

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
DEBORAH SHAPIRO KURTZMAN, individually and in her
capacity as a member of 303-9W Co., LLC and in the right
and name of 303-9W Co., LLC,

Plaintiff,

- against -

ERIC BERGSTOL, et al.,

Defendants.

-----X
SUSAN HITO SHAPIRO and BENJAMIN OSTRER, as
co-executors of the estate of MILTON B, SHAPIRO, et al.,

Plaintiffs

- against -

DEBORAH SHAPIRO KURTZMAN, et al.

Defendants

-and-

CUSTOM BUILDERS CORP., et al.

Nominal Defendants

-----X
DEBORAH SHAPIRO KURTZMAN, individually and in her
capacity as a member of Rosman Center, LLC

Plaintiff,

-against-

SUSAN HITO SHAPIRO and BENJAMIN OSTRER, as
co-executors of the estate of MILTON SHAPIRO, et al.,

Defendants

-----X
DEBORAH G. KURTZMAN,

Plaintiff

-against-

SUSAN HITO SHAPIRO and BENJAMIN OSTRER, as co-executors

DECISION AND ORDER

Index No.: 493/01.

Index # 7875/2001

Motion #16 - MD
Motion #17 - MD Moot

Index # 062/02

Index # 3639/2010

of the estate of MILTON B. SHAPIRO, et al.

~~-----X~~
Hon. Thomas E. Walsh, II, J.S.C.

The following papers, numbered 1-3, were considered in connection with Plaintiff's application for an Order (1) restoring the within matter to this Court's trial calendar and (2) for such other and further relief as thus Court deems just and proper; and also were considered in connection with Defendant Deborah Kurtzman's Notice of Motion on Index # 7875/01 for an Order awarding Deborah G. Kurtzman attorney's fees and costs pursuant to 22 NYCRR 130.1.1 and Civil Practice Law and Rules § 2214 incurred defending against claims asserted against her herein and granting such other and further relief as the Court deems just, necessary and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion (Motion #16)/Affirmation of Jed M. Weiss, Esq./Exhibits (A-E)/Memorandum of Law in Support/	1
Notice of Motion (Motion #17)/Affirmation of David M. Kohane, Esq./Memorandum of Law/Exhibits (A-B)	2
Affirmation of Edward F. Beane, Esq. In Opposition to Motion #16/Affidavit of Benjamin Ostrer/Exhibits (A-F)/Memorandum of Law in Opposition	3
Reply Memorandum of Law in Further Support of Motion #16/Affirmation of Jed M. Weiss, Esq./Exhibits (A-B)	4
Reply Memorandum of Law in Further Support of Motion #17/Affirmation of Jed M. Weiss, Esq.	5

The Defendant, Deborah Kurtzman, filed the instant motions as to Index # 7875/2001 (Action #1), one to restore the action and the other upon restoral of the action for attorneys fees and costs pursuant to 22 NYCRR 130.1.1 and Civil Practice Law and Rules § 2214. Decedent Milton Shapiro commenced Index # 7875/2001 against Defendant Kurtzman. In 2011 Defendant Kurtzman moved for summary judgment to dismiss Milton Shapiro's Complaint. Defendant Kurtzman raised in her Reply Affidavit that she was seeking an attorney's fee award

of the estate of MILTON B, SHAPIRO, et al.

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Hon. Thomas E. Walsh, II, J.S.C.

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pursuant to 22 NYCRR § 130-1.1, but had not moved for those attorney's fees or costs in her moving papers. The Court in two (2) Decisions dated February 21, 2012 and February 11, 2014 found that Milton Shapiro engaged in frivolous conduct pursuant to 22 NYCRR § 130-1.1 for which the Court granted Deborah Kurtzman attorney's fees and expenses.

Milton Shapiro appealed the Decision and the Appellate Division, Second Department issued a Decision and Order dated April 26, 2017 reversing the Court's two(2) Decisions and vacated the award of counsel fees and costs. According to the Appellate Division, Second Department Decision, the Court erred in awarding Deborah Kurtzman attorneys fees in Action # 1 since the relief was sought in her reply papers only and Mr. Shapiro had no notice of the application or an opportunity to be heard in opposition. The parties appeared before the undersigned based upon a Appellate Division, Second Department Decision on one of the other companion actions (Index # 3639/2010) which remitted that action to the trial court. Upon remittal, the parties appeared before the undersigned on May 11, 2017 and Action #1 was not discussed. On June 22, 2017 the parties again appeared before the undersigned to discuss Action #2. During that appearance the parties agree that Defendant Kurtzman indicated that she intended on renewing her motion for sanctions with the proper notice to Plaintiff Shapiro. At that appearance, Plaintiff's counsel asserted that the Appellate Division, Second Department's Decision precluded restoral of Action #1 and as a result precluded her filing of a motion for sanctions on a matter that had not been restored. As a result of the dispute, Defendant Kurtzman sought clarification of the April 26, 2017 Decision and Order of the Appellate Division, Second Department, specifically asking whether the Decision permitted her to renew her motion for sanctions. In a Decision and Order dated November 21, 2017, the Appellate Division, Second Department declined to clarify its April 26, 2017 Decision and Order.

The issue that has arisen between the parties that has resulted in the instant motions is whether the undersigned can consider Defendant Deborah Kurtzman's application to restore Action #1 and upon restoral consider her application for attorney's fees and costs.

The Defendant contends that the Court should entertain her sanctions motion whether or not Action #1 is "administratively listed as active" and seeks to have the motions consolidated for decision. The basis of Defendant Kurtzman's motion is that the April 26, 2017 Decision of the Appellate Division, Second Department did not reach the merits of Kurtzman's fee application and did not include any language precluding her from renewing her request for sanctions. Further, Defendant contends that she is not seeking to modify the Appellate Division's April 26, 2017 Decision and Order, but rather is seeking to follow the procedural requirements as they were set forth by the Court. Specifically, Defendant asserts that the Appellate Division did not preclude any future application for fees on a newly and properly noticed motion. Finally, Defendant submits that the Court has jurisdiction to adjudicate the sanctions motion (Motion #17) filed by the Defendant, as courts can consider motions for sanctions "long after cases are disposed."

In opposition the Plaintiff argues that the instant motion to restore is just another attempt by the Defendant to have the Appellate Division's April 26, 2017 Decision reconsidered. Plaintiff contends that the Appellate Division terminated Action #1 with their Decision and Order as the matter was not remitted to the undersigned, but was only vacated. As a result, Defendant submits that Action #1 terminated with the Appellate Division's April 26, 2017 Decision and Order and the undersigned cannot restore a matter that the higher court has terminated and not remitted.

The Court has considered the arguments raised by the parties and reviewed the Decision & Order of the Appellate Division, Second Department dated April 26, 2017. The Court finds that Action #1 (Index # 7875/2001) terminated when the Appellate Division did not specifically reserve the Defendant's rights to re-file her motion despite noting that she had raised the relief in the improper procedure. The Decision also fails to remit any portion of Action #1 to the lower court, as the Appellate Court did in their Decision and Order regarding Action #2 (3639/2010). As such, the Court lacks jurisdiction to restore a case that has been terminated

after appeal by the Appellate Division. Defendant Kurtzman's motion to restore (Motion #16) is denied in its entirety. In light of the denial of the motion to restore, the Defendant's motion for sanctions (Motion #17) is denied as moot.

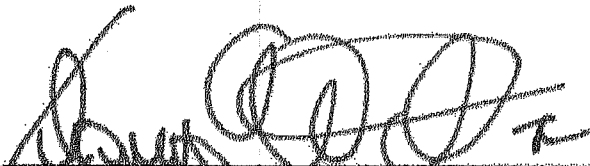
Accordingly, it is hereby

ORDERED that Defendant Kurtzman's Notice of Motion (Motion #16) for Restoral on Action # 1 (Index # 7875/2001) is denied in its entirety; and it is further

ORDERED that Defendant Kurtzman's Notice of Motion (Motion #17) for Sanctions on Action #1 (Index # 7875/2001) is denied as moot

The foregoing constitutes the Decision and Order of this Court on Motions # 16 and #17.

Dated: New City, New York
February 11, 2019


HON. THOMAS E. WALSH, II
Justice of the Supreme Court

TO:

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