

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

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SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.
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Index-No. 024517/88

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

Motion sequence numbers 45, 46, 47 and 48 are consolidated for disposition herein.

Motion Sequence Number 45

In motion sequence number 45, defendant Judith Herskowitz ("Herskowitz") moves to reargue/renew, pursuant to CPLR §2221, or to vacate, pursuant to CPLR § 5015, the following orders:

(1) a January 19, 1993 order holding Herskowitz in Contempt of Court for a discovery violation and awarding fees of \$23,500.00 to plaintiff's then-counsel, Steven Delibert;¹

(2) an Order of Commitment dated February 19, 1993, directing that Herskowitz be committed and held for a hearing to determine whether she should be held in custody or otherwise punished for Contempt of Court; and

(3) a default judgment entered on January 21, 1994 against Herskowitz in the amount of \$4,300,024.42.

The basis for Herskowitz's motion is a challenge to the court's jurisdiction over her

¹ Mr. Delibert passed away in July 2004.

person. However, as plaintiff notes, this jurisdictional challenge has been repeatedly rejected, by this court, and by the Appellate Division as well.

In Charney v. North Jersey Trading Corp., 150 Misc.2d 849 (S.Ct. N.Y. Cty. 1991) (Tompkins, J.), plaintiff responded to defendants' (including Herskowitz) previous motion to dismiss² by "seek[ing] sanctions on the Herskowitz defendants for their bad faith in bringing repetitive, identical motions for dismissal based on jurisdictional arguments that were previously denied and the pattern of engaging and discharging counsel." *Id.* at 850. In granting plaintiff's motion for sanctions, the court noted:

The court records also reflect that this motion is the 24th motion in this action. The initial jurisdictional motions to dismiss were denied by Justice Silberman on May 8, 1990. In its decision of October 2, 1991, this court denied the Herskowitz defendants' motion to dismiss as being the third attempted reargument of the court's decision of April 9, 1991 and order of May 21, 1991 and the prior order of Justice Silberman which resolved the jurisdictional issue. The Herskowitz defendants have repeatedly reargued the jurisdictional issue by denominating [them] as new motions without properly identifying them as reargument motions. **They have repeatedly claimed that the jurisdictional issue was never heard despite continued rulings by this court and by Justice Silberman who denied reargument on this issue.** There is no legitimate basis for four reargument motions on one issue. **These activities by the Herskowitz defendants were done not to reach the merits of this action, but to harass their adversary and take advantage of the transfer of this action from another Individual Assignment System part to delay the case.** The court therefore permits withdrawal of counsel but determines that the proceedings shall not be stayed. The Herskowitz defendants should not obtain a benefit caused by their own misconduct.

² As noted by the Appellate Division in Charney v. North Jersey Trading Corp., 184 A.D.2d 409, 409 (1st Dept. 1992), "[t]he IAS court correctly deemed the motion [to dismiss] by defendants North Jersey Trading Corporation and the individual defendants to be a motion to reargue. As such, no appeal lies from the denial of reargument (Matter of Hochberg v. Davis, 171 A.D.2d 192). Were we to consider the matter on the merits, we would affirm for the reasons stated by Justice Tompkins in his decision dated October 2, 1991."

Id. at 850-51 (emphasis supplied).

Subsequent to this decision, defendants brought an Article 78 petition “in the nature of a writ of prohibition for an order prohibiting respondent Justice Harold Tompkins from proceeding any further in the action . . .”. Herskowitz v. Tompkins, 184 A.D.2d 402 (1st Dept. 1992), appeal dismissed, 80 N.Y.2d 1023 (1992). Dismissing this petition, the Appellate Division noted:

In this case, the [personal] jurisdictional issue should have been addressed by way of an appeal from the October 16, 1991 order directing petitioners to answer the complaint in the underlying *Charney* action. . . . As stated by the Court of Appeals in Matter of Rush v. Mordue (68 N.Y.2d 348, 353): “Use of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings. Permitting liberal use of this extraordinary remedy so as to achieve, in effect, premature appellate review of issues properly reviewable in the regular appellate process would serve only to frustrate the speedy resolution of disputes and to undermine the statutory and constitutional schemes of ordinary appellate review [citations omitted]”. **In this case, the manner in which petitioners have chosen to proceed is not only inappropriate but duplicative.**

Id. at 403 (emphasis supplied. Rather than appealing the determination as to personal jurisdiction directly, however, it has been Herskowitz’s practice to collaterally attack the judgment against her, in bankruptcy proceedings in New Jersey, 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), and proceedings in Florida, see Charney v. Herskowitz, 689 So.2d 1101, 1102 (Fla. 3rd Dist.1997), where plaintiff sought to enforce the judgments against Herskowitz.

Now, at the eleventh hour in this case, and following this court’s order granting plaintiff’s motion for the disbursement of funds in the hands of the Receiver, Herskowitz, once again, renews her previously-rejected jurisdictional claims. See CPLR § 5015 (4). See also Charney v.

Herskowitz, supra, 689 So.2d at 1102 (noting that “the issue of personal jurisdiction was raised in and decided by the Supreme Court of New York”). For the reasons stated by Justice Tompkins, and noted above, as well as the rationale of judicial economy as described by the Appellate Division above, the court rejects Herskowitz’s claim that the court lacked personal jurisdiction over Herskowitz in this action.

So, too, the Appellate Division has previously ruled that it possesses subject matter jurisdiction in this case. See Herskowitz v. Tompkins, supra, 184 A.D.2d at 403 (“there being no doubt that the sole asset of the New Jersey corporation, the building over which a receiver was appointed, is located within the court’s jurisdiction, Charney’s contest as to her rights in such property provides sufficient contacts for the exercise of the court’s [subject matter] jurisdiction”). Herskowitz has provided no adequate basis, under CPLR § 5015 (4), for disturbing that determination.

Additionally, the court takes note of the fact that Herskowitz’s explanation for her previous failure to pursue appropriate appeals – rather than duplicative collateral attacks – of these orders, is her fear of being arrested for Contempt of Court. At all times, however, Herskowitz had the choice of retaining counsel for the purpose of pursuing her legal remedies;³ alternatively, she could have requested that the arrest warrants be lifted. In fact, this court lifted the warrants for a limited time period so that Herskowitz could appear personally. Moreover, as plaintiff notes, Herskowitz could have avoided being held in Contempt of Court by simply

³ As the court noted in Charney v. North Jersey Trading Corp., supra, 150 Misc.2d at 850, the court has permitted Herskowitz’s counsel to withdraw on at least four occasions due to the nonpayment of counsel fees.

paying the sanctions imposed upon her while challenging the appropriateness of those sanctions. Consequently, Herskowitz has failed to establish that her lengthy delay in filing this motion constituted “excusable default.” CPLR § 5015 (1). Moreover, Herskowitz has not met her burden of proof as to any other bases to vacate these orders pursuant to CPLR § 5015.

Similarly, Herskowitz’s motion does not meet the requirements of CPLR § 2221. Plainly, this motion, if deemed a motion to reargue, has not been made within thirty days of service of a copy of the relevant orders, CPLR § 2221(d)(3), nor does this motion assert the existence of either new facts or new law which would have changed the prior determination of these issues, CPLR § 2221(e)(2).⁴

Motion Sequence Number 46

In motion sequence number 46, Herskowitz seeks to renew/reargue, pursuant to CPLR § 2221, or to vacate, pursuant to CPLR § 5015, this court’s decision of April 13, 2004, wherein the court granted, on default, plaintiff’s motion for an order directing the distribution of sums held by the Receiver of the property of North Jersey Trading Corporation. However, this is the second such motion Herskowitz has made pertaining to the court’s April 13, 2004 decision. By decision and order dated October 12, 2004, this court denied Herskowitz’s motion to vacate the order for the distribution of funds, holding, *inter alia*, that “Herskowitz has offered no legal

⁴ Herskowitz’s argument, that Paul Windels’ role as Receiver in this case was “terminated” by virtue of the entry of final judgment, has no bearing on the court’s determination of Herskowitz’s motions, insofar as Herskowitz has failed to supply “reasonable justification for the failure to present” such alleged facts on the prior motion. See CPLR § 2221(e)(3). Nevertheless, the court notes that no order has been entered discontinuing Windels’ role as Receiver in this case.

argument to suggest that there is any merit to her opposition to plaintiff's motion for the disbursement of funds held by the Receiver for North Jersey Trading Company."

Now, on this, Herskowitz's second motion to vacate the court's decision and order of April 13, 2004, Herskowitz offers no new facts or new law, CPLR §2221, no reasonable excuse for her default or "meritorious defense" on the motion to distribute funds, CPLR §5015; accordingly, Herskowitz's motion to vacate is denied.

Herskowitz also asks that this court "refer back pursuant to CPLR § 2217(a) the issue of the May 8, 1990 order to Justice Jacqueline Silbermann who entered that order." Essentially, Herskowitz contends that Justice Silbermann never ruled against her on her jurisdictional motions to dismiss. As noted above, however, Justice Tompkins explicitly found that the defendants, including Herskowitz, "have repeatedly claimed that the jurisdictional issue was never heard despite continued rulings by this court and by Justice Silbermann who denied reargument on this issue." Charney v. North Jersey Trading Corp., *supra*, 150 Misc.2d at 850. Moreover, as also noted above, the Appellate Division has approved Justice Tompkins's rationale in denying defendants' motion(s) to dismiss on jurisdictional grounds. See Charney v. North Jersey Trading Corp., *supra*, 184 A.D.2d at 409. For this reason, the court declines to refer this matter back to Justice Silbermann.

Motion Sequence Number 47

Motion sequence number 47 is titled "Supplemental Motion for Disqualification of Judge," in direct reference to Herskowitz's previous motion requesting that this court disqualify itself from this case. That previous motion was denied in a decision and order dated February 16,

2005.

In the present motion for disqualification, Herskowitz again asserts that this court lacks personal jurisdiction over her. See Affidavit of Judith Herskowitz, dated Dec. 15, 2004, p. 2-3, ¶ 5. As discussed above, this argument is without merit. So, too, Herskowitz's assertion, in this motion, that the January 21, 1994 default judgment against her in the amount of \$4, 300, 024.42 was erroneous, is repetitive of motion sequence number 45 and has been addressed above. Moreover, her assertion that the judgment was wholly satisfied is without merit; while her sons entered into a settlement agreement which was "wholly satisfied," Herskowitz did not.

The court's references to Herskowitz's dilatory and obstreperous litigation tactics, in its October 12, 2004 decision and order denying her motion to vacate her default on plaintiff's motion for distribution of funds in the hands of the Receiver, are not evidence of any judicial bias against Herskowitz. Rather, those references reveal the "pattern of default," see Collins v. Bertram Yacht Corp., 53 A.D.2d 527, 527 (1st Dept. 1976), aff'd, 42 N.Y.2d 1033 (1977), which provided support for the court's entry of a default judgment against Herskowitz, as well as its subsequent decision to deny Herskowitz's motion to vacate that default.

Additionally, Herskowitz argues that, because the Receiver allegedly distributed funds pursuant to this court's decision of April 13, 2004 and *before* the court's decision of October 12, 2004, the latter decision – which denied Herskowitz's motion to vacate – was the "product of patent bias and prejudice." However, as the parties agree, there was no stay of the court's April 13, 2004 decision; therefore, any alleged distribution of funds which occurred prior to the court's decision on Herskowitz's motion to vacate, while unknown to the court, would not have been

improper.

As noted in this court's previous decision denying Herskowitz's motion to disqualify, Herskowitz has moved to disqualify judges no less than ten times, apparently after receiving rulings with which she was not pleased. See Decision and Order dated February 16, 2005 at pp. 1-2. As was the case with Herskowitz's prior motion, she has failed to meet her burden of establishing actual bias against her, as opposed to a mere speculative possibility of bias. See Rumsey v. Niebel, 286 A.D.2d 564, 565 (4th Dept. 2001); Ficarola v. Town Bd. Gov't., 276 A.D.2d 666, 666 (2nd Dept. 2000).

Motion Sequence Number 48

In motion sequence number 48, Herskowitz moves to reargue/renew pursuant to CPLR § 2221, or to vacate pursuant to CPLR § 5015, the court's decision and order of February 16, 2005, which denied her motion for disqualification of the court. In support of this motion, Herskowitz again asserts that her default on plaintiff's motion to distribute funds in the hands of the Receiver was not "willful and contumacious," see Massey v. City of New York, 249 A.D.2d 245, 245-26 (1st Dept. 1998). As more fully outlined in the court's decision denying Herskowitz's motion to vacate that default (dated Oct. 12, 2004), the court has already considered and rejected this argument.

Herskowitz also asserts that the above-mentioned Satisfactions of Judgment as to her sons ██████ and ██████ Herskowitz, relieved her of any liability in the instant action. In support of this oft-repeated argument, Herskowitz erroneously asserts that "[t]his Court acknowledged that under the well settled law, Charney's judgments were discharged against Judith Herskowitz

as well.” As noted above, the record reveals that Herskowitz’s sons entered into a settlement agreement which was “wholly satisfied” as to them; Herskowitz did not enter into a settlement agreement. Significantly, Herskowitz’s papers here acknowledge that those Satisfactions of Judgment were submitted to the court in conjunction with Herskowitz’s motion to vacate the default judgment on plaintiff’s motion for the distribution of funds; plainly, then, the court has already considered, and rejected, that argument.

In essence, Herskowitz has raised the arguments above – and others – to imply that those decisions which were not in Herskowitz’s favor were, *ipso facto*, evidence of the court’s bias against her. However, as noted in the court’s original decision denying Herskowitz’s recusal motion, mere “dissatisfaction” with the prior rulings of the court, absent more, is insufficient to meet Herskowitz’s burden of establishing actual bias. See supra, Ficarola v. Town Bd. Gov’t., 276 A.D.2d at 666. More importantly in the context of this motion, reiteration of already-rejected arguments fails to meet the requirements of reargument or renewal under CPLR § 2221, and provides no basis for vacating the court’s prior decision pursuant to CPLR § 5015.

In the same motion, Herskowitz also seeks “restitution of the North Jersey Trading Corporation surplus in the approximate sum of \$700,000.00 distributed by Paul Windels III as prearranged in Charney’s May 29, 2003 Motion for Disbursement.” The basis for this request is, as noted above, see supra, p. 5 n. 4, Herskowitz’s assertion that Windels’ position as Receiver was automatically terminated by entry of a final judgment against her; additionally, Herskowitz asserts that Windels never qualified as Receiver by posting a bond and taking an oath.

Herskowitz, it must be noted, defaulted on plaintiff’s motion for the distribution of funds

by the Receiver. Thereafter, Herskowitz's motion to vacate that default was denied. Therefore, this argument is, in essence, a second motion to reargue/renew, or to vacate the default.

Herskowitz, however, again fails to provide the court with reasonable justification for her default and has presented the court with no new facts that would have changed the court's prior determination on the motion for distribution of funds. The court, therefore, does not reach this issue.⁵

Injunction Against Further Filings By Herskowitz In This Matter

As the above decision clarifies, this case has a long and tortuous history, made more so by the vexatious and abusive litigation tactics engaged in by Herskowitz. As is also apparent, the judgments against Herskowitz – including the \$4.3 million judgment entered against her on January 21, 1994 – are final. Nevertheless, there continue to be outstanding arrest warrants for Herskowitz in the state of New York due to her failure to satisfy judgments arising from imposed sanctions.

⁵ 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.). Additionally, as noted above in the context of motion sequence number 45, no order has been entered discontinuing Windels' role as Receiver in this case, which is generally a prerequisite to termination of a Receiver's duties.

“To prevent a multiplicity of vexatious proceedings and actions a court of equity may enjoin further litigation of a cause of action which has already been adjudicated (28 Am. Jur., Injunctions, p. 716).” Walston & Co. v. Klein, 44 Misc.2d 607, 610 (S.Ct. N.Y. Cty. 1964), affirmed 24 N.Y.2d 559 (1st Dept. 1965). “[W]hen, as here, a litigant is abusing the judicial process . . . solely out of ill will or spite, equity may enjoin such vexatious litigation.” Sassower v. Signorelli, 99 A.D.2d 358, 359-60 (2nd Dept. 1984) (internal citations omitted). “Public policy generally mandates free access to the courts. However, a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will.” Pignataro v. Davis, 8 A.D.3d 487, 489 (2nd Dept. 2004). Under these circumstances, it is within the court’s discretion to prohibit a litigant from submitting future applications “without its prior written approval.” Id.

Therefore, Herskowitz is enjoined from submitting any future filings in this matter, which includes cases filed under index numbers 024517/88 and 0023002/92, without the prior written approval of this court.

Accordingly, it is hereby

ORDERED that Herskowitz’s motion to vacate and or reargue/renew a January 19, 1993 order holding Herskowitz in Contempt of Court and awarding fees of \$23,500.00 to plaintiff’s then-counsel, Steven Delibert, an Order of Commitment dated February 19, 1993, directing that Herskowitz be committed and held for a hearing to determine whether she should be held in custody or otherwise punished for Contempt of Court, and a default judgment entered on January 21, 1994 against Herskowitz in the amount of \$4,300,024.42 (motion sequence number 45), is

denied in its entirety; and it is further

ORDERED that Herskowitz's motion to vacate and/or renew/reargue this court's decision and order of April 13, 1994, which granted plaintiff's motion for an order directing the distribution of sums held by the Receiver of the property of North Jersey Trading Corporation (motion sequence number 46), is denied in its entirety; and it is further

ORDERED that Herskowitz's motion to "refer back pursuant to CPLR § 2217(a) the issue of the May 8, 1990 order to Justice Jacqueline Silbermann" (motion sequence number 46) is denied in its entirety; and it is further

ORDERED that Herskowitz's motion for disqualification of the court (motion sequence number 47) is denied in its entirety; and it is further

ORDERED that Herskowitz's motion to vacate and/or renew/reargue this court's decision and order of February 16, 2005, which denied Herskowitz's motion for disqualification of the court (motion sequence number 48), is denied in its entirety; and it is further

ORDERED that Herskowitz's motion for "restitution of the North Jersey Trading Corporation surplus in the approximate sum of \$700,000.00 distributed by Paul Windels III" (motion sequence number 48) is denied in its entirety; and it is further

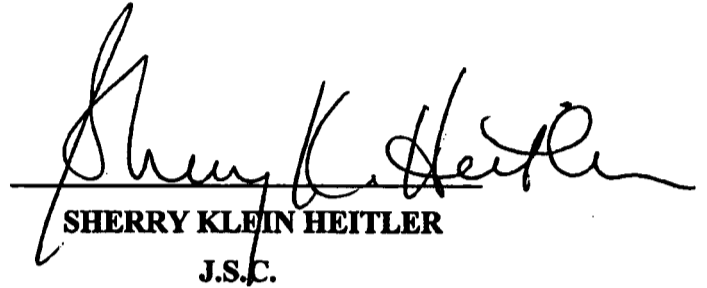
ORDERED that Paul Windels III, as Receiver of the Property of North Jersey Trading Corporation, shall, within 60 days of the date of this decision and order, move for judicial settlement of his final account pursuant to New York Business Corporation Law §§ 1216 and 1217 and in accordance with this court's decision and order of April 13, 2004, which granted plaintiff's motion for an order directing the distribution of sums held by the Receiver of the

property of North Jersey Trading Corporation; and it is further

ORDERED that, henceforth from the date of this decision and order, defendant Judith Herskowitz is enjoined from submitting any future filings in this matter, which includes cases filed under index numbers 024517/88 and 0023002/92, without the prior written approval of this court.

This shall constitute the decision and order of the court.

DATED: June 8, 2005


SHERRY KLEIN HEITLER
J.S.C.