

Estate of Jurzenia v Mims
2017 NY Slip Op 32473(U)
October 2, 2017
Supreme Court, Suffolk County
Docket Number: 13490/2013
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Estate of Florence Jurzenia, Jean Jurzenia Burden, as co-executor of the Estate of Florence Jurzenia, Edward Jurzenia, as co-executor of the Estate of Florence Jurzenia, Silver Sands Motel, Inc., Jean Jurzenia Burden, as shareholder in Silver Sands Motel, Inc., Edward Jurzenia, as shareholder in Silver Sands Motel, Inc., Richard Terry Keefe IV, as shareholder in Silver Sands Motel, Inc., and Walter H. Burden III, Edward Jurzenia, individually, and Jean Jurzenia Burden, individually,

Plaintiffs,

- against -

Jerry M. Mims, Eric Friedlander, Long Island Capital Management Corp., PM Advisory Group, Sol LoPiccolo, Anthony Galeotafiore, AJG Capital Group Associates, Inc., Deborah Loftain, Peter Shembri, Gail Shembri, Patricia A. Judd, Richard Olivo, Philip Solomon, Rosemary Solomon, Angela Sivillo, Susan Bonitch, also known as Susan Sivillo, AnneMarie Prokopiak, also known as AnnMarie Panagos, Patricia Warner, Jennifer R. Hain, Elizabeth R. Reis, The Gross Family Holdings, LLC, The Wheatley Harbor, LLC, Stanley Weisz and Stanley Gross, Titleland Abstract, also known as Titleland Guarantee, Inc., Affirmative Land Services Inc., and Excel Abstract, Inc.,

Defendants.

Index No.: 13490/2013

Attorneys [See Rider Attached]Motion Sequence No.: 012; MOT.DMotion Date: 4/26/17Submitted: 7/19/17Motion Sequence No.: 013; XMDMotion Date: 7/19/17Submitted: 7/19/17Motion Sequence No.: 014; XMOTDMotion Date: 7/19/17Submitted: 7/19/17

Upon the following papers numbered 1 to 59 read upon this motion and cross motion to compel and cross motion for protective order: Notice of Motion and supporting papers, 1 - 9; Notice of Cross Motion and supporting papers, 11 - 28; 29 - 36; Answering Affidavits and supporting papers, 37 - 43; 49 - 53; 59; Replying Affidavits and supporting papers, 44 - 48; 54 - 58; it is

ORDERED that this motion by defendants, Peter Schembri and Gail Schembri (#012), and the cross-motion by defendants, Richard Olivo and Long Island Capital Management Corp. (#014), for an order pursuant to CPLR 3126 for the failure of plaintiff Walter H. Burden III (Walter Burden) to submit to a deposition are granted only to the extent that Walter Burden is precluded from offering evidence upon the trial of this action as to those claims asserted by him or on his behalf and as to defenses and counterclaims asserted against him unless he submits to a deposition under reasonable accommodations within thirty (30) days from the date of service of a copy of this order with notice of entry (*see First London Commodity Options, Ltd. v Shearson Hayden Stone Inc.*, 81 AD2d 518 [1st Dept 1981]); and it is further

ORDERED that the cross-motion by plaintiffs (#013) for a protective order prohibiting the conduct of a deposition of Walter Burden and directing that he respond to interrogatories is denied.

Plaintiffs commenced this action by the filing of a summons and complaint on May 20, 2013 to obtain a judgment declaring that the execution of certain deeds were fraudulently induced and that the execution of certain powers of attorney and mortgages were forged, in addition to other relief. Walter Burden is co-mortgagor on several of the contested mortgage loans, an owner of certain properties that are secured by mortgage loans, and the subject of several disputed powers of attorney. To date, plaintiff Burden has failed to appear for a deposition, notwithstanding the directive that depositions of plaintiffs be held as set forth in the preliminary conference stipulation and order dated February 19, 2014, and in the conference stipulations and orders dated December 17, 2014, April 15, 2015, July 15, 2015 and September 28, 2016. In response to plaintiffs' counsel's claim that "the stressful environment [of a deposition] will endanger Walter's life", defendants have agreed to depose Burden in a manner consistent with his alleged medical and psychological needs.

Defendant movants and cross-movants now seek an order compelling Burden's deposition or precluding him from offering evidence should he fail to appear. Plaintiffs have cross-moved for a protective order excusing Burden's appearance and directing that he respond to written interrogatories. In support of plaintiffs' claim that Walter Burden suffers from severe depression and suicidal impulses, plaintiffs have submitted copies of what are claimed to be partial hospital records dated June 7, 1997, June 20, 1997 and June 28, 1997, Social Security disability records from 1999, health insurance records from July 2007, unsworn letters from Z. Micah Kaplan, M.D., dated March 12, 2015 and June 26, 2016, with a note dated January 17, 2017, unsworn letters from Douglas K. Hoverkamp, M.D., dated July 13, 2015 and May 8, 2017, and other documents. The unsworn statements, however, are incompetent inadmissible hearsay, and no foundation was submitted to support their admissibility (*see O'Connor v Restani Constr. Corp.*, 137 AD3d 672, 29 NYS3d 8 [1st Dept 2016]; *see also Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). Plaintiffs have also submitted the affidavits of Jean Jurzenia Burden and Terry Keefe in support of their cross-motion, though neither is sufficient to raise a credible issue of fact regarding Burden's medical condition (*see Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]).

The Court notes that plaintiffs' counsel quoted an edited version of CPLR 2106 in reply to defendants' assertion that the unsworn physicians' letters are inadmissible. The omission of the

provision set forth in the statute that a statement of a non-party physician is admissible “when subscribed and affirmed by him to be true under the penalties of perjury” was an incomplete representation.

In reply to defendants’ opposition to plaintiffs’ cross-motion, plaintiffs submitted the affirmations of Drs. Kaplan and Hoverkamp to support the contention that the process of submitting to a deposition would seriously affect Burden’s mental health and cardiac condition, and in a note dated January 17, 2017, Dr. Kaplan opines that Burden “[s]hould not participate in legal matters.” Those physician affirmations, however, were improperly submitted in reply rather than as part of plaintiffs’ cross-motion-in-chief (*see Doyoga v Camelot Taxi Inc.*, 102 AD3d 594, 961 NYS2d 30 [1st Dept 2013]).

Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court (*Morales v Zherka*, 140 AD3d 836, 836-837, 35 NYS2d 121 [2d Dept 2016]). Here, defendants have indicated their willingness to accommodate Burden’s needs by conducting the deposition in a “non-confrontational” setting at or near plaintiff’s residence, and to conduct the deposition in the presence of only one or two of the numerous defense attorneys. It has also been suggested that his deposition be conducted in the presence of a physician of plaintiff’s choosing. While plaintiffs have suggested the use of interrogatories be substituted in place of a deposition of Burden, their submissions to the Court do not support their contention that interrogatories are an appropriate alternative that would not present a risk to his health. Under the circumstances, it is the determination of this Court that severe prejudice to the defendants would result from their inability to explore Walter Burden’s claims through the vehicle of an oral deposition and, accordingly, a conditional order of preclusion is appropriate.

Dated:

10/2/2017



 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION

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