Wolf v Flowers
2012 NY Slip Op 33734(U)
December 26, 2012
Supreme Court, Dutchess County
Docket Number: 4233/11
Judge: Robert M. DiBella

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
DUTCHESS COUNTY

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MICHAEL WOLF and JAMI-LYNN WOLF,

Plaintiffs,

DECISION AND ORDER

-against-

FRANK J. FLOWERS and LIDIA T. FLOWERS, **INDEX NO. 4233/11**

Defendants.

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DiBella, J.

The following papers were read and considered on this motion by plaintiff seeking an order staying all proceedings in this matter for a period of at least 12 months:

1) Order to Show Cause; Affirmation of Irving Gertel, Esq.; Exhibits A–C; Affidavit of Zev Wolf; and
2) Affirmation in Partial Opposition of Craig P. Curcio, Esq.; Exhibits A–B.

This action arises out of a motor vehicle accident which occurred on October 30, 2010. It is alleged that, while plaintiff was standing next to defendant's vehicle, the vehicle moved backward and, then forward, striking and injuring plaintiff.

This action was commenced on June 30, 2011 and thereafter, a Request for Judicial Intervention was filed on October 11, 2011. A preliminary conference was conducted and a Preliminary Conference Order was issued on November 17, 2011. Pursuant to that order, all discovery was to be completed and a Note of Issue filed on or before September 7, 2012, and a compliance conference was scheduled for March 26, 2012.

By letter dated March 23, 2012, plaintiff's attorney wrote to the Court requesting an adjournment, on consent, of the March 26th conference stating:

> "As of this time, depositions of the parties are scheduled for May 22, 2012. Both parties believe that the compliance conference would be most productive if conducted after the depositions are held . . . ."

The Court granted the request and adjourned the matter to May 30, 2012. On May 21, 2012, plaintiff's counsel informed the Court for the first time that, "shortly after commencement of this civil action, [plaintiff] was taken into protective custody by agents of the Federal Government." He apparently will not be released until he testifies at certain unspecified trials which will take approximately 12 months. Plaintiff's father contends he has been "assured" that his son will be released after he testifies.

Plaintiff's counsel contends that since his client is unavailable to him and may not be deposed or even contacted other than by family members, a stay of all proceedings is warranted.

Defendants submit "partial opposition" to the motion. Initially, they note that plaintiff's application is not supported by any affidavit of any federal agent or prosecutor and, therefore, we "are left with no choice but to take the representations of the plaintiff's attorney as to the whereabouts of [plaintiff] as truth." (Defendant's Affirmation in Partial Opposition ¶ 7). Defendants' counsel also contends that he spoke to the Federal Bureau of Investigation and they would neither confirm nor deny whether plaintiff was in their custody.

In addition, while defendants' counsel is willing to wait a year to defend this action, he requests an order dismissing the case in its entirety if plaintiff is still "unreachable or unable" to prosecute this action because, "it would unfairly prejudice defendants if plaintiffs

were able to continuously hold off this lawsuit for an indefinite amount of time." (*Id.*).

For the reasons set forth herein, the Court finds that plaintiff has failed to establish his entitlement to relief and, therefore, the motion is denied.

Applications for adjournments are addressed to the sound discretion of the trial court (*see Davidson v. Davidson*, 54 AD3d 988 [2d Dep't 2008]). In deciding applications for adjournments, the trial court must "indulge in a balanced consideration of all relevant factors" (*Wilson v. Wilson*, 97 AD2d 897 [3d Dep't 1983]). While it may be incumbent upon the trial court to consider all relevant factors, it is the movant's obligation to provide sufficient information to permit such consideration and review. The plaintiff has failed in this regard and the application is deficient in several important respects.

First, although the plaintiff's attorney's affirmation and the affidavit of plaintiff's father state that they are based on "personal knowledge," it is clear that much of the information is hearsay. The plaintiff himself fails to provide an affidavit in support of this application and even the basic facts are unsupported by any affidavit of any federal or law enforcement authority as to plaintiff's status, arrangement, or potential release date.

Second, the supporting papers fail to state precisely when plaintiff was taken into custody. Counsel alleges that plaintiff was taken into custody "shortly" after commencement of the action but neglects to state whether this occurred before or after the filing of the Request for Judicial Intervention or the issuance of the Preliminary Conference Order.

Third, even assuming plaintiff was unable to appear for a deposition, it seems

incomprehensible that for a period of a year or two, he could not provide signed authorizations to obtain medical records or appear at a doctor's office for an examination. Even convicted felons housed in maximum security facilities can get their signatures notarized and receive basic medical care.

Fourth, the plaintiff has failed to even allege any prejudice that would accrue if the action was either discontinued or dismissed without prejudice. Clearly the three year statute of limitations (CPLR 214) has yet to expire and recommencement without the filing of a Request for Judicial Intervention would accomplish the same benefit to plaintiff without the undue burden on the Court's calendar. The Court can discern no reason why it should repeatedly manage conference dates, requests for adjournments, and unnecessary motion practice in an indefinitely dormant action. This waste of judicial resources, at taxpayer expense, benefits no one and should not be permitted.

In accordance with the foregoing, the motion is denied. Plaintiff is directed to provide appropriate authorizations and papers discovery within 90 days from the date of this Decision and Order. Thereafter, the defendant's deposition shall be conducted and completed on or before April 9, 2013.

Plaintiff's counsel shall appear for a compliance conference and serve and file a Note of Issue on April 24, 2013 at 9:30 A.M. at the Dutchess County Courthouse, 10 Market Street, Room 404, Poughkeepsie, New York. The Note of Issue shall be subject to a deposition of plaintiff and an Independent Medical Examination to be conducted post-Note of Issue but at least five (5) months prior to the scheduled trial date.

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This Decision shall be deemed proper notice pursuant to CPLR 3126 and the plaintiff's failure to prosecute this action in accordance with the schedule set herein may result in an order of dismissal on April 24, 2013.

This is the Decision and Order of the Court.

Dated: December 26, 2012
Poughkeepsie, New York

Hon. Robert DiBella, JSC

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