

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

SUSAN CHARNEY,

INDEX NO. 024517/88

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 055

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,

MOTION CAL. NO. _____

_____ and

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhlbits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This motion is decided in accordance with the decision memorandum dated
July 27, 2007.

FILED
AUG 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: JULY 27, 2007

SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

SUSAN CHARNEY,

INDEX NO. 024517/88

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. _____

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
[REDACTED] and
[REDACTED]

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
AUG 0 1 2007
NEW YORK
COUNTY CLERK'S OFFICE
PAPERS NUMBERED _____

Cross-Motion: Yes No

The court is in receipt of a letter from Judith Herskowitz dated July 13, 2007, including attachments, which were received on July 16, 2007. Although said letter states in the last paragraph:

I hereby enclose a copy of my motion for judicial notice of the record returnable on July 30, 2007 for which an evidentiary hearing is requested. This is in compliance with this Court's June 18, 2007 letter having served copies of the papers on notice to the parties. The original with copies of the relevant record to be filed with the clerk of the court.

the court will deem said letter as a request to file this motion in accordance with this court's June 8, 2005 order, which requires Ms. Herskowitz to request permission to make a motion. Upon review of the proposed motion papers, the court finds that the issues presented therein have been dealt with in several previous decisions.

Therefore, the court denies permission to allow Ms. Herskowitz to make said motion. This constitutes the decision and order of the court.

Dated: JULY 27, 2007


SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

THIS MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

-----X
SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
[REDACTED]

Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

Index No. 024517/88

DECISION & ORDER

FILED

AUG 0 1 2007

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Judith Herskowitz ("Herskowitz"), who is pro se, moves to vacate this court's order of October 26, 2006. Receiver Paul Windels III ("Receiver") opposes the motion.¹

Background

This shareholder's derivative action has had a long and tumultuous history that spans almost 20 years, with litigation occurring in three states on both the State and Federal level. At one point this court enjoined Ms. Herskowitz from making a motion without first getting court approval. On or about June of 2003, plaintiff Susan Charney, defendant Herskowitz's sister, moved for an order directing the distribution of sums held by the appointed Receiver of the property of North Jersey Trading Corporation ("NJTC"). NJTC's assets were liquidated after the plaintiff prevailed in the underlying shareholder's derivative action. The case was adjourned to September 22, 2003 at Herskowitz's request. However, Herskowitz did not appear. The court contacted Herskowitz at her home in Florida and held a telephone conference on the record. During the conference, Herskowitz requested an adjournment which was granted.

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It is noted that, pursuant to NYCRR §32.6[c][8], Herskowitz objects to Windels acting as his own counsel. However, that rule pertains to a Receiver's obtaining compensation that exceeds the statutory maximum. It does not relate to a receiver defending one's self.

However, Herskowitz once again failed to appear on the adjourned date. Instead, she faxed this court a letter from Dr. Alan Saltzman stating that she was under stress and needed time to rest and recuperate. As a result, the court permitted Herskowitz to appear by phone. During the conference, Herskowitz informed this court that she feared traveling to New York because she had an outstanding arrest warrant. To address her concern, the case was adjourned to November 18, 2003 and the arrest warrant was lifted. However, the court stated that it would enter a default judgment if Herskowitz did not appear on the adjourned date. On November 18th, Herskowitz failed to appear and a default was entered in plaintiff's favor.

By decision and order of April 13, 2004, the court approved plaintiff's proposed plan for the Receiver to disburse funds to creditors of NJTC. Thereafter, on October 12, 2004, defendant's motion to vacate the default judgment was denied.

Subsequently, by decision and order dated June 8, 2005, this court denied Herskowitz's second motion to vacate the default judgment of April 13, 2004 and Receiver, Windels, was directed to move for judicial settlement of his final accounting.

Windels moved for judicial settlement and Herskowitz opposed the motion and cross-moved to vacate this court's April 13, 2004 and October 12, 2004 decisions. Herskowitz argued that, pursuant to B.C.L. §1216(c), this court was required to "hear the allegations, objections and proofs of all parties interested and allow or disallow such account in whole or in part, and make a final order." B.C.L. §1216. However, this court found, in its order of March 23, 2006, that as an "interested party" is "the attorney-general or any creditor or shareholder", Herskowitz did not qualify as an interested party. Specifically, because she owes in excess of \$4,000,000 to NJTC and there has been a determination that she must turn over her shares of NJTC to the Sheriff of New York County she does not fit within the designated group of interested parties. Therefore,

Herskowitz's motions were denied. On October 23, 2006, the Receiver's account was settled and he was discharged.

Arguments

Herskowitz now moves to renew and vacate the order to settle the Receiver's account on various grounds. Specifically, she argues that a hearing was required before a decision could be rendered; that she was excluded as not an "interested party" and was threatened with contempt should she appear in court; and, finally, that the Receiver was never qualified to serve as Receiver. The Receiver argues that Herskowitz's motion must be denied as she failed to raise any new facts.

Analysis

The Receiver is correct and defendant's application is denied.

Herskowitz has made each of her arguments in prior applications which have all been denied. Herskowitz's claim that the settle order should be vacated because there was not a hearing is unfounded. As she is aware, the Receiver complied with B.C.L. §1215 and §1216 by publishing notice of the court date, at which time all interested parties were directed to appear and the court would hear any and all objections. Such public notice appeared for several weeks in the New York Post and The New York Sun. The following individuals were served:

Susan Charney
Judith Herskowitz
Herskowitz
Herskowitz

Hon. Eliot Spitzer
Fidelity & Deposit Co. of Maryland

Eric Christu, Esq.
Clifford Hark, Esq.
Hywel Leonard, Esq.
William T. Livingston, III, Esq.
Steven Morris, Esq.

On the scheduled date, September 11, 2006, no one appeared to object to his final account.

Herskowitz's second contention, that she was excluded from attending and threatened with contempt is unfounded. A prior judge issued a Warrant of Arrest for Ms. Herskowitz if she entered the New York State jurisdiction. As has been the practice in this matter, the court has accommodated Ms. Herskowitz's schedule requests and issued approximately eight orders suspending the Order of Commitment to permit Ms. Herskowitz to enter New York and attend court conferences without her having to be concerned that she would be arrested. Her argument that the court prevented her participation is disingenuous. In fact, Herskowitz was so grateful that the court lifted the arrest warrant and accommodated her travel preferences that she stated: "You're the first honorable judge that has done this." (dated October 22, 2003 at p. 17)

Finally, with respect to Ms. Herskowitz's argument that the Receiver was not qualified to serve as Receiver, same is also denied as moot. As the court noted in its June 8, 2005 decision:

The court notes, however, that it appears that Herskowitz lodged no such objections at the time Windels was appointed Receiver by order of the court, on May 17, 1991, or within a reasonable time thereafter. Objections to the regularity of a proceeding appointing a receiver may be waived by such unjustified delay. See McNabb v. Porter Air-Lighter Co., 44 A.D. 102, 105-06 (1st Dept. 1899). See also 7-12 White on New York Corporations § N1203.02 (citing with approval McNabb v. Porter Air-Lighter Co.)

As the court stated in its March 23, 2006 decision (after Ms. Herskowitz again raised this issue), the objection to the Receiver's qualifications was moot.

In essence, this application is once again an attempt to relitigate what has already been decided by this judge and other judges who have presided in this matter. Pursuant to CPLR § 2221(c), a motion to renew must present material facts that existed at the time of the original motion but were not known to the party seeking renewal. See Matter of Beiny, 132 A.D.2d 190, 209 (1st Dept. 1987). Moreover, the party must explain why the evidence was not previously

presented and could not have been discovered at time of the original motion. See Matter of Estate of Saxton, 245 A.D.2d 733, 734 (3d Dept. 1997). In the case at bar, Herskowitz merely reiterates her arguments and fails to provide the court with any new material facts.


Although Herskowitz designated her motion as one for renewal, the court may consider the motion as one to reargue where no new or additional facts are given. See e.g., Ginsberg v. Ginsberg, 104 A.D.2d 482 (2nd Dept. 1984). A motion to reargue is designed to afford a party the opportunity to establish that the court overlooked or misapprehended relevant facts or principles of law. Pro Brokerage, Inc. v. Home Ins. Co., 99 A.D.2d 971 (1st Dept. 1984).

After review of the court's order of October 23, 2006, it is apparent that the court did not overlook or misapprehend the relevant facts or misapply the controlling principles of law. A motion to reargue is not just a repetitious application by a litigant who feels he should have reconsideration. See, New York Cent. R. Co. v. Bandon Corp., 110 N.Y.S.2d (App. Term, 1st Dept. [1952]).

Accordingly, the court denies plaintiff's application in its entirety.

This shall constitute the decision and order of the court.

DATED: JULY 27, 2007


SHERRY KLEIN HEITLER
J.S.C.

FILED
AUG 01 2007
NEW YORK
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