

Murphy v Metrikin

2021 NY Slip Op 31525(U)

May 3, 2021

Supreme Court, New York County

Docket Number: 805387/2018

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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ANNABELLA MURPHY, as Administrator of the Estate of
CHARLES MURPHY, a/k/a CHARLES WILLIAM MURPHY,

Plaintiffs,

- v -

AARON METRIKIN, M.D.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number 131, 132, 133, 134, and 135
(Motion 006)

were read on this motion to/for REARGUMENT.

DECISION AND ORDER

In this action to recover damages for wrongful death and medical malpractice, the
plaintiff moves pursuant to CPLR 2221(d) for leave to reargue her opposition to that branch of
the defendant's prior motion that sought to compel her to respond to so much of his second
post-deposition notice to produce as requested production of certain of her decedent's financial
records. By order dated April 6, 2021 (SEQ 004), the court declined to consider the plaintiff's
October 13, 2020 affirmation in opposition because it was neither notarized nor accompanied by
a certificate of conformity, despite being subscribed outside of the State of New York. The court
thereupon granted that branch of the defendant's motion to the extent of directing the plaintiff
either to produce those documents or provide a notarized Jackson affidavit (Jackson v City of
New York, 185 AD2d 768 [1st Dept 1992]) attesting that she had no such documents or could
not find documents related to the subject demands after a diligent search, along with a
certificate of conformity. The motion for leave to reargue is granted, without opposition, and,
upon reargument, the April 6, 2021 order is modified by deleting the provisions therein requiring
the plaintiff to produce the request documents or submit a notarized Jackson affidavit. The

court otherwise adheres to its prior determination directing the plaintiff to serve and file a certificate of conformity pursuant to CPLR 2309.

On August 11, 2020, the defendant served his second post-deposition notice to produce, requesting, among other things, the decedent's invoices and financial records for numerous items for the years 2015 and 2016, as well as checking and credit card statements and tax returns. In response to that notice to produce, the plaintiff agreed to provide the financial records to the extent that the invoices and records existed. She nonetheless generally objected to the remainder of request as "irrelevant, abusive, and offensive," and stated that she would not respond without a clear court order. The plaintiff also stated that she had already provided the defendant with all of the checking and credit card statements and tax returns that she had been able to locate.

In opposition to that branch of the defendant's motion as sought to compel production of those items, the plaintiff submitted an affirmation under the penalties for perjury, executed in London, UK, on October 13, 2020, in which she stated that she does not keep receipts, that all payments on behalf of her decedent were basically made through credit cards or checks, and that she did not have receipts for the period from March 1, 2015 to March 27, 2017. She asserted that, "a long time ago," she had provided defense counsel with all credit card records and all of the checking account records, as well as tax returns, that were in her possession.

The plaintiff contended that

"[t]here was no rational reason for keeping receipts when all our expenses were documented on credit cards or checks. Not every transaction begets a receipt. In addition, when my husband was alive, he took care of our financial records. He is unfortunately now deceased. To my knowledge, my husband did not keep receipts for expenses such as what was demanded."

She asserted that she could not provide receipts for every "burdensome request made by defense counsel, with requests ranging from groceries to restaurants and flowers," that "[s]ome of the requests are absurd such as item y: "other/cash" whatever that might mean." The plaintiff concluded that, to her knowledge, "these records simply do not exist."

In its prior order, the court concluded that the contents of that affirmation satisfied the standards applicable to a *Jackson* affidavit (*Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]), pursuant to which a party asserts that he or she has no documents responsive to a demand or cannot find documents related to the subject demands after a diligent search. The court, however, overlooked a statutory change in law that permits a person executing a written statement outside of the United States to employ an affirmation rather than an affidavit. As the plaintiff correctly notes, the Legislature amended section 2106 of the CPLR to add subsection “b,” which allows persons outside of the United States to employ affirmations rather than affidavits, as long as the person asserts that he or she is indeed out of the country and that he or she is affirming the statement under New York’s penalties for perjury. This fairly recent amendment provides as follows:

“The statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

“I affirm this day of , _____ , under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law”

(CPLR 2106[b]). The plaintiff’s October 13, 2020 affirmation conforms with these requirements.

As explained in this court’s prior order, CPLR 2106(a) permits nonparty attorneys, physicians, osteopaths, and dentists to employ affirmations in lieu of affidavits. The court further explained that declarants who have religious objections to taking an oath may also employ affirmations, but such affirmations nonetheless must be notarized to have evidentiary value (see (*see Slavenburg Corp. v Opus Apparel*, 53 NY2d 799 [1981]; *Diaz v Tumbiolo*, 111 AD3d 877 [2d Dept 2013]; *People v Eisenstadt*, 48 Misc 3d 56 [App Term, 9th & 10th Jud Dists

2015]; CPLR 2300). CPLR 2106(b) is silent as to whether affirmations authorized by the subdivision nonetheless must be notarized in the same fashion as religious-exception affirmations, as opposed to CPLR 2106(a) affirmations, which have always been accepted without notarization. Recent case law construing CPLR 2106(b) suggests that notarization is not required, as "notarized affidavits" are compared with "affirmations" in an either/or fashion (see *Akhmedova v Akhmedov*, 189 AD3d 602 [1st Dept 2020]).

However, CPLR 2106(b) affirmations must still include the required certificate of conformity, pursuant to which an attorney or public official in the foreign country of signature certifies that the affirmation otherwise conforms to the style of affirmations employed in that country (see *US Bank N.A. v Langner*, 168 AD3d 1021 [2d Dept 2019]). The plaintiff's failure in this regard, however, does not require the court to disregard her affirmation in opposition to the defendant's motion to compel, or to reject her papers, as the defect may be cured by the submission of the proper certificate nunc pro tunc (see *Bank of New York v Singh*, 139 AD3d 486 [1st Dept 2016]). Upon consideration of the plaintiff's October 13, 2020 affirmation, the court concludes that the plaintiff has discharged her obligations in connection with the defendant's request to produce her decedent's financial records. The court further notes that, in any event, she has proactively and in good faith served a subpoena upon Bank of America in an attempt to secure bank records that are not in her possession, a procedure that the defendant could also have employed had he elected to do so.

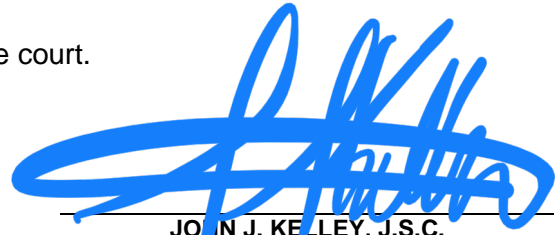
In light of the foregoing, it is

ORDERED that the plaintiff's motion for leave to reargue is granted, without opposition, and, upon reargument, this court's order dated April 6, 2021 is modified by deleting the determination therein directing the plaintiff to produce her decedent's financial records or submit a notarized *Jackson* affidavit, and the court otherwise adheres to its determination directing the plaintiff to serve and file a certificate of conformity nunc pro tunc as of October 13, 2020.

This constitutes the Decision and Order of the court.

5/3/2021

DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE