Flowers v 73rd Townhouse LLC
2023 NY Slip Op 30097(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 651036/2010
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

----------X

J. CHRISTOPHER FLOWERS,

Plaintiff,

- v -

73RD TOWNHOUSE LLC,73RD TOWNHOUSE MEMBER LLC,73RD KR LLC, JAMES K. RINZLER, BENJAMIN S. RINZLER, BRADLEY T. RINZLER, ROBERTA K. RINZLER, THE ESTATE OF MILTON S. RINZLER, THE RINZLER FAMILY LIMITED PARNTERS, DOMINION PROPERTY GROUP, LLC, DOMINION MANAGEMENT COMPANY, LLC, DOMINION FINANCIAL CORPORATION, JUDITH KINGSFORD, MILTON S. RINZLER, JAMES K. RINZLER, BENJAMIN S. RINZLER, BRADLEY T. RINZLER, and ROBERTA K. RINZLER,

Defendants.

----------X

INDEX NO. 651036/2010

MOTION DATE 09/13/2022

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 479, 481, 482, 483, 484, 485, 486

were read on this motion to/for SANCTIONS.

In this heavily litigated action, commenced in 2010, the plaintiff seeks, *inter alia*, a judgment against the defendants for fraudulent conveyances by the defendant-judgment debtor 73rd Townhouse, LLC (73rd Townhouse), to evade collection of a $500,000.00 consent judgment entered in favor of the plaintiff-judgment creditor in a prior action. By a decision and order dated August 31, 2020, the court granted the plaintiff's motion for partial summary judgment (SEQ 010) on the first, second, third, fifth, sixth, seventh, and sixteenth causes of action, with an evidentiary hearing to be held to determine the damages and attorney's fees due to the plaintiff as against each defendant. By a decision and order dated October 30, 2020, the court, *inter alia*, denied a subsequent motion by the plaintiff to hold the defendants in contempt and for sanctions, including attorney's fees, pursuant to 22 NYCRR § 130-1.1., CPLR 3126, and NY Judiciary Law § 753 (SEQ 011), in part for conduct alleged in connection with the plaintiff's motion for partial summary judgment, without prejudice to renewal upon the court's determination of the plaintiff's motion to reargue the motion for partial summary judgment (SEQ 012). The court denied the plaintiff's motion to reargue on March 3, 2021. The First Department, Appellate Division, modified the court's August 31, 2020, decision on partial summary judgment on February 1, 2022, denying summary judgment on the second cause of action, removing the court's directive that a hearing on the individual defendants' intent be

conducted, and otherwise affirming. On February 2, 2022, the plaintiff renewed his motion to hold the defendants in contempt and for sanctions of at least $500,000.00 (SEQ 011). The defendants oppose the motion. The motion is granted in part.

22 NYCRR § 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR § 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against . . . a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR § 130-1.1(c). "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of . . . the party." Id.

The gravamen of the plaintiff's argument for sanctions pursuant to 22 NYCRR § 130-1.1 is that nearly every action taken, statement made, and legal strategy adopted by the defendants and their counsel since the inception of this action over a decade ago, and even prior to that, has amounted to frivolous conduct. The plaintiff's litany of bad behavior includes, among other things: filing a motion to dismiss based on a "deliberately-misleading reading" of the complaint; raising legal arguments that were subsequently rejected by the court or Appellate Division; failing to turn over "prime financial evidence"; failing to timely search for and produce discovery and witnesses; filing certain opposition to the plaintiff's summary judgment motion; and filing certain opposition to the instant motion. The defendant's litigation of this matter, even if partly unsuccessful or based in dubious interpretations of the law that have already been rejected by this court and the Appellate Division, First Department, does not constitute frivolous conduct warranting the imposition of sanctions under the circumstances of this case. Nor may the plaintiff recover sanctions at this juncture for the defendants' purported discovery violations, which, as discussed in greater detail below, should have been fully addressed by the plaintiff well before the filing of the note of issue and certificate of readiness.

Nonetheless, the plaintiff accurately points out that defense counsel neglected to advise the court of the death of one of the defendants, whom counsel claimed to represent, for over a year. Such failure is more than a harmless oversight; it amounts to frivolous conduct indisputably prejudicial to the plaintiff insofar as the death of a party, as counsel well knows, automatically stays an action and generally renders all proceedings thereafter a nullity until a proper substitution is completed and the stay is lifted. See Griffin v Manning, 36 AD3d 530, 532 (1st Dept. 2007); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012) Manto v Cerbone, 71

AD3d 1099 (2nd Dept. 2010); Nieves v 331 E. 109th St. Corp., 112 AD2d 59 (1st Dept. 1985). Counsel's oversight is rendered all the more inexcusable by the admission that counsel purported to represent the decedent and his wife throughout this litigation based on another individual defendant's alleged informal agreement to undertake responsibility to act on his codefendants' behalf, and not based on any agreement with the decedent and his wife and certainly not as the retained attorney for a duly appointed representative of the decedent's estate. Since counsel did not inform the court of the death, he of course did not timely demonstrate to the court that "special circumstances" existed in this case create an exception to the general rule. See Griffin v Manning, supra. As a result of counsel's frivolous conduct, the court imposes sanctions against counsel in the sum of $7,500.00.

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [a pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). However, sanctions pursuant to CPLR 3126 are inappropriate where the party seeking discovery has filed a note of issue and certificate of readiness representing that all discovery is completed and that there are no outstanding discovery requests, without preserving any rights or objections, thereby waiving his right to challenge deficiencies in responses to discovery orders. Marte v City of New York, 102 AD3d 557, 558 (1st Dept. 2013); see also Paulino v Xing Wu Chen, 187 AD3d 547, 548 (1st Dept. 2020); Williams v Laura Livery Corporation, 173 AD3d 497, 498 (1st Dept. 2019); Rivera-Irby v City of New York, 71 AD3d 482, 482 (1st Dept. 2010); Escourse v City of New York, 27 AD3d 319, 320 (1st Dept. 2006).

The record reflects delays on the part of the defendants in producing discovery sought by the plaintiff and directed in court orders. In connection therewith, the plaintiff made a series of motions to compel production, beginning in 2013 and ending in late 2017 (SEQ 002, SEQ 004, SEQ 007, SEQ 008). Of these, the only Notice of Motion referencing sanctions pursuant to CPLR 3126 was filed on September 19, 2014 (SEQ 004). Notwithstanding that the court's order disposing of such motion, dated March 30, 2015, did not award sanctions, the plaintiff never moved to reargue the motion, nor does it appear the plaintiff perfected an appeal of the motion. The plaintiff then waited to file a further application for sanctions pursuant to CPLR 3126 (SEQ 011) until nearly 6 months after the last discovery conference was held and 5 months after the plaintiff had filed the note of issue and certificate of readiness. The last conference order, dated March 1, 2018, and the certificate of readiness, filed March 29, 2018, both reflect the plaintiff's representation that all discovery was completed, without any reservation. Nonetheless, the instant application includes allegations that the defendants continue to withhold highly relevant materials they were ordered to produce, and that the plaintiff incurred $500,000.00 in expert expenses on summary judgment as a result of the unavailability of such materials.

The branch of the plaintiff's application seeking sanctions for failure to comply with discovery orders pursuant to CPLR 3126 must be denied as untimely. Contrary to the plaintiff's erroneous pronouncement that only the Appellate Division, Second Department, requires motions for discovery sanctions to be made prior to the filing of the note of issue and certificate of readiness, substantial caselaw in the Appellate Division, First Department, makes clear that the same rule applies here. See, e.g., Paulino v Xing Wu Chen, supra; Williams v Laura Livery Corporation, supra; Marte v City of New York, supra; Rivera-Irby v City of New York, supra; Escourse v City of New York, supra. The plaintiff's election to spend $500,000.00 in retaining experts rather than moving for further disclosure and sanctions prior to filing the note of issue and certificate of readiness, and his motion for summary judgment, was a strategic decision the plaintiff was authorized to make. However, it does not change the law. The plaintiff's suggestion that the court, by setting a deadline for the filing of the note of issue, compelled him to make an affirmative misstatement as to the status of discovery in this action is incorrect and the plaintiff is cautioned that it could itself form a basis for sanction pursuant to 22 NYCRR § 130-1.1(a).

Under Judiciary Law § 753, a court of record "has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced." Judiciary Law § 753(A). In order to support a finding of civil contempt, it must be determined (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that it appears, with reasonable certainty, that the order has been disobeyed, (3) that the party to be held in contempt had knowledge of the order, and (4) there is demonstrated prejudice to the right of a party to the litigation. Matter of McCormick v Axelrod, 59 NY2d 574, 583 (1983); see El-Dehdan v El-Dehdan, 26 NY3d 19, 29 (2015); Bernard-Cadet v Gobin, 94 AD3d 1030, 1031 (2nd Dept. 2012).

Here, no basis for civil contempt exists. The only orders the plaintiff identifies as having been violated are discovery orders. As the court has already explained, the plaintiff waived any further objection to the defendants' responses to such orders when he represented to the court at a conference on March 1, 2018, that discovery was complete and proceeded to file the note of issue and certificate of readiness. Moreover, contempt is omitted as a permissible sanction against a party for failure to disclose under CPLR 3126. Thus, it does not appear that a contempt remedy is even a procedurally appropriate under the circumstances. In any event, the plaintiff may not circumvent the caselaw providing for waiver of his right to demand sanctions under CPLR 3126 by simply recasting his demand as a motion for civil contempt.

Accordingly, it is

ORDERED that the plaintiff's motion to renew its application to hold the defendants in contempt and for sanctions, including attorney's fees, pursuant to 22 NYCRR § 130-1.1., CPLR 3126, and NY Judiciary Law § 753 is granted to the extent that the plaintiff is awarded sanctions against defense counsel, Goldberg Weprin Finkel Goldstein, LLP, pursuant to 22 NYCRR § 130-1.1 in the sum of $7,500.00, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of J. Christopher Flowers and against Goldberg Weprin Finkel Goldstein, LLP, in the sum of $7,500.00.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/9/2023
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE