

Schwartz v Bourque

2018 NY Slip Op 31274(U)

June 7, 2018

Surrogate's Court, Nassau County

Docket Number: 2013-376098/B

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Brenda Schwartz,

Plaintiff,

-against-

**Christine Bourque, as Executrix of the Estate of
DOROTHY WINTERSALER, and Christine
Bourque, Individually,**

Defendants.

DECISION & ORDER

**File No. 2013-376098/B
Dec. Nos. 34468 & 34469**

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion..	1
Attorney’s Affirmation in Support of Motion with Exhibits.	2
Notice of Cross Motion.	3
Attorney’s Affirmation in Opposition to Motion and in Support of Cross Motion with Exhibits.	4
Affirmation in Reply and in Opposition to Cross Motion.	5

Plaintiff, Brenda Schwartz, moves for an order (1) pursuant to CPLR §3102, authorizing the plaintiff to conduct limited disclosure; and (2) such other, further and different relief as this court deems just and proper. Defendant, Christine Bourque, cross-moves for an order (1) denying the plaintiff’s motion; (2) pursuant to CPLR §3215(a), entering judgment dismissing plaintiff’s complaint, with prejudice, in its entirety; and/or in the alternative, (3) pursuant to 22 NYCRR §§ 130-1.1, 130-1.2 and 130-1.3 of the Rules of the Chief Administrator of the Court, awarding sanctions against plaintiff and her attorneys;

(4) awarding legal fees in the amounts incurred by defendant individually and as executrix of the estate of Dorothy Wintersaler, in defending the claims made by plaintiff; and (5) granting such other and further relief as this court may deem just and proper.

This action regarding title to real property was commenced in Supreme Court, Nassau County, against Dorothy Wintersaler, and was transferred here by order of the Supreme Court after her death and the appointment of Christine Bourque as her executor. Plaintiff previously moved for summary judgment on her complaint and defendant cross-moved for summary judgment dismissing all of the plaintiff's claims.

By decision dated June 14, 2017, this court, inter alia, denied both plaintiff's motion for summary judgment and defendant's cross motion for summary judgment with regard to plaintiff's first cause of action.¹ The first cause of action in the plaintiff's complaint is against Christine Bourque, as executor of the estate of Dorothy Wintersaler, for Dorothy's purported breach of the agreement entered into by the plaintiff and the decedent on November 21, 1978 (the 1978 Agreement). The 1978 Agreement provides, in relevant part, that:

“3. DOROTHY WINTERSALER, agrees, provided BRENDA SCHWARTZ and ROBERT SCHWARTZ have continuously maintained the premises outlined in paragraph 1 of this agreement, to name BRENDA SCHWARTZ in her Last Will and Testament and thereby give, devise and bequeath the premises . . . to BRENDA SCHWARTZ in fee simple absolute, subject to any existing mortgage at the time of her death.”

¹ The decision also granted defendant's cross motion for summary judgment to the extent of dismissing the second, third and eleventh causes of action in the complaint and granted plaintiff summary judgment on the fourth, fifth, sixth, seventh, eighth and ninth causes of action in the complaint. The tenth cause of action was not addressed on the motion or cross motion for summary judgment.

In denying summary judgment on plaintiff's first cause of action, this court found unresolved questions of fact because the plaintiff failed to offer any proof of the claim that she paid all expenses associated with the upkeep of the premises, as required by the terms of the 1978 Agreement.

The matter was set down for a hearing to take the plaintiff's proofs with regard to her satisfaction of her obligations under the 1978 Agreement and to fix a reasonable attorney's fee for plaintiff's attorneys. At the hearing commenced on September 18, 2017, it was determined that the personal check registers and other documents which plaintiff was prepared to submit as evidence in support of her claim that she had paid the expenses for the upkeep of the premises were inadmissible (*Lambert v Sklar*, 91 AD3d 917 [2d Dept 2012]).

Plaintiff therefore seeks permission of this court to conduct limited disclosure so that she may acquire the evidence necessary to support her claim. Since the denial of her motion for summary judgment with regard to her first cause of action for breach of contract, the plaintiff has been on notice that she must establish her performance pursuant to the contract. Moreover, at the commencement of the hearing in this matter when it became apparent that the only evidence which the plaintiff had to support her claim was inadmissible, she was on notice that she needed to procure appropriate evidence. The plaintiff has had more than sufficient time to subpoena whatever bank, utility or other records which might be available to support her claim. If such records are no longer available, affording the plaintiff additional time for discovery will not ameliorate that situation. Plaintiff has failed to demonstrate that defendant would have any evidence whatsoever which would support her claim so there is no basis for allowing the plaintiff additional time to seek discovery from defendant.

Accordingly, plaintiff's request for permission to conduct limited disclosure is **DENIED**.

According to the plaintiff, the defendant's cross motion was untimely made. In any event, the affirmative relief sought therein must be **DENIED**.

There is no valid basis for granting the defendant a default judgment against the plaintiff pursuant to CPLR § 3215 (a), which provides for such relief when a plaintiff has failed to proceed to trial or if there is neglect to proceed. Neither ground for default is present here.

Insofar as the defendants' cross motion seeks sanctions, Part 130 of the Rules of the Chief Administrator of the Courts (22 NYCRR part 130) provides for the award of costs and imposition of financial sanctions for frivolous conduct in civil litigation. Conduct is frivolous and subject to the award of costs and/or the imposition of sanctions when it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false (22 NYCRR 130-1.1 [c]; *Weissman v Weissman*, 116 AD3d 848 [2d Dept 2014]; *Muro-Light v Farley*, 95 AD3d 846 [2d Dept 2012]; *Mascia v Maresco*, 39 AD3d 504 [2d Dept 2007]).

In determining whether a party's conduct is frivolous, the court must consider, among other factors, the circumstances under which the conduct took place, including the time available to investigate the legal or factual basis of the conduct, and whether the conduct was discontinued when its lack of legal or factual basis should have been apparent or was brought to the attention of counsel or the party (22 NYCRR 130-1.1 [c]; *Finkelman v SBRE, LLC*, 71

AD3d 1081 [2d Dept 2010]; *Matter of Ernestine R.*, 61 AD3d 874 [2d Dept 2009]; *Glenn v Annunziata*, 53 AD3d 565 [2d Dept 2008]).

This court has determined that neither the conduct of plaintiff nor her counsel is deemed to rise to the level of frivolous conduct as defined by the applicable rule and thus the court declines to impose costs or sanctions at this time. Similarly, the court finds that there is no basis for an award of attorneys' fees to defendant in either her individual capacity or her capacity as an executor.

Plaintiff's motion for an order authorizing the plaintiff to conduct limited disclosure is **DENIED**. Defendant's cross motion for entry of a default judgment; sanctions; and legal fees is **DENIED**.

Counsel for both parties are directed to appear before this court for a conference on June 28, 2018 at 10:00 a.m. to schedule the continuation of the hearing in this matter.

This constitutes the decision and order of the court.

Dated: June 7, 2018
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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