

Bashian & Farber, LLP v Syms
2017 NY Slip Op 30599(U)
January 9, 2017
Supreme Court, Westchester County
Docket Number: 60595/2014
Judge: Joan B. Lefkowitz
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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
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BASHIAN & FARBER, LLP and GARY E. BASHIAN, P.C.,

Plaintiffs,

DECISION and ORDER

Index No. 60595/2014
Motion Date: Jan. 9, 2017
Seq. No. 12

-against-

RICHARD SYMS; RICHARD SYMS AS TRUSTEE OF THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; INEVA SYMS aka I. EVE SYMS aka EVE SYMS; INEVA SYMS aka I. EVE SYMS aka EVE SYMS AS TRUSTEE OF THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; AND John Does #1-10,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order striking defendants' answer; and/or resolving issues in plaintiffs' favor; and/or prohibiting defendants from offering evidence that support their claims and defenses; and granting plaintiffs costs and attorney's fees pursuant CPLR 3126 and Part 130. Defendants oppose the motion.

Order to Show Cause - Affirmation in Support -Exhibits A-W
Affirmation in Opposition to Order to Show Cause – Exhibits 1-10 – Affirmation of Service

Upon the foregoing papers and oral argument heard on January 9, 2017, this motion is determined as follows:

The facts and procedural history of this case are not included herein as they have now been reiterated by the court on several occasions, most notably, in the June 29, 2015 Decision and Order of this Court (Lefkowitz, J.), and in the December 11, 2015 Decision and Order of this

Court (Wood, J.), and, most recently, in the December 16, 2016 Decision and Order of this Court (Wood, J.) which, inter alia, granted plaintiffs' motion to amend the complaint to add Ruth Merns and Michael D. Lynch as party defendants, and the debtor and creditor causes of action for the alleged fraudulent sale of defendants' Lewisboro property to Merns.

By this motion, plaintiffs seek an order striking defendants' answer; and/or resolving issues in plaintiffs' favor; and/or prohibiting defendants from offering evidence that support their claims and defenses; and granting plaintiffs costs and attorney's fees. Plaintiffs contend that defendants have failed to timely respond to: (1) plaintiffs' demands made at the time of defendants' depositions on July 25, 2016, and later memorialized in a letter dated August 5, 2016; (2) plaintiffs' Third Notice for Discovery and Inspection, dated August 4, 2016, and a follow up letter dated September 12, 2016; and (3) plaintiffs' October 4, 2016 demands (in the form of subpoena duces tecum) for information to be submitted at a hearing before the Honorable Charles D. Wood, J.S.C., on October 7, 2016. The parties appeared for a compliance conference on September 12, 2016, after which the Court issued a Compliance Order dated September 12, 2016, directing the parties to serve any supplemental demands on or before September 16, 2016, and responses to those demands on or before September 23, 2016. After the compliance conference, plaintiffs, by letter dated September 12, 2016, acknowledged that defendants had served responses to items 1, 3-10, and 13-18 of plaintiffs' Third Notice for Discovery and Inspection, but noted that responses were still outstanding to items 2, 11-12, 19-25.

When the parties appeared at a compliance conference on September 26, 2016, defendants had not provided the outstanding responses. Defendants were granted an extension to serve responses on or before October 11, 2016. When the parties appeared for a conference on November 7, 2016, defendants had not served responses to the outstanding discovery demands and the Court issued a briefing schedule to plaintiffs for the instant motion. Defendants eventually served responses to the outstanding demands on November 16, 2016.

Plaintiffs argue that defendants' further response was still deficient as the tax authorizations provided were copies, barely legible and incomplete. As to the remaining demands, plaintiffs assert that defendants implausibly responded that they "do not have any documents responsive" to the requests.

In opposition to the motion, defendants note that during the two years of discovery, they have produced many documents, including authorizations, 176 pages of financial and/or estate planning documents, responses to plaintiffs' three notices for discovery and inspection, a bill of particulars, 164 pages comprising the file of an attorney who prepared certain estate planning documents, various affidavits and supplemental affidavits from defendants specifying the status of income tax returns, more than 800 pages comprising of defendant Mr. Sym's entire medical file, as sought by plaintiffs, and dozens of financial information authorizations. Defendants further note that the recent delay in providing documents was due to the parties engaging in settlement discussions. Defendants argue that, given the foregoing, the striking of their answer or the imposition of sanctions is unwarranted.

CPLR 3126 provides that if any party “willfully fails to disclose information which the court finds ought to have been disclosed,” the court may, inter alia, issue an order of preclusion or 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]).

The Court finds that defendants’ conduct does not rise to the level of willful and contumacious behavior warranting the harsh penalty of striking their answer or the imposition of sanctions. While defendants had only partially responded to plaintiffs’ August 4, 2016 demands by September 12, 2016, defendants thereafter responded to plaintiffs’ August 4, 2016 demands on November 16, 2016. Defendants note that the delay in their further response to plaintiffs’ August 4, 2016 demands was due to the parties’ engaging in settlement discussions. Nevertheless, to the extent that the tax authorizations recently provided were copies, illegible, and incomplete, defendants should provide original, legible and complete authorizations. As to the remaining demands, defendants provided the authorization for financial advisor Brian Sodol and indicated that they were not in possession of the documents sought. The Court finds this response is sufficient.

With respect to plaintiffs’ July 2016 post-deposition demands (as detailed in plaintiffs’ August 5, 2016 letter), defendants’ responses to the August 4, 2016 demands also served to respond to plaintiffs’ post-deposition demands, including demands seeking lease/rental information regarding the rental of defendants’ Amenia, New York property, buyer information and sales agreement for defendants’ Waccabuc, New York property, and financial information for defendant Mrs. Syms. Plaintiffs additionally sought, in their post-deposition demands, the name and address of the doctor(s) treating defendant Mrs. Syms for chemotherapy, a demand to which defendants properly objected. Plaintiffs have not met their initial burden of making an evidentiary showing that defendant Mrs. Syms’ medical condition has been placed in controversy in the action (*Lombardi v Hall*, 5 AD3d 739, 740 [2d Dept 2004] [a party waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue]; *Modern New York Discovery*, Scope of Disclosure § 23:31).

Lastly, plaintiffs contend that defendants failed to provide information pursuant to an October 4, 2016 demand (in the form of a subpoena duces tecum) for documentation which was to have been provided at a hearing before the Honorable Charles D. Wood, J.S.C., held on October 7, 2016. The information sought was information regarding defendants’ Lewisboro, New York property, loan documents between defendants and Ruth Merns, and gift tax returns pertaining to gifts between defendants and Ruth Merns. Significantly, the recent Decision and Order of this Court (Wood, J.), dated December 16, 2016, inter alia, granted plaintiffs’ motion to amend the complaint to add Ruth Merns and Michael D. Lynch as party defendants, and debtor

and creditor causes of action for the alleged fraudulent sale of a Lewisboro property to Merns. Plaintiffs have since filed a summons and amended complaint and the parties will now proceed with discovery respecting plaintiffs' newly-added claims and the newly-added party defendants.

In light of the foregoing, plaintiffs' motion for an order striking defendants' answer is granted only to the limited extent that defendants are to provide original and complete authorizations to obtain tax information from the New York State Department of Taxation and Finance and Internal Revenue Service. The Court denies the remaining branches of plaintiffs' motion.

Accordingly,

ORDERED that plaintiffs' motion for an order striking defendants' answer is granted only to the limited extent that defendants are to provide original and complete authorizations to obtain tax information from the New York State Department of Taxation and Finance and Internal Revenue Service on or before January 23, 2017; and it is further

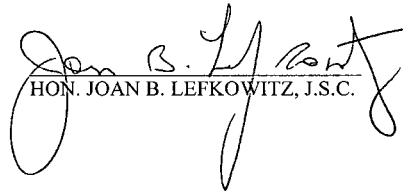
ORDERED that the remaining branches of plaintiffs' motion for an order resolving issues in plaintiffs' favor; and/or prohibiting defendants from offering evidence that support their claims and defenses; and granting plaintiffs costs and attorney's fees are denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry on all parties within ten (10) days of entry and shall file proof of service on the NYSCEF website within five (5) days of service; and it is further

ORDERED that counsel for all parties are directed to appear for a conference in the Compliance Part, Courtroom 800 on January 30, 2017, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 9, 2017


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

To:
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By NYSCEF