

JUDITH HERSKOWITZ, ...
HERSKOWITZ,
HERSKOWITZ

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

PLAINTIFF(S)

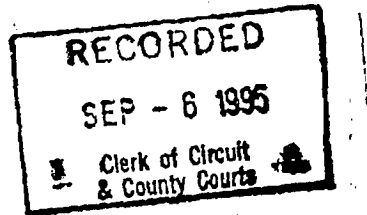
CASE NO. 92-472 (32)
94-2887 (32)
94-5714 (32)

VS

SUSAN CHARNEY, ETC.,
ET AL

REPORT OF GENERAL MASTER
ON HERSKOWITZ MOTION FOR
SUMMARY JUDGMENT

DEFENDANT(S)



SUSAN CHARNEY

PLAINTIFF

CASE NO. 93-22964 (32)
94-669 (32)
94-3614 (32)

VS

NORTH JERSEY TRADING
CORPORATION, ETC., ET AL

DEFENDANTS

THIS MATTER came before the undersigned on (1) the Motions for Summary Judgment of Judith Herskowitz, Herskowitz and Herskowitz in unconsolidated case as styled above bearing Circuit Court Case Nos. 94-472 (32); 94-2887 (32); and 94-5714 (32); and, (2) the Herskowitzes Motion for Sanctions and Motion to Strike in connection with the unconsolidated, non-lawsuit matters filed by Susan Charney pursuant to Fla. Stat. §55.505 (Florida Enforcement of Foreign Judgments Act) bearing Circuit Court Case Nos. 93-22964 (32); 94-559 (32); and 94-3614 (32); and

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having considered pleadings, affidavits, memoranda and other matters of record, and being otherwise fully advised in the premises, it is

FOUND AND RECOMMENDED as follows:

1. Through counsel, the parties expressly agreed that there are no material issues of fact in dispute.

2. That the three Herskowitz actions styled herein each are separate, unconsolidated civil actions, viz. Case Nos. 94-472, 94-2887, and 94-5714; the plaintiffs Herskowitz have moved for summary judgment in each civil action.

3. That the three Charney matters mentioned above are *non*-lawsuit, non-consolidated matters filed pursuant to Fla. Stat. §55.505, viz. Case Nos. 94-669, 94-3614, and 93-22964.

4. That the three Herskowitz actions hereinabove mentioned in paragraph 1, were filed pursuant to Fla. Stat. §55.509.

5. That pursuant to the requirements of Fla. Stat. §55.509 (2)

"(2) If the judgment debtor shows the circuit or county court any ground upon which enforcement of a judgment of any circuit or county court of this state would be stayed, the court shall stay enforcement of the foreign judgment ... " [Emphasis Added]

6. That the Herskowitzes have shown such a ground as mentioned in Fla. Stat. §55.509(2), as hereinafter discussed.

7. The Herskowitzes Motions for Summary Judgment should be granted as to

Case Nos. 94-472 (32); 94-2887 (32); and 94-5714 (32). See: Riskin v Miklos, 569 So. 2d 941 (Fla. 4th DCA 1990); Hupp v Accessory Distributors, Inc., 475 A. 2d 679 (N.J. Super. A.D. 1984); In Re: Judith Herskowitz, Debtor, U.S.D.C., So. D. Fla., Case No. 93-14360 BKC-AJC, Emergency Motion for Stay Relief, Conversion, Dismissal, Etc., (Transcript dated December 29, 1993, P. 28, 29, 30. See Exhibit A, attached).

A. At issue is the viability of a series of orders and judgments from the Supreme Court of New York; the Herskowitzes have moved for summary judgment to deny these orders and judgments full faith and credit for lack of in personam and lack of subject matter jurisdiction. The orders and judgments of the New York State court are:

An Order and Judgment by default dated November 21, 1993 in sum of \$4,251,947.84 purportedly on behalf of North Jersey Trading Corporation and in the sum of \$935.00 on behalf of Susan Charney against _____ and Herskowitz, recorded in Case No. 93-22964 and upon which suit was filed by _____ and _____ in Case No. 94-472;

An Order and Judgment by default dated January 19, 1993 for \$23,500 and an Order and Judgment dated February 6, 1991 for \$5,000 individually for Susan Charney against Judith Herskowitz, _____ Herskowitz and _____ Herskowitz recorded in Case No. 94-669 and upon which suit was filed by the Herskowitzes in Case No. 94-2887;

An Order and Judgment by default dated January 21, 1991 in the sum of \$4,300,024.42 purportedly on behalf of North Jersey Trading Corporation and in the sum of \$700.00 on behalf

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of Susan Charney against Judith Herskowitz
in Case No. 94-3614 and upon which suit was
filed by Judith Herskowitz in Case No. 94-5714;

B. Judgment-creditor Susan Charney had commenced a derivative action in the State Supreme Court of New York against Judith Herskowitz, Herskowitz and Herskowitz, in 1988. The only "service" on the Herskowitzes was of an Order to Show Cause dated December 13, 1988, to which was appended, as Exhibits, a Complaint¹ and a Summons.

C. In the instant proceedings, the Plaintiffs/Judgment-debtors Herskowitz maintain that under New York CPLR 304, an action may only have been commenced by the service of process. The overriding significance of Sec.304 was explained in the instructively similar case of Inglesias v Rodriguez:

"The threshold issue before this court is whether there was service of the summons and complaint sufficient to confer jurisdiction over the person of the defendant.

...In New York, service is effective only when it is made strictly pursuant to the appropriate method authorized by the CPLR. *Markoff v South Nassau Community Hosp.*, 61 N.Y.2d 283, 288, 473 N.Y.S.2d 766, 461 N.E.2d 1253; *Macchia v Russo*, 67 N.Y.2d 592, 505 N.Y.S.2d 591, 496 N.E.2d 680. Indeed, in a challenge to service of process, the fact that notice of the action has been

¹ In that complaint Charney sought a declaratory judgment declaring her the shareholder of 40 shares of North Jersey Trading Corporation (a closed New Jersey Corporation); for inspection of the corporate books and records; for appointment of receiver; and for damages derivatively on behalf of North Jersey Trading Corporation.

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received is of no moment if the notice is by means other than those authorized by statute. *Macchia v Russo*, supra, at 595, 505 N.Y.S.2d 591, 496 N.E.2d 680.

Section 304 of the CPLR provides that ... an action...is commenced and jurisdiction acquired by service of a summons. *Gomez v Bobker*, 104 A.D.2d 790, 480 N.Y.S.2d 43. At best, the summons and complaint appeared to be mere exhibits to the order to show cause, and as such were insufficient for the commencement of an action and acquisition of jurisdiction over the person of the defendant. Cf., *Matter of Cammaratta*, 60 Misc.2d 521, 302 N.Y.S. 2d 710."

Inglesias v Rodriguez, 541 N.Y.S.2d 701, 702 (S.Ct. 1989).

The service of the Order to Show Cause in the instant matter (mentioned supra "B"), dated December 13, 1988, was but a motion under New York law; as such it was insufficient to commence an action and it was thus ineffective to acquire personal jurisdiction over parties.²

8. The Herskowitzes challenged personal jurisdiction in that New York State Court proceeding based on the validity of what essentially was non-service. An evidentiary hearing to determine the validity of the manner of service and the validity of the court's jurisdiction was begun in the New York court, but was never completed.

9. The law of Florida provides that this court must accord full faith and credit to a foreign judgment if, but only if, there has been a full and fair adjudication on the

² *Inglesias v Rodriguez*, supra; *Gimbel Bros. Inc. v Swift*, 307 N.Y.S. 2d 952 (1970).

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merits of the issues pertaining to Jurisdiction. In Riskin v Miklos our District Court of Appeal opined:

"...where, [however] the jurisdictional issue is *not* fairly litigated in the initial court, the defendants are free to raise the question de novo in the jurisdiction in which enforcement of the judgment is attempted. Ratner v Hensley, 303 So. 2d 41 (Fla. 3d DCA 1974) and cases cited." [Court's Emphasis]
Riskin v Miklos, 569 So. 2d 940, 941 (Fla. 3d DCA 1990).

10. The Herskowitzes' alleged "withdrawal" of their objection to personal jurisdiction is unsupported in the record. It seems clear that the order of Justice Tompkins reciting that the objection to jurisdiction had been "withdrawn" is unsupported in the record;³ nor was the initial motion to dismiss ever denied or determined on the merits. To the contrary, New York counsel for Charney acknowledged in testimony during a bankruptcy proceeding on December 29, 1993 that he had no knowledge of any written document supporting such a withdrawal of the jurisdictional objection.⁴

³Ratner v Hensley, 303 So. 2d 41, 45 (Fla. 3rd DCA 1974) "The remaining question is whether or not this record shows that the question of jurisdiction over the defendant Ratner was litigated...". [E.S.]

⁴See Exhibit "A" attached. P. 29, Lines 16-24
"Q. Not Judge Tompkins' ruling. I said is there any document that you have knowledge of where the defendants Judith Herskowitz, Herskowitz, Herskowitz and Alex Fried withdrew their jurisdictional objections in the New York Court?"

A. In so many words, I don't believe so.

11. Notwithstanding that the defendants Herskowitz repeatedly raised the issue of jurisdiction over their person in each of the various lawsuits, all courts denied relief to the Herskowitzes, yet none are shown by the record to have ever addressed the personal jurisdiction issue on the merits.

"In determining whether the originating Court acquired jurisdiction where an action is instituted in one state on a judgment recovered in another, the question of the jurisdiction of the court rendering the judgment over the subject matter and over the person sued is open to challenge and adjudication in the latter court. However, the validity of the judgment is generally determined by the law of the state of its rendition." Milligan v Wilson, 107 So. 2d 773, 775 (Fla. 2d DCA 1958).

Under New York law where jurisdiction is timely raised, the facts supporting such jurisdiction must be litigated and established on the record. As regards that issue:

"The issue of jurisdiction, as with any other litigated issue, is subject to the shield of res judicata. However, that shield may be raised only when the determination of jurisdiction depends on a fact actually litigated in the suit. If the Court's determination of jurisdiction is merely a legal conclusion, the claim of lack of jurisdiction to render the particular judgment may always be asserted and raised directly or collaterally. [citing cases]" Rudenjak Overseas Travel Co., v Deplas, 420 N.Y.S. 2d 313, 314 (N.Y. Pt. 13 1979).

12. In accordance with the findings of paragraph 7 hereinabove, it is recommended that the Herskowitzes motions for summary judgment in the above enumerated three cases should be granted with reservation of jurisdiction in the court

Q. You do not have any such document?

A. I don't believe there is such a document in so many words."
U.S. Bkrp. Ct. transcript, testimony of Steven Delibert.

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concerning such other or further relief as may be deemed just and proper.

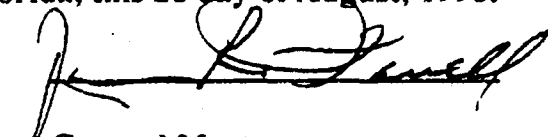
13. As to the Herskowitzes motion for sanctions and motion to strike, the same is or are moot in light of the within recommendation to grant summary judgment. In the alternative, if the court rejects the recommendation for the grant of summary judgment, then said motion for sanctions and motion to strike should be renoticed for further hearing herein.


14. As regards the Motion to Dissolve Freeze Order filed by Marvin J. Herskowitz, Executor of the Estate of Bernard J. Herskowitz, Deceased, said motion will be separately addressed by a subsequent recommendation.

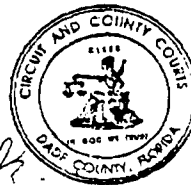
WHEREFORE, the undersigned files this Report with the Office of the Clerk of the Court.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this date to: Clifford Hark, 100 S. Biscayne Boulevard, Miami, FL 33131; Mark Herskowitz, P.O. Box 403303, Miami, FL 33040; Stanley Bartel, 44 W. Flagler Street, Miami, FL 33130; Ira L. Dubitsky, 44 W. Flagler Street, Miami, FL 33130

DATED at Miami, Dade County, Florida, this 28 day of August, 1995.


General Master

STATE OF FLORIDA, COUNTY OF DADE
HEREBY CERTIFY that the foregoing is a true and correct copy of the
original as the in this office. Sept. 8 AD 19 95
HARVEY RUVIN, CLERK, of Circuit and County Courts
Deputy Clerk 



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Motion to Strike Charney's Supplemental Memorandum of Law; and having heard argument from the attorneys of the parties; makes the following determinations:

1. On October 13, 1995 CHARNEY argued that under *Clements v. Clements*, WL 567676 (Fla. App. 3rd DCA 95) it would be reversible error to ratify the General Master's Report because of alleged failure to comply with Florida Rule of Civil Procedure 1.490(f), which requires the General Master to provide a written record of the proceedings to be reviewed. *Clements* expressly applies to evidentiary hearings, unlike the instant hearing, which was conducted on a Motion for Summary Judgment with oral argument. There was no trial and no evidentiary hearing before the General Master. The purpose of the *Clements* rule is to assure that the trial judge is afforded the opportunity to conduct an independent review of the same evidence and testimony made before the General Master. Since the General Master indicated that he reviewed the pleadings, affidavits and accompanying documents, the Court has the same ability to review them. Accordingly, *Clements* is inapplicable to the instant case.

2. CHARNEY's Supplemental Memorandum of Law In Support of CHARNEY's Exceptions To Report and Recommendation of General Master consisted of facts and arguments not presented before the General Master.

3. There are no genuine issues as to any material fact in dispute;

4. The Recommendations of the General Master are fully supported by the affidavits of the parties and the accompanying documents and under applicable law;

5. The General Master correctly applied the dictates of *Riskin v. Miklos*, 569 So.2d 940, 941 (Fla. 3rd DCA, 1990), and properly determined that at no point in the extensive proceedings in any court has there ever before been an adjudication on the merits based upon a full and fair hearing of the HERSKOWITZES' jurisdictional objections, contrary to CHARNEY's claims;

6. The record below demonstrates that the General Master was correct in stating that Judge Tompkins' Order claiming that Judge Silbermann had permitted the HERSKOWITZES to withdraw their jurisdictional objections was not supportable in the record;

7. The General Master correctly refused to apply the doctrine of Res Judicata, which doctrine is not applicable on the state of the record. A review of the record consisting of the papers submitted by the parties and documents accompanying same and memoranda of law, support the General Master's conclusion that although the HERSKOWITZES repeatedly raised the jurisdictional issues and were denied relief in the various courts (both trial and appellate), the denials were never on the merits of the jurisdictional issues. Likewise as to that New York federal court judgment CHARNEY has never properly pleaded it as res judicata and even if she had done so, it would not have barred the HERSKOWITZES' jurisdictional claims on the ground of res judicata.

8. The General Master correctly applied New York law to determine that the documents CHARNEY sought to have served upon the HERSKOWITZES were legally insufficient to commence an action in the Supreme Court of the State of New York. Accordingly, all proceedings in the New York State courts (trial and appellate) were null and void ab initio; and

9. The judgments and orders that CHARNEY seeks to domesticate are thus not entitled to full faith and credit for lack of in personam jurisdiction. It is therefore

ORDERED AND ADJUDGED

1. That CHARNEY's Exceptions to the Report of the General Master on HERSKOWITZ Motion for Summary Judgment dated August 28, 1995, be and the same are hereby denied;

2. That the HERSKOWITZES' Motion to Strike CHARNEY'S Supplemental Memorandum of Law In Support Of CHARNEY'S Exceptions To Report and Recommendation of General Master be and the same is hereby granted.

3. That the Report of the General Master on HERSKOWITZES' Motion for Summary Judgment dated August 28, 1995 be and the same is hereby ratified and approved;

4. That the Court adopts each and every recommendation contained therein as this Court's Order;

5. That the parties herein are ordered to abide by all the findings and recommendations contained in the General Master's Report dated August 28, 1995; and

6. The Court reserves jurisdiction to award attorney fees and costs and to grant such additional relief as may be just and proper.

DONE AND ORDERED at Miami, Dade County, Florida on this 2nd day of ~~October~~ ^{November}, 1995.

JUDGE ROSEMARY USNER JONES

CIRCUIT COURT JUDGE

Copies furnished to:
Ira L. Dubitsky
Eric Christu
Stanley Bartel
Mark Herskowitz