Herman v Herman
2016 NY Slip Op 30808(U)
May 2, 2016
Supreme Court, New York County
Docket Number: 650205/2011
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ROSEMARIE A. HERMAN, et al.,

Index No. 650205/2011

Plaintiffs,

DECISION & ORDER

-against-

JULIAN MAURICE HERMAN, et al.,

Defendants.

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JULIAN MAURICE HERMAN,

Third-Party Plaintiff,

-against-

JOSEPH ESMAIL and SOLITA N. HERMAN,

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.

Plaintiffs move (Motion Sequence 028) to preclude defendant Julian Maurice Herman (Maurice) from participating in the damages inquest against him based upon his failure to comply with two court orders issued upon his repeated and continuing refusal to comply with discovery after his pleadings were stricken. The orders were dated: July 13, 2015, entered on July 15, 2015 (Default Decision, Dkt 1190); and October 20, 2015 (Reargument Decision, Dkt 1327).[1] The Default Decision was affirmed on December 3, 2015, and the Court of Appeals denied Maurice's motion for leave to appeal. *Herman v Herman*, 134 AD3d 442 (1st Dept 2015), *lv den* 2016 NY Slip Op 69220 (April 5, 2016) (nor).

[1] References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System (NYSCEFS). Capitalized terms defined in the Default Decision have the same meaning in this opinion. The Reader's familiarity with the facts relating to the action is assumed, as they are set forth at length in numerous decisions by this court and the Appellate Division.

Maurice opposes and cross-moves to strike plaintiffs' complaint for allegedly withholding key evidence. He, also cross-moves to preclude plaintiff from offering evidence at the inquest on the value of the LLCs after 1998, on the grounds of relevancy and prejudice. Plaintiffs oppose. Offit requests to participate in the inquest, as it has not been severed, and to limit damages to the date of the 1998 Transaction and to out-of-pocket losses.[2]

Background

The Default Decision, in addition to striking Maurice's answer, ordered him to produce, within 20 days after the decision was entered in the NYSCEFS on July 15, 2015, i.e., by August 5, 2015, *inter alia*: 1) unsigned copies of his 1998 through 2003 personal tax returns, which his accountant, Kaufman, had found on its back-up server (Unsigned Returns), with redactions ***unrelated to the LLCs*** whose value is at issue on damages; and 2) Maurice's communications with Kaufman (Kaufman Communications).[3] If the Unsigned Returns were not produced by the deadline, the Default Decision ordered that Maurice "is precluded from contesting damages at the inquest." Dkt 1172. That was a self-executing order. Contemptuously, Maurice did not produce the Unsigned Returns that were in Kaufman's possession by the August 5 deadline.

On July 24, 2015, Maurice moved to reargue the Default Decision. Dkt 1214. On August 18, 2015, plaintiffs cross-moved to enforce the conditional order on the grounds, *inter*

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[2] Offit did not submit a motion. He filed a memorandum of law. Limited Response of Defendant Michael Offit (Offit MOL), 3/18/16 Dkt 1414.

[3] The Default Decision directed Maurice to produce the portions of his unsigned personal returns in Kaufman's custody that reported "income, expenses, deductions, loans, losses, interest, management fees and/or any other benefit Maurice received or deduction he took related to the LLCs in 1998 through 2003, including the K-ls issued to him." Default Decision, p 22. He was permitted to redact information unrelated to the LLCs, except for the tax year, the taxing authority's information, his name, his address, the preparer's information, the date, the signature lines and/or any part of the tax form (as opposed to entries thereon). *Id.*

alia, that Maurice had not timely produced the Unsigned Returns and the Kaufman Communications. Notice of Cross-Motion, Dkt 1239; Reargument Decision, Dkt 1327.

In opposition to the cross-motion, Maurice admitted that he had not produced the Unsigned Returns until September 9, 2015, more than a month late. 9/9/15 Affidavit of Maurice Herman, Dkt 1280, ¶101. He also admitted in his affidavit that he did ***not even ask*** Kaufman's firm to produce them until August 17, 2015, two weeks after the deadline had passed. *Id*, ¶100. He feebly argued that August 17 was when his lawyer got a letter from the IRS advising that it did not have copies of his personal returns, and that Kaufman personnel were out of town until after Labor Day (he did not say when they left, although he had known since mid-July that he was obligated to produce the Unsigned Returns). *Id.* With respect to the Kaufman Communications, Maurice's affidavit averred that he "routinely" did not "retain emails or documents that are not important." *Id*, ¶¶ 7 & 120 & fn 7, p 39. However, Maurice did not say that there were no Kaufman Communications to produce. In addition, Maurice heavily redacted the Unsigned Returns that he produced belatedly, ***including improper redactions of entries related to benefits he received from the LLCs, which the Default Decision had required him to produce.*** Plaintiffs objected in correspondence.

In the Reargument Decision, the court gave Maurice yet another chance. Maurice was ordered to submit an affidavit *in camera* explaining transactions with several entities that he owned, which were reported on the Unsigned Returns so that the court could determine whether they were related to the LLCs. 11/16/15 Decision (In Camera Decision), Dkt 1336. Specifically, Maurice was required to produce, by November 6, 2015: 1) the Kaufman Communications; 2) an affidavit concerning his efforts to search for them and when they were discarded or deleted; 3) an *in camera* affidavit regarding redacted entries on the Unsigned Returns stating whether they

"reflect monies paid to Maurice by entities listed thereon for any transaction, fee, service or loan connected with the LLCs, and if so, ... which entity or entities paid him, how much each one paid him, on which returns, and why he was paid by each one." The Reargument Decision's final decretal paragraph warned, "if Maurice fails to comply in any respect, on time, ... the cross-motion is granted and, he is precluded from offering evidence at the inquest without the necessity of a further motion." That was the second self-executing order. Maurice disobeyed it.

In his November 6, 2015 affidavit, Maurice averred that he had found 13 Kaufman Communications, which he had not turned over previously, but which he claimed were irrelevant. 11/6/15 Maurice Herman Affidavit, Dkt 1333, ¶13. In his *in camera* affidavit concerning the Unsigned Returns, he admitted that some of the redactions related to his reportable income due to ownership of entities with interests in the LLCs, but he omitted dollar amounts and/or the reasons why he received money from the entities, in violation of the Reargument Decision. In Camera Decision, Dkt 1336 & 11/6/15 Maurice *In Camera* Affidavit, ¶¶ 5-6. Maurice was ordered to produce, by November 23, 2015, copies of his 1998 through 2002 Unsigned Returns showing all entries relating to the LLCs; Consolidated, Integrated, Seton, Ardent and Tudor. *Id.*[4]

Subsequently, in a December letter, Maurice's attorney, Darren Traub, admitted that an entity owned by Maurice, Sheffield, received payroll payments and commissions from the LLCs that had been redacted from the Unsigned Returns. 12/7/15 Traub Letter, Dkt 1341. The court issued yet another order compelling Maurice to provide copies of the Unsigned Returns that revealed the entries for Sheffield. 12/10/15 Order, entered on 12/15/15, Dkt 1358.

[4] The 2003 return was not included because plaintiffs had a signed copy that was filed in connection with a Tax Proceeding against Maurice.

Discussion

CPLR 3126 provides that if a party refuses to obey an order for disclosure, the court may make such orders as are just including an order prohibiting the disobedient party from supporting or opposing claims or defenses, and from producing in evidence. The sanction can include precluding the disobedient party from putting in affirmative proof at an inquest. *Langer v Miller*, 281 AD2d 338 (1st Dept 2001). The First Department has held that it is reversible error not to enforce a conditional order that has been disobeyed without a reasonable excuse. *Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532, 533 (1st Dept 2013). Further, enforcing a conditional order in that circumstance does not require a finding that the failure to comply was willful. *Id.*

Maurice is precluded from participating in the inquest. He has been given perhaps more chances than the law allows to comply with the conditional orders. *See Keller*, *id.* He repeatedly flouted this court's Default and Reargument Decisions by not complying at all, not complying on time, or only partially complying, without offering reasonable excuses. He delayed the action and wasted judicial resources. His actions were clearly contumacious. As he is precluded from participating in the inquest, the prong of the cross-motion to limit the proof of damages is denied.

The balance of the cross-motion also is denied. Maurice offers supposedly key evidence on liability, allegedly withheld by plaintiffs, which he claims demonstrates that the action is barred by the statute of limitations. Maurice claims the withheld evidence proves that Rosemarie knew about the 1998 Transaction when she executed a pre-nuptial agreement in 1999. However, Maurice's pleadings have been stricken, and he was defaulted. That holding was affirmed on appeal. Maurice, thus, can no longer contest liability, including a defense based on the statute of limitations. *See Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984) (defendant

whose answer is stricken admits liability). In addition, due to his default, Maurice has no right to discovery. *Beaulieu v Jay Realty Corp.*, 111 AD3d 524 (1st Dept 2013); *Yeboah v Gaines Service Leasing*, 250 AD2d 453 (1st Dept 1998).

Furthermore, the evidence offered is not key. It is a legal bill that was turned over by the law firm of Cadwalader Wickersham & Taft, who formerly represented Rosemarie, in response to a third subpoena served by Offit. 3/18/16 Avedesian Affirmation, Dkt 1415, p 2, fn 3. The invoice, dated July 21, 1999, contains nothing to indicate that Rosemarie, or her lawyers, knew about the 1998 Transaction. Dkt 1408. The narrative descriptions of services state that Rosemarie's lawyers spoke to Maurice and to Rosemarie with "attention to financial disclosure." What they knew about her finances and discussed is not on the invoice, which mentions neither the 1998 Transaction nor the notes payable in connection with it, as alleged by Maurice ***without any basis in fact***. Maurice infers that Cadwalader must have discussed the 1998 Transaction and the notes with Rosemarie, because they discussed her finances with her and schedules on the prenuptial agreement [Dkt 1289] listed notes as assets and sources of income.[5]

The Appellate Division, faced with the same argument, including the 1999 prenuptial agreement and Cadwalader's time records (although not the bill) affirmed this court's ruling that the statute of limitations presented a question of fact. *Herman v Herman*, 2013 NY Misc LEXIS 713 (Sup Ct NY Co, Feb. 8, 2013) (nor), *affirmed* 121 AD3d 565 (1st Dept 2014). In 2012,

[5] Maurice speculates that, "Cadwalader would have undoubtedly reviewed and examined the notes receivable from the 1998 Transaction before referencing them and their value in the 1999 Prenuptial Agreement." 3/4/16 Memorandum of Law in Support of Cross-Motion, Dkt 1392, fn 6, p 7.

plaintiffs produced time records for the same bill, with the same descriptions of services as on the newly produced invoice. Dkt 360 & 392.[6]

Striking plaintiffs' complaint for not producing the bill is unwarranted. The following factors are appropriately considered and warrant striking a pleading for failure to provide disclosure: 1) whether the conduct was prejudicial, impeded the movant's ability to obtain true discovery and forced the movant to spend enormous amounts of money and time to prove his or her case; 2) whether the misconduct was not isolated and was not corrected; and 3) whether in considering a lesser sanction, the court concluded that the wrongdoing would continue if the lawsuit was allowed to proceed. *CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 323 (2014). A default judgment may be granted where conduct is particularly egregious; designed to conceal critical matters; and perpetrated repeatedly and wilfully. *Id*, 321. Where a party's conduct is not "central to the success of the scheme to hide information from the court and the other parties, the drastic sanction should not be imposed." *Id*, 324. Here, even if the bill is new, the entries on it are the same as what plaintiffs produced in 2012. Maurice was not prejudiced, or forced to expend enormous amounts of money and time due its non-production. There was no scheme to hide information because the same information was previously produced by plaintiffs in 2012.

Turning to Offit's request to participate in the inquest, the court severs the claims against Maurice from the rest of the action. CPLR 603. Where a default judgment which establishes liability is granted against one defendant, it is appropriate to sever the inquest from the action against non-defaulting defendants, provided there is no prejudice. *Koppell River Realty, Inc. v Rodriguez*, 85 AD3d 520 (1st Dept 2011). Offit incorrectly argues that severance is only

[6] While Maurice claims the documents produced by plaintiffs in 2012 were not legible, the court was able to read them once they were printed.

appropriate where judgment against a defaulting defendant is entered by the Clerk. CPLR 5012 provides that after ordering a severance, the court "may direct a judgment ... as to one or more parties." *Card v Polito*, 55 AD2d 123 (4th Dept 1976) (severance should be granted in absence of prejudice whether judgment may be entered by clerk or requires application to court). The court has already granted plaintiffs' motion for a default judgment on liability against Maurice in the Default Decision, and all that remains is the assessment of damages directed therein. There is no reason why plaintiffs should be further delayed from obtaining a judgment against Maurice.

There will be no prejudice to Offit if he does not participate in Maurice's inquest. He will not be bound by the damages assessed. *Taylor v Pescatore*, 102 AD2d 867 (2d Dept 1984) (non-defaulting defendant who does not participate in inquest has no full and fair opportunity to contest damages and is not bound by damages assessed against defaulter); *Gallivan v Pucello*, 38 AD2d 876 (4th Dept 1972) (same holding). Moreover, Offit's request to participate was based on prejudice due to the lack of severance, which has now been remedied. Offit MOL, Dkt 1414, p1. Offit's request to limit damages at Maurice's inquest is denied for the same reason and because it is premature. Offit may make a motion in limine with respect to an assessment of damages against him prior to his trial.

The remaining arguments of the parties have been considered and found to be non-germane or without merit. Accordingly, it is

ORDERED that the motion by plaintiffs (Motion Sequence 028) to preclude defendant Julian Maurice Herman from participating in the inquest against him is granted and his cross-motion is denied; and it is further

ORDERED that upon service upon him of a copy of this order with notice of entry at cc-nyef@nycourts.gov, the Clerk of the court is directed to sever plaintiffs' claims against

defendant Julian Maurice Herman from the balance of the action, which shall continue as a separate action, and to note the severance in the court's records; and it is further

ORDERED that upon service upon the Clerk of the Trial Support Office at trialsupport-nyef@nycourts.gov of a copy of this order with notice of entry, she shall note the severance of plaintiffs' claims against defendant Julian Maurice Herman in the court's records.

Dated: May 2, 2016

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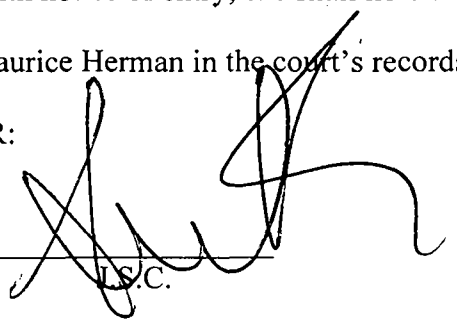

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C