

Judiciary Law § 753 A: Section Narrowly Construed

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summary proceedings can proceed expeditiously to final judgment, subject, of course, to occasional reversals by a superior court.

JUDICIARY LAW

Judiciary Law § 753A: Section narrowly construed.

Section 753A of the New York Judiciary Law empowers a court of record to punish "a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced. . . ." Although the section obviously bestows broad powers upon a court, it has been narrowly construed by a lower court.

The plaintiff-husband in *Shapiro v. Shapiro*²⁴⁸ moved to punish the defendant-wife for failure to comply with the visitation rights granted him in a final judgment of separation rendered by the Supreme Court of Nassau County. This motion was made in the Supreme Court, Nassau County—now the situs of a divorce action predicated upon the judgment of separation. The divorce action was properly before the court, and jurisdiction existed over both parties. Since the Queens County Supreme Court would have a record of the final separation judgment for purposes of making a determination in the divorce action, it would appear that the most logical and practicable place to make the motion would be in Queens County. However, Justice Brown held that the court was without jurisdiction to hear the motion and that plaintiff would have to move in the court that rendered the judgment of separation. This decision was reached in spite of plaintiff's urging that the motion should be granted in order to safeguard his summer visitation rights from continued violation.

The decision finds support only by taking a narrow view of the phrase "pending in the court" as it appears in section 753A. The court defined it to mean the specific court hearing an action or rendering the final judgment. However, the supreme court is one of general jurisdiction and designations as to venue do not limit the powers of the court as to subject matter.²⁴⁹ Therefore, a more liberal and sounder interpretation of the phrase would indicate that the Supreme Court of Queens County had the requisite jurisdiction to entertain the motion.

Moreover, it should be noted that this was a motion on notice.

²⁴⁸ 60 Misc. 2d 622, 303 N.Y.S.2d 565 (Sup. Ct. Queens County 1969).

²⁴⁹ See, e.g., 7B MCKINNEY'S CPLR 501, supp. commentary 11 (1969).

This fact would also make CPLR 2212(a) applicable. That section states:

A motion on notice in an action in the supreme court shall be noticed to be heard in the judicial district where the action is triable or in a county adjoining the county where the action is triable.

Although the "adjoining county" provision is discretionary with the court, and courts will usually exercise this discretion to transfer the motion to the judicial district where the action is triable,²⁵⁰ the *Shapiro* facts clearly fall within the intendment of this statute as well. Thus, in view of the circumstances and the clear statutory authority for hearing the motion, the Supreme Court, Queens County should have granted the relief sought.

ELECTION OF REMEDIES

Election of Remedies: Summary judgment against bankrupt precludes showing of fraud in subsequent action.

In *In re Galich*,²⁵¹ the respondent objected to petitioners' motion to discharge its judgment pursuant to section 150 of the New York Debtor and Creditor Law.²⁵² Previously, in 1966, the respondent had sold clothing valued in excess of \$1000 to the petitioners on credit. Two weeks later, they filed petitions in bankruptcy. However, some two months before petitioners were adjudicated bankrupts, the respondent obtained an order for summary judgment against them. The judgment entered upon this order was the one in question in the instant proceeding.

Respondent contended that the petitioners had falsely represented their solvency in a credit statement it had requested at the time of the sale. This allegation, it argued, prevented discharge of the judgment it had obtained.²⁵³ The court examined the complaint in the action for summary judgment and found no allegation as to fraud. Moreover, there was no basis whatsoever in either the pleadings or the judgment from which fraud could be deduced. Apparently, the respondent had

²⁵⁰ 7B MCKINNEY'S CPLR 2212, supp. commentary 14 (1968).

²⁵¹ 59 Misc. 2d 836, 300 N.Y.S.2d 670 (Monroe County Ct. 1969).

²⁵² N.Y. DEBT. & CRED. LAW § 150 (McKinney 1945).

²⁵³ A party shall not be discharged where he obtains money or property on credit "in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive. . . ." Bankruptcy Act, ch. 575, § 1, 52 Stat. 851 (1938), 11 U.S.C. § 35(a)(2) (1964).