

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

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BLANCHE WILLIAMS and MARIAN EVANS,	:	
Plaintiffs	:	
	:	
vs.	:	CIVIL NO. 330/1982
	:	
CARLYLE WILLIAMS and ESTHER NUGENT,	:	
Defendants	:	

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MEMORANDUM OPINION

FEUERZEIG, J.

Two motions are before the court. The first is plaintiffs' motion for partial summary judgment, which will be denied because there are genuine issues of material fact. Their request for a preliminary injunction included in that motion also will be denied because plaintiffs have not convinced the court either that they will prevail on the merits of the case or suffer any irreparable damage if it is not granted.

The second motion is the defendant Carlyle Williams' motion for sanctions for failure to attend a properly noticed deposition. The motion for sanctions, reluctantly, will be denied.

Motion for Summary Judgment

To grant summary judgment the court must determine that there is no genuine issue of material fact and that, as a matter of law, the moving party is entitled to judgment. Fed.R.Civ.P. 56; Smith v. Sparky's Inc., Civil No. 78-232 (D.V.I. December 6, 1979). When considering a motion for summary judgment the court must resolve all inferences and factual questions against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (3d Cir. 1974); Chulani (V.I.) Inc. v. Fireman's Fund Insurance, Civil No. 70-93 (D.V.I. February 20, 1980).

Plaintiffs here allege that "[t]here are no contested facts that Carlyle Williams did convert the top story of 210 Hospital Ground to his own use." Yet Carlyle Williams does, in fact, dispute that allegation. In his affidavit he claims to have agreed with his stepmother, the plaintiff Blanche Williams, to build two apartments on the upper level of 210 Hospital Ground in return for the right to collect the rent. Since this obviously raises a genuine issue of material fact, summary judgment will be denied.

Motion for Preliminary Injunction

The four most important factors for a court to consider in deciding whether to grant a preliminary injunction are:

1. the significance of the threat of irreparable injury to the plaintiff if the injunction is not granted;

2. the relative harm to the plaintiff in denying the injunction as weighed against the harm to the defendant that granting the injunction would cause;
3. the probability that plaintiff will succeed on the merits, and
4. The public interest.

Commonwealth of Pennsylvania ex rel Creamer v. United States Department of Agriculture, 469 F.2d 1387 (3d Cir. 1972); 11 C. Wright & A. Miller, Federal Practice and Procedure, §2948 at 430-31 (Supp. 1982). Here plaintiffs have failed to establish either that the threat of irreparable harm to the plaintiffs will be significant if the injunction is not granted, or that the plaintiffs will likely succeed on the merits. Hence, no preliminary injunction will issue.

Motion for Sanctions

It is undisputed that the defendant gave proper notice, in accordance with Rule 30(a) and (b), Fed.R.Civ.P., to the plaintiff Marian Evans and her attorney. The plaintiffs' counsel, however, argues that the defendant never applied to the court for an order directing the plaintiffs to appear at a specific time and place. Therefore, counsel contends sanctions are inappropriate. Plaintiffs' attorney claims she advised defendant's counsel that she was scheduled to appear in court at the very time the deposition was scheduled, which is not contested by defendant's counsel. Since a court appointment carries more weight than a deposition, counsel reasons, she was justified in not attending the deposition. Plaintiffs' counsel is mistaken. Rule 30(a) F.R.Civ.P. provides:

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e). (emphasis added)

When plaintiffs' counsel received the defendant's proper notice of deposition and she could not attend or reach agreement with opposing counsel as to a new time and date, the appropriate course of action was to move either for a protective order pursuant to Rule 26(a) or for an order enlarging the time pursuant to Rule 30(b)(3). Fed.R.Civ.P. Plaintiffs' counsel did neither. Even when defendant's counsel called her to reschedule the deposition she recalcitrantly refused to reschedule the deposition at any reasonable time. The court does not and will not countenance such obstructionism. It also rejects plaintiffs' argument that it was defendants' duty to seek a court order to compel the plaintiffs to attend the properly noticed deposition. Nevertheless, counsel for the defendants knew that plaintiffs' counsel had to attend court at the time of the scheduled deposition. Admittedly, plaintiffs' counsel refused to suggest any other reasonable time, but by failing to reschedule the deposition for another time, the defendants' counsel deliberately required plaintiffs' counsel to seek a protective order or enlargement of time. Such action on the part of defense counsel is not blameless. As a result, in this instance the court will not impose sanctions. Counsel should be advised, though, that in the future if a notice of deposition is served in accordance with the rules and the deponent fails to appear, seek a protective order, or an enlargement of time, sanctions will be imposed.

Plaintiffs also are pressing for an expedited hearing. The court is willing to accommodate counsel, but only after plaintiffs' counsel permits the defendants to have the discovery to which they are entitled. Accordingly, further proceedings in this action will be stayed until such time that plaintiffs and defendants reach a mutual agreement on the time or times for taking all anticipated depositions. Fed.R.Civ.P. 37(d) and (b)(2)(c).

In conclusion, the court feels compelled to comment on the failure of the parties' counsel to cooperate with one another in conducting discovery. As the District Court in Tradewinds, Inc. v. Citibank N.A., Civil No. 80-7 (D.V.I. Div. St.T. & st.J., January 11, 1983) said: "Counsel for all parties surely owe a responsibility to their clients, if not to the court, to resolve minor differences over discovery. . . through stipulation rather than through time consuming (and costly) motions."

April 15, 1983


HENRY L. FEUERZEIG
Judge of the Territorial Court