

**Rudes v Heller**

2008 NY Slip Op 31114(U)

April 3, 2008

Supreme Court, New York County

Docket Number: 0114298/2004

Judge: Joan Madden

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

PRESENT: MADDEN  
Justice

PART 11

RUDAS, SAUL

INDEX NO. 114298/04

MOTION DATE 2-28-08

MOTION SEQ. NO. 20

MOTION CAL. NO. \_\_\_\_\_

- v -

KENNETH HELLER

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the appended memorandum Decision and order.

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

**FILED**

APR 14 2008

CLERK OF THE SUPREME COURT  
STATE OF NEW YORK

Dated: April 8, 2008  
make no time April 3, 2008

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
SAUL RUDES, Index No. 114298-2004

Plaintiff,

-against-

KENNETH HELLER,

Defendant.

-----X  
-----X

KENNETH HELLER, Index No. 114466-2005

Plaintiff,

-against-

SAUL RUDES,

Defendant.

-----X

JOAN A. MADDEN, J.:

In motion seq. no. 20 in Rudes v. Heller; Index No. 114298/04, Saul Rudes ("Rudes") moves for an inquest on damages, and Kenneth Heller ("Heller") cross moves to vacate the February 13, 2008 decision and order of Justice Bransten which struck Heller's pleadings based on his failure to appear for deposition, and for renewal and reargument of this court's decision and order dated February 7, 2008, which denied Heller's request to videotape his deposition. In motion seq. no. 10 in Heller v. Rudes; Index No. 114466/2005, Heller moves for recusal of this court.

In Index No. 114298/04, Rudes sues Heller for attorney's fees in connection with an action in which a S.M. Pires<sup>1</sup> ("Pires") retained Heller to represent him in connection with personal injuries Pires allegedly sustained while employed as a seaman (hereinafter "the personal injury action"). According to the complaint, verified by Rudes, the personal injury action resulted in a judgment in the sum of \$4,000,000, plus interest, and Heller retained Rudes as appellate counsel to handle appeals in return for 10% of Heller's net fee in the personal injury action. The complaint further alleges that although Heller after years of appeal, recovered \$8,329,720.65, the sum of the award and interest, he gave Pires only \$4,153,181 and retained \$4,176,539.54. Furthermore, the complaint alleges that Heller told Rudes that the entire amount of \$8,329,720.65 had to be paid to Pires and no part of the money deducted and that therefore Heller could not pay Rudes any attorney's fees. In the complaint Rudes seeks, inter alia, 10% of the \$4,000,000 retained by Heller as attorney's fees.

In Index No. 114466/05 Heller sues Rudes for \$50,000 which Heller alleges he loaned to Rudes in installments during 2000 and which Heller alleges was to be repaid in installments by Rudes. Heller further alleges that Rudes paid the first installment on

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<sup>1</sup>Pires was initially a co-plaintiff with Rudes but apparently discontinued his claims against Heller.

or about July 8, 2000 and was to pay the last installment on or about December 8, 2000 and that "Rudes has failed to make any payments in satisfaction of the outstanding loan."

The two complaints have been consolidated for joint discovery and trial.

First, Heller's motion for recusal of this court will be addressed, which for the reasons that follow, is denied. At the outset, it must be noted that this motion is part of a pattern by Heller of seeking the recusal of the judge presiding over matters in which he is a party. For example, when Justice Judith Gische presided over this case, Heller sought her recusal in motion seq. no. 002 and motion seq. no. 003, and these motions were denied.<sup>2</sup> In an unrelated matter also assigned to this court, Blaikie v. Heller; Index No. 600805/03, Heller sought this court's recusal, which this court denied. Significantly, the grounds for recusal in all the motions contain the identical language that the Administrative Judge of New York County has handpicked this court as well as the other justices to preside over the various actions, and that this court and the other justices have a relationship with Rudes.

As there is no basis for this court's recusal on the ground of Judiciary Law § 14 by reason of interest or consanguinity, the

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<sup>2</sup>Justice Gische declined to sign the order to show cause seeking her recusal in motion seq. no. 003 as duplicative of motion seq. no. 002, which was *sub judice* when it was filed.

court is the sole arbiter of whether recusal is warranted.

Schwartz v Schwartz & Schlacter, 188 AD2d 285 (1<sup>st</sup> Dept 1992); see also, EECP Centers of America, Inc. v Vasomedical, Inc., 277 AD2d 349 (2d Dept 2000). Here, Heller's unsubstantiated allegations of bias and prejudice in connection with the selection of judges to preside over this action do not provide a basis for this court's recusal. Nor do Heller's unsubstantiated allegations that this court has some type of relationship with Rudes, which it does not, provide a grounds for recusal.

The court will next consider Heller's motion to vacate Justice Bransten's February 13, 2008 order and to renew and reargue this court's February 7, 2008 order. These orders must be viewed in light of a December 13, 2007 order of Justice Acosta in connection with motion seq. no. 006, granting Pamela A. Elisofon's request to be relieved as counsel for Heller and adjourning the action to January 17, 2008, "to comply with the CPLR automatic stay provision." Justice Acosta further stated that "the parties are advised to be prepared to proceed with discovery on January 17, 2008."<sup>3</sup>

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<sup>3</sup>At the immediately preceding conference on November 8, 2007, Justice Acosta stated that, "Let me just tell you folks that I know you have gone through about seven or eight different judges, and some of whom have disqualified themselves, recused themselves, some of whom seem to have been worn down by just the sheer acrimony in this litigation. That is not going to happen here. I won't let you folks turn my courtroom into a playground. That is not going to happen. So I'm warning both of sides because action will be taken in the event you attempt to do that;

Due to Justice Acosta's intervening appointment to the Appellate Division, the conference was administratively adjourned from January 17, 2008 to January 24, 2008, and then placed on this Part's calendar for February 7, 2008. The parties were informed by chambers that the conference would go forward on February 7, 2008.

As indicated by the record of February 7, an attorney, Jacob Fogel, stated that he was appearing of counsel to Susan Harmon on behalf of Mr. Heller for the purpose of requesting an adjournment pursuant to an Order to Show Cause which Mr. Heller had or was filing. After questioning by the court, Fogel stated that he would be representing Mr. Heller on that date in connection with the issues before the Court.

In a written order of February 7, 2008, this Court directed counsel for Heller to file a notice of appearance and that the depositions were to go forward as scheduled on February 13, 2008, and denied Fogel's request that Heller be permitted to appear for deposition by videotape. The order also stated that the "[f]ailure to appear at the deposition will be deemed a waiver of the right to depose the party and/or would subject the non-complying party to sanctions per CPLR 3126 including, but not

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okay?... I want counsel to sit with my court attorney and come up with a discovery schedule for the discovery to be completed in this case and for this matter to proceed to trial as soon as practicable." (Minutes of November 8, 2007 proceedings before Justice Acosta, at 3, 4 and 9).

limited to, preclusion of the non-appearing party's testimony and/or striking the pleading[s]."

Heller then moved by order to show cause (motion sequence no. 009) for permission to appear by video tape at the deposition and vacatur of the February 7, 2008 order requiring him to appear at the court house for such deposition. This motion was made returnable on February 13, 2008, and due to this court's unavailability was heard by Justice Bransten. Heller alleged that the order was designed to cause him "to be incarcerated due to an outstanding warrant of contempt." The warrant of contempt was issued by Justice Silver, Supreme Court, Bronx County, in connection with Heller's failure to turn over a client's file to new counsel.

On February 13, 2008, Justice Bransten denied Heller's motion, and in a written order stated, inter alia, that "Ms. Harmon stated on the record 1) she had not filed a notice of appearance pursuant to Justice Madden's 2/7/08 order; 2) she wished to have an adjournment which this court, pursuant to Justice Madden's order, denied; 3) she stated Mr. Heller could not be in court because of the weather. . .; 4) Ms. Harmon told the court that Sheriffs were present to arrest Mr. Heller should he appear and the court told Ms. Harmon that if Mr. Heller did appear, that the court would allow the depositions to go forward before the Sheriffs would be allowed to carry out Justice

Silver's order for Mr. Heller's arrest for contempt.

Justice Bransten held that based on Heller's failure to appear, pursuant to this Court's February 7, 2008 order, Heller waived Rudes' deposition. Justice Bransten also held that "[a]t Mr. Rudes' request and pursuant to CPLR 3216 and pursuant to Justice Madden's order, the court hereby strikes Mr. Heller's pleadings in both cases - Index No 11466/05 and 113298/04."

In this cross motion, as indicated above, Heller moves to renew and reargue this court's February 7, order which directed that he appear at the courthouse for deposition and which denied his motion to appear by videotape, and to vacate Justice Bransten's February 13 order striking his pleadings in both actions and finding that Heller waived his right to depose Rudes.

In the instant motion, and in motion seq. no. 009 made before Justice Bransten, Heller argues that the order of this court "was clearly designed to incarcerate your affiant [Heller] by forcing him to choose between appearing in New York to vigorously pursue his meritorious case...or be incarcerated on a bogus, trumped up, contempt order issued by Justice Silver against your affiant in Bronx County, which is currently on appeal to the First Department." Heller Affidavit in support of both motions, ¶ 33. Heller further states that "on January 26, 2007, Justice Silver held "Kenneth Heller to be in contempt of Court for failing to turn over all his files in this matter to

the law firm of Jacoby & Myers." Id., ¶ 34.

To the extent that Heller seeks reargument and renewal of this court's February 7, 2008 order to permit videotaping of his deposition, that motion is denied. It must be noted that Heller is a disbarred attorney and that in the order of disbarment the Appellate Division stated:

In light of the cumulative evidence of [Heller's] 24-year history of sanctions, his perverse and persistent refusal to accept adverse rulings, reflective of an utter contempt for the judicial system, and his consistent, reprehensible, unprofessional behavior, which has included screaming at, threatening and disparaging judges, adversaries and experts, intentionally defying court rulings, and disrupting and thwarting proper legal process through both physical and verbal aggression, we are of the opinion that the appropriate sanction here is disbarment.

Thus, the contempt of court finding by Justice Silver for failure to turn over the file as ordered, is a continuation of the type of conduct which led to Heller's disbarment.<sup>4</sup> While

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<sup>4</sup>Heller's conduct in this litigation is also consistent with this type of conduct as reflected in the numerous and often repetitive motions he has made in both actions. The following is a list of motions Heller has made in Index No. 114298/04: (1) motion to strike defendant's Bill of Particulars (motion seq. no. 004); (2) motion to disqualify Harmon as counsel for Pires (motion seq. no. 005); (3) motion seeking recusal of Justice Smith and the dismissal of the complaint (motion seq. no. 006); (4) motion to vacate the stipulation of discontinuance (motion seq. no. 007); (5) motion seeking recusal of Justice Friedman (motion seq. no. 008); (6) motion to dismiss the complaint for failure to state a cause of action (motion seq. no. 009); (7) motion to sever the action (motion seq. no. 010); (8) motion seeking recusal of Justice Richter (motion seq. no. 011);

Heller has a right to appeal Justice Silver's order, absent a stay, Heller remains subject to arrest. It must be noted that according to Justice Bransten's order of February 13, Ms. Harmon who requested an adjournment on behalf of Heller on that date, told the court that the Sheriffs were present to arrest Heller and Justice Bransten indicated that she would direct that depositions go forward before the Sheriffs were permitted to carry out Justice Silver's order.

Moreover, as to Heller's motion to permit him to appear for

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(9) motion for a jury trial of certain factual issues (motion seq no. 012); (10) motion for a jury trial of certain factual issues (motion seq no. 013); (11) motion to reargue the denial of the motion to dismiss (motion seq no. 014); (12) motion to stay the proceedings pending summary judgment motion (motion seq. no. 015); (13) motion to enjoin and restrain the action from being reassigned to another pre-trial part of a Justice of Supreme Court, New York County and to transfer action to the Supreme Court, Kings County (motion seq. no. 017); (14) motion to enjoin and restrain the action from being reassigned to a trial part of a Justice of Supreme Court, New York County and to transfer the action to Supreme Court, Kings County (motion seq. no. 018).

Heller has made the following motions in Index No. 114466/05: (1) motion for a protective order as to Rudes' discovery requests (motion seq. no 001); (2) motion seeking the recusal of Justice Gische and disqualification of Rudes' attorney (motion seq. no 002); (3) motion seeking the recusal of Justice Gische (motion seq. no 003); (4) motion seeking disqualification of Rudes' attorney (motion seq. no 004); (5) motion seeking the recusal of this court (motion seq. no 005); (6) motion to stay all proceedings for thirty days to permit Heller to get new counsel (motion seq. no 007); (7) motion seeking the recusal of this court (motion seq. no 008); (8) motion seeking videotaped deposition (motion seq. 009); (9) motion seeking the recusal of this court (motion seq. no 010).

deposition by videotape, granting this motion would facilitate Heller in his pattern of evading the orders of the court.

As to the cross motion to vacate Justice Bransten's order of February 13 striking Heller's pleadings and finding that he waived his right to depose Rudes, Heller argues that as there was no motion before Justice Bransten for this relief and as Justice Bransten's was not the IAS judge assigned to the case, the February 13 order should be vacated. Even if these arguments had merit, which they do not, the cross motion effectively places the issue before this court, and the court finds that under the circumstances here and for the reasons stated above, striking the pleadings was an appropriate remedy given Heller's failure to comply with this court's February 7 order and his conduct demonstrating that he will not personally appear for a deposition in this matter in New York county.

Although the court's February 7 order provided for alternative discovery sanctions other than striking the non-complying party's pleadings, under the circumstances here, given the wilful and contumacious character of Heller's default in appearing for a deposition, and as the record indicates that he will continue to refuse to appear, the sanction of striking his pleadings is appropriate.<sup>5</sup> See Couri v. Siebert, \_\_\_ AD2d \_\_\_,

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<sup>5</sup>In any event, under the circumstances here, the alternative discovery sanctions as to Rudes v. Heller of precluding Heller's trial testimony, or pursuant to CPLR 3126, determining the issues

2008 WL 519319, \*2 (1<sup>st</sup> Dept 2008) (holding that plaintiff's "dilatory, evasive and ultimately contumacious conduct" in failing to comply with discovery demands warranted striking his complaint); Garfield v. Done Fashion, Inc., 227 AD2d 128, 128-129 (1<sup>st</sup> Dept 1996) (trial court properly exercised its discretion in striking defendants' answer based on "defendants' repeated failure to comply with court-ordered discovery coupled with their inadequate excuse for such non-compliance"); Kutner v. Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1<sup>st</sup> Dept), lv denied, 88 NY2d 802 (1996) (striking defendants' answers was warranted based on their disobedience of court orders directing the production of documents and the appearance of defendant for deposition).

As to Rudes' motion for an inquest, it must be denied since Rudes' papers are legally insufficient to establish a prima facie case as he fails to submit supporting documentation, including, inter alia, the underlying documents relating to the settlement of the personal injury action, to support Rudes' claim for attorney's fees. This denial is without prejudice to renewal upon legally sufficient papers.

Accordingly, it is

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relevant to Heller's deposition testimony in accordance with Rudes' claims against Heller would effectively have the same result as striking Heller's pleadings. Similarly, in Heller v. Rudes, the alternative discovery sanction of precluding Heller's trial testimony has the same result as striking his pleading.

ORDERED that Rudes' motion for an inquest on damages in Index No. 114298/04 (motion seq. no. 20) is denied without prejudice to renewal; and it is further

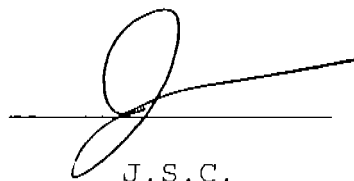
ORDERED that Heller's cross motion for renewal and reargument of this court's February 7 order denying his request to videotape his deposition is denied; and it is further

ORDERED that Heller's cross motion seeking to vacate the February 13 order of Justice Bransten is denied; and it is further

ORDERED that Heller's motion seeking recusal of this court is denied.

DATED:

DATED: April 3 2008



J.S.C.