

Orosz v Orosz

2011 NY Slip Op 34175(U)

December 5, 2011

Supreme Court, Westchester County

Docket Number: 1127/09

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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.

FILED
DEC - 6 2011
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

FILED AND ENTERED
ON 12-6 2011
WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
MARGARET J. OROSZ,

Plaintiff,

-against-

TIBOR OROSZ, MARIA OROSZ, WILLIAM MAN, WILLIAM SHARROCKS, NATIONAL CITY BANK, HSBC BANK USA, NATIONAL ASSOCIATION, and AMERICAN HOME MORTGAGE SERVICING, INC.,

Defendants.

-----X
LEFKOWITZ, J.

SHORT FORM ORDER

Index No. 1127/09
Motion Date: Dec. 5, 2011

Seq. No. 3

The following papers numbered 1 to 19 were read on this motion by plaintiff for (1) an order, pursuant to CPLR 3125 and/or 3126, striking defendant William Sharrocks' answer and/or precluding defendant William Sharrocks from producing in evidence any items or testimony for failing to provide discovery and failing to appear at court conferences; and (2) an order, pursuant to CPLR 3124, compelling defendant William Sharrocks to respond to plaintiff's combined discovery demands dated February 3, 2011.

Order to Show Cause - Affirmation in Support - Exhibits	1-10
Affirmation in Support - Exhibit	11-12
Answering Affirmation - Exhibits	13-19

Upon the foregoing papers and the proceedings held on December 5, 2011, the motion is decided as follows:

In this action, plaintiff seeks, inter alia, to set aside fraudulent conveyances of certain real property allegedly transferred by defendants Tibor Orosz and Maria Orosz to prevent plaintiff from enforcing a judgment against them in the amount of \$1,993,003.01¹, an order declaring

¹ Plaintiff was awarded judgment against defendants Tibor and Maria Orosz in *Margaret Orosz v Tibor Orosz, Maria Orosz, 22 Huntington Street LLC, Loyalty Investors LLC, Loyalty Management LLC, Spring Street LLC and Westland Street Investors LLC* (Index No. 11889/01) by the Court (Giacomo, J.) by Decision and Order entered December 19, 2007.

mortgages on the real property purportedly taken by defendant William Sharrocks to be null and void, and monetary damages. Defendants Tibor Orosz and Maria Orosz failed to answer. By answer dated March 24, 2009, defendant William Sharrocks denied all of the allegations, alleged lack of personal jurisdiction, and sought legal costs, expenses and punitive damages against plaintiff. By answer dated May 5, 2007, defendant William Man also denied all of the allegations, alleged lack of personal jurisdiction, and sought legal costs, expenses and punitive damages against plaintiff.

On February 11, 2011, plaintiff filed, inter alia, an Affidavit of Service of Notice of Deposition and Combined Discovery Demands dated February 3, 2011 on defendant William Sharrocks by Federal Express on February 7, 2011. The combined discovery demands included Plaintiff's First Notice to Produce For the Purposes of Discovery and Inspection, Plaintiff's Demand for Witness Information, and Plaintiff's Demand for Statements. Defendant Sharrocks did not respond to the demands. Plaintiff's counsel asserts that he filed a request for a preliminary conference on or about March 17, 2011.

On May 3, 2011, a preliminary conference was held. Counsel for plaintiff, defendant Man and defendant American Home Mortgage Servicing, Inc. appeared. Defendant Sharrocks did not attend the conference. This Court, by Preliminary Conference Order of the same date, directed, in relevant part, all depositions be completed by September 30, 2011, demands for discovery be served by June 3, 2011, and responses to discovery demands served on or before July 15, 2011.

On October 26, 2011, a compliance conference was held. Defendant Sharrocks again failed to appear. At the conference, the Court issued a Briefing Schedule for the present motion. By Compliance Conference Order dated October 27, 2011, this Court directed defendant Man to respond to plaintiff's discovery and inspection demands and directed all party depositions be completed on or before December 2, 2011. The order does not direct defendant Sharrocks to respond to plaintiff's discovery demands.

Plaintiff's counsel contends that on or about October 27, 2011, he received a copy of a letter from defendant Sharrocks dated October 24, 2011 and addressed to the Court. Therein, defendant Sharrocks stated that he would not be attending the October 26th, 2011 compliance conference as his life had been threatened by plaintiff's husband when he appeared for a deposition, and Justice William J. Giacomo had issued an order directing that neither plaintiff nor her husband could be in the Courthouse at the same time as defendant Sharrocks. Defendant Sharrocks further stated that since he did not know if plaintiff's husband would be at the conference, he would not attend until his safety was assured.

Plaintiff now moves for relief based upon defendant Sharrocks' alleged willful failure to provide discovery and failure to appear at court conferences. Plaintiff contends that defendant Sharrocks is aware of the proceedings and has deliberately chosen not to appear at court conferences. Plaintiff's counsel denies defendant Sharrocks' allegations in his letter. Plaintiff also asserts that Justice Giacomo never issued a restraining order forbidding plaintiff and her husband from being in the Courthouse with defendant Sharrocks. Plaintiff further contends that

defendant Sharrocks' conclusory excuses for failing to appear for the compliance conference should be disregarded and notes that defendant Sharrocks has failed to produce any documents in response to plaintiff's discovery demands or offer any excuse for his failure to do so.

Accordingly, plaintiff contends that since she has been prejudiced by defendant Sharrocks' willful failure to comply with court ordered discovery, his answer should be stricken or he should be precluded from offering evidence. Alternatively, plaintiff seeks an order compelling defendant Sharrocks to respond to plaintiff's combined discovery demands.

Defendant Sharrocks, who is appearing pro se, opposes the motion. Defendant Sharrocks avers that he never received plaintiff's discovery demands and would have objected to the demands. Defendant Sharrocks annexes a printout from Federal Express which indicates that there was no information regarding the tracking number listed on plaintiff's Affidavit of Service of the combined discovery demands. He further avers that he is not in possession of any documents related to the case, and defendant Tibor Orosz took all the papers when defendant Sharrocks assigned his interest in the real property to defendant Maria Orosz. Defendant Sharrocks also avers that Maria Orosz was suppose to pay the mortgage and clear his credit, but that no payments were made and the property went into foreclosure. Defendant Sharrocks contends that there was nothing in the title search regarding plaintiff's claims against the real property and that he never would have gotten involved with the real property if he had known it was the subject of a lawsuit. Defendant Sharrocks denies receiving a copy of the Preliminary Conference Stipulation/Order and notes that his name does not appear on the document. Defendant Sharrocks also denies receiving any pleadings or discovery in the present action. Defendant Sharrocks contends that he was never advised of plaintiff's deposition and that he would have wanted to depose plaintiff to see what documents exist to support her "wild claims."

With respect to court conferences, defendant Sharrocks, who is 72 years old, asserts that he did not and will not attend court conferences until his safety is assured since he has a coronary condition and if attacked "could possible be crippled or die." Defendant Sharrocks avers that when he appeared for his deposition at the office of plaintiff's counsel in 2009, he was attacked by plaintiff's husband, Jim Severine. Defendant Sharrocks contends that, in light of the attack, the Court (Giacomo, J.) ordered that neither plaintiff nor her husband were to be present when he was in the Courthouse. To that end, defendant Sharrocks annexes a letter he sent to the Court (Giacomo, J.) dated March 17, 2009, wherein he states that plaintiff's husband insulted him and threatened to shoot him, throw him down the stairs and break his neck. By letter, the Court (Giacomo, J.) directed defendant Sharrocks' continued deposition take place in the Westchester County Supreme Courthouse and neither plaintiff nor her spouse should be present in the Courthouse on the date of the continued deposition. Defendant Sharrocks asks the Court to grant relief necessary to protect him if his appearance is deemed necessary and that any depositions be taken in the Courthouse, not plaintiff's counsel's office. Defendant Sharrocks denies willfully delaying the present action.

Finally, defendant Sharrocks contends that the present motion was not properly served by plaintiff. Defendant Sharrocks notes that the Order to Show Cause directed service by overnight courier, but that it was served by 2 day service in violation of the order.

Defendant American Home Mortgaging Servicing, Inc. joins plaintiff's motion for the reasons set forth in the plaintiff's counsel's affirmation. American Home Mortgaging Services, Inc. also seeks an order precluding defendant Sharrocks from opposing its cross claims against him.

Initially, the Court finds that plaintiff's service of the Order to Show Cause by Federal Express for delivery on November 16, 2011 does not warrant denial of the present motion. The Order to Show Cause directed that service be made upon defendant Sharrocks by overnight courier on or before November 15, 2011. Service of the Order to Show Cause under New York law was complete upon delivery or pick up by the overnight courier. Accordingly, plaintiff's service of the Order to Show Cause was completed upon pick up by Federal Express, an overnight courier, on November 14, 2011. Although the Court contemplated delivery/pick up by the overnight courier no later than November 15, 2011 and delivery upon defendant Sharrocks no later than November 15, 2011, plaintiff's service also accomplished delivery upon defendant Sharrocks on November 16, 2011.

Under the circumstances of this case, however, plaintiff has not demonstrated entitlement to an order striking defendant Sharrocks' answer or precluding him from offering evidence at trial. CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or 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]).

In opposition to the motion, defendant Sharrocks has provided a sufficient excuse for his failure to appear at court conferences and provide demanded discovery. Accordingly, his conduct cannot be deemed willful and contumacious. Plaintiff, however, will be prejudiced if defendant Sharrocks does not provide a response to plaintiff's combined discovery demands dated February 3, 2011, which were annexed to the Order to Show Cause served on defendant Sharrocks. Accordingly, defendant Sharrocks is directed to provide a response to plaintiff's combined discovery demands on or before December 23, 2011. To the extent that defendant Sharrocks is not in possession of the documents demanded, defendant Sharrocks shall provide plaintiff with an affidavit setting forth whether the documents requested were in his possession at one time and the nature of those documents, the details of the search made for the requested documents, and any knowledge as to the whereabouts of the documents not in his possession. A party has an obligation to exercise due diligence by making reasonable inquires and consulting available sources of information in order to provide requested documents (*see 9H Realty Corp. v*

Zurich Ins. Co., 89 AD2d 584 [2d Dept 1982] [checking of own records does not constitute due diligence]; *Creekmore v PSCH, Inc.*, 26 Misc3d 1217 [A] [Sup Ct, New York County 2010]).

In view of the foregoing, it is

ORDERED that the branch of the motion seeking an order striking the answer of defendant Sharrocks or precluding him from offering evidence or testimony at trial is denied; and it is further

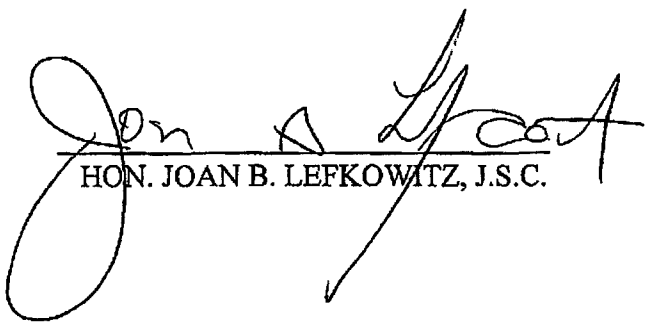
ORDERED that the branch of the motion seeking an order compelling defendant Sharrocks to respond to plaintiff's combined discovery demands dated February 3, 2011 is granted, and defendant Sharrocks is directed to provide a response to plaintiff's combined discovery demands on or before December 23, 2011; and it is further

ORDERED that in the event that defendant Sharrocks fails to provide the foregoing response on or before December 23, 2011, plaintiff shall file, with notice to all parties, an affidavit of non-compliance and a proposed order striking defendant Sharrocks' answer on or before January 6, 2011; and it is further

ORDERED that counsel and defendant Sharrocks shall appear for a conference in the Compliance Part, Courtroom 800, on January 11, 2012 at 9:30 A.M. In the event plaintiff files an affidavit of non-compliance, no appearances on that date are necessary.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 5, 2011


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

TO:

Jasne & Florio, LLP
By: Daniel Florio, Jr., Esq.
Attorneys for Plaintiff
30 Glen St., Ste. 103
White Plains, NY 10603
By facsimile: (914) 682-8692