SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
A. JEFFREY GROB
Court Attorney-Referee

REFEREE'S PART
NASSAU COUNTY

DAWNELL C. C. BATISTA,

Plaintiff,

Index No. 201931/05

-against-

Motion Sequence No. 16

Motion Date: February 11, 2009

RICHARD J. BATISTA, JR.,

Defendant.

The following papers read on this application to stay, permit expert testimony and disqualify Court Appointee:

Order to Show Cause	X
Responsive Submissions	XXX
Reply Papers	XX

Upon the foregoing papers, it is ordered that the defendant's application is determined as hereinafter set forth:

The above-captioned matrimonial action was referred to the undersigned for

trial. The parties, by stipulation dated October 9, 2008, elected to invest this Court with the authority to resolve their disputes, requesting that the Reference proceed on a "hear and determine" basis. The instant application thereafter followed.

The inter-related prayers to stay the trial of the instant action and for leave to call Dr. Arthur J. Matas as an expert witness are premised on what defense counsel characterizes as the "measurable (monetary) value" (¶ 2, supporting affirmation Dominic A. Barbara, Esq. [1/11/09]) of the kidney donated by the defendant to his wife in 2001. It is in that context that the defendant seeks to call Dr. Matas, whose impressive and extensive curriculum vitae attests to his standing in the field of transplantation, to amplify the defendant's claim that the donated organ should be construed as a marital asset and valued accordingly.

The prayer to stay the trial pending the issuance and exchange of Dr. Matas' report is denied as academic, as a copy thereof was included as an exhibit within defendant's reply papers.

The confluence of several factors leads this Court to withhold the leave sought and to preclude the defendant from calling Dr. Matas as an expert witness.

Initially, the Court finds no support for the proposition the defendant asserts and notes the conspicuous absence of any such authority within his submissions.

At its core, the defendant's claim inappropriately equates human organs with

commodities. (see, Colavito v New York Organ Donor Network, Inc., 438 F3d 214, 226 [2d Cir. 2006])

Although precedent provides that interspousal gifts made during the tenure of a marriage are marital assets subject to equitable distribution (see, Chase v Chase, 208 AD2d 883, 884), public policy acts to circumscribe its application. The employment of public policy to advance societal purposes is not novel (see, generally, Ortega v City of New York, 9 NY3d 69; Tenuto v Lederle Laboratories, 90 NY2d 606, 612), with corresponding common law antecedents informing the relation between spouses *vis-a-vis* conveyances of real property. (see, Bertles v Nunan, 92 NY152, 156; see, also, Ackerman v Ackerman, 78 Misc2d 1, 3-4, affd 45 AD2d 856)

While the term "marital property"is elastic and expansive, consisting of a "wide range of intangible interests" (DeJesus v DeJesus, 90 NY2d 643, 647) its reach, in this Court's view, does not stretch into the ethers and embrace, in contravention of this State's public policy, human tissues or organs.

"With minor variation, New York codified the UAGA in 1970 as Public Health Law article 43 (L 1970, ch 466), describing who may be a donor or donee of an anatomical gift, and how a gift may be executed or revoked." (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 54)

In pertinent part Public Health Law § 4307, the controlling statute, provides:

"It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer for valuable consideration any human organ for use in human transplantation. The term human organ means the human kidney, liver, heart, lung, bone marrow, and any other human organ or tissue as may be designated by the commissioner but shall exclude blood. *** Any person who violates this section shall be guilty of a class E felony."

Thus, the defendant's effort to pursue and extract "monetary compensation therefor" (¶ 18, supporting affirmation of Dominic A. Barbara, Esq. [1/11/09]) not only runs afoul of the statutory proscription, but, conceivably, may expose the defendant to criminal prosecution thereunder.

Tellingly, "[s]ection 4301 (5) recognizes that the 'rights of the donee created by the gift are paramount to the rights of others'." (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 55)

That human organs listed on a popular internet auction site have generated bids exceeding five (5) million dollars, as has been widely reported (see, Colavito v New York Organ Donor Network, Inc., 438 F3d 214, 221 [2d Cir. 2006]), rather than attenuating the efficacy of New York's comprehensive organ donor scheme, illustrate, in concrete terms, the lengths to which some people, perhaps fearful of their own mortality, may be driven by desperation, and underscore the beneficent purpose for which the legislation was designed. (see, Matter of New York City Health and Hospitals Corporation

v Sulsona 81 Misc2d 1002, 1007 ["In enacting section 43 of the Public Health Law, the Legislature of the State of New York intended to devise a systematic procedure to effectuate the public policy of this State to encourage Anatomical Gifts"])

In addition to its public policy infirmity, this aspect of the defendant's application is procedurally wanting, and, in this regard, a review of a portion of the action's litigative history is illuminating.

The Hon. Angela G. Iannacci, the Justice to whom the litigation was initially assigned, afforded the parties six (6) months within which to secure necessary experts and directed that written reports memorializing the opinions thereof be exchanged within the same temporal parameters. (see, P.C. Order [10/25/05]) Thereafter, the deadline for expert disclosure was extended upon the defendant's motion until December 31, 2007. (see, SFO, Iannacci, J., [11/17/07])

The Note of Issue, signifying the completion of the discovery period and its proponent's readiness for trial, was filed herein on February 25, 2008. While nineteen (19) formal applications have been brought in connection with this litigation to date, the filing of the Note of Issue does not appear to have been challenged, and certainly no motion addressing the action's calendar status was made within twenty (20) days of its filing, as required by 22 NYCRR § 202.21(e).

"If for any reason the case is deemed unready, it is important for the objecting

party to move to strike the case (vacate the note of issue) promptly, and in any event not beyond the time allotted by the rules. Opportunity for further disclosure and other pretrial procedures may otherwise be forfeited." (Siegel, Practice Commentaries, McKinney's Cons. Laws of N. Y., Book 7B, C3402:5; see also, Construction by Singletree, Inc. v Lowe, 55 AD3d 861, 863)

22 NYCRR § 202.21 (d) speaks, *inter alia*, to the need for post-calendar discovery. In pertinent part it provides: "Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings (emphasis supplied)."

Inasmuch as the organ transplant at issue occurred in 2001, well prior to action's commencement in 2005 and long before the filing of the Note of Issue in February of 2008, the defendant can find no refuge in the preceding Court Rule.

22 NYCRR § 202.16 (g) (2) provides, in pertinent part, as follows: "Each expert witness whom a party expects to call at the trial shall file with the court a written report, which shall be exchanged and filed with the court no later than 60 days before the date set for trial, and reply reports, if any, shall be exchanged and filed no later than 30 days before such date."

After efforts made to resolve the litigation during the spring and summer of 2008 proved unavailing, the Court, with the input and consent of counsel for the respective parties, selected January 13, 2009 for trial. The report issued by the movant's proposed expert was not exchanged within the governing time frame. Oddly, though dated January 5, 2009, it does not appear to have been provided to adverse counsel until the service of reply papers on February 11, 2009, the date on which the instant application was submitted for determination.

While the failure to exchange an expert's report in conformity with the preceding requirements is not necessarily preclusive, the "[l]ate retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause as authorized by CPLR § 3101(d)(1)(i)." (22 NYCRR § 202.16 [g] [2])

Although the contextual authority is limited, the "good cause" standard has broad application in civil practice (see, CPLR 306-b; 2004; 3212 [a]), albeit a narrow focus.

"Good cause is a written expression or explanation by the party or his legal representative evincing a viable, credible reason for delay, which, when viewed objectively, warrants a departure or exception to the timeliness requirement." (Surace v Lostrappo, 176 Misc2d 408, 410)

Good cause is generally found only in exceptional circumstances where a

party's failure to act in a timely manner was the result of circumstances beyond its control (see, Eastern Refractories Company, Inc. v Forty Eight Insulations, Inc., 187 F.R.D. 503, 505 [S.D.N.Y. 1999]), and "[t]he salient issue is always the nature of the excuse proffered for the delay." (Rodriguez v E & P Associates, 20 Misc 3d 1129A)

Critically lacking from the movant's submission is the chronology of the efforts made to retain an expert (see, Goldstein v Lopresti, 284 AD2d 497), and the lack of specificity is compounded by the absence of documentary corroboration. (see, Winslow v Pyramid Company/Aviation Mall, 248 AD2d 922 [3d Dept.])

As noted in the corresponding practice commentary, "[e]xtensions of time are not free for the asking: The movant must show 'good cause'." (Alexander, Practice Commentaries, Mc Kinney's Cons. Laws of N.Y., Book 7B, CPLR 2004)

Vague, unsubstantiated, and conclusory assertions, such as presented herein, are insufficient as a matter of law to satisfy the defendant's burden to establish good cause. (see, Dettmann v Page, 18 AD3d 422)

Notably, "[n]o excuse at all, or a perfunctory excuse, cannot be 'good cause'." (Brill v City of New York, 2 NY3d 648, 652)

That the defendant may not proffer the economic proof he seeks to adduce, however, does not suggest that the sacrifices, magnanimity and devotion, which arguably and logically attend, are beyond the pale or lack relevancy under DRL § 236 B (5) (d)

(13).

The third and final aspect of the defendant's application is predicated, in part, on an apparent fundamental misconception of the proper role and function of an attorney appointed by the Court to represent the interests of children whose parents are embroiled in matrimonial litigation.

In theory, and, regrettably, at times in practice, the interests of children may be at variance with those espoused by one or both of their divorcing parents. Consequently, the attorney appointed to represent children must be a zealous advocate, acting with scrupulous independence, and the rights of children in this regard rise to the level of constitutional imperative. (see, Matter of Jamie T T, 191AD2d 132, 135-136 [3d Dept.])

There is no indication that counsel for children failed to diligently represent their interests, engaged in intentional misconduct or that a conflict of interest has developed between her and her clients. (see, Zirkind v Zirkind, 218 AD2d 745; Matter of H. Children, 160 Misc2d 298, 300-301; see also, Matter of Maurer v Maurer, 243 AD2d 989 [3d Dept.])

Moreover, moving counsel's reliance on Cervera v Bressler (50 AD3d 837) is misplaced. There, in contradistinction to the matter *sub judice*, the appointee, in submissions to the Court, persistently relied on the hearsay declarations of one parent and

engaged in repeated attacks on the other's character.

Contrary to the position advanced by the movant, the remedy employed by the Court Appointee in an effort to obtain compensation does not exceed permissible bounds. (see, C.E. v P.E., 177 Misc 2d 272, 278)

Based on the foregoing, the defendant's prayer to disqualify the individual previously appointed by the Court to represent the parties' children is denied.

Lastly, the Court is aware that Mr. Justice De Stefano, before whom a branch of this action is pending, has issued a stay of the proceedings pending before him. The grounds on which the subject stay was predicated are at variance with those asserted before the undersigned and have yet to be raised herein.

Dated: February 24, 2009

Court Attorney-Referee