

Stanescu v Stanescu
2018 NY Slip Op 33716(U)
March 26, 2018
Supreme Court, Westchester County
Docket Number: 60186/2017
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

-----X
CATHERINE STANESCU,

Plaintiff,

-against-

JOHN STANESCU,

Defendant.
-----X

DECISION and ORDER

Index No. 60186/2017

Motion Date: Mar. 26, 2018

Seq. No. 3

LEFKOWITZ, J.

The following papers were read on defendant’s motion for an order pursuant to CPLR 3126 to strike, and pursuant to CPLR 3124 compelling plaintiff to provide all information and documents responsive to defendant’s demand dated December 19, 2017.

Order to Show Cause dated February 23, 2018; Affirmation in Support; Exhibits 1-6
Affirmation in Opposition; Exhibits A-E

Upon the foregoing papers and proceedings held on March 26, 2018, this motion is determined as follows:

This action was commenced on or about July 7, 2017. Plaintiff sought a partition of a residence (hereinafter “the subject property”). Plaintiff also sought a judgment directing the immediate sale of the subject property and a determination and distribution of the respective interest and credits in the proceeds from the sale according to the parties’ respective rights. The parties own the subject property as tenants-in common through one share of capital stock and a license agreement issued by the Kuder Island Colony, Inc., for the premises known as Site 18, Hen Island in the City of Rye, New York. Plaintiff stated in her complaint that the parties acquired this capital stock from the estate in or about June or July, 1998.

In his answer defendant denied the essential allegations in the complaint. He asserted the affirmative defenses of misuse and conversion of funds, unclean hands, a demand for escrow, and inadequate purchase offers. Defendant also asserted two counterclaims against plaintiff for an accounting and the improper conversion of funds. Defendant asserted that these alleged actions by plaintiff commenced in 1998.

On or about July 3, 2017, plaintiff served a reply to defendant’s counterclaims denying all

allegations asserted against her in regards thereto.

Plaintiff and defendants are siblings. They received their rights of survivorship ownership in the property from the estate of George Stanesco pursuant to his last will and testament dated October 18, 1996. The parties own properties, other than the subject property, that they inherited from the estate of George Stanesco. The parties here are involved in several other litigations, including an action concerning a property in Yonkers and an action concerning the estate of their mother.

By "First Demand for Production of Documents," dated July 19, 2017, defendant sought information and documents from plaintiff. Plaintiff filed an objection dated September 22, 2017.

By notice dated August 14, 2017, plaintiff moved for summary judgment seeking an immediate partition and sale of the subject property, an appointment of a referee to conduct the partition by public auction and to equitably distribute the proceeds to the parties, and costs and disbursements. By notice dated September 1, 2017, defendant cross-moved for an order compelling production of all documents demanded by him or, alternatively, dismissing the complaint.

On September 8, 2017, the parties executed a preliminary conference stipulation that was so-ordered by the court (Tolbert, J.).

By letter to the court dated November 1, 2017, defendant withdrew his cross motion seeking relief relating to discovery.

By another "First Demand for Production of Documents," dated December 19, 2017, defendant sought information and documents. A comparison of the two demands reveals that they are substantially the same except: the December demand limits some of the documents requested to the subject property only (demand numbers 2, 4, 5, 6 and 10); the demand in July for all paperwork in plaintiff's possession containing defendant's name is omitted; and the December demand numbers 14, 15, 16 and 17, seeking emails and letters from plaintiff to defendant and from defendant to plaintiff, referable to the subject property, are new demands.

The parties appeared for a compliance conference on December 20, 2017. The compliance conference referee report and order, so-ordered by this court (Lefkowitz, J.), directed plaintiff to respond to defendant's discovery demands on or before January 19, 2018. On or about January 17, 2018, plaintiff served her objections to these demands. She objected to all demands other than demand numbers 18-25 (25 which is incorrectly referred to in the demand as 21).

When the parties appeared for their next compliance conference on February 9, the discovery motion briefing schedule regarding the present motion was issued.

The court (Ecker, J.), issued a decision and order dated February 23, 2018. In that decision and order the court noted that defendant agreed to the sale of the subject property at a

fair price, to an independent purchaser upon the condition that the proceeds remain in escrow pending resolution of the remaining litigations between the parties. The court directed the sale of the subject property to be conducted pursuant to RPAPL §915, with the proceeds to be held in trust by plaintiff's attorney pending further order of the court. The court directed plaintiff to submit an order on notice.

On or about March 1, 2018, plaintiff submitted her proposed interlocutor judgment. To date a judgment has not been issued.

Presently defendant seeks an order compelling plaintiff to provide all information and documents responsive to his demands dated December 19, 2017, or alternatively, dismissing the complaint and the reply to his counterclaims. Defendant asserts that in objecting to his demands, plaintiff is completely refusing to engage in the discovery process. Defendant contends that even though plaintiff is objecting to the length of time involved, the issues here surround the entire financial relationship between the parties. Defendant asserts that only plaintiff has knowledge of which back accounts were utilized with respect to the subject property.

Plaintiff opposes the motion. She notes that the referee to be appointed by Judge Ecker will determine the respective financial rights, interests and equities of the parties. Plaintiff argues that the only relevant documentation as to the rights and interests of these parties to the subject property will be determined by the court appointed referee which should not involve claims in other legal proceedings not involving the subject property.

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]). There is nothing on the record in this action from which the court can infer willful and contumacious action on plaintiff's part. The record demonstrates that plaintiff timely filed a detailed response to defendant's December demand for documents two days before the deadline set forth in the compliance conference referee report and order.

Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]).

Plaintiff concedes that demand numbers 18-25 are relevant to the issue of the rights, equities and interest of the respective parties to the proceeds from the sale of the subject property. The court agrees with plaintiff that demand numbers 12-17, seeking copies of text messages, emails, and letters, from plaintiff to defendant and from defendant to plaintiff are documents that defendant should have in his personal possession as either the sender or the receiver of these messages.

In demand number 1 defendant seeks testamentary instruments which purportedly bequeaths the subject property to the parties. The court finds that insofar as the parties agree that they are tenants-in-common of the subject property, these documents are not relevant.

In demand number 2 defendant seeks all documents evidencing joint bank accounts in which the parties are both named, located in this country, Romania or Greece, and which were the source of funds used to pay any bill or expense for the subject property. The court finds that this demand is overbroad in its specificity.

In demand number 3 defendant seeks documents relating to copies of checks, money orders, cash receipts, credit card payments, evidencing payment of rent maintenance or any special assessment for the subject property. In demand number 4 defendant seeks all documents evidencing the tax status and/or payment of taxes for the subject property. In demand number 5 defendant seeks copies of checks signed by plaintiff from any joint checking account with defendant if the funds were utilized to pay rent, maintenance, assessment, special assessment, fines or other expense for the subject property. In demand number six defendant seeks copies of all credit card statements on the parties' joint accounts if that credit card was used to pay any rent, maintenance, assessment, special assessment, fines or other expense for the subject property. In demand number 7, defendant seeks copies of checks, money order, or cash receipts received by plaintiff from occupants or tenants of the subject property. The court finds that these demands are relevant to the issues in this case.

In demand numbers 8 and 10 (there is no demand number 9) defendant seeks documents from accounts relating to Fleet Bank in the parties' names. Plaintiff objects to these demands stating that Fleet Bank no longer exists and that, defendant as an acknowledged co-owner of these accounts, should not burden plaintiff with this demand which he, too, can obtain. The court agrees with plaintiff.

In demand number 11 defendant seeks copies of checks received by plaintiff for the payment of electricity, gas or any other expense from the tenant at any property in which the parties have an interest. The court finds that this demand is overbroad in that it seeks documents for properties other than the subject property and should be restricted to the subject property only.

In sum, and keeping in mind that in this action plaintiff sought a judgment directing the immediate sale of the subject property and a determination and distribution of the respective interest and credits in the proceeds from the sale according to the parties' respective rights, the court finds that plaintiff should provide to defendant documents responsive to defendant's demand numbers 3-7, 11, and 18-25, insofar as these documents are relevant to the issues relating to the parties' respective interest in the proceeds from the sale of the subject property.

All documents provided should pertain to the subject property only and cover the period from July 1998 at which time the parties acquired the subject property as tenants in common.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is:

ORDERED that the branch of defendant's motion seeking an order compelling plaintiff to provide discovery is granted only to the extent that, on or before April 13, 2018, plaintiff is directed to provide to defendant documents responsive to defendant's demand numbers 3-7, 11 and 18-25, which documents relate to the subject property only which the parties own as tenants-in common through one share of capital stock and a license agreement issued by the Kuder Island Colony, Inc., and known as Site 18, Hen Island in the City of Rye, New York, and covering the time period from July 1998 to the present. To the extent that any document the court is now directing plaintiff to provide cannot be provided, on or before April 13, 2018, plaintiff shall provide her personal affidavit stating the parameters of her search for the particular document(s) and why it(they) cannot be provided; and it is further

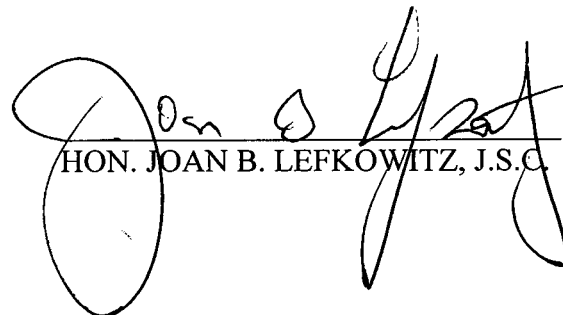
ORDERED that the remaining branch of defendant's motion seeking an order pursuant to CPLR 3126 is denied; and it is further

ORDERED that defendant is directed to serve a copy of this decision and order, with notice of entry, upon plaintiff within five days of entry; and it is further,

ORDERED that the compliance conference presently scheduled for March 30, 2018, is adjourned and both parties shall appear for a conference in the Compliance Part, Room 800 on April 18, 2018, at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
March 26, 2018



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

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