

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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TIMOTHY THUKU, as Administrator of the Estate of
LEMMY THUKU, deceased,

Index No. 452203/2018

Plaintiff,

-against-

324 E. 93 LLC, PERRY GAULT MANAGEMENT
CO., INC., DAVID SHEPHERD and ASHLEY
SHEPHERD,

**AFFIRMATION IN OPPOSITION
TO THE FRIVOLOUS ORDER TO
SHOW CAUSE BY DEFENDANTS
TO ADJOURN THEIR TWICE-
COURT-ORDERED
DEPOSITIONS**

Defendants.

And a third-party action among the defendants.

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ELIZABETH EILENDER, affirms the following statements to be true under the penalty of perjury pursuant to CPLR 2106(a):

1. I am of counsel to Jaroslawicz & Jaros PLLC, attorneys for the plaintiff in this tragic wrongful death action and am making this affirmation in opposition to the frivolous and truly offensive Order to Show Cause by defendants 324 E. 94 LLC and Perry Gault Management, Co., Inc., the Building owner. These dilatory defendants seek to avoid appearing for a deposition which has been twice Court-ordered (Exhibit A, Order #1, dated Jan. 29, 2019, Exhibit B, Order #2 [Bluth, J.] dated March 26, 2019).

2. This case involves the tragic death of a twenty-five (25) year old man, Lemmy Thuku, who died in a house fire on October 27, 2016 due to the defendants 324 E. 94 LLC and Perry Gault Management, Co., Inc.'s violations of law, recklessness, carelessness and negligence.

3. After graduating from Pennsylvania State University, Lemmy Thuku worked in financial services for BlackRock and resided with a roommate in defendants' five-floor walk-up apartment building on the Upper East Side.

4. The Administrator, Timothy Thuku, is a brother of the decedent and lives in New York City. Decedent's sister, Phyllis Thuku, resides in Boston, MA, and the decedent's parents and another brother reside in Kenya—where the decedent was from.

5. Plaintiff's father appeared from Kenya to attend the plaintiff's deposition in New York last week.

6. Defendants have no legitimate, non-frivolous basis to delay depositions AGAIN, and we request that costs and sanctions be imposed them and their counsel for this frivolous application. As the First Department has held:

Pursuant to 22 NYCRR 130-1.1 (a), a court “in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct” and, in “addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part” (*see also Tag 380, LLC v. Ronson*, 51 A.D.3d 471, 856 N.Y.S.2d 623 [2008]).

As defined in subdivision (c) of 22 NYCRR 130-1.1, conduct is frivolous if “(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; . . .

Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intl., Inc., 94 A.D.3d 580, 581-582 (1st Dep't 2012) (Emphasis added); *see also Visual Arts Foundation, Inc. v. Egnasko*, 91 A.D.3d 578 (1st Dep't 2012) (finding sanctions hearing appropriate); *see also Premier Capital v. Damon Realty Corp.*, 299 A.D.2d 158, 158 (1st Dep't 2002) (“The record amply supports the finding that defendant and Abrahams engaged in frivolous conduct since their conduct was ‘completely without merit in law,’” and for other reasons).

7. The filing of this Order to Show Cause is the very definition of “frivolous conduct,” as it was done solely for delay and to frustrate the litigation.

8. The plaintiff Administrator was deposed on April 24, 2019. The deposition of decedent’s sister, Phyllis Thuku, who traveled in from Boston, was commenced the same day, but was not completed at that time. Plaintiff decedent’s father has traveled in from Kenya to attend.

9. By way of background, defendants 324 E.93 LLC/Perry Gault Management Co., Inc., also happen to be Third-party defendants in a property damage/mechanics lien action entitled *Casella Construction v. 322 East 93rd Street, LLC*, commenced in Index No. 155098/2017. (the “Casella Action”). The *Casella* Action, which is pending before Justice Ling-Cohan, was filed against the adjacent building (322 East 93rd Street) by a contractor who performed work long after the fire and allegedly claims to be owed money.

10. For obvious reasons, the *Casella* Action is NOT CONSOLIDATED with our action.

11. Indeed, Justice Ling-Cohan denied defendants’ motion to consolidate the actions in October 2018 (Exhibit C), and although defendants have moved to reargue, no decision has been issued and no oral argument has been scheduled since the motion was submitted in Room 130 on January 9, 2019.

12. Accordingly, the *Casella* Action has nothing to do with this wrongful death action, neither procedurally nor, in my opinion, even substantively.

Two Court Orders And Still No Defendant Has Appeared For Deposition

13. The Court held a discovery conference on January 29, 2019, at which time Justice Bluth directed (and all counsel stipulated) that depositions must proceed as follows:

Plaintiff on or before March 28, 2019

Defendants 324 E. 93 LLC/Perry Gault Management on or before April 10, 2019

Defendant David Shepherd on or before April 18, 2019

Defendant Ashley Shepherd on or before May 1, 2019

(See Exhibit A, Order #1, dated Jan. 29, 2019)

14. Phyllis Thuku (sister) and father Isaac Thuku (father) made arrangements to travel to New York to attend the deposition of Timothy Thuku (Administrator) on the March 28th court-ordered date, and days earlier were here in New York City ready to proceed. Despite having the Court-ordered date for plaintiff's deposition fully two months in advance, three days before the date, the defendants called my office and begged to adjourn the deposition because attorney Peter Gaudio, whom defense counsel had chosen to conduct the deposition, was involved in a trial in Brooklyn (Exhibit D, Engagement Aff dated March 26, 2019).

15. We were not authorized to overrule the Court's order, and so stated to defense counsel. If they wished relief from the Court's order, they would have to seek it from Justice Bluth.

16. The next day, March 26, 2019, we appeared before Justice Bluth, who initially was inclined to deny the application but because the defendants were able to agree upon new dates, to take place within 30 days, Justice Bluth granted the application and amended the prior Order. The new order set the following depositions dates, which were agreed to by the defendants:

Plaintiff: April 24, 2019

Defendant Building: May 7, 2019

Defendant Shepherds: TBD, as their attorney is having a baby about that time

See Exhibit B, Order #2, dated March 26, 2019.

17. The Court may recall that all parties were present on March 26, 2019 before Your Honor and the dates set forth in Exhibit B were fixed.

18. Defendants did not make a peep about any other counsel needing to be consulted.

19. Defendant did not voice any objection as to their client having to be deposed more than once. Nothing.

20. At that time, I suspect that all they wanted was to get the plaintiff's deposition adjourned because Mr. Gaudioso was on trial and then would burden all counsel and the court with this purported issue of another attorney in another action wanting to question their witness.

21. Astoundingly, a week before the new Court-ordered date, the defendants suddenly claim that a different attorney—not Peter Gaudioso, apparently—in the unconsolidated *Casella* Action could not show up on May 7th for the Building's deposition. Because of that attorney's unavailability, our entire case would have to be upended and delayed—as though the plaintiff's family's loss of their 25 year-old son and brother was not tragic enough.

22. The defendants' conduct in seeking to avoid two Court orders shows willfulness. *Kroll v. Parkway Plaza Joint Venture*, 10 A.D.3d 633 (2d Dep't 2004); *Emanuel v. Broadway Mall Props.*, 293 A.D.2d 708 (2d Dep't 2002).

23. If participation by counsel in the *Casella* action was so important, why did defense counsel not only stay silent on March 29th but also agree to May 7th for his client's deposition without first consulting *Casella* counsel?

24. The Court should not permit the defendants to continue to maneuver and avoid raising their right hand and testifying.

25. In light of what discovery and my investigation of the facts has revealed so far, we are not surprised that defendant's principal, Jeff Gault is reluctant to testify under oath.

26. While Mr. Gault surely sees himself as a busy man who should not have to be bothered appearing more than once at a deposition, Mr. Gault and his sophisticated counsel cannot ignore Court orders with impunity.

27. Defendant's crocodile tears of prejudice are just that. It is the plaintiff who will be prejudiced by delaying the defendant's deposition yet again.

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