs' counsel has ignored specific directives to produce plaintiffs for depositions relying upon ever changing reasons why plaintiffs should not be produced for depositions. Notably, despite the court advising plaintiffs' counsel to the contrary, plaintiffs' counsel continued to insist that certain motions made by plaintiffs stayed discovery. It was not until April 11, 2016, after multiple court orders directing the depositions of the parties, that plaintiffs' counsel claimed that plaintiff Owens was incapacitated and unable to be deposed and that plaintiff Sarah Lawrey could not travel to Westchester County for a deposition due to her medical conditions.

Moreover, plaintiffs have not offered any excuse for belatedly advising the court that plaintiff Pearl Owens is unable to appear for a deposition due to her physical and mental condition, and that plaintiff Sarah Lawrey is unable to travel from Georgia for her deposition due to her medical conditions. Additionally, plaintiffs' counsel concedes that defendant had priority of deposition prior to the amended complaint being deemed served, but failed to address or offer any excuse for the failure of plaintiff James Williams, who lives in New York, to appear for a deposition in violation of several court orders issued prior to the court deeming the amended complaint served.

Additionally, although the motion record contains evidentiary proof that plaintiff Pearl

Owens has been incapacitated since 2011 and is unable to be deposed,<sup>1</sup> plaintiffs failed to demonstrate that plaintiff Sarah Lawrey is physically unable to appear for a deposition in New York. Accordingly, plaintiffs have failed to provide an adequate excuse for plaintiff Sarah Lawrey's failure to appear for a deposition by the deadlines set forth in multiple court orders.

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]). Moreover, "a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result" (*Farrakhan v N.Y.P. Holdings* 226 AD2d 133, 135-136 [1<sup>st</sup> Dept 1996]; see *Gabriel v Johnson's L.P. Gas Serv.*, 98 AD3d 168, 175 [4th Dept 2012]; *Gartner v Unified Windows, Doors & Siding*, 68 AD3d 815, 815 [2d Dept 2009]). It is within the discretion of the court to determine whether a party has demonstrated the requisite undue hardship warranting a protective order directing the party's deposition be held outside of New York by video conference or other remote means (*Yu Hui Chen v Chen Li Zhi*, 81 AD3d 818 [2d Dept 2011]; *American Bank Note Corp. v Daniele*, 81 AD3d 500, 501 [1st Dept 2011]; *Gabriel v Johnston's L.P. Gas Serv.*, 98 AD2d at 176 [court abused its discretion in denying protective order directing party deposition be conducted by video conference]).

Although such undue hardship has been found by the courts where a party has demonstrated that they are unable to leave their country of residence due to failing health or due to their immigration status (*Yu Hui Chen*, 81 AD3d at 819 [China-based deponent unable to secure visa to travel to United States]; *Wygocki v Milford Plaza Hotel*, 38 AD3d 237 [1<sup>st</sup> Dept 2007] [76 year old plaintiff medically unable to travel to New York]; *Doherty v City of New York*, 24 AD3d 275 [1<sup>st</sup> 2005][plaintiff denied travel visas for court-ordered New York deposition on three occasions]; *Hoffman v Kraus*, 260 AD2d 435, 688 NYS2d 575 [2d Dept 1999][defendant was a resident of Hungary, was more than 70 years old, and in failing health]), plaintiffs have failed to demonstrate by evidentiary proof that plaintiff Sarah Lawrey is prevented from traveling to New York for her deposition due to her health. The only proof offered by plaintiffs in support of their contention that plaintiff Sarah Lawrey cannot travel for her deposition is a one sentence letter from her physician which states that the physician advised plaintiff Sarah Lawrey "to avoid travel due to her current medical conditions." This letter, by itself, is insufficient to demonstrate that plaintiff Sarah Lawrey is unable to travel to Westchester County due to her medical conditions.

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<sup>1</sup> Defendant annexed to her motion papers a letter from plaintiffs' counsel dated April 11, 2016 and the attachments to the letter, including the judgment of the Superior Court of New Jersey, Chancery Division, dated October 12, 2011, wherein the Court determined that plaintiff Owens was an incapacitated person by the reason of unsoundness of mind and appointed the Public Guardian for Elderly Adults of New Jersey as the guardian of plaintiff Owens' person and property. Notably, CPLR 1201 provides that a person judicially declared to be incompetent shall appear by the committee of his property. It is unclear on this record whether either Richard J. O'Keeffe, Esq. or William J. Florence, Esq. have been retained in this action by the Public Guardian for Elderly Adults of New Jersey on behalf of plaintiff Owens.

Notably, the letter fails to set forth plaintiff Sarah Lawrey's medical conditions or physical limitations which would hinder her ability to travel.

Also, although plaintiffs' counsel asserts in his affirmation that plaintiff Sarah Lawrey has diabetes, asthma and high blood pressure, an attorney's affirmation is without evidentiary value if there is no personal knowledge of the facts (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Kase v H.E.E. Co.*, 95 AD3d 568, 569 [1<sup>st</sup> Dept 2012]). Plaintiffs' counsel failed to set forth the basis for any personal knowledge as to Sarah Lawrey's medical conditions in his affirmation. In any event, plaintiffs failed to demonstrate by evidentiary proof that these purported medical conditions would prevent plaintiff Sarah Lawrey from traveling. Further, the statement of plaintiffs' counsel that plaintiff Sarah Lawrey is only able to walk for short distances is, again, not supported by any evidentiary proof or based upon any alleged personal knowledge of counsel. Additionally, it cannot be said that the inability to walk distances long distances would, by itself, prevent plaintiff Sarah Lawrey from traveling. The court takes notice that people with disabilities, who are unable to walk long distances, are still able to travel.

Moreover, this court cannot agree with plaintiffs' counsel's contention that the service of the amended complaint deemed all prior discovery orders in this action null and void. Contrary to the contention of plaintiffs' counsel, the service of an amended complaint does not constitute a "new action" such that all prior orders are rendered void and unenforceable. If such were the case, a plaintiff who failed to follow court ordered discovery would merely have to amend the complaint or obtain permission to amend their complaint in order to avoid any penalty for failing to comply with court ordered discovery and essentially obtain a "do over." Such a result would unjustly benefit plaintiffs who blatantly ignore court orders, such as plaintiffs in the present case.

Similarly, contrary to plaintiffs' counsel's contention in opposition to defendant's motion to dismiss, the service of the amended complaint did not negate defendant's priority of deposition. As discussed above, the service of the amended complaint by plaintiffs did not constitute a "new action," nor restart the clock to serve a Notice of Deposition to obtain priority of deposition. After plaintiffs filed and served their original complaint, defendant was the first to serve a Notice of Deposition and obtained priority as to the depositions. Plaintiffs have failed to provide any authority in support of their contention to the contrary.

In any event, even if plaintiffs' counsel's belief that plaintiffs had priority of deposition after the amended complaint was deemed served was credited by this court as a reasonable excuse for the failure to produce plaintiffs for depositions in response to defendant's last Notice of Deposition, plaintiffs' counsel has failed to provide a reasonable excuse for the failure to comply with court orders directing plaintiffs' depositions prior to the service of the amended complaint.

Accordingly, this court can only conclude that plaintiffs intentionally failed to produce plaintiff Sarah Lawrey and James Williams for depositions in violation of multiple court orders without an adequate excuse. The repeated noncompliance with this court's orders without an adequate excuse can only be deemed by this court to be willful and contumacious such that dismissal of the amended complaint is warranted (*see Flynn v City of New York*, 101 AD3d 637; *see also Woolard v Suffolk County Water Auth.*, 16 AD3d 582 [2d Dept 2005])[complaint properly

dismissed where plaintiffs directed to appear for depositions by a date certain or have their complaint dismissed, and plaintiffs failed to appear for depositions]). “If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). “Although perhaps an undesirable outcome, parties, where necessary, will be held responsible for the failure of their lawyers to meet court-ordered deadlines and provide meaningful responses to discovery demands ...” (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 207-208 [2d Dept 2012]).

Notably, the fact that current counsel for plaintiffs was substituted in as counsel for plaintiffs does not excuse plaintiffs’ failure to appear for court ordered depositions. Although Mr. O’Keeffe was substituted in as counsel for plaintiffs in November, 2015, plaintiffs continued to violate subsequent court orders to appear and complete their depositions on the grounds that plaintiffs’ motion to amend the complaint was pending and discovery was stayed. Thereafter, it is clear from the record that Mr. O’Keeffe did not even attempt to schedule plaintiffs’ appearances for their depositions despite multiple court orders directing the completion of the parties’ depositions and the court advising Mr. O’Keeffe that discovery was not stayed. In his letter dated March 31, 2016, Mr. O’Keeffe stated that he had not yet made arrangements for the depositions of plaintiffs Owens and Lawrey. Moreover, by letter dated April 11, 2016, Mr. O’Keeffe stated for the first time that plaintiff Owens was incapacitated and unable to be deposed, and that he was waiting for a letter from plaintiff Lawrey’s doctor indicating she could not travel for her deposition.

In any event, this court notes that both current counsel and former counsel for plaintiffs appear to be affiliated with the law office of William J. Florence, Esq. as the correspondence uploaded by both counsel in this action were on the letterhead of the law office of William J. Florence, Jr., Esq. This court further notes that William J. Florence, Jr., Esq., has continued to be listed as counsel of record for plaintiffs on the NYSCEF website, despite Mr. Florence’s own statements at oral argument that he is counsel for the Estate and a conflict of interest prevents him from also representing plaintiffs.

Additionally, dismissal of the complaint is warranted insofar as this court issued a Decision and Order dated January 25, 2016, which granted defendant’s motion to dismiss plaintiffs’ complaint unless plaintiffs appeared for their depositions on or before February 22, 2016. The Decision and Order further directed defendant to file an affidavit of noncompliance on or before March 4, 2016, in the event that plaintiffs failed to appear for their depositions. Plaintiffs failed to appear for their depositions and defendant filed an affidavit of noncompliance on March 1, 2016. The affidavit of noncompliance, however, was not forwarded to the Court Attorney-Referee assigned to the case and a dismissal order was not issued based on the affidavit of noncompliance.

Therefore, that branch of defendant’s motion seeking dismissal of plaintiffs’ complaint is granted and plaintiffs’ motion must be denied in its entirety. In light of the dismissal of plaintiffs’ complaint, defendant’s application for attorney’s fees, costs and disbursements for the present motion is denied.

In view of the foregoing, it is:

ORDERED that the branch of defendant's motion seeking an order striking plaintiffs' complaint is granted and plaintiff's amended complaint is dismissed; and it is further

ORDERED that the branch of defendant's motion seeking an award of attorney's fees, costs and disbursements for the present motion is denied; and it is further

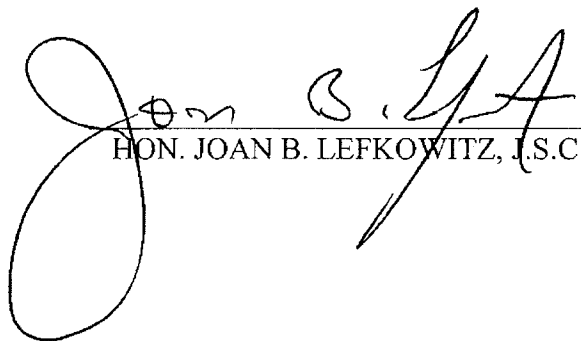
ORDERED that plaintiffs' motion is denied in its entirety; and it is further

ORDERED that defendant shall serve plaintiffs with a copy of this Decision and Order, with notice of entry, within seven days of entry; and it is further

ORDERED that defendant shall file Judgment with the Westchester County Clerk with a copy of this Decision and Order which shall award defendant judgment and dismiss plaintiffs' amended complaint.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York  
August 11, 2016



HON. JOAN B. LEFKOWITZ, J.S.C.

To:

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cc: Compliance Part Clerk