

Heath v Wojtowicz

2009 NY Slip Op 31264(U)

June 9, 2009

Supreme Court, New York County

Docket Number: 40555/78

Judge: Joan A. Madden

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

PRESENT: Madden
Justice

PART 11

Heath, George

INDEX NO. 40555/1978

MOTION DATE _____

MOTION SEQ. NO. 7

MOTION CAL. NO. _____

- v -
Wofstowicz, John S.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision, order and judgment.*

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: June 9, 2009

[Signature]
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: PART 11

-----X
GEORGE HEATH,

Plaintiff,

INDEX NO. 40555/78

-against-

JOHN S. WOJTOWICZ, WILLIAM G. O'DONNELL,
EDWARD M. CHIKOFSKY, MURRAY J. CHIKOFSKY,
ARTISTS ENTERTAINMENT COMPLEX, INC., MARTIN
BREGMAN, WARNER BROS., INC., STATE OF NEW
YORK, CRIME VICTIMS COMPENSATION BOARD,
EDWARD A. MORRISON, and RONALD ZWEIBEL,
Chairman of the Defendant Board,

Defendants.,

UNFILED JUDGMENT
(This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

JOAN A. MADDEN, J.:

In this action, plaintiff George Heath has pursued for more than 30 years, his rights to a portion of the royalties from the film "Dog Day Afternoon," based on funds due and owing to the late defendant John S. Wojtowicz, who committed the bank robbery that was the subject of the film.

In 2002, Heath moved for a order to hold defendant Warner Bros., Inc. and other parties in contempt for failing to pay him royalties in accordance with a court order issued in October 1981.¹ At that time, the Appellate Division First Department affirmed the denial of Heath's

¹In a decision and order dated January 12, 2000, the Hon. Diane Lebedeff explained that on October 16, 1981, "the late Shanely N. Egeth directed the Board [the New York State Crime Victims Board] to recognize a claim by George Heath against 16 2/3% of any funds ultimately due to Wojtowicz (Index No. 40555/78, judgment of October 16, 1981)." Specifically, Judge Egeth dismissed Heath's action against the Crime Victims Compensation Board and its Chairman Ronald Zweibel, on condition that "defendants recognize the existence of a claim by George Heath against 16 2/3% of any funds ultimately due to Wojtowicz after disposition of all

motion, holding, *inter alia*, that there was “no evidence that the New York City’s Human Resources Administration’s lien on the subject funds has been satisfied.” New York State Crime Victims Board v. Abbott, 293 AD2d 372 (1st Dept), lv app disp, 98 NY2d 693 (2002), lv app disp, 99 NY2d 579 (2003).

In 2006, Heath moved for an order seeking, *inter alia*, to void HRA’s lien, based on the death of Mr. Wojtowicz in January 2006. By a decision and order dated September 16, 2006, this court denied that motion, holding that the death of Mr. Wojtowicz had no effect on HRA’s right to continue receiving payments. Noting that Heath neither alleged nor presented any evidence showing that the lien had been satisfied, and that HRA submitted opposition papers that the lien had not be fully satisfied, this court concluded that it is was “bound by the First Department’s determination that Heath is not entitled to assert a claim for royalties until the HRA lien is fully satisfied.” This court additionally concluded that “[w]ith respect to Heath’s further arguments objecting to the distribution of funds including the constitutionality of such distributions, in a separate but directly related action, the Appellate Division First Department previously held that Heath’s ‘challenge to the court’s determination as to who the funds at issue should be distributed is barred by the doctrine of res judicata, having been considered and rejected in numerous prior related actions.’ New York State Crime Victims Board v. Abbott, 247 AD2d 263, lv app disp, 92 NY2d 100 (1998) (citing Heath v. Warner Communications, Inc., 891 FSupp 167 [SDNY]; New York State Crime Victims Board v. Abbott, 212 AD2d 22 [1st Dept 1995]).”

other statutorily mandated payments and are directed to pay the same if, as, and when due, unless prior to such time, a further and different order or judgment of this Court, bars, limits, or otherwise disposes of any such funds remaining available for distribution.”

In July 2007, Heath submitted a proposed order to show cause challenging HRA's lien as time-barred, and objecting once again to the distribution of the funds and the constitutionality of the distributions. Rejecting those arguments as without merit, this court declined to sign the order to show cause and noted that Heath submitted no evidence that HRA's lien had been satisfied. Heath appealed, and on February 5, 2008, the Appellate Division First Department dismissed the appeal "because the court's decision not to sign plaintiff's order to show cause . . . is not appealable." Heath v. Wojtowicz, 48 AD3d 214 (1st Dept 2008). The First Department, however, added that even if the appeal were not dismissed, the time period for HRA to enforce its lien against the property in Wojtowicz's estate had not expired, and Heath's "challenges to the manner in which the subject royalties of the film are being distributed are precluded by the doctrine of res judicata." Id at 215.²

Heath now moves by order to show cause for the following relief: 1) "amendment" of the "decision and order, dated October 16, 1981 . . . to include defendant John S. Wojtowicz' disclaimer as assignee of said one percent in favor of plaintiff"; and 2) "reimbursement" of "unlawfully excessive royalties improperly paid by defendant Warner Bros., Inc. over to New York City Human Resources Administration, as well as any other such royalties unlawfully or

²The record reveals that while the appeal was pending, the Clerk of the Appellate Division First Department contacted HRA regarding the status of its lien against Wojtowicz. By letter dated January 8, 2008, HRA responded "that the lien/claim of the Human Resources Administration (HRA) of the City of New York against John Wojtowicz has been fully satisfied. The Hon. Judge Diane Lebedeff of the Supreme Court, New York County, in an order dated January 12, 2000, ordered payment in the amount of \$12,000 to HRA. It appears from our record that we were paid a total of \$14,376.00. Therefore, we await further advice on the refund of any overpayment. We do not have any further interest to pursue at this time." The Appellate Division's February 5, 2008 decision dismissing Heath's appeal does not reference any of this information as to the satisfaction of HRA's lien. A copy of the letter is annexed to Heath's motion papers.

improperly distributed with interest.”³

The motion is granted in part and denied in part. In a letter dated February 27, 2007, HRA informed the Crime Victims Board that its lien “has been fully satisfied.” The letter specifically explained that “[t]he court ordered that payment be made in the amount of \$12,000. It appears from our record that we were over paid and a total of \$14,376 was received. Therefore, we will issue a refund for the overpayment, accordingly. Please advise us how to make our the check for the refund and where it should be mailed.”

In opposing the motion, Warner Bros. states that it “acknowledged HRA’s lien and paid against it,” and despite the HRA letter annexed to the motion papers, Warner Bros. “was not advised that its lien had been satisfied.” Warner Bros further states that “[a]lthough given Wojtowicz’s waiver of any claim to such royalties, Heath arguably has no rights, Warner Bros. would be prepared to commence paying Heath 16 2/3 % of future Dog Day Afternoon royalties which would have been due to Wojtowicz, going forward, in order to resolve these litigations.”

In view of HRA’s February 27, 2007 letter, it is now clear that HRA’s lien has been fully satisfied. As to the effect of Wojtowicz’s disclaimer, since HRA had rights to the royalties to which Wojtowicz would have been entitled, the court is not persuaded that any issue exists as to Heath’s rights to a portion of those same royalties, upon satisfaction of HRA’s lien. While Warner Bros. seeks to limit Heath’s royalties to 16 2/3% of the future royalties that would have been due to Wojtowicz, the court finds that the Heath’s rights to such royalties began to accrue as soon as the HRA lien was satisfied, i.e. February 27, 2007. Heath, therefore, is entitled to his

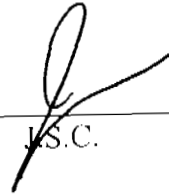
³Heath first moved by notice of motion for the identical relief. In a short form order dated July 10, 2008, this court denied the motion “with leave to renew by order to show cause as directed in this court’s decision and order of September 28, 2006.”

share of the royalties commencing from that date, and the motion is granted to that extent. In all other respects the motion is denied.

Accordingly, it is hereby

ORDERED, ADJUDGED AND DECLARED that plaintiff George Heath is entitled to 16 2/3 % royalties that would have been due to John S. Wojtowicz, accruing on and after February 27, 2007 and continuing thereafter into the future, together with statutory interest at the rate of 9% on the amount past due from February 27, 2007 up through the date this decision and order is entered.

DATED: June 9, 2009

ENTER:


J.S.C.

UNFILED JUDGMENT
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