COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Appellate Court Docket No.
2012-P-0524

JESSE E. TORRES III
JENNIFER J. ADAMS
Appellants

v.

JESSE E. TORRES IV, DONALD F. TORRES
DEBTMERICA, LLC. and SOPHIE J. TORRES
Appellees

Appeal from Superior Court, County of Barnstable,
Civil Docket #BACV2011-00433

REPLY BRIEF FOR APPELLANTS

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The *Defendants' Counter-Statement of the Issues* in *section I*, completely misstates the facts and law in the matter before the Court. The ruling by the Trial Judge on the issue of the *time of performance*, wrongful or not, should never have been at issue, as it fails to consider the arguments as stated in the Appellants' Brief [Pg. 37-43]. The same issues for which the Plaintiffs were denied their right to argue and have heard in the Lower Court on this matter.

Before allowing the Defendants to argue the *time of performance*, it was and is required that it be determined whether there was a viable contract between the Plaintiff Jesse E. Torres III and his mother, the Defendant Sophie J. Torres. If there was a contract, as the evidence clearly demonstrates there was, the time of performance is moot as a matter of law, as the Plaintiffs were not arguing the wording of a Will, but rather a Contract with clear and concise language.

Counter-Statement of Case
Defendants' Errors, Misstatements and Omissions

The Defendants' counter-statement is so fraught with innuendos, misstatements and deceptions that it

would be held in high esteem by the world's greatest illusionists. What are missing are any facts based on any evidence. The facts are that their claims are contrary to the evidence. There can be no other purpose to the Defendants' egregious diatribe other than to influence this Honorable Court, just as they have been successful doing in the past with the lower Court:

> **THE COURT:** It doesn't seem right, and there's absolutely no gain from that kind of activity for anything that's happening in this courtroom, nothing. And it could have an adverse -- I'm not -- I can't give you the metrics on it, I can't figure out exactly what it is, and I don't intend to, but I can tell you that -- that it's going to be an unnecessary cloud on the litigation. [Trans B., Pg I-28, lines 2-8]

The Defendants use terms like, *90 year old mother,* when it suits them, yet the record and their motions show that they *vehemently* argued against a competency exam by a psychiatrist. They assert that the Plaintiff Jesse E. Torres III forced his Mother to sign a new Will, using terms like, *“disregarding the suspected circumstances under which this Will was executed and the motives of the defendant...”* [Appellees' Brief, Pg. 8]. Yet the record is clear, her long-term neighbors, Drew Framson, a former police officer with training in

elder services, and his wife, Gail, both witnesses to the signing of the Will and Contract, signed sworn affidavits stating the exact opposite [App. A48 and A155]. The Defendants attempt to deceive the Court speculating that it will not take notice that the Contract between the Plaintiff and the Defendant, a mother and son, gave specific rights to the mother to sell any of the properties as she saw fit [App. A37]. The Defendants through Counsel start their claim with, the *"Plaintiff Jesse E. Torres III drafted a Will for his mother the Defendant Sophie J. Torres"* [Appellees' Brief, pg. 2]. The Defendants are attempting to mislead this Court just as they intentionally misled the Lower Court. However, this also supports the Plaintiffs' argument that the review of the 1947 case of Johnson v. Starr, 321 Mass. 566, 569 (1947) is long overdue [Appellants' Brief, Pg. 36]. The record is clear and undisputed, the Defendant Sophie J. Torres and the Plaintiff, Jesse E. Torres III, sat down and used Quicken Will Maker, with the Defendant Sophie Torres providing all of the answers and pertinent records, [Trans. C., Pg II-8, lines 12-17] in the exact manner that she did each year with the Plaintiffs in preparing

her taxes using Turbo Tax. Just like her Tax Returns, she was given the Will upon its completion [App. A42-A46]. She specifically stated it would be reviewed by her estate attorney, Kathryn Wilson [Trans C., Pg. II-8, lines 18-19; App. A40],. On or about the following week, the Will and the Contract, in accordance with Defendant Sophie J. Torres' specific instructions, were sent by Express Mail, Return Receipt Requested, in two separate packages to her C.P.A., Jeffrey Cooper [App. A85 and A98-A101] for filing.

The record is clear, the Defendants' whole case is based on a **second** title inserted into the Contract when printed, *"Addendum to the Will of Sophie J. Torres"* [App. A36]. This bug in Quicken Will Maker, serves as the sole basis of the Defendants' argument.

The record is clear, a Contract entitled "PERMANENT TRANSFER OF PROPERTY RIGHTS" was agreed to by the Plaintiff Jesse E. Torres III and the Defendant Sophie J. Torres in order to stop the Plaintiff Jesse E. Torres III from filing a claim on his father's estate for monies owed the Plaintiff for loans and services to the Defendant, in an agreed-to amount in excess of $1,640,000 [App. A36-A39]. The record is

clear, it was the Defendant who insisted on, and solely benefited from, the new Will, since it took away waterfront properties in her and her late husband's existing Will, in which all assets had been left to their son, the Plaintiff Jesse E. Torres III.

The Defendants use of phrases such as, *"Plaintiffs' Complaint is voluminous and contains extraneous claims not pertinent to this appeal",* [Appellees' Brief, Pg. 3] attempting to divert this Court's attention from the fact that the Plaintiffs' *arguments were never heard.* On the subject of *voluminous*, it is beyond belief that Counsel for the Defendants has the audacity to make statements on the record, that it was the Plaintiffs who filed *voluminous* pleadings with the Court. The record is clear, it was Counsel for the Defendants who saw fit to file three (3) separate 12(b)(6) Motions to Dismiss, one for each of the Defendants Counsel represents: Sophie J. Torres [App. A75], Jesse E. Torres IV [App. A126] and Debtmerica, LLC [App. A173]. While one Motion to Dismiss for all three Defendants would have been sufficient, Counsel for the Defendants opted to burden the lower Court and the Plaintiffs with the *voluminous*

and burdensome work involved in these three separate filings as the Plaintiffs argued:

> "The Plaintiffs are herein forced to restate this same argument in this Opposition as the Defendants brought three (3) separate motions to dismiss rather than a single combined motion." [App. A143]

Making false and/or misleading statements far beyond *"argument"* to the Court is a clearly demonstrable tactic of the Defendants. The Defendants, knowing of the Plaintiff Jesse E. Torres III's association with the Impeachment of Judge Shirley R. Lewis, did intentionally attempt to, and were successful with, casting suspicion on the Plaintiff in the eyes of the Court. [Appellants' Brief, Pg. 15]. The record reflects this suspicion with which the Court held the Plaintiff, in its very manner towards the Plaintiff. We pray the Court take Judicial Notice and review the facts and documents in this matter to determine for itself the actions of the parties.

The Defendants misstate the facts with, the *Plaintiffs... make extraneous claims not pertinent to this appeal* [Appellees' Brief, Pg. 3]. While we will not argue that many of the counts in the Plaintiffs' Complaint [App. A2] were under the Civil R.I.C.O.

statutes, which must be made with specificity, and that having Hell's Angles show up outside your home in the desolate desert of Baja Mexico, after your life has been threatened by a convinced Felon, son of and influenced by, the Defendant Donald F. Torres, is much more terrifying in reality than in the comfortable confines of a Civil Court, we can say that these counts qualify as egregious to the Plaintiffs, rather than "*extraneous*" claims made by the Plaintiffs. We can also note from the Record that the Mexican Federal Attorneys office and the California D.E.A. and state Police agreed [App. A9].

The Defendants claim that a *"myriad of motions were filed"* that were addressed by "Barnstable Superior Court in a manner befitting same." [Appellees' Brief, Pg. 5] Yet, not once did the Defendants ever file for protective orders, motions to quit, or ever make any such claim in this matter, as there were never a *"myriad of motions"*, as the record shows, only limited motions and discovery pertinent to the Plaintiffs' case [Att. Schedule of Pleadings]. The *"befitting manner"* in which the Plaintiffs' Motions were handled by the Barnstable Superior Court is central to the Plaintiffs'

Appeal in this matter as it pertains to, and clearly demonstrates bias, or at minimum, errors and omissions.

The Plaintiffs' Appeal is clearly stated and we will not re-argue it herein. To keep our Reply Brief from being *voluminous* we will sum up what has always been the Defendants' tactics and arguments. They have neither the facts nor the law on their side, so they *"pound on the table"*.

ARGUMENT
ERRORS, OMISSIONS AND MIS-APPLICATION OF LAW

As applies to Defendants' Section I: The Defendants' sole argument is based on Johnson v. Starr, 321 Mass. 566, 569 (1947), Count I and assumes that the contract entitled "PERMANENT TRANSFER OF PROPERTY RIGHTS" [App. A36], is part of the Will. The entire basis of their argument is that the second related document, a Will, written using a computer program called Quicken Will Maker, added its own heading, *"Addendum to the Will of Sophie J. Torres"* [Appellants Brief, Pg. 36]. Their argument also ignores the fact that even when these documents are combined, a Will and a Contract, they are legally recognized and legally defined as *"Contract Wills"*.

The Plaintiffs have clearly set forth in their Appellants' Brief to this Honorable Court that, before this argument, as a matter of law, can be considered, it must first be determined if the document entitled “PERMANENT TRANSFER OF PROPERTY RIGHTS” is a contract or part of the Will and that the Trial Judge's statement that *“I've never heard of that”* [Trans C, II-6, 25] is not a matter of law for which he can base his ruling. This Court should first consider the Plaintiffs' arguments as set forth in their Brief, that the Defendants' arguments are premature since the Court must first determine if it is a Contract, to wit:

1. Promissory Estoppel applied, as the Plaintiffs clearly, and to their detriment, relied on the written Contract signed by the Defendant Sophie J. Torres, and therefore the Defendants should be estopped from making this argument,

2. While admittedly unknown by the Trial Judge [Trans C, II-6, 25], this is the very definition of a “Contract Will” and as such, the Defendants' argument does not apply. See Murphy v. Glenn 964 P.2d 581 (1998), Williams v. Mason, 556 So.2d 1045, 1048-49 (Miss. 1990),

3. It has long been upheld by Federal and Massachusetts Courts, that it is the language of a document that determines its meaning and standing, not a second title affixed thereto by a computer program, and as such, the Defendants' argument is at minimum, not yet ripe for consideration by the Courts.

4. The Defendant Sophie J. Torres' own instructions and record show that these two documents, the Will and the Contract, were mailed to her accountant for filing as two separate documents [App. A85 and A98-A101], with specific instructions as to the conditions under which the Contract was to be opened. It is unarguable that these were intended to be, and are, two separate documents, a Will and a Contract.

Wherefore, as we have set forth above, Johnson v. Starr is not ripe for argument and consideration by the Court until the Plaintiffs' arguments may be heard and ruled upon. Even if solely for the sake of argument, the Court was to consider the application of Johnson v. Starr, we have addressed the inapplicability of the Defendants' arguments surrounding Johnson v. Starr in our Appellants' Brief and Opposition Motions [App. A80, A135, A182] and will not re-argue them herein. We will therefore limit our arguments at this time to new issues raised by the Defendants as they attempt to twist, pound and make fit cases that don't apply to the case now before this court.

At least the Defendants in the arguments set forth therein, did qualify their claims with *"While these facts were not identical to the present matter, they are analogous"* [pg. 11]. Their reference to Daniels v. Newton is clearly off point. Even if we were to agree

that a bird and a plane are *analogous* to one another, as they both can fly, one would not buy a ticket on a bird to fly across the country, and the same reasoning applies in their *analogous* application of Daniels v. Newton in the matter now before this Court. The Defendants cannot ignore language in the Contract to apply case-law that suits them, as in their quote:

> "The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration, whether promise or denial, could give him any cause of action in respect of that agreement ...." [Appellees' Brief, Pg. 11]

When the contract between the parties clearly states:

> “that this provision is both permanent and persistent and cannot be modified, including *but not limited to*, any future Wills or Codicils. This is a binding and durable provision...” [App. A37]

and contains specific penalties for such breach:

> “Solely in consideration of receiving the PROPERTIES, JET does herein relinquish any and all claims against the Estate of SJT and/or SJT and DAD for the services rendered and monies loaned to SJT and/ or DAD as long as the terms and conditions of this Agreement are fully complied with. If any of these provisions are violated, any monies and interest (at a rate not to exceed that of a normal bank loan during the same time frames and considerations) will become fully due and payable...[App. A37]

The Defendants make the argument against claims of *"Anticipatory Breach"* [Appellees' Brief, pg. 11], which were not filed by the Plaintiffs, and as is clear from the language of the Contract, the Plaintiffs' claim is for Breach of Contract, the penalties of which are clearly stated in the Contract.

The remaining argument by the Defendants as it pertains to Johnson v. Starr and Daniels v. Newton is on the fact that the *time of performance had not yet arrived*. Not only is this argument premature as set forth above, but totally off-point, as the Contract clearly set forth that changing the Will was a specific breach of the Contract, with clear and well-defined penalties being that, the monies owed the Plaintiff Jesse E. Torres III, prior to the date of the Contract, would become fully due and payable upon any such breach [App. A37]. There was no claim by the Plaintiffs to enforce the Will, only claims for the monies owed to the Plaintiffs. See our Appellants' Brief, and specific application of these claims in Williams v. Mason, 556 So.2d 1045,

1048-49 (Miss. 1990).

As applies to Defendants' Section II: While the Defendants apparently attempt to make fit out of context scraps of testimony from the record to support the lower Court's conversion from their three Motions to Dismiss under M.R.C.P. 12(b)(6) to a Rule 56 Motion for Summary Judgment, this simply cannot be done without proper notice to the parties.

The Federal Second Circuit Court of Appeals examined this specific issue. The Federal rules are analogous to the Massachusetts rules as is the Federal District Court to the Massachusetts Superior Court. This ruling is directly on-point to the conversion by the Barnstable Superior Court from a M.R.C.P. 12(b)(6) Motion to Dismiss to a Rule 56 Motion for Summary Judgment. They stated: This cannot be done without proper notice to the parties and a chance for them to present evidence as allowed under a Rule 56 Motion for Summary Judgment, nor before they have had ample discovery to acquire evidence to support their claims.

In Bano v. Union Carbide Corp., 273 F.3d 120,

2001 U.S. App. LEXIS 24488 (2d Cir. N.Y., 2001) a panel of the Second Circuit Court of Appeals was convened and reinstated a suit arising out of the 1984 Bhopal, India factory explosion. The district court dismissed all of plaintiff's claims except for one after converting the defendants' motion to dismiss under FRCP 12(b)(6) into a Rule 56 motion for summary judgment. As the Plaintiffs argue herein, the plaintiffs in that matter argued on appeal that the district court gave inadequate notice of conversion prior to granting the motion. The appeals panel agreed and found that the conversion was in error, or at the least premature. Citing the language of FRCP 12(d), which is analogous to the Massachusetts rule, the panel explained that **"this means that a district court must give notice to the parties before converting a motion to dismiss pursuant to Rule 12(b)(6)."** The district court had found notice was unnecessary because the plaintiffs were already on notice to a possible conversion. Citing to a previous Second Circuit case the court emphasized that "care should, of course, be taken by the

district court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact...". Their reliance on, and application of these facts by the District Court were deemed in error by the 2nd circuit in that all parties must receive proper and not simply implied notification, and as such the District Court's Ruling was overturned, and so should the ruling by the Barnstable Superior Court.

In Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286 (Ind. 2003) it was clearly stated by the Appeals Court that when a Trial Rule 12(B)(6) motion is treated as a motion for summary judgment, the court must grant the parties a reasonable opportunity to present summary judgment materials. In this case even though a matter outside the pleading – the Larkins affidavit – was presented to and apparently not excluded by the trial court, as they stated: there is nothing before us suggesting the trial court treated this matter as a motion for summary

judgment. And thus there was nothing before them to suggest the trial court afforded the parties an opportunity to present Rule 56 materials in support of, or in opposition to, summary judgment. Instead, because the parties treated the Defendants' motion as one to dismiss for failure to state a case, the appellate court ruled accordingly, and found this was in error. And on this ground they reversed the judgment of the trial court as the ruling of this case should also be overturned.

Even when the conversion of a 12(b)(6) motion to a rule 56 motion is most liberally construed such as in Condon v. Local 2944, United Steelworkers of America, 683 F.2d 590, 593-94 (1st Cir.1982), the Court ruled that when discovery has barely begun, as in the case which is the subject of this Appeal, and the nonmovant has had no reasonable opportunity to obtain and submit additional evidentiary materials to counter the movant's affidavits, conversion of a Rule 12 motion to a Rule 56 motion is inappropriate. Gay v. Wall,761 F.2d 175, 177-78 (4th Cir.1985). In

the case at bar, the Plaintiffs' duly served Discovery was stayed by the Defendants 12(b)(6) Motions.

As in the case before the Court, on point is the case of Rebecca S. Burick, 18 F.3d 514 Plaintiff-appellant, v. Edward Rose & Sons, a Corporation and Great Oaks Apartments,and Jim Pierson, Defendants-appellees, where the appellate court stated that surprise of such conversion is what happened in that case. The court stated that "in this circuit, to avoid the problems raised by such surprise, we have urged district judges to give notice when they intend to convert a 12(b)(6) motion to dismiss into a motion for summary judgment. See Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 377 (7th Cir.1987); See also Fleischfresser v. Director of School Dist. 200, 15 F.3d 680, 684-85 (7th Cir. Feb. 2, 1994).

The Eleventh Circuit, in interpreting Rules 12(b)and 56, has gone further, requiring that a ten-day notice be given by a district court whenever it intends to treat a 12(b)(6) motion as one for summary judgment. Jones v. Automobile Ins.

Co. of Hartford, Conn., 917 F.2d 1528, 1531-35 (11th Cir.1990).

The Appellants' Brief is clear and concise, and is well supported by the record, that the Plaintiffs were not allowed to obtain nor present evidence as allowed under a Rule 56 Summary Judgment Motion, nor did they ever receive notification of any such conversion prior to the lower Court's Ruling, and as such, the Defendants argument has no merit. The Trial Judge erred in his conversion to a Rule 56 motion [App. A201].

As applies to Defendants' Section III: While the Defendants offered no more than their opinion as to whether there was or was not bias by the Trial Judge, the Honorable Christopher J. Muse, they do assert, or testify, that they saw no such bias [Appellees' Brief, Pg. 16]. The Plaintiff Jesse E. Torres III has, unfortunately, been before many Judges within the Massachusetts Judicial system. In some cases, he was represented by one of New England’s most prestigious law firms, Bingham and Dana. In other cases, he represented himself Pro-Se before numerous Judges at the Barnstable

Superior Court. He has argued related matters, that at their very core, were issues of bias by a Judge, and did so before the Massachusetts Supreme Judicial Court, the Honorable First Justice Paul J. Liacos presiding. There have been many times, before many Judges, that Mr. Torres has not agreed with a Judge's decision, but he has never claimed bias, with the sole exception of Judge Shirley R. Lewis, who had thousands of Massachusetts citizens seeking her Impeachment and ninety-seven (97) complaints filed against her in the Massachusetts Supreme Judicial Court.

As Counsel for the Defendants testified to their opinion, on the record, we would argue that we are entitled to ours, on the record as well. While it is certainly not our claim that Judge Muse is a candidate for Impeachment, it is our belief that Judge Muse was clearly biased, and said bias did deprive the Plaintiffs the right to make those arguments contained within their brief in the case at bar, and as such were denied their day in Court.

Of note, the Plaintiffs did not present a

Motion to Compel that the tapes of the hearings be delivered to the Plaintiffs, as was ordered by the lower Court. This was done, not in error, but rather in hopes that this Court will take it upon itself to obtain and review these tapes. We believe that the review of these tapes will be more than sufficient to substantiate the Plaintiffs' claims of bias in a way that cannot be expressed by the written word.

APPELLANTS' CONCLUSION

The Plaintiffs pray this Court to take into consideration the Plaintiffs' arguments, the facts presented herein, and the cases provided which are on point, and disregard those cases and arguments which are not.

By the Appellants, Pro Se,

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