

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

SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,

Defendants.

SHERRY KLEIN HEITLER, J.:

Index No. 024517/88

DECISION & ORDER

FILED 24/

APR 22 2004

NEW YORK
COUNTY CLERK'S OFFICE

Pursuant to New York Business Corporation Law § 626(e), plaintiff Susan Charney has moved for an order directing the distribution of sums presently held by the appointed Receiver of the property of North Jersey Trading Corporation, a company whose assets were liquidated subsequent to plaintiff's success in the underlying shareholder's derivative action. Plaintiff's motion outlines a proposed plan for payment of attorneys' fees and expenses. In light of the fact that these fees and expenses exceed the corporation's present assets, the plan calls for each claimant, with one exception,¹ to receive less than he is presently owed, with the proviso that, if the corporation's assets should increase in the future, each claimant will retain the right to seek payment of the balance due.

¹ Although Florida lawyer Eric Christu claims \$ 102,879.45 in unpaid legal fees, the proposed plan calls for him to receive \$ 105,000.00 in anticipation of defendant Judith Herskowitz's future collateral attacks on the Florida decision domesticating the New York judgment against defendants. In this regard, the Court notes that Ms. Herskowitz's "Cross-Motion for Stay and/or to Abate in Deference to Preemptive and Primary Jurisdiction of Other Proceedings" indicates that she continues to challenge the validity of the Third Circuit's decision in plaintiff's favor. See Charney v. Herskowitz, No. 95-03406 (Fla. 3rd D.C.A. Sept. 16, 1998).

This case, which stems from a twenty-year-old family dispute, has a long and tortuous history. Courts in three states, at both federal and state levels, have made note of Herskowitz's obstructive and frivolous litigation tactics. See, e.g., In re North Jersey Trading Corporation, No. 93-31620 (SAS) (Bkr., D.N.J. July 10, 2000), p. 7 ("In addition to her repeated bad faith claims that she was not served with papers from the court and her adversaries, Ms. Herskowitz has also often claimed to have served her adversaries with her own papers when in fact she has not"); Herskowitz v. Charney, 1994 U.S. Dist. LEXIS 19856, *1, *5 (S.D.N.Y. 1994) ("considering plaintiffs' history of resistance to and failure to comply with court orders, I recommend that defendant's motion to dismiss be granted"); In re: Judith Herskowitz, 166 B.R. 764, 765 (Bankr. S.D. Fla. 1994) ("[A]lthough Ms. Herskowitz filed this case here, she almost never wishes to go forward with any scheduled matter. Also, she has on occasion, played games with the court regarding efforts to link her by telephone for the conduct of telephone hearings scheduled in that format for her convenience."); Herskowitz v. Tompkins, 184 A.D.2d 402, 404 (1st Dcpt. 1992) ("petitioners have consistently employed improper and vexatious procedures, making numerous duplicative motions"). Ms. Herskowitz has been excluded from the courtroom, see In re North Jersey Trading Corp., 177 B.R. 814, 816-18 (Bankr. D.N.J. 1995), aff'd, No. 95-2876 (D.C., D.N.J., Oct. 2, 1995); sanctioned repeatedly, see, e.g., Herskowitz and Judith Herskowitz v. Susan Charney, No. 93-9020 (2nd Cir. Dec. 7, 1993), Charney v. North Jersey Trading Corp., 150 Misc.2d 849, 851 (Sup. Ct. N.Y. Co. 1991); held in contempt, see, e.g., Charney v. North Jersey Trading Corp., Index No. 24517/88 (Sup. Ct. N.Y. Co. Jan. 19, 1993) (\$ 23,500.00 contempt fine), and there are, even now, arrest warrants outstanding, based upon her failure to comply with court orders. See Charney v. North Jersey Trading Corp., Index No. 24517/88 (S.Ct. N.Y. Co. Feb. 19, 1993) (Tompkins, J.). It is within the

framework of this history that the Court renders the decision herein.

In support of the motion for distribution of funds, plaintiff has submitted the affirmations/affidavits of plaintiff, plaintiffs lead counsel Steven Dclibert, Receiver Paul Windels III, Esq., and the four other lawyers/firms seeking remuneration herein. As these submissions establish, each of these claimants, including the Receiver, is in agreement as to the appropriateness of this plan.

The only opposition to this motion comes from *pro se* defendant Judith Herskowitz,² against whom there is a judgment in excess of \$ 4million in favor of North Jersey Trading Corporation. See Charney v. North Jersey Trading Corp., Index No. 24517/88 (Sup.Ct. N.Y. Co. Jan. 21, 1994) (Tompkins, J.). Ms. Herskowitz, however, has declined to appear before this Court to voice her opposition.

This motion was brought on by an Order to Show Cause that was returnable on June 23, 2003. The case was then adjourned, pursuant to Ms. Herskowitz's request, to September 22, 2003. Ms. Herskowitz, however, did not appear on that date. Therefore, the Court contacted Ms. Herskowitz by telephone at her home in Florida. Present during this phone conference were plaintiffs attorney and the Receiver, as well as a stenographer who recorded the conversation. The Court informed Ms. Herskowitz that it would make every effort to accommodate her religious needs and, therefore, would not expect her to travel to New York on Friday evenings or Saturdays for a court appearance. At Ms. Herskowitz's request, the Court agreed to set the next court date following

² Co-defendants █████ Herskowitz and █████ Herskowitz have settled with plaintiff and take no position with regard to this motion. Co-defendant Fried is now deceased.

a holiday and at her convenience. Accordingly, the Court adjourned the case to October 22nd.

Additionally, the Court informed Ms. Herskowitz that she had not filed her cross-motion properly. The Court extended her time to file said motion to no later than October 3rd and ascertained that Ms. Herskowitz understood its directions with regard to appearing in court at 9:30 a.m. on October 22nd, 2004.

Although Ms. Herskowitz properly served her cross motion by October 3rd, she did not appear on October 22nd as agreed. Instead, on October 21st, Ms. Herskowitz faxed to the Court a letter from Dr. Alan Saltzman, indicating that Ms. Herskowitz was unwell and “needs to have stress reduction and time to rest so she can recuperate.”

Once again, the Court engaged in an on-the-record telephone conference between Ms. Herskowitz, the Court, plaintiffs attorney and the Receiver. During that conference, Ms. Herskowitz asserted that she had not had enough time to read plaintiffs and the Receiver’s papers replying to her cross-motion. In addition, Ms. Herskowitz informed the Court that she feared being arrested under an outstanding warrant should she travel to New York. With the agreement of plaintiffs attorney and the Receiver, the Court set another return date, for November 18th. Ms. Herskowitz was informed that the arrest warrant would be lifted, and a copy of the order lifting the warrant would be sent to her home so that she could travel to New York for this court appearance without fear of arrest. The Court clarified that this was the final adjournment it would grant to Ms. Herskowitz:

The Court: If you do not show up again, ma’am, and –

Ms. Herskowitz: I have no fear now.

The Court: – and they request this warrant to be reinstated, I will reinstate it. Do you understand that? I will not grant you a fourth adjournment. And I am telling you, ma'am, and strongly advising you to get a lawyer.

Ms. Herskowitz assured the Court that she would appear on November 18th:

Ms. Herskowitz: Thank you. Your Honor, I want to thank you so much for lifting this warrant. You're the first honorable judge that has done this. You have no idea how many times I was threatened of being arrested for absolutely nothing.

Okay, I'm going to send you in the mail to show you that this was mailed out, two days – absolutely and he's not telling the truth –

The Court: We're way beyond that, Miss Herskowitz. I am going to see you on the 18th at 9:30 a.m.

Ms. Herskowitz: I'm telling the truth. I will see you on the 18th.

Although this Court suspended the arrest warrants against Ms. Herskowitz for the time period of November 16th, 2003 to November 23, 2003, and mailed copies of the Orders suspending those

warrants to Ms. Herskowitz, Ms. Herskowitz again declined to appear before this Court as scheduled on November 18th. Accordingly, on that date, this Court held Ms. Herskowitz in default:

The Court: I have extended the courtesy to Ms. Herskowitz on numerous occasions with regard to her nonappearance in this Court. It is clear to me at this point that she is not appearing today and, as such, she is deemed in default with regard to what is before the Court at this particular time.

Courts possess an “inherent power. . . to control their own calendars and the disposition of business.” Heist v. Cameron, 211 A.D.2d 429, 430 (1st Dept. 1995). However, it is “the strong policy of this State that cases be decided on the merits.” Fischbach & Moore, Inc. v. Skyline Constr. Mgmt., 293 A.D.2d 390, 392 (1st Dept. 2002) (citing Heist, supra, 211 A.D.2d at 430). Consequently, before any default judgment may be entered, a court must assure itself that its jurisdiction has been established through proper notice and that, despite every opportunity, the defendant has purposely declined to appear and be heard on the merits. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Where, as here, these conditions have been met, “the constitutional requirements are satisfied,” id., and the court’s entry of a default judgment against that party will not be disturbed on appeal absent an abuse of discretion. See Collins v. Bertram Yacht Corp., 53 A.D.2d 527, 527 (1st Dept. 1976) (court did not abuse its discretion in refusing to vacate default judgment where the “default was not inadvertent; it was part of a pattern of default”), aff’d, 42 N.Y.2d 1033 (1977) and Cobbs v. Run Transit, Inc., 111 A.D.2d 363, 364 (2nd Dept. 1985) (court did not abuse its discretion in refusing to vacate default judgment where plaintiff repeatedly failed to follow court’s direction to retain counsel, despite repeated adjournments for this purpose).

In this case at bar, defendant Herskowitz has wilfully absented herself from this Court's proceedings, Particularly in light of the "bad faith procedural tactics"³ Ms. Herskowitz has utilized throughout this more than fifteen-year litigation, a default judgment in plaintiffs favor is plainly warranted. In this regard, the Court also notes that plaintiffs moving papers correctly assert that the distribution of funds for the payment of plaintiffs reasonable expenses, including reasonable attorney's fees, incurred in pursuit of a successful shareholder's derivative suit, is appropriate to reimburse plaintiff for costs the corporation would have borne had it pursued the action itself. Glenn v. Hoteltron Systems, Inc., 74 N.Y.2d 386,393 (1989). See also New York Business Corporation Law § 626(e).

Here, the corporation has obtained a judgment in excess of \$ 4 million against defendant Herskowitz and has retained additional monetary assets despite the corporation's previously questionable activities leading to the appointment of a Receiver on the ground that it appeared that the corporation was "not being properly maintained and that the income of the corporation may be subject to improper diversion." Charnoy v. North Jersey Trading Corp., Index. No. 245 17/88 (Sup. Ct. New York Co. May 21, 1991) (Tompkins, J.). Thus, the corporation has received a "substantial benefit" as a result of the shareholder's derivative suit, and an award of reasonable attorney's fees and other reasonable expenses is appropriate under BCL § 626(e). Seinfeld v. Robinson, 246 A.D.2d 291, 295 (1st Dept. 1998). Moreover, in light of Mr. Delibert's hourly rate (\$ 170.00) for his legal representation, and the fact that he has not requested that a multiplier be used to increase his award, see, e.g., Klein ex rel. SICOR Inc. v. Salvi, 2004 U.S. Dist. LEXIS 4844, *1, *17 (S.D.N.Y. 2004),

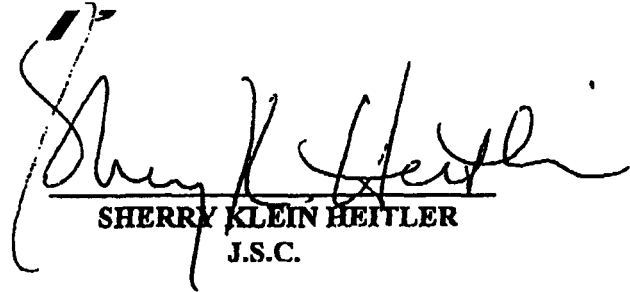
³ See In re North Jersey Trading Corporation, No. 93-31 620 (SAS) (Bankr., D.N.J. July 10, 2000), p. 7 (Hon. Stephen A. Stripp, discussing Herskowitz's litigation tactics, notes "May all who read this be forewarned.").

the Court finds that his fees, as well as those of the other attorney/claimants, are reasonable.

Accordingly, plaintiff's motion for disbursement of funds held by the Receiver is hereby granted. The Receiver is directed to distribute funds to plaintiff and attorneys in accordance with plaintiff's proposed plan. Thereafter, the Receiver is directed to place into a separate escrow account anticipated Receivership expenses and commissions, distribution of which is subject to the Receiver moving for judicial settlement of his final account pursuant to New York Business Corporation Law §§ 1216 and 1217. Plaintiff's motion for protective order (dated August 5, 2003) and Receiver's motion for protective order (dated August 6, 2003) are hereby denied as moot.

This shall constitute the decision and order of the court.

DATED: APRIL 13, 2004



SHERRY KLEIN HEITLER
J.S.C.