

Couri v Siebert

2008 NY Slip Op 30109(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0107240/2004

Judge: Michael D. Stallman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MICHAEL D. STALLMAN
Justice

PART 7

Index Number : 107240/2004
COURI, JAMES
vs
SIEBERT, JOHN M.D.
Sequence Number : 018
STRIKE ANSWER

INDEX NO. _____
MOTION DATE 3/29/07
MOTION SEQ. NO. 018
MOTION CAL. NO. 20

this motion to/for Strike

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-E
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-3</u>
<u>4</u>
<u>5</u>

Cross-Motion: Yes No


Upon the foregoing papers, It is ordered that this motion "is determined in accordance with the annexed memorandum decision and order."

Copies to be mailed to both sides

FILED
JAN 17 2008
NEW YORK
COUNTY CLERKS OFFICE

MICHAEL D. STALLMAN
J.S.C.

Dated: 1/14/08


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 7**

-----X
JAMES COURI,

Plaintiff,

- against -

JOHN SIEBERT and JOHN SIEBERT, M.D. P.C.,

Defendants.
-----X

Index No. 107240/04

Decision and Order

FILED
JAN 17 2008
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff pro se alleges that defendants owe him millions of dollars arising from investment transactions from 1997 through 2003. Plaintiff and defendants bring four motions involving each other's alleged non-compliance with discovery orders of a Special Referee and Special Master who supervised discovery in this action. Plaintiff also seeks to remove the Special Referee from all issues in this action, including a reference to hear and report on defendants' motion for contempt against plaintiff. This decision address all five motions.

BACKGROUND

Plaintiff is the alleged assignee of all interests, rights, and obligations of certain companies in which he held either a direct or indirect controlling interest. Plaintiff alleges that defendants fraudulently induced the affiliated companies into a settlement agreement for much less than what was owed to them, based on allegedly false representations by defendants of their financial insolvency and/or inability to pay the total sum due and owing. Siebert allegedly had been an officer of one of the affiliated corporations.

Defendants assert counterclaims against plaintiff, alleging that they invested \$7 million with

plaintiff's companies, but plaintiff allegedly paid defendants \$5,000. According to defendants, plaintiff failed to deliver any financial statements, balance sheets, income statements, profit and loss statements, and tax returns with respect to any of the companies in which defendants had invested money.

By order dated June 5, 2005, Justice Harold B. Beeler referred "all pre-note discovery in this case, including all discovery conferences" to a Special Referee. Special Referee Louis Crespo supervised discovery until July 2006, at which time discovery was stayed. Special Referee Crespo issued many decisions and orders regarding discovery.

Discovery in this case has not proceeded smoothly, due in part to plaintiff's health problems, which he claims has impaired his ability to proceed with this litigation. By order dated February 15, 2006, Special Referee Crespo denied, without prejudice, plaintiff's application of an adjournment of a contempt hearing, due to plaintiff's "chronic heart defects." The Special Referee took note that plaintiff's history of angina dates back to the 1980s.¹ By order dated June 8, 2006, Special Referee Crespo indicated that plaintiff "has been diagnosed with Level-5 Melanoma and had surgery on May 31, 2006." Due to plaintiff's health, Special Referee Crespo had permitted the parties to make informal applications by fax for discovery orders, and plaintiff made numerous applications. While Referee Crespo was supervising discovery, the action had been reassigned to Justice Heitler.

¹ See also Pavia v Couri, Sup Ct, NY County, Jan. 30, 2007, Madden, J., Index No. 124625/02. In Pavia v Couri, Justice Madden found, "While J. Couri has health issues, according to the affirmations from his physicians, the conditions from which he suffers are chronic and may never be resolved. Moreover, despite his health issues, J. Couri has shown himself to be able to appear in court on numerous occasions without incident, to argue his points clearly and cohesively, and produce voluminous motion papers and other submissions. The court appearances in which Couri has had heart-related complaints have been in connection with going forward with trial or dispositive hearings, such as to hold him in civil contempt." Ibid.

Discovery has also not proceeded due to the parties' acrimonious attitude towards each other. By order dated April 25, 2006, Special Referee Crespo directed defendants to move for either sanctions or dismissal of the complaint, for plaintiff's constant failure to abide by the direction of the Court with regard to his deposition. Special Referee Crespo stated, in relevant part:

"Time and again, as reflected on the record, the plaintiff was instructed to answer questions as posed rather than respond with personal attacks on the attorney as well as his view of the merits of defendants' counterclaims. The record will show that the plaintiff reveals a lack of respect as to the Court's directions, otherwise he would answer the questions as asked rather than answer with a question or respond in a way that seemingly presses his claims. His failure to abide by my directions suggest a deliberate and evasive strategy not to answer the questions that are asked. . . . This uncooperative course of conduct or 'determined strategy' is nothing short of delay that deserves the most vehement condemnation.

The patience of the Special Referee has been tried and I am left with no option other than the instant order, to wit: that the defendant move forthwith on motion for sanctions and/or dismissal of the complaint due to the plaintiff's failure to abide by the Special Referee's rulings and directions. . . . [A]ll discovery is stayed unless otherwise directed by the Honorable Shirley Klein Heitler."

Following the parties' conference before Justice Heitler, which Referee Crespo attended, Referee Crespo modified his April 25, 2006 order, so that discovery would go forward under his supervision.

By order dated June 9, 2006, Referee Crespo directed as follows:

"The plaintiff shall execute IRS Form 4506 and DTF Form 505 for all of the above corporations as well as himself (as duly noted by plaintiff in the IRS Forms 4506 T), dated May 16, 2006. The IRS Form 4506 and DTF Form 505, shall be provided by the defendants . . . and made returnable to the Special Referee Louis Crespo, NY Supreme Court, 71 Thomas Street, Room 203, NY NY10013. . . .

Siebert shall execute a IRS Form 4506 and DTF Form 505 for tax year 1996, and executed and returned to the plaintiff for mailing and payment. The defendants' [*sic*] tax return shall be made returnable to the Special Referee Louis Crespo,

In view of plaintiff's medical condition any prospective discovery and litigation and/or hearing is hereby stayed for period of six weeks pending a status report on the medical condition of the plaintiff."

By order dated July 14, 2006, Referee Crespo reported and recommended to Justice Heitler to:

“(1) direct that the plaintiff comply with the June 28, 2006-order, to wit: the ministerial act of executing tax documents or be held in contempt; (2) that he be directed to continue with discovery after the lifting of the temporary stay due conditioned on his present medical treatment and prognosis; and (3) any other appropriate relief requested by the parties, including any request or opposition by either party for recusal of the undersign Special Referee.”

Defendants moved to strike plaintiff’s complaint for failure to comply with discovery demands, and plaintiff cross-moved to strike defendants’ counterclaims, alleging non-compliance with discovery. By order dated December 11, 2006, Justice Heitler referred the motion and cross motion to Court Attorney Bernard Fields, appointed as Special Master/Referee “to make discovery rulings re the above given matter.” By order dated December 14, 2006, Referee Crespo remanded the remaining discovery issues to Justice Heitler. By order dated January 19, 2007, Special Referee Fields issued several directives to plaintiff and defendants regarding discovery.

Plaintiff now moves to strike defendants’ answer and for sanctions against defendants due to their alleged noncompliance with Referee Fields’s order (Motion Seq. No. 018); defendants move to reject his order (Motion Seq. No. 019).

Defendants also move to strike plaintiff’s complaint and for attorneys’ fees against defendants. Defendants claim that plaintiff allegedly violated a so-ordered stipulation dated May 23, 2000, permanently enjoining him from commencing or maintaining any new action pro se without leave of the Administrative Judge Hon. Jacqueline Silbermann (Motion Seq. No. 021). Plaintiff moves for sanctions and to strike defendants’ affirmative defenses due to “ex parte” communications with Judge Silbermann regarding whether plaintiff obtained her permission to sue (Motion Seq. No. 020).

In addition to the parties' discovery disputes, defendants had moved for an order finding plaintiff in contempt for violating the terms of the parties' "mutual restraining order" of February 17, 2005. By order dated December 12, 2005, Justice Beeler referred the motion to a Special Referee to hear and report, and the matter was assigned to Special Referee Crespo. A hearing was held on March 23, 2006 and continued on May 24, 2006. The hearing was adjourned without a further date due to plaintiff's health.

Plaintiff moves to remove Special Referee Crespo from all remaining issues in this action (Motion Seq. No. 022).

DISCUSSION

Motion Seq Nos. 18 & 19

Plaintiff moves to strike defendants' answer due to their alleged noncompliance with Special Referee Fields's order of January 19, 2007. Referee Fields directed plaintiff to provide:

1. An affidavit of search for documents, describing "dates of the search," "the places searched" and "who did the search";
2. Proof of the dissolution of the corporations in question either voluntarily or by operation of law;
3. A copy of a transcript of the deposition of defendants' accountant, within 30 days;
4. IRS Forms 4506 and New York State form DTF 505 for James C. Couri and corporate entities requesting tax and amended tax returns for the years 1996-2003, to be sent to the Supreme Court.

Couri Aff., Ex A. Referee Fields also directed defendants:

1. To re-serve documents which they claim answer plaintiff's demands, by specifying which demands they have answered, within 2 weeks;
2. To provide IRS Forms 4506 and New York State form DTF 505 requesting tax and amended tax returns for Siebert and John Siebert M.D. P.C. for the years 1996-2003.

Ibid.

Plaintiff has not complied with Referee Fields's order. His affidavit of search does not

describe the dates of search, the places searched, and who did the search. Plaintiff essentially claims that he threw away everything. Couri Aff., Ex E. Referee Fields rejected this excuse, finding,

“the fact that plaintiff alleges he destroyed certain files because the statute of limitations had run on the filing of tax returns does not take into account that there is a six year statute of limitations as to actions in New York and the documents necessary to prove the allegations made in the complaint.”

Couri Aff., Ex A. The affidavit of search concedes the point, but Couri goes on to say that “extenuating circumstances supersedes and negates such requirement.” Couri Aff., Ex E. Since June 2006, plaintiff was ordered to provide tax authorizations for himself and his corporations, but plaintiff has never complied. Plaintiff shows no proof that he supplied the EBT transcript of defendants’ accountant.

In view of plaintiff’s own evasive noncompliance, plaintiff is not entitled to an order striking defendants’ answer for their alleged noncompliance with discovery. See Vitello v JAM Installers, 264 AD2d 774 (2d Dept 1999) (defendants forfeited their right to conduct physical examinations of the injured plaintiff and to have the plaintiffs comply with further discovery when they failed to complete the plaintiffs’ depositions and submit to their own depositions as scheduled by the court at numerous pretrial conferences over a three-year period). Plaintiff’s motion to strike defendants’ answer based on discovery noncompliance is therefore denied.

Defendants argue that the January 19, 2007 order of Special Referee Fields should be reversed, because plaintiff should not be given a further opportunity to provide discovery in this case. Defendants also contend that Referee Fields’s order contradicts prior discovery rulings of Special Referee Crespo.

By order dated June 9, 2006, Referee Crespo directed Siebert to execute a IRS Form 4506

and DTF Form 505 for tax year 1996 only. Thus, Referee Fields should not have directed defendants to provide tax authorizations for the years 1997-2003, without an explanation as to why the tax authorizations for the additional years were necessary, or without a finding that defendants had not previously complied with discovery requests for those tax years.

In all other respects, Referee Fields's order is proper. Referee Fields found that defendants claimed to have produced documents responsive to plaintiff's demands, but did not label them to correspond to plaintiff's demands. CPLR 3122 (c) provides that, "whenever a person is required . . . to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request."

Simply producing a stack of documents to plaintiff responsive to plaintiff's document requests does not comply with CPLR 3122 (c), if the documents themselves were not kept in this manner in the regular course of business. Special Referee Fields properly exercised his discretion to require defendants' discovery responses to be labeled to correspond to plaintiff's demands.

The Court does not disturb the ruling of Special Referee Fields that plaintiff is entitled to an EBT of the records keeper who provided an affidavit detailing a search for documents.

Therefore, defendants' motion to reverse the order dated January 19, 2007 of Special Referee Fields is granted to the extent that his direction to defendants to provide tax authorizations is hereby vacated, and Siebert is directed to execute a IRS Form 4506 and DTF Form 505 for tax year 1996 only.

Due to plaintiff's noncompliance with prior discovery orders, the Court must take "a more proactive approach in such circumstances." Figdor v City of New York, 33 AD3d 560, 561 (1st Dept 2006). Plaintiff has failed to provide tax authorizations, as directed in prior orders of Special

Referee Crespo dated June 9, 2006 and June 28, 2006, and the order of Special Referee Fields dated January 19, 2007. Plaintiff's pattern of noncompliance must be deemed wilful, especially in light of plaintiff's affidavit of search, in which he argues only that he should be excused from complying with the orders. If plaintiff does not provide the tax authorizations within 60 days, then plaintiff's reply to defendants' counterclaims shall be stricken and the Clerk shall award defendants judgment on their counterclaims. This drastic remedy is warranted because defendants would be deprived of any meaningful ability to prove their counterclaims, or to cross-examine plaintiff. Plaintiff has shown no excuse for his recalcitrance in performing the ministerial act of requesting copies of tax returns. Given that plaintiff is healthy enough to type and fax letters to the Court and make motions, plaintiff should be healthy enough to send authorizations to the federal and state tax authorities.

Pending plaintiff's proof of compliance in full by timely providing the tax authorizations, depositions are stayed. Plaintiff may move to lift the stay of further depositions, upon proof of his compliance. Plaintiff is reminded that, if he persists in his assertion that he is unable to engage in depositions, disclosure will never be completed and plaintiff will not be able to file a note of issue or otherwise pursue his claims to resolution.

Motion Seq. Nos. 20 & 21

Defendants move to strike the complaint because plaintiff allegedly violated a so-ordered stipulation dated May 23, 2000, which permanently enjoins him from commencing pro se actions without leave of the Administrative Judge.

The May 23, 2000 so-ordered stipulation of settlement resolved an action that plaintiff commenced in 1999 against individuals not named in this action. The so-ordered stipulation states, in pertinent part:

“2. Following the entry of this Stipulation and Order, the plaintiff, James C. Couri, including any business in which Couri is a controlling stockholder, **agrees to be permanently enjoined from commencing or maintaining any new action in a *pro se* capacity in any New York Court (State and/or Federal) against any individual or entity for any reason whatsoever without first obtaining leave to do so by the Administrative Judge of the particular Court.** Claims made in, and subject to the jurisdiction of, the Small Claims Part of any court are excepted from this Stipulation and Order.

3. Nothing contained herein shall prohibit James C. Couri from commencing and/or maintaining a new action or third-party complaint, without the need to obtain permission from an Administrative Judge, so long as he is represented by an attorney at law. . . .

4. Nothing contained herein shall prohibit James C. Couri, in a *pro se* capacity, from defending any action commenced against Couri without seeking leave from the Administrative Judge of that Court. Further, Couri is permitted to assert, in a *pro se* capacity, any counterclaims in that action . . .”

Burke Affirm., Ex A (emphasis added).

Defendants wrote to Justice Jacqueline Silbermann, Administrative Judge of the Supreme Court, New York County, Civil Branch, inquiring whether plaintiff obtained or sought leave to commence this action. By letter dated March 12, 2007, Justice Silbermann replied, “No permission to commence a litigation was requested or given by me.” See Burke Affirm., Ex G.

Plaintiff submits a letter dated September 19, 2003 from Justice Silbermann which states, “If your action is not against any of the parties named in the stipulation dated May 23, 2000 “So Ordered” by Hon. Alice Schlesinger, then you may commence it *pro se*, provided it is on your own behalf and not on behalf of a corporation.” Couri Opp. Aff., Ex A. By letter dated March 22, 2007, Justice Silbermann forwarded the September 19, 2003 to defendants’ counsel, who had previously inquired whether she had granted leave. Ibid. She states, “This [September 19, 2003] letter, I believe, will clarify the situation.” Ibid.

In view of Justice Silbermann's interpretation of the stipulation of settlement, the Court denies defendants' motion to strike the complaint for plaintiff's failure to obtain the leave of Justice Silbermann before commencing this action pro se.

Plaintiff moves to strike defendants' answer and counterclaims. Because Justice Silbermann had informed defendants' counsel of her interpretation of the so-ordered stipulation of settlement, plaintiff argues that defendants have committed a fraud upon the Court. Plaintiff also argues that defendants had improper ex parte communications with Justice Silbermann, and seeks to disqualify defendants' counsel.

DR 7-110, which prohibits an attorney from communicating ex parte with the Court, does not apply. It states, "In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except [i]n writing if the lawyer promptly delivers a copy of the writing . . . to an adverse party who is not represented by a lawyer. . . ." 22 NYCRR 1200.41 (b). Clearly, the letter by defendants' counsel to Justice Silbermann, inquiring as to whether plaintiff obtained her permission to bring this action, does not indicate that plaintiff was copied with the letter. See Burke Affirm., Ex F. However, as defendants indicate, Justice Silbermann is not the judge presiding over this action, and the inquiry was administrative in nature. Therefore, defendants' letter to Justice Silbermann did not violate DR 7-110.

However, more troubling is the fact that defendants brought this motion to strike plaintiff's complaint after Justice Silbermann apparently forwarded to them a letter stating that the so-ordered stipulation was not a bar to plaintiff's pro se action. Defendants conclude that, because Justice Silbermann's letter contradicts the terms of the May 23, 2000 so-ordered stipulation of settlement,

plaintiff must have misled Justice Silbermann. Alternatively, defendants hint that “it is not beyond plaintiff to doctor documents.” Burke Opp. Affirm. ¶ 7.

Defendants do not dispute that Justice Silbermann sent their counsel the letter dated March 22, 2007. Thus, they cannot seriously claim that plaintiff could have doctored a letter which Justice Silbermann’s office sent directly to them. If defendants believed that plaintiff misled Justice Silbermann, the proper course would have been to inquire further once they received the March 22, 2007 letter. Nevertheless, plaintiff has not demonstrated entitled to sanctions; plaintiff’s motion for sanctions is denied.

Motion Seq. No. 22

Plaintiff moves for an order removing Special Referee Crespo from this action. Plaintiff argues that Justice Heitler removed him when she appointed Bernard Fields as Special Master/Referee. Plaintiff contends that the orders of Special Referee Crespo are inconsistent, rambling, incomplete, and biased.

Special Referee Crespo no longer supervises discovery in this case. Pursuant to the order of Referee Crespo dated December 14, 2006, the “remaining issues as to discovery were entertained by Justice Heitler. Accordingly the supervision of discovery is no longer before me.” However, a motion for contempt was also referred to Special Referee Crespo to hear and report, by Justice Beeler’s order of December 12, 2005.

Justice Heitler did not remove Referee Crespo as referee to hear and report as to the contempt motion. Her order dated December 11, 2006 states, “Bernard Fields, Esq. is appointed as Special Master to make **discovery** rulings re the above given matter” (emphasis added). Although the order appears to appoint Bernard Fields as the Special Master over all discovery, Justice Heitler stated in

a later decision and order dated February 9, 2007, that “defendants’ motion and plaintiff’s cross motion were referred to Special Referee Bernard Fields on December 11, 2006.” Consequently, there is no Referee currently supervising discovery.

Having reviewed the decisions and orders of Referee Crespo, the Court finds that they are well-reasoned, well supported and thoroughly detailed. Referee Crespo is familiar with the parties, and he already started the hearings on the contempt motion. Plaintiff’s accusations of bias are unsupported. Therefore, plaintiff’s motion to remove him as Special Referee to hear and report on defendants’ motion for contempt against plaintiff is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff’s motion to strike defendants’ answer (Motion Seq. No. 018) is denied; and it is further

ORDERED that defendants’ motion to reverse the January 19, 2007 order of Special Referee Bernard Fields (Motion Seq. No. 019) is granted to the extent that Item # 6, which directs defendants to provide certain tax authorizations is hereby vacated, and that to the extent not already done, defendant Siebert is directed to file, within 30 days, IRS Form 4506 with the Internal Revenue Service and DTF Form 505 with the New York State Department of Taxation and Finance, requesting the tax returns and amended tax returns of John Siebert for tax year 1996 to be sent to the Supreme Court of New York County, IAS Part 7, 111 Centre Street Rm 949, New York, New York 10013; and it is further

ORDERED that defendants are directed to comply with Referee Fields’ order of January 19, 2007 in all other respects within 30 days, to the extent they have not already done so; and it is further

ORDERED that plaintiff is directed to file, within 60 days, IRS Form 4506 with the Internal Revenue Service and DTF Form 505 with the New York State Department of Taxation and Finance, requesting the tax returns and amended tax returns of James C. Couri, Couri Group Inc., Couri Capital Group, Couri Acquisition Group, Goldfish Enterprises, Guardian Financial Planning Corp., Kindervest Planning Corp., and Tangerine Venture Corp. for tax years 1996-2003 to be sent to the Supreme Court of New York County, IAS Part 7, 111 Centre Street Rm 949, New York, New York 10013; and it is further

ORDERED that if plaintiff does not provide the tax authorizations within 60 days, then plaintiff's reply to defendants' counterclaims shall be stricken and the Clerk shall award defendants judgment on their counterclaims; and it is further

ORDERED that, pending plaintiff's proof of compliance in full by timely providing the tax authorizations, all depositions are stayed. Plaintiff may move to lift the stay upon proof of his compliance; and it is further

ORDERED that plaintiff's motion to strike defendants' answer and counterclaims and for sanctions (Motion Seq. No. 20) is denied; and it is further

ORDERED that defendants' motion to strike the complaint (Motion Seq No. 21) is denied; and it is further

ORDERED that plaintiff's motion to remove Special Referee Crespo from the remaining issues of this action (Motion Seq. No. 22) is denied, and the contempt hearings shall continue, without prejudice to an application by plaintiff for an adjournment before the Special Referee due


to his health, upon an affirmation from a physician that, for specific medical reasons cited by the physician, plaintiff's participation in the hearing would be hazardous to plaintiff's health.

This constitutes the decision and order of the Court.

Dated: *January 14, 2008*

New York, New York

ENTER:



J.S.C.

RECEIVED IN STATE COURT

FILED
JAN 17 2008
NEW YORK
COUNTY CLERKS OFFICE