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

PRESENT: Hon. Lewis Bart Stone PART 56

Index Number : 602673/2007
KEIZMAN, ADI
VS.
SULTZER, NEIL
SEQUENCE NUMBER : 004
VACATE DEFAULT JUDGMENT

INDEX NO. 602673/07

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted in part and denied in part in accordance with the annexed Decision and Order

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

Dated: 8/8/2010

HON. LEWIS BART STONE

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

ADI KEIZMAN, AMA FRANCIES, INC., and RAYA JEWELRY MANUFACTURING CO.,

Petitioners,

-against-

NEIL SULTZER, ESTHER HERSHKO, NADAV HERSHKO and SHANIE HERSHKO,

Respondents,

- and-

ISAAC HERSHKO and NATASHA JEWELRY MANUFACTURING, LLC a/k/a NATASHA & CO.,

Respondents,

DECISION AND ORDER

Index Number 602673/07

Hon. Lewis Bart Stone, J

By Notice of Motion dated February 19, 2009, Esther Hershko ("Esther"), Nadav Hershko ("Nadav") and Shanie Hershko ("Shanie"), certain of the Respondents in this matter, moved this Court to vacate its Findings of Fact, Order and Money Judgment entered against them on default on September 22, 2008 and a Money Judgment entered thereon on September 25, 2008 (collectively the "September 2008 Orders"). Petitioners submitted an Affidavit in opposition. Esther

Nadav and Shanie requested no oral argument or hearing. Petitioners requested a dismissal or in the alternate an evidentiary hearing on the motion. This Court in the exercise of its discretion subsequently requested that the parties appear before it to clarify certain matters in the motion papers to enable the Court to address the issues presented. At this appearance, the Court limited the parties to answering questions put by the Court, and asked the parties to submit proposed orders.

The September 2008 Orders imposed sanction against various Respondents, including but not limited to Esther, Nadav and Shanie, for having violated earlier Orders of this Court.

Esther, Nadav and Shanie have alleged in their Motion to Vacate the September 2008 Orders on the grounds of the failure service, that Shanie is a minor and that the amount of the sanctions was improper.

The underlying dispute began about nine years ago when Petitioner Ad Keizman ("Keizman") and Isaac Hershko ("Isaac"), who were both in the jewelry business, agreed to do business together under certain terms and conditions. Although various additional corporations and individuals were involved on each side, Keizman and Isaac were the principals. The relationship soured and led to litigation in Supreme Court, New York County, under Index No. 103461/02.

Following trial before Judicial Hearing Officer Ira Gammerman, JHO

Gammerman issued a 59 page Finding of Fact, Decision and Judgment (the "Gammerman Decision") in favor of Keizman and his related entities (hereafter, collectively "Keizman"), and against Isaac, and a limited liability company controlled by him (hereafter, collectively "Isaac"), in the amount of $4,437,186.66, together with prejudgment interest from November 14, 2000 and costs and disbursements. On November 29, 2000, a judgment was entered against Isaac in the aggregate amount of $6,858,395,43. Isaac appealed the Gammerman Decision to the First Department which modified the decision by reducing the amount of the judgment by $30,000 or less than seven-tenths of one percent of the judgment, but otherwise affirmed the Gammerman Decision, 52 A.D.3d 204 (1st Dep't 2008).

The Gammerman Decision found that Isaac's testimony was not credible, noting that "the evidence adduced at trial persuades me that [Isaac] Hershko engaged in massive fraud and misconduct in his dealings with Keizman." (Gammerman Decision p. 25). Finding such fraud, JHO Gammerman "pierced the corporate veil" of Isaac's Limited Liability Company and other entities used by him to perpetrate his wrongs against Keizman. JHO Gammerman also ordered Isaac not to dissipate assets.

Petitioners have since attempted to realize upon this judgment and having collected nothing, commenced Supplemental Proceedings against Respondents and others under CPLR Art. 52 in August 2007 to compel their attendance at depositions

and to disclose certain records to enable Keizman to trace assets he believed to have been fraudulently transferred by Isaac in violation of JHO Gammerman Order not to dissipate assets.

Petitioners assert that Isaac transferred his properties through various entities to make investments and to hide such assets from Petitioners. Isaac placed such entities in the names of his wife and children. Esther is Isaac's wife, although in her motion she asserts Isaac moved out of their family home to live with his girlfriend. Nadav and Shanie are respectively Isaac's son and daughter. Petitioners papers have cited various court proceedings and determinations relating to these properties to support their position.

Depositions of Esther, Nadav and Shanie are relevant to establish whether Petitioners assertions of improper transfers may be supported, to enable Petitioners to proceed against these transferred assets to satisfy their judgment against Isaac. Esther's present plea of poverty, notwithstanding her record "ownership" of substantial real estate, might, for example, corroborate Petitioner's position that Isaac was using her to secrete his assets. This Court appreciates why the movants, as Isaac's relatives, may be loath to address, under oath, their ownership of the properties on the one hand, or their part in a money-laundering or mortgage fraud scheme or in a violation of JHO Gammerman's order, on the other. Family wealth

possible inheritance and spousal support issues also lurk in the background, creating other reasons why there may be a reluctance to be deposed. Such grounds, however, are insufficient to negate Petitioners' rights and provide no basis for Esther, Nadav or Shanie to violate and blatantly disregard proper orders of this Court.

On September 24, 2007, all parties to the Supplementary Proceeding appeared before this Court. Respondents appeared by two separate counsel, one representing Respondents Esther, Nadav, Shanie, and Neil Sultzer, and the other representing the various cited respondent entities whose ownership was in question (the "Cited Entities"). At the conclusion of the proceeding before the court that day, all counsel stipulated that the depositions sought by Petitioners would occur between November 5 and November 7, 2007 and that documents subpoenaed under an earlier subpoena duces tecum served by Petitioners would be produced to Petitioners' counsel by November 5, 2007. Such Stipulation was "so ordered" by this Court (the "So Ordered Stipulation"). Prior to such dates, Respondent's attorney "resigned" and Petitioners renoticed the depositions serving Esther, Nadav and Shanie with new subpoenas to appear beginning on December 10, 2007. Esther and Nadav appeared on the 10th, accompanied by the same counsel who had supposedly "resigned" a month earlier. Although Esther also appeared on December 11, she left after an hour, before the completion of her deposition, never to return.

Although the So Ordered Stipulation, reserved to each Respondent the right, "prior to the depositions ordered," to apply for a protective order, no such application was made.

Following Esther's walking out of the deposition, Petitioners sought and received from this Court on December 19, 2007, an Order to Show Cause requiring Esther, Shanie and Nadav to show cause on January 11, 2008 why they should not comply with the So Ordered Stipulation. On January 11, 2008 Esther appeared before this Court pro se, again claiming that her attorney had resigned. Nadav was present on January 11, but did not enter the well of the Court. This Court does not know where Shanie was on that day. Isaac's attorney appeared but expressly refused to represent Esther or the other Respondents. The Cited Entities did not appear before the Court on January 11 and never delivered the documents required by the subpoena duces tecum. The Court, after hearing from those before it, found that the Respondents had not complied with the So Ordered Stipulation and issued a new Order ("The January 11 Order") requiring the delivery of the subpoenaed documents and requiring Esther, followed by Nadav and then Shanie to appear for depositions at Petitioner's counsel's office at 9:30 a.m. to 5:00 p.m. on January 17, 2008 (with a luncheon break) and to appear continuously until depositions were complete. Such order further stated that the failure to comply would be sufficient cause for the

imposition of sanctions and spelled out what such sanctions would be. While the January 11 Order also provided for service on each Respondent effected at their last known address, counsel for Petitioners personally delivered copies to Isaac's attorney and Esther in the hallway outside of the courtroom after the hearing.

On January 11, the Court was advised that Esther, who claimed to have then been without counsel, had "consulted" with another attorney who was present that day. As such lawyer made it clear that he had not been retained and was therefore not representing Esther, the Court did not allow such counsel to participate in the proceeding on Esther's behalf. After the failure of Esther, Nadav and Shanie to appear for depositions and the subpoenaed documents to be delivered in accordance with the January 11 Order, Petitioners moved this Court on April 25, 2008, on approximately thirty days notice to Esther, Nadav, Shanie and counsel for Isaac and the Cited Entities, to impose sanctions on Respondents. On such date, no Respondent appeared or filed papers and, following such default, on September 22, 2008, the Court issued Findings of Fact, Order and Money Judgment, setting separate sanctions against the respective Respondents for their willful failures to comply with Orders of the Court through June 11, 2008, the date of Petitioner's application for sanctions was granted by this Court.

To date, neither Esther, Nadav or Shanie have attended any deposition nor have

any subpoenaed documents been delivered to Petitioners nor have any payments of Petitioners' expenses or sanctions, as ordered, been made.

While the sanctions were imposed on various Respondents by the September 2008 Orders, this Motion of Esther, Nadav and Shanie only seeks relief from sanctions imposed upon them. As Counsel for Esther, Nadav and Shanie does not represent any other Respondents sanctioned in the September 2008 Orders, no motion is before this Court to set the September 2008 Orders aside as to such other Respondents. Accordingly, this Decision and Order does not affect the continuing validity of any sanctions imposed against any of such other Respondents.

Esther, Nadav and Shanie assert a series of grounds why the September 2008 Orders should be set aside as to them. Some apply to some of them; some to all. This Court will address these assertions seriatim.

Shanie objects to the sanctions imposed against her on the grounds that she is a minor, asserting that, as a result, any requirement that she testify and the imposition of sanctions on against her was improper. In September 2007, Shanie was represented by counsel who, on her behalf, expressly agreed in the So Ordered Stipulation to produce Shanie for deposition. The So Ordered Stipulation reserved to counsel the right to apply for a protective order prior to the commencement of the depositions. No application for a protective order on behalf of Shanie was made prior to the time

the depositions were either scheduled or actually commenced. Accordingly, Shanie's objection to participation in depositions is untimely. Shanie was even younger when the So Ordered Stipulation was agreed to by her counsel. Thus, to the extent her minority or age could have constituted a basis for a protective order, her counsel's failure to seek one within the time reserved therefor under the So Ordered Stipulation has waived her objection. No evidence has been submitted to show that Shanie is incapable of giving testimony or does not understand the meaning of an oath. What she does or doesn't know about the Cited Entities and her father's activities remains to be ascertained. As a minor, her alleged ownership interest in some of the Cited Entities is at least curious. Clearly, Petitioners may decline to depose her if they are satisfied with the responses of Ether and Nadav, just as much as they have the right to depose her, if they are not. Scheduling of her deposition after that of Esther and Nadav was, accordingly, contemplated by the Stipulation.

Nadav and Shanie assert they failed to receive notice of the Court's Order of January 11 and the motion seeking sanctions. These assertions are contained in the Affidavit of William P. Caffrey, Jr. (the "Caffrey Affidavit"), who represents Esther, Nadav and Shanie, and in the affidavits of Esther and Nadav. No affidavit was submitted by Shanie. However, "facts" supplied in the combined affidavits are in many instances presented and interweaved so that persons with direct knowledge of

facts are silent and the remainder of the "facts" are supplied by Caffrey, who had no knowledge of the facts surrounding the relevant Orders and Judgments as he had apparently not been retained until after they were entered. Further, Esther does not deny that the January 11 Order was delivered to her in person by Counsel for Petitioners following the January 11, 2008 hearing.

Further, the Caffrey Affidavit, in challenging notice of the motion for sanctions, alleges that the motion was "made upon Esther and Shanie at the wrong address." The best Nadav can do is to say that his father, Isaac, may have intercepted his mail and he never was aware of the sanctions hearing. Nadav also asserts that he relied on his father to "handle this", an assertion at odds with a statement that he had no notice.

Esther asserts that she and Isaac have separated and that she moved out of the family home to which notices were sent on and that she relied on her husband to handle the matter. This statement is inconsistent if in fact neither Esther or Nadav knew of the notices, there was no basis for them to have relied on Isaac. Further, even if Esther had once relied on Isaac, the performance of Isaac's attorney at the hearing on the January 11, where Isaac's attorney explicitly disclaimed to represent Esther, should have been more than ample notice to her that Isaac was no longer "taking care" of the matter.

Esther adds as another reason for her failure to comply with the Court's order to be deposed is that she was "diagnosed with Hodgkin's Lymphoma in August 2007, just at the same time this proceeding was commenced, and [her] disease has greatly interfered with [her] ability to attend depositions in this proceeding". As the date of such diagnosis preceded the date of the So Ordered Stipulation, signed in November 2007, she knew of the diagnosis at the time the So Ordered Stipulation was signed by her counsel. Although the So Ordered Stipulation gave her the right to seek a protective order prior to the scheduled deposition, her failure to do so and her initial attendance at the aborted deposition which commenced in December 2007, belies her current statement that her medical problem precluded her from being able to proceed with depositions.[1] The excuse she gave for breaking off the deposition before its completion was that Shanie was ill; there was no mention of her own illness until this motion was made.

As Esther admits that her attorney "quit in December 2007, shortly after" she had attended and then aborted the deposition, she concedes that she was represented by counsel at the time of the aborted deposition.

Ether's silence as to why her prior counsel quit is telling, in light of her other

[1]While cancer is a dread disease, the National Cancer Institute web page reports that Hodgkins Lymphoma is relatively less dread than many cancers, having a cure rate of 75% and a five-year survival rate for white women (of which Esther is one) of 86.7%.

statements. She asserts that "Isaac retained counsel to represent her and her children", yet counsel quit, knowing she had not completed the deposition she had begun and which counsel had stipulated. Absent a showing to the contrary, the Court may reasonably infer that counsel quit either because Isaac, who was paying counsel, pressed counsel to act improperly, or that Esther refused to continue the deposition over objection of her counsel.

Esther's new excuse that her Hodgkins Lymphoma prevented her from beginning her deposition on January 17 is equally underwhelming, especially by reason of what such assertion does not say. Esther in her affidavit submitted with this motion avers that on January 17, 2008, she went to Memorial Hospital "to have blood work done in connection with my illness." Her affidavit is silent on whether such appointment on such date was medically required for her treatment or was merely scheduled for her convenience or to provide a cover for her non-attendance at the January 17 deposition. In any event, by not discussing a hospitalization, the clear implications is that such hospital visit was no more than an outpatient visit, which, even if it were medically indicated, would have at most caused a delay of the deposition for a single day, for which the promised sanction set forth in the January 11 Order would have been one dollar.

Esther's statement in her affidavit that neither she nor her children have

anything to do with her husband's business or with the facts and circumstances giving rise to the underlying judgment is irrelevant to this supplemental proceeding. The deposition does not concern Isaac's jewelry business or with the facts and circumstances giving rise to the underlying judgment, but whether Esther has any interest in the Cited Entities or has any knowledge whether and when they were purchased by Isaac and whether such purchases were in violation of JHO Gammerman's orders.

Esther has advanced a series of excuses as to why the sanctions should be set aside as to her. When she appeared before this Court pro se, she advised the Court that she was no longer represented.[2] Having made such assertion, service of papers on her, instead of counsel became appropriate. As this proceeding is a civil proceeding, this Court has no obligation to see that she had counsel. As it is clear that she failed to advise Petitioners' counsel of a change of her address, service of papers by petitioners' counsel on her or to her last known address was proper. Her failure to advise Petitioners' counsel of her change of address or to arrange with the post office

[2] She did not indicate why she was no longer represented nor does her affidavit enlighten the Court as to the reason. Her affidavit only states "the attorney retained by Isaac to represent us, Harold Bergow, quit in December 2007, shortly after I was deposed." The Court notes that this locution also misrepresents what occurred. Although Esther's deposition was commenced, Esther left without completing her deposition asserting that Shanie was ill. As Esther never returned to complete the deposition, the term "after I was deposed" improperly implies that her deposition had been completed.

for her mail to be forwarded is her own lapse and cannot be asserted to deprive Petitioners of their rights. As Esther's Motion does not assert post office error in not forwarding notices, the Court must assume that she made no effort to forward mail to her new address.

Esther's assertion that she relied on her husband Isaac, from whom she has been separated "since 2005 when he moved out of our family residence at 60 Heron Dr., Hewitt, New York and took up residence with his girlfriend", strains credibility. Further, reliance on a former spouse who has taken up with a new girlfriend, even if believable, constitutes no defense to Esther's failure to comply with orders of this Court.

Under CPLR Rule 5015, this Court having entered a judgment on default may "relieve a party from [such default] upon such terms as are just, on the motion of any interested person" upon the ground that the default was excusable. However, the discretion of the Court should only be exercised when the person seeking to open the default may show a meritorious defense on the "underlying issue". Here Esther has been resisting being deposed for almost two years, with continuing excuses, hiding behind her alleged illness, her child's illness, her attorney quitting, a husband who JHO Gammerman found to have engaged in a "massive fraud and misconduct" and who she asserts had been philandering, to the extent that she moved out of the family

home, failures to give a forwarding address and in effect, every excuse short of "the dog ate my homework." At no time did she present any meritorious sworn statements germane to the underlying issue - i.e. what was her direct or indirect interest if any in the real estate which Petitioners believe was beneficially owned by Isaac, and her knowledge of when Isaac moved funds into such investments, and whether she had knowledge of her children having any such interest or knowledge. The "merits" of the depositions go to such issues.

From their papers, it is clear that Petitioners still seek to depose Esther. Esther however has made no effort to schedule depositions or appear for them since December 2007 when she walked out, even after retaining the counsel who made this motion to set aside the sanctions. Esther is still bound by the So Ordered Stipulation to attend and complete a deposition. As the "merits" of this proceeding involve Esther's fulfilment of her obligation to be deposed, her mere promise to do so at this point is hardly a showing of good faith given her track record of failure to comply. She promised to be deposed in 2007 and has been dragging her feet since.

The Motion is denied as to Esther.

This Court notes that Esther still has an ongoing obligation to complete her deposition in a timely manner and that this Court is open to Petitioners' further application or application for additional or different sanctions for any future

contumacious behavior on Esther's part in carrying out the So Ordered Stipulation. For counting purposes, this Court will presume further contumacious acts to commence on the first business day, ten days following the service of notice of entry of ths Decision and Order, at which time Esther shall, unless excused by Petitioner's counsel prior thereto, appear during normal business hours at Petitioners' office every business day thereafter, until the deposition has been completed, Fridays excepted. The Court will deem excuses to have been established for any period of hospitalization and for any Jewish religious holiday which requires Esther to avoid working. Esther will have Fridays and weekends off in which to make and schedule any outpatient medical visits, and to address religious observances.

Nadav and Shanie fall into a different category. On January 11, 2008, when this Court issued the January 11 Order to direct Esther, Nadav and Shanie to appear for depositions on January 17, 2008, and advised that failure could lead to sanctions, neither Nadav nor Shanie were "before the Court" either by being represented by Counsel or having appeared "pro se", so as to have an opportunity to be heard. Even though Nadav was apparently in the courtroom, he did not appear "pro se", and was not, unlike Esther, directly addressed by the Court and ordered by this Court to be deposed under the threat of sanctions. Although his obligation to be deposed had been fixed by the So Ordered Stipulation, when he was represented by counsel, the issue

of sanctions had not been addressed at that time. The Order to Show Cause returnable January 11 expressly related to sanctions, and directed Esther, Nadav and Shanie to Show Cause why sanctions should not be imposed against them. While Esther appeared pro se and had an opportunity to be heard, Nadav, although present, did not "appear". While he was of such age that the Court might have ordered him to the well of the Court and directed him to appear for depositions or face sanctions, this Court did not do so. Accordingly, this Court hereby sets aside and vacates the sanctions on Nadav.

As this Court has no basis to believe that Shanie, unlike Esther and Nadav, was even in Court on January 17, 2008 to hear the direct order of this Court to Esther to attend depositions or be subject to sanctions, the Court's decision as to Nadav must apply, a fortiori to her. Further, unlike Nadav, Shanie is a minor and as she was not represented by counsel on January 17, 2008, this Court could not have ordered her to appear without having addressed issues of her being an unrepresented minor at such time. Accordingly, this Court sets aside and vacates the sanctions on Shanie.

Finally, Esther asserts that the maximum sanction permissible under 22 NYCRR §130-1.2 is $10,000, and complains of the escalating sanctions provided for in the January 11 Order, objecting to the amount of the sanctions imposed on her.

The January 11 Order directed Esther to appear for deposition on January 17,

2008 and each day thereafter until depositions were complete. The Order made it clear that each day of failure would constitute a separate violation of the Order and that the sanctions under 22 NYCRR §130-1.2 would apply to each day. Thus, Esther's failure to appear each day constituted a separate violation of the Order.

Esther's reading of 22 NYCRR §130-1.2 to buy her way out of having to comply with an order of the Court forever for $10,000 is not a proper reading of such limitation. The limitation is to put a cap on a sanction for a single violation, not a continual, repeated violation. The absurdity of her position may be illustrated by an example where, assuming the Court could know that the deposition would take six days, and ordered her presence on six named days, that a sanction for missing four could be no higher than a sanction for missing one. If Esther's position were to be accepted, a court would have to issue a separate order following each contumacious act to vindicate its order, a consummate waste of judicial resources. To conserve such resources, this Court made it clear in the January 11 Order that each day violation would be separately sanctionable.

The doubling of daily sanctions was not intended to serve as a mechanism to collect sanctions but as a method to induce compliance with a proper Order of the Court. It is the very method Justice Theodore J. Jones (now Judge Jones of the Court of Appeals) employed to induce a reluctant Transport Workers Union into complying

with his Order to Cease an illegal strike against the New York City Transit System. This Court adopted such precedent to induce a reluctant Esther to comply with its order that she be deposed in this Special Proceeding.

Although the doubling of the amount of sanctions by reason of the persistent violation of the Court's order eventually would have resulted in sanctions exceeding the $10,000 limit allowed under 22 NYCRR §130-1.2, this Court in its Findings of Fact and Award and Judgment applied such $10,000 limit with respect to those days of violation for which the compounding of the amount would have exceeded $10,000 to such amount. Accordingly, the sanctions imposed do not exceed the amounts permissible for sanctions under 22 NYCRR §130-1.2, and Esther's objections to such amount are hereby overruled.

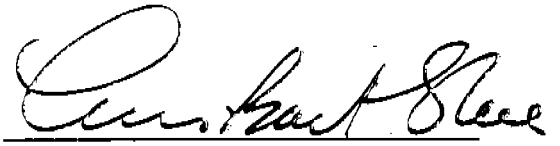
In vacating sanctions against Nadav and Shanie, this Court notes that as Nadav and Shanie are presently represented by counsel, such counsel is hereby directed to inform them of their ongoing obligation under the So Ordered Stipulation to attend depositions, and that this Decision and Order now constitutes full and adequate notice to them that their failure to appear for such depositions will constitute grounds for sanctioning them for each and every day they fail to attend and proceed with such depositions, under the same schedule and under the same conditions as such depositions have been scheduled for Esther, the amounts of such sanctions for each

day of violation, to be set by this Court.

The Motion is granted with respect to Nadav and Shanie and denied with respect to Esther. Settle Orders to vacate the sanction judgments against Nadav and Shanie.

This is the Decision and Order of the Court.

DATED: JULY 21, 2009
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court