

McGlashan v McGlashan

2024 NY Slip Op 33158(U)

August 20, 2024

Supreme Court, Kings County

Docket Number: Index No. 11191/2015

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of August, 2024.

P R E S E N T:
HON. WAVNY TOUSSAINT
Justice.

COLONI MCGLASHAN,

Plaintiff,

Index No.: 11191/2015

DECISION AND ORDER

-against-

ROSETTA MCGLASHAN, as EXECUTOR
of the ESTATE OF ZACHARIAH MCGLASHAN,
DECEASED,

Defendant.

The following papers numbered 1 to read herein
Notice of Motion/Order to Show Cause/
and Affidavits (Affirmations) Annexed
Cross Motion and Affidavits (Affirmation) Annexed
Answers/Opposing Affidavits (Affirmations)

Papers Numbered¹

24-29; 62-68; 69-77; 78-86

See Clerk's Minutes Where
Referenced; 88-90; 91-97;
98-101

Reply Affidavits (Affirmations)

See Clerk's Minutes Where
Referenced; 103-106;
107-112; 113-115

Affidavit (Affirmation)
Other Papers

42; 49; 50-54

¹ In addition to referencing the NYSCEF Docket Numbers herein, the Court also refers to the minutes of the Kings County Clerk for certain documents submitted before this matter was fully e-filed, and for which the conversion uploads found at NYSCEF Doc. Nos. 1 and 2, may not contain. Such references are denoted as "Clerk's Minutes" and are identified by filing date.

Upon the foregoing papers, the Court is tasked with finally resolving plaintiff's motion (Seq. 28), which seeks an order, pursuant to CPLR § 3126, striking the answer.² Motion Seq. 28 was conditionally granted by the Court on October 25, 2023 (the "10/25/23 Order"; NYSCEF Doc. No. 44). However, in lieu of immediately striking the answer, the defendant/estate, and its counsel Rita Hill, Esq. ("Counsel Hill"), were afforded an additional 45 days to comply with the mandates of the order which directed the defendant/estate to submit a proper accounting of rents, among other things. Their compliance is now at issue.

The defendant/estate cross-moves (Seq. 30) for an order, pursuant to CPLR § 3025, granting leave to amend the answer. Additionally, the defendant/estate moves (Seq. 32) for an order, pursuant to CPLR § 3025, holding plaintiff's counsel, Bruce Reznick, Esq. ("Counsel Reznick"), in contempt for failing to comply with prior court orders requiring an accounting of rents for 480 Hancock Street, Brooklyn, NY (the "subject property"), among other things. The defendant/estate similarly moves (Seq. 33) for contempt against plaintiff Coloni McGlashan ("plaintiff"). Finally, defendant/estate moves (Seq. 34) for an order, pursuant to CPLR § 2221, to vacate and modify the January 25, 2021 Court order (the "1/25/21 Order") and the 10/25/23 Order. Plaintiff opposes these motions.

For the reasons set forth below, Motion Seq. 28 is granted insofar as defendant/estate's First Counterclaim for an accounting is stricken. Motion Seq. 30 (to

² Former named defendant Zachariah McGlashan ("decedent-defendant Zachariah McGlashan"), also plaintiff's father, died on August 27, 2021, during the pendency of this action. His surviving spouse, Rosetta McGlashan ("Mrs. McGlashan") has been appointed Executor of the Zachariah McGlashan's Estate, now substituted as defendant herein (the "defendant/estate").

amend) is denied. Motion Seqs. 32, 33 (for contempt), and 34 (to vacate and modify) are also all denied.

BACKGROUND

This is an action to quiet title to the subject property. Dora Rubie ("Rubie"), plaintiff's grandmother, bequeathed the subject property to plaintiff pursuant to a will dated June 22, 2005 (the "will"; NYSCEF Doc. No. 1, ps. 55-62). Rubie subsequently transferred the subject property to her son, decedent-defendant Zachariah McGlashan, eight weeks before her death on March 30, 2015. The transfer deed is dated February 2, 2015, and was recorded in the City Register's Office on August 21, 2015 (*id.*, ps. 57-58). Upon Rubie's death, the will was deemed valid and admitted to probate her estate by order of the Kings County Surrogate, dated May 24, 2018 (*id.*, ps. 1524-1527). Plaintiff also was appointed Executor of Rubie's estate under this same order (*id.*, ps. 36 and 54).

Prior to his appointment and unrelated to his duties as executor, plaintiff initiated this action on or about September 2, 2015, alleging that when the deed was transferred, Rubie was in extremis, suffering from the last stages of cancer and legally blind. Under these circumstances, plaintiff alleges decedent-defendant Zachariah McGlashan fraudulently induced Rubie to transfer the subject property to him (*id.*, ps. 36-38). Plaintiff seeks a judgment declaring the deed transfer *void ab initio*. The defendant/estate denies the core allegations of the complaint and seeks an accounting of rents and a declaration that it is the lawful owner of the subject property (*id.*, ps. 15-18).

THE PARTIES' CONTENTIONS

I. The Parties' Contentions on Motion Seq. 28

A. Procedural History Regarding Motion Seq. 28

Plaintiff moved (Seq. 28) to strike the answer based on the alleged failure of the defendant/estate to submit a proper accounting. This is not the first such motion between the parties, with each having filed several prior motions alleging the other had failed to provide a proper accounting. A review of relevant dispositive orders on this issue is necessary to frame the Court's analysis of Motion Seq. 28.

1. The 4/6/16 and 5/9/18 Orders

On or about October 23, 2019, defendant/estate moved (Seq. 25) to modify an order of the Court dated May 9, 2018 (the "5/9/18 Order") which, in turn, had modified the Court's order of April 6, 2016 (the "4/6/16 Order"). The 4/6/16 Order addressed the collection, dispensation, and accounting of rents related to the subject property. On or about December 4, 2019, plaintiff cross-moved (Seq. 26) for an order to compel Counsel Hill to turn over all rental income received and to strike the defendant/estate's answer for failure to comply with the Court's prior orders. On February 26, 2020, the Court set the matter down for a hearing to be held on May 6, 2020 "to determine whether defendant Zachariah McGlashan should be held in contempt for allegedly failing to comply with this Court's order to turn over all rent money to prior counsel, Mr. Heslop, and to his current counsel, Ms. Hill" (see Clerk's Minutes filed 3/3/20). After several adjournments, largely due to Covid-19 restrictions but also due to Counsel Reznick's technological inability to

conduct hearings virtually by computer and the Court's inability to reach Counsel Hill for several months, the matter was adjourned to December 23, 2020 for oral arguments. Further attempts by the Court to reach Counsel Hill prior to the oral argument date proved unsuccessful. Consequently, the motions (Seqs. 25 and 26) were marked fully submitted.

2. *The 1/25/21 Order*

The Court finally modified the 5/9/18 Order by its order dated January 25, 2021 (the "1/25/21 Order"; NYSCEF Doc. No. 3), thereby resolving Motion Seqs. 25 and 26. Among other things, the 1/25/21 Order directed the City of New York to make any and all rental payments on behalf of any tenant, then or in the future residing in Unit #2, payable to Counsel Reznick – a change from the prior orders which had made the rent payable to defendant/estate's prior counsel, Mr. Heslop. The order also directed any future rents received regarding Unit #2, whether or not paid by the City of New York (i.e., paid by the tenant), to be paid over to Counsel Reznick. Decedent-defendant Zachariah McGlashan was directed to pay over to Counsel Reznick any rent he collected, and Counsel Reznick was to deposit into his escrow account any rents he received. Decedent-defendant Zachariah McGlashan also was directed to provide Counsel Hill with a list of all tenants then currently residing in the subject property. Finally, Counsel Hill was to provide the tenant list and turn over all rent received by her to Counsel Reznick, within 30 days of service of the order (*id.*).

3. *The 10/25/23 Order*

Just over 60 days from entry of the 1/25/21 Order, Counsel Reznick filed plaintiff's Motion Seq. 28 on February 28, 2021, seeking an order striking the answer for

defendant/estate's alleged failure to provide an accounting or otherwise comply with the 1/25/21 Order (NYSCEF Doc. No. 40, ps. 1-8). The defendant/estate opposed, contending that any such failure was not willful and contumacious and, in any event, was for good reason, related in part to decedent-defendant Zachariah McGlashan's illness (NYSCEF Doc. No. 23, ps. 1-8). In reply, plaintiff argued the defendant/estate failed to demonstrate compliance with any part of the 1/25/21 Order or that decedent-defendant Zachariah McGlashan was authorized, under any of the orders, to use the rental receipts for his personal obligations (NYSCEF Doc. No. 40, ps. 54-58).

Oral argument on Motion Seq. 28 was conducted on June 16, 2021. Subsequent to the oral argument, the entire matter was stayed upon the August 27, 2021 death of decedent-defendant Zachariah McGlashan. After some time, plaintiff moved (Seq. 29) to vacate the stay and to amend the caption to reflect the Estate of Zachariah McGlashan as defendant. The Court granted the motion (Seq. 29) by order dated October 11, 2023 (NYSCEF Doc. No. 43). Thereafter, the Court issued the 10/25/23 Order conditionally resolving Motion Seq. 28, and stated:

"Accordingly, the Court grants plaintiff's motion to strike defendant's answer, unless within 45 days of service of this order with Notice of Entry, Rosetta McGlashan, as Executor of Zachariah McGlashan, deceased, fully complies with the Jan[.]. Order. Failure to comply with this order will result in defendant's answer being stricken upon submission by plaintiff of an affidavit of non-compliance." (NYSCEF Doc. No. 44; emphasis supplied).

As the 10/25/23 Order was based, in part, on the 1/25/21 Order, Counsel Hill also was required to comply with the provision directing her to "turn over all rental income received relative to the [subject property] to [Counsel Reznick]".

B. The Parties Contentions Regarding the Alleged Breach of the 10/25/23 Order

On December 30, 2023, Counsel Reznick filed an Affirmation of Non-Compliance (NYSCEF Doc. No. 49), alleging Mrs. McGlashan (acting for the defendant/estate) and Counsel Hill had both failed to comply with the 10/25/23 Order. Counsel Reznick alleged Counsel Hill did not identify the name of the person from whom rent was received, provide an accounting of rent received (including that previously collected by decedent-defendant Zachariah McGlashan and Mrs. McGlashan) or produce unredacted hospital records, purportedly as directed by the 1/25/21 Order (though the Court notes that production of such records was not required by the 1/25/21 order). Counsel Reznick also asserted Counsel Hill did not have the authority to accept any rent payment for the subject property.

In opposition, Counsel Hill filed an Affidavit of Compliance (NYSCEF Doc. No. 50) contending Counsel Reznick did not demonstrate how the defendant/estate failed to comply, since no corroborating documentation was attached to his affirmation (*id.* at par. 9, 11). Counsel Hill contends neither the 1/25/21 nor the 10/25/23 orders required decedent-defendant Zachariah McGlashan to identify the person from whom rent was received, provide an accounting, or produce unredacted hospital records. Counsel Hill denied the 10/25/23 Order prevented her from accepting rent for the subject property (*id.* at par. 10). She also asserts Counsel Reznick did not provide the names of tenants who paid rent to Mrs. McGlashan, the amount of rent Mrs. McGlashan failed to turn over to him, or the dates of the alleged receipt of rental income by Mrs. McGlashan – a position which, in effect, shifts Mrs. McGlashan's obligations under the orders to Counsel Reznick.

Nonetheless, Counsel Hill asserts she has not “accepted rent payments for the subject premises” (*id.*, at par. 10) and has “paid over to the plaintiff’s counsel all rental income in her possession for the estate of Zachariah McGlashan” (*id.*, at par. 13).

In a letter dated November 20, 2023 (NYSCEF Doc. No. 42), relevant here, Counsel Hill stated that a check in the amount of \$756 sent to Counsel Reznick, “represents the entire balance of funds for rent received in [her] escrow account” (*id.*), just as alleged in the Affidavit of Compliance.³ Counsel Hill provided the names of the tenants, except for an individual allegedly known only to plaintiff. Finally, Counsel Hill confirmed that Mrs. McGlashan receives checks from the City of New York “two to three times each month” and that one tenant pays Mrs. McGlashan directly (*id.*). Of all such funds received, Counsel Hill stated Mrs. McGlashan would withdraw same and tender the funds to Counsel Reznick by check (*id.*).

II. The Parties’ Contentions Regarding Motion Seq. 30

The defendant/estate moves (Seq. 30) to amend the answer to change some of the admissions and denials to various paragraphs of the complaint and to add new affirmative defenses and counterclaims asserting breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, and conversion (NYSCEF Doc. Nos. 26). The defendant/estate asserts the proposed amendments are to prevent prejudice or surprise to plaintiff, particularly as it relates to allegations surrounding the mental and physical state of Rubie when the deed transfer to decedent-defendant Zacharia McGlashan was executed.

³ The letter was offered by Counsel Hill in opposition to Counsel Reznick’s request to adjourn Motion Seq. 30 (and 31), then scheduled for January 6, 2024.

Finally, the defendant/estate proposes facts challenging Rubie's execution of the will; along with facts asserting Rubie's revised testamentary intent as reflected in a subsequent, unexecuted will.⁴

In opposition, plaintiff contends the defendant/estate's motion to amend the answer was premature, since the Court had yet to decide plaintiff's pending motion to strike the answer.

III. The Parties' Contentions Regarding the Contempt Motions (Seqs. 32 and 33)

The defendant/estate moves (Seqs. 32 and 33) for an order, pursuant to CPLR § 3025, holding Counsel Reznick and plaintiff in contempt for failing to comply with the prior Court orders. Counsel Hill argues that with respect to Counsel Reznick (Seq. 32), he, among other things, did not deposit rent checks he received into his escrow account or timely convert to e-filing as ordered by the Court.

In opposition, Counsel Reznick contends that his failure to deposit checks into his escrow account between February 2022 and February 2023 was not intentional or willful in that he had believed his wife, who was responsible for such tasks, had done so. He states his wife became ill and ultimately passed, without having deposited the checks. Counsel Reznick contends that when this issue came up in the course of the litigation, he searched his files, found the checks, attempted to deposit them in March of 2024, but by that time,

⁴ Initial oral argument on Motion Seq. 30 was held on January 10, 2024, at which both Counsel Hill and Counsel Reznick were present and ready to proceed. Counsel Reznick had served Counsel Hill with a hard copy of the opposition papers via mail on or about October 27, 2023. Such service was deemed complete (CPLR § 2103[b][2]; *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Thereafter, the opposition papers were filed in the Motion Support Office on November 6, 2023 but Counsel Hill never filed a reply. Oral argument was further adjourned to February 28, 2024, when Counsel Hill disclosed to the Court that the preliminary letters appointing Mrs. McGlashan as Executor had expired, thereby affecting her authority to act on behalf of the defendant/estate. This issue was to be resolved before the next court date.

the checks were stale and not accepted for deposit. Counsel Reznick states further that under cover letter dated March 19, 2024, he returned the checks to the City of New York (NYSCEF Doc. No. 89) and requested the City of New York to reissue the checks. Upon receipt of the re-issued checks, Counsel Reznick states he will re-deposit them into his escrow account. Finally, Counsel Reznick asserts the case has been converted to e-file and that plaintiff is not in breach of any Court orders in this regard.

In reply, Counsel Hill argues contempt does not require a showing of "intent or willfulness" and that Counsel Reznick has admitted he did not deposit the checks as required, notwithstanding his explanation for not doing so. Counsel Hill points out that the conversion to e-filing was to be done by May 15, 2023, well before Counsel Reznick completed the conversion on December 20, 2023. Counsel Hill argues that whether the papers were served on her is irrelevant to a determination of Counsel Reznick's non-compliance under the orders. Counsel Hill also argues that Counsel Reznick's failure to account for rents received is a breach of his fiduciary duty which, in turn, has prejudiced Mrs. McGlashan's ability to fulfill her duties as Executor. Finally, Counsel Hill asserts Mrs. McGlashan has fully complied with the 10/25/23 and 1/25/21 orders. Mrs. McGlashan submits an affidavit asserting, among other things, that she regularly sent rent checks received by her to Counsel Reznick for deposit.

As to plaintiff (Seq. 33), Counsel Hill argues that plaintiff also failed to account for rent received as required by the Court's 3/14/18, 3/6/19, 1/25/21 and 10/25/23 orders. In opposition, plaintiff contends he long-ago produced an accounting as required by the various court orders. In his affirmation (NYSCEF Doc. No. 92), plaintiff points to the

April 8, 2019 order of Justice Colon (the "4/8/19 Order"; NYSCEF Doc. No. 2, ps. 632-633)⁵, not cited by Counsel Hill, which directed both he and decedent-defendant Zachariah McGlashan to provide an accounting⁶. Plaintiff asserts he produced the required accounting via his November 13, 2019 affidavit (NYSCEF Doc. No. 2, ps. 1578-1616). Nevertheless, plaintiff states decedent-defendant Zachariah McGlashan again moved (Seq. 27) to compel an accounting, alleging plaintiff had not complied with the 4/8/19 Order. However, plaintiff points out, and the record confirms, that Justice Colon denied decedent-defendant Zachariah McGlashan's motion by order dated November 20, 2019, finding plaintiff had indeed produced an accounting as directed. As the order stated:

Defendant Zachariah McGlashan having moved this court to compel compliance with respect to orders dated April 8, 2019 and September 6, 2019 [and] for sanctions as prayed for is denied as moot as plaintiff has provided [the accounting] [and] complied in full by affidavit sworn to November 13, 2019 by plaintiff" (NYSCEF Doc. No. 2, p. 1558; emphasis supplied).

Finally, plaintiff contends he has expended \$15,391.38 of his own funds relating to the upkeep of the subject property (NYSCEF Doc. No. 97).

In reply, Counsel Hill submits documents, which she alleges, are both proof of defendant's compliance and plaintiff's non-compliance, including, among other things: (1) joint bank account statements from Rubie and plaintiff (apparently to show deposits of rent checks and plaintiff's personal use of those funds indicated by various debits;

⁵ The 4/8/19 Order resolved both plaintiff's (Seq. 16) and decedent-defendant Zachariah McGlashan's (Seq. 18) motions to compel, among other things, as follows: "(4) Parties shall provide accounting of all income and expenses of the respective apartments in their control by 5/14/19 for defendant and by 6/8/19 by plaintiff".

⁶ Decedent-defendant Zachariah McGlashan also had previously moved (Seq. 23) to compel plaintiff to account. Another order issued by Justice Colon on September 6, 2019 resolved that motion directing plaintiff to provide various documents.

NYSCEF Doc. No. 108), (2) a document labeled “Zachariah McGlashan Accounting” dated March 7, 2019, covering the period September 2017 to March 7, 2019 (NYSCEF Doc. No. 110),⁷ and (3) an affidavit from Mrs. McGlashan (NYSCEF Doc. No. 112), in which she denies the allegation that she has failed to comply with court orders and in which she further states that she and Counsel Hill have been sending rent checks to Counsel Reznick. Counsel Hill argues these documents prove compliance with the Court orders and renders Counsel Reznick’s Affirmation of Non-Compliance, previously filed with respect to Seq. 28, false.

IV. The Parties’ Contentions Regarding the Motion to Vacate and Modify (Seq. 34)

Defendant moves (Seq. 34) for an order, pursuant to CPLR § 2221, as the basis to vacate and modify the 1/25/21 and 10/25/23 orders in so far as striking certain language in the 1/25/21 Order regarding Counsel Hill’s lack of communication with the Court, among other things, and deleting some of the directives of the 10/25/23 Order with respect to whom the City of New York was to pay rent and granting leave to defendant to amend the caption to state “Rosetta McGlashan in her capacity of Preliminary Executor of the Estate of Zachariah McGlashan” (see NYSCEF Doc. No. 79 at sub-section (g) of the “WHEREFORE” clause).

⁷ The Court observes several discrepancies in the purported accounting submitted by Counsel Hill when compared to the earlier submission of this same accounting, previously filed by Counsel Hill on September 2, 2019 (NYSCEF Doc. No. 2, ps. 1078 – 1109 and Ex. C (with schedules) at ps. 1086 - 1100). First, the prior accounting on page 1 (*id.* at p. 1087) states it is for the period “September 2017, 2018 - February 28, 2019”, while the now submitted version omits this printed reference and has the partial printed and hand-written notation “September 11, 2017 – March 7, 2019”. Second, the prior version at the signature page (*id.* at p. 1090) has an incomplete date “April [] 2019” and is unsigned, while the now submitted version, striking out April, is dated and partially hand-written “March 7, 2019” and is signed by Zachariah McGlashan.

As to the 1/25/21 Order, Counsel Hill argues she fully explained to the Court “the circumstances surrounding the lack of communication with the Court” as set forth in the June 16, 2021 transcript and that she was unaware of the appearance dates in 2020. Counsel Hill asserts that the Court’s statement that the matter was adjourned in part due to the fact Counsel Reznick lacked the authority to appear virtually is “inaccurate” since he has appeared using “technology”, namely his telephone to dial-in remotely. Counsel Hill argues that Counsel Reznick could have notified her of the upcoming motion dates, but failed to do so, and as such, the Court’s statements attributed to her unfairly cast her “in a negative and unprofessional light”. Counsel Hill also argues the Part 70 Rules mandated the Court to afford her (and her client) an opportunity to appear at oral argument which was denied when Motion Seqs. 25 and 26 were marked submitted without her having appeared.

As to the 10/25/23 Order, Counsel Hill argues that Counsel Reznick has hampered Mrs. McGlashan’s obligations as fiduciary of the estate when he sent a letter of attornment to the tenants directing them to make payments to him. Counsel Hill likewise argues that the provisions of the 10/025/23 Order, directing the City of New York to make the rent payable to Counsel Reznick, hampers these fiduciary obligations. For these reasons, Counsel Hill argues the decretal provisions directing the City of New York to make rent payments to Counsel Reznick should be changed so that the payments are made to Mrs. McGlashan, as the estate fiduciary. Counsel Hill also argues that the numerous “frivolous” motions from plaintiff seeking to strike the defendant/estate’s answer, should be prohibited

by the Court going forward, as they are based on discovery-related matters for which discovery has been completed.

Plaintiff opposes, contending the motion, though styled as one to “vacate and modify”, is actually an untimely motion to reargue. Counsel Reznick argues that the defendant/estate’s unperfected appeal regarding the 1/25/21 order acts as a waiver to any subsequent objections to the 1/25/21 Order. Counsel Reznick also argues that in any event, even if the motion is considered as a motion to reargue, Counsel Hill has failed to show that the Court overlooked or misapprehended any facts or law when it issued the 1/25/21 or 10/25/23 orders. Counsel Reznick contends that Counsel Hill’s attempt to blame him for her non-appearances at the court dates should be given “short shrift”, as she should suffer the consequences of her own default. He further contends the appointment of Mrs. McGlashan as executor should have no bearing on this Court’s orders, as any issues regarding Ms. McGlashan’s authority are currently being litigated in the Surrogate’s Court (NYSCEF Doc. No. 100). Finally, Counsel Reznick contends that any prohibition against motion practice should be denied, as a party should be “free to chart their own litigation course” and free to seek any appropriate relief when it believes a court order has been breached.

In reply, Counsel Hill argues that the within motion is not identified as one to reargue because it is not intended to be such a motion, and that the question remains whether the 1/25/21 and 10/25/23 orders should be “modified or vacated”. Counsel Hill argues that Counsel Reznick had a duty to notify her of upcoming court dates and that his failure to do so was designed to gain an unfair advantage. Counsel Hill argues that the

“Appearance Detail” for the instant case never indicated that certain dates were for oral arguments. As to why, the 10/25/23 Order should be changed so that the rent checks are not sent to Counsel Reznick. Counsel Hill argues that his admission that he didn’t deposit the checks when received, is evidence that Counsel Reznick has mismanaged rent proceeds and thus, should be removed from this role. Finally, Counsel Hill urges the Court to consider CPLR § 5015(a)(3), which permits a court which rendered a judgment or order to relieve a party from it, upon such terms that may be just.

DISCUSSION

I. Motion Seq. 28

The parties have repeatedly contested the production of an accounting throughout the pendency of this matter. While relevant, an accounting is not germane to the seminal question in this case -- which is whether the deed transfer between Rubie and decedent-defendant Zachariah McGlashan was valid, or not. Yet, the Court is confronted with the procedural history documenting the defendant/estate’s long-standing failure to produce an accounting, to which plaintiff was absolutely entitled (*Zohar v LaRock*, 185 AD3d 987, 991 [2d Dept 2020]; *Laurenzano v Laurenzano*, 156 AD2d 430, 430-431 [2d Dept 1989]). In the face of the defendant/estate’s noncompliance, the record shows that plaintiff indeed produced an adequate accounting as of November 13, 2019.

Mindful of the procedural posture in which Motion Seq. 28 was brought, the Court conditionally struck the answer, but gave Mrs. McGlashan and Counsel Hill 45 days to comply with the 10/25/23 Order (with the compliance date being December 28, 2023). As proof of compliance, Counsel Hill annexed the following checks to her Affidavit:

1. A check dated 11/9/23 in the amount of \$756.00 made payable to "Bruce Reznick, Esq." (identified as "Attorney Escrow Check"; NYSCEF Doc. No. 52);
2. A bank check dated 11/30/23 in the amount of \$8,601.29 made payable to "Bruce Reznick" drawn from "The Estate of Zachariah McGlas[]" (identified as "November 2023 Rent Received Check"; NYSCEF Doc. No. 53.) and
3. A bank check dated 12/29/23 in the amount of \$1,547.00 made payable to "Bruce Reznick" drawn from "The Estate of Zachariah McGlas[]" (identified as "December 2023 Rent Received Check"; NYSCEF Doc. No. 54).

The two estate checks, in and of themselves, are not an accounting. Each further raises questions regarding the rent allegedly collected for the referenced period (i.e., November 2023 and December 2023), since the checks do not identify, in any detail, the source of the funds collected (whether from the City of New York or from a tenant), the amounts attributable to each, or the dates of collection. The escrow check for \$756 amplifies these questions for the same reasons.

The record refutes Counsel Hill's argument that neither the 1/25/21 or 10/25/23 orders required her or Mrs. McGlashan to identify the tenant from whom rent was received or that an accounting was required. First, the identification of tenants was explicitly required by the 5/9/18 and 1/25/21 orders⁸. Indeed, Counsel Hill appears to undercut her own argument in this regard, as she provided tenant information in the previously referenced letter dated November 20, 2023 (*see, supra* p. 8). Second, decedent-defendant Zachariah McGlashan indeed acknowledged that an accounting was necessary in this

⁸ The 5/8/18 Order plainly states: "The defendant will provide his counsel with the full name of the tenant, which counsel will provide to plaintiff's counsel". The 1/25/21 Order similarly states: "The defendant shall provide his counsel with the names of all tenants currently residing in the subject premises . . .".

action and demanded same as characterized by the "First Counterclaim" (NYSCEF Doc. No. 1 at ps. 16-17). He also had previously stipulated to provide an accounting to Counsel Reznick before August 16, 2018, but apparently never did so. (see Clerk's Minutes filed 10/5/18). Finally, as previously discussed, reciprocal accountings were ordered by Justice Colon as of April 2019 (see, *supra*, p. 11). Counsel Hill's arguments to the contrary are therefore unavailing.

On balance, when taking into account the complete record on Motion Seq. 28, the Court finds that Mrs. McGlashan and Counsel Hill have demonstrated some minimal compliance with the 10/25/23 Order, though having done so in piecemeal, haphazard, and disjointed manner. Nonetheless, after over three years from the date of the 1/25/21 Order (and nearly eight years from the initial 4/6/16 Order), the Court still does not have a clear picture of how decedent-defendant Zachariah McGlashan, Mrs. McGlashan or Counsel Hill marshalled and used the rental funds collected by them and, moreover, whether all such funds have indeed been turned over to Counsel Reznick, as repeatedly ordered by the Court.

Although the Court in its prior order granted conditional striking of the defendant/estate's answer, upon review of the pleadings in this action, the Court notes that the subject accounting at issue relates directly only to the accounting requested by the defendant/estate in the First Counterclaim. Moreover, the First Counterclaim is not germane to resolving the validity of the deed transfer or adjudicating the defendant/estate's request for a judgment declaring the deed transfer *void ab initio* (*Goldman v Citicore I*,

LLC, 149 AD3d 1042, 1044-1046 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Joseph*, 117 AD3d 982, 984 [2d Dept 2014]).

It is recognized that the penalties listed in CPLR § 3126 “were not intended to be exhaustive” and the “practice commentaries to CPLR 3126 encourage the courts to exercise their ingenuity, and to devise sanctions as narrowly tailored as possible to the circumstances of the individual case” (*DiDomenico v C&S Aeromatik Supplies, Inc.*, 252 AD2d 41, 49 [2d Dept 1998]). Further, the Court has discretion to determine the “nature and degree of the penalty to be imposed pursuant to CPLR 3126” (*Nationstar Mgt., LLC v Jackson*, 192 AD3d 813, 815-816 [2d Dept 2021]; *Lucas v Stam*, 147 AD3d 921, 925 [2d dept 2017]). There appears to have been some minimal effort by the defendant/estate to provide some record of amounts received by provision of checks to plaintiff’s counsel but nonetheless, it appears there has never been full compliance with the Court’s orders. Striking the First Counterclaim is an appropriate sanction in response to the defendant/estate’s tepid compliance with the 10/25/23 Order. Accordingly, plaintiff’s motion (Seq. 28) is granted, to the extent of striking the First Counterclaim for an accounting (*Oliveri v Carter*, 256 AD3d 393, 394 [2d Dept 1998]). All other decretal provisions of the 1/25/21 Order, as incorporated into the 10/25/23 Order, are otherwise upheld.

II. Motion Seq. 30

The proposed amended answer (NYSCEF Doc. No. 26) appears to be no more than an improper, collateral challenge to plaintiff’s appointment as Executor of the Estate of Dora Rubie. Such matters should be adjudicated in the Surrogate’s Court, to the extent

they remain viable. In any event, the alleged facts and occurrences set forth by the defendant/estate in the proposed answer were known to decedent-defendant Zachariah McGlashan at the time the initial answer was served, and no excuse has been offered for the delayed amendment (*Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1075, 1077 [2d Dept 2016]). Leave to amend the answer is therefore denied.

III. Motion Seqs. 32, 33 and 34

A. Civil Contempt

"The aim of civil contempt is to vindicate a party's right to the benefits of a judicial mandate or to compensate that party for the interference by the contemnor" (*Matter of Banks v Stanford*, 159 AD3d 134, 140 [2d Dept 2018]; *Matter of McCormick v Axelrod*, 59 NY2d 574, 582-583 [1983]). To support a finding of civil contempt, first, there must be a lawful order of the court in effect clearly expressing an unequivocal mandate. Second, it must appear with reasonable certainty that the order has been disobeyed. Third, the party to be held in contempt must have had knowledge of the court's order. Fourth, the violation of the court's order must be shown to impede, impair, or prejudice the rights of another party (*Matter of McCormick*, 59 NY2d at 582-583; *Matter of Banks*, 159 AD3d at 140). The movant has the burden of proving contempt by clear and convincing evidence (*Heffer v Krebs*, 196 AD3d 684, 685 [2d Dept 2021]). "Once the movant makes the required showing, the burden shifts to the alleged contemnor to refute that showing, or to offer evidence of a defense such as an inability to comply with the order" (*id.*). "A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court" (*id.*).

Motion Seqs. 32 and 33 appear, in large measure, as untimely challenges to the Court's adjudication of Motion Seqs. 28 and 30. In any case, the defendant/estate did not prove Counsel Reznick's and plaintiff's contempt by clear and convincing evidence, having failed to show that the stated defense to plaintiff's quiet title action – that the deed transfer from Rubie to decedent-defendant Zachariah McGlashan was valid – was defeated, impaired, impeded or prejudiced by plaintiff's and his counsel's alleged breach of the court orders. Were the Court persuaded by the defendant/estate's submissions, which it is not; in response, both plaintiff and his counsel have tendered valid reasons for any alleged non-compliance. Mrs. McGlashan's arguments alleging prejudice to her ability to fulfill her fiduciary duties as Executor are unavailing. Motion Seqs. 32 and 33 are therefore denied.

B. The Motion to Vacate and Modify

Though styled a motion to "vacate and modify", Motion Seq. 34, in sum and substance, seeks to reargue Motion Seqs. 28 and 30, which addressed broadly whether the parties had complied with the Court's 1/25/21 and 10/25/23 orders. The defendant/estate, in fact, cites to the re-argument statute (CPLR § 2221) as the statutory basis for the motion (*see* the Notice of Motion; NYSCEF Doc. No. 78). Inasmuch as CPLR § 2221(d) requires the filing of a motion to reargue within thirty days from entry of the offending order(s) (here the 1/25/21 and 10/25/23 orders), Seq. 34 is untimely, having been filed some three years after entry of the 1/25/21 Order and some five months after entry of the 10/25/23 Order. After due consideration of the record before it, the defendant/estate has failed to establish that the Court overlooked or misapprehended relevant facts or misapplied controlling principals of law to warrant changing the prior orders (*Hallett v City of New*

York, 219 AD3d 809, 810 [2d Dept 2023]. Motion Seq. 34 masquerades as an untimely motion to reargue and is therefore denied.

CONCLUSION

All arguments raised on the notions and evidence submitted by the parties in connection thereto have been considered by the Court, regardless of whether they are specifically discussed herein. Accordingly, it is hereby

ORDERED, that plaintiff's motion (Seq. 28) to strike the defendant/estate's answer, is granted only to the extent the First Counterclaim for an accounting is hereby stricken. The answer is otherwise preserved, and it is further

ORDERED, that the defendant/estate's cross-motion (Seq. 30) for leave to amend the answer, is denied; and it is further

ORDERED, that the defendant/estate's motions (Seqs. 32, 33 and Seq. 34), are all denied in every respect; and it is further

ORDERED, that within thirty (30) days from the entry of this order, Counsel Reznick shall provide the Court with a written update regarding the status of the rent checks returned to the City of New York.

For Clerks use only

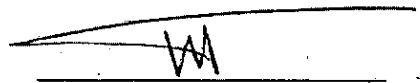
MG _____

MD _____

Motion Seq.# 28, 30, 32, 33, 34

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KINGS COUNTY CLERK
FILED

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J.S.C.

HON. WAVNY TOUSSAINT
J.S.C.