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

JUDITH HERSKOWITZ, XXX HERSKOWITZ GENERAL JURISDICTION DIVISION
XXXX HERSKOWITZ,
Plaintiffs,
vs.
SUSAN CHARNEY, and SUSAN CHARNEY CASE NO(s) 94-472 CA (22)
(purportedly) on behalf of NORTH 94-2887 CA (22)
JERSEY TRADING CORPORATION, 94-5714 CA (22)

Defendants.

SUSAN CHARNEY,
Plaintiff,
vs.
NORTH JERSEY TRADING CORPORATION, CASE NO(s) 93-22964 CA (22)
ALEXANDER FRIED, JUDITH HERSKOWITZ, 94- 669 CA (22)
XXXX HERSKOWITZ & XXX HERSKOWITZ 94-3614 CA (22)

Defendants.

MOTION TO STRIKE FOR SHAM PLEADING

COMES NOW Judith Herskowitz and moves this Honorable Court pursuant to Fla.R.Civ.P. 1.150 to strike as sham pleading, the defense of Susan Charney individually and Susan Charney (purportedly) on behalf of North Jersey Trading Corporation (hereinafter "Charney") the waiver of personal jurisdiction raised in a June 6, 1995 Affidavit of Steven Delibert upon which Charney relies, and to strike that Affidavit as well, in that it falsely asserts, without record support, that a determination on personal jurisdiction was made on the merits in an April 9, 1991 decision embodied in a May 21, 1991 order.

Background Information

1. Susan Charney sought domestication of several New York default judgments one of which

was in an arbitrary sum in excess of four million dollars against Judith, XXXX and XXX Herskowitz ("the Herskowitzes").[1] The Herskowitzes moved for summary judgment seeking to deny full faith and credit on the New York judgments for lack of personal jurisdiction. Charney opposed the Herskowitzes' motion with a Cross Motion for Summary Judgment. Charney's motion was supported with the Affidavit of her New York attorney Steven Delibert sworn to on June 6, 1995, and filed in the above entitled actions on June 15, 1995.

2. Because, Charney repeatedly failed and refused to appear for her deposition,[2] General Master John Farrell (to whom the motions were referred) declined to hear Charney's Cross Motion for Summary Judgment therefore, Delibert's Affidavit was not in issue. Consequently, the

---

[1] The judgments were without valid bases. North Jersey Trading Corporation a closed New Jersey corporation owned a 54 unit apartment building in New York City. It was managed and was the source of livelihood of Alex Fried until his death in 1992, the father of Herskowitz and Charney. Pursuant to Charney's Post Memorandum, Delibert claimed a hypothetical rental income from 1985 to 1993, paid 365 days a year. He minimized expenses including only the utility bills, mortgage payments, and the super's salary. The difference of $2,104,963.33 he falsely claimed as "loss" of income. He added on $960,000,00 as penalty, and 1.6 million for prejudgment interest. Omitted was the loss of income on apartments kept vacant by Fried to co-op or refurbish to increase the controlled rents, the loss on vacancies, nonpayment, etc., the super's helper, taxes, legal and accounting fees, telephone, repairs, painting, capitol improvements i.e. windows, a new boiler, etc., and most significantly the income of Fried. So, the Herskowitzes were made responsible for the support of Fried and for the expenses of North Jersey, to furnish that invalid bases for Charney's judgments.

[2] The Herskowitzes repeatedly attempted to take Charney's deposition to identify in which order she was claiming jurisdiction was determined by the New York court. The first of these was scheduled for July 25, 1994. On her failure to appear, the Herskowitzes filed a Certificate of Non-Appearance. Charney then served an untimely Motion for Protective Order, received after the scheduled deposition. The Herskowitzes sought to strike Charney's domestication proceedings and pleadings, followed with an Amended Motion to Strike and/Or to Compel Discovery. On May 10, 1995, General Master Farrel entered a Report and Recommendation on the Herskowitzes' Motion to Strike, saying that counsel for Charney agreed to withdraw the Motion for Protective Order and to produce Charney for deposition in Miami, Florida. That Report was ratified and adopted by Order entered on May 25, 1995. Still, Charney again failed and refused to appear. The Herskowitzes then filed a Motion for Sanctions and Motion to Strike Charney's pleadings and domestication cases, with prejudice for her discovery violations, which motions remain pending for determination.

Herskowitzes had no occasion to introduce into evidence the complete New York record in order to refute Delibert's claim in his June 6, 1995, Affidavit, that a determination on personal jurisdiction had been made by the Supreme Court of New York. So, there was no opportunity to prove that his affidavit was unsupported by any record in that case and is a sham.[3]

3. On November 5, 1995 a Final Judgment had been entered in favor of the Herskowitzes denying full faith and credit on Charney's New York judgments for lack of personal jurisdiction and holding the New York State Court proceedings null and void ab initio. That determination was based on the undisputed fact and conceded by Delibert in sworn testimony on December 29, 1993 that an October 2, 1991 order of the New York Court, declaring that the Herskowitzes have withdrawn their objections to personal jurisdiction lacked documentary support. The excerpt of Delibert's sworn testimony was attached to the General Master's Report and Final Judgment.[4]

---

[3] Page 45 of the June 28, 1995 transcript of the proceedings before the General Master,

MR. DUBITSKY: We are going to object to setting it down [the Cross Motion for Summary Judgment] because we have asked to take discovery, and the case law is very clear, as long as there is unresolved discovery they have no right to have it set down.
THE COURT: Actually he has a right to have it set down, no right to have it heard.
MR. DUBITSKY: And determined.
THE COURT: Right.

[4] Delibert testified under oath on December 29, 1993 in a Bankruptcy Court case as follows:

Q. Are you familiar with the October 2, 1991 order of Judge Tompkins?
A. In a general way, yes.
Q. .....is there any document that you have knowledge of where the defendants Judith Herskowitz, XXX Herskowitz, XXXX Herskowitz and Alex Fried withdrew their jurisdictional objections in the New York court?
A. In so many words, I don't believe so.
Q. You do not have any such document?
A. I don't believe there is such a document in so many words."...........
Q. I am asking you if there is any such document wherein these parties withdrew their jurisdictional objections. The same parties as above.
A. I know of no document stating an expressed withdrawal of the objections."

4. Charney procured a reversal of the Final Judgment because she claimed that there were material issues of fact that were not considered by the lower court. As for the primary material issue Charney asserted that the lower court had not considered Delibert's June 6, 1995 Affidavit. Delibert claimed in that Affidavit that the Herskowitzes had in effect waived personal jurisdiction before the New York court. Charney submitted that Affidavit without any of the relevant supporting documents, which clearly show that the alleged defenses raised by Charney never constituted a genuine issue of material fact to deprive the Herskowitzes of that Final Judgment. Charney knew this argument to be a sham, since it was based on the false affidavit of Delibert.

The Unsupported Sham Defense in Delibert's Affidavit

5. Charney asserts for the first time in this Court that a determination on personal jurisdiction on the merits was made by the Supreme Court of New York (the lower court) in an April 9, 1991 decision and May 21, 1991 order. Charney fabricated this claim, after Delibert conceded in sworn testimony that it was unsupported by the New York record that the Herskowitzes withdrew their objections to jurisdiction. That false and unsupported jurisdictional assertions by Delibert in his June 6, 1995 affidavit are stated as follows:

> "The issues relating to personal jurisdiction over the Herskowitzes were determined adversely to them (and affirmed on appeal), in the main New York action;...."
>
> "6. In the original, underlying shareholder's derivative action, <u>Charney v. North Jersey Trading Corp., et al.</u>. Supreme Court, New York County No. 24517/88, the court affirmatively determined its own jurisdiction, **on a motion by Susan Charney in which the Herskowitzes actively participated, and lost**.
>
> 7. The Herskowitzes disingenuously seek to imply that there was no decision on personal jurisdiction by the New York courts, because their own dismissal motions were not decided on the merits -- **<u>but they omit to inform this Court,</u>** that the Decision of Justice Tompkins dated April 9, 1991 (Exhibit 14 to the Herskowitzes'

moving papers),embodied in an order entered May 21, 1991 (Herskowitz Exhibit 15), which ordered them to answer the complaint, was rendered:

(A) On a motion by plaintiff Charney for default judgment for the defendants' failure to answer;

(B) **After** **full briefing and argument in which the Herskowitzes actively participated; and**

(**C)** **After** **personal service was made for a second time**, on all of the Herskowitz defendants......."

"That decision of the New York Supreme Court may be correct, as Charney claims; it may be incorrect as the Herskowitzes claim -- but it is a decision by the trial court on the issue of its own personal jurisdiction, after a motion, on which defendants participated at length...."

"The Herskowitzes again seek to mislead this Court, in falsely asserting that the Appellate Divisions's affirmance of Justice Tompkins' jurisdictional finding did not reach the merits, when it explicitly did..."

The April 9, 1991 Decision and May 21, 1991 Order

6. Under New York civil pleading rules CPLR 304 in effect in 1988 and 1991, an action was commenced and jurisdiction was acquired by the service of summons. New York CPLR 2219 expressly requires that the court state the determination in its order and detail it appropriately. The April 9, 1991 decision and May 21, 1991 order made no reference to any determination on personal jurisdiction, or to any second service but, merely stated that:

"In light of complicated procedural history of this action and defendants' evident dispute with plaintiff on the underlying facts, **the court declines to grant a default judgment**, but directs defendants, with the exception of defendant Alexander Fried, to answer within 30 days after service of a copy of this order with notice of entry." (Emphasis supplied)

The April 9, 1991 decision was embodied in a May 21, 1991 order and stated as follows:

ORDERED, that the motion of the plaintiff in No. 24517/88 for the entry of judgment by default against the defendants North Jersey Trading Corporation, Judith Herskowitz, XXXX Herskowitz, and XXX Herskowitz, be and it hereby is DENIED;

> "ORDERED, that the defendants in No. 24517/88, North Jersey Trading Corporation, Judith Herskowitz, XXXX Herskowitz, and XXX Herskowitz, answer the Amended Complaint therein, within thirty (30) days of service of a copy of this Order with notice of entry;"

7. Thus, contrary to Charney's contentions her Motion for Default was **denied**. There was no waiver of personal jurisdiction for failure to answer as Delibert would have it, because as shown here the Herskowitzes were not required to answer. Charney resorted to the Motion for Default in attempts to do away with the requirement to prove the validity of her service and long arm jurisdiction over the Herskowitzes and Fried. Charney falsely accused them that they failed to answer her complaint on her first service or to answer her amended complaint on an alleged second service

Regarding Charneys' alleged first service in 1988, the Herskowitzes filed a Motion to Dismiss the Complaint, for lack of personal jurisdiction. In January 1989, Charney amended her complaint but, pursuant to a March 8, 1989 order, the Herskowitzes were not required to respond to the amended complaint pending determination on personal jurisdiction in an evidentiary hearing. The evidentiary hearing was commenced, but when it became evident that Charney was unable prove the validity of her service, she refused to proceed. She even caused the judge to recuse herself and the case was reassigned to a new judge.

8. Charney through Delibert conceded on page 11 in a Reply Affirmation verified on March 18, 1991 that she decided not to proceed with the evidentiary hearing, because she rather decided to make a second personal service sometime around November 1990. Upon the Herskowitzes' denial of that service in their Mar ch 1991 Affidavit, Charney then claimed a residential posting as to Judith Herskowitz and as to XXX Herskowitz she could not show any service. Although New York law mandates an evidentiary hearing on disputed issues of service, no such hearing was even scheduled on that second service. In fact Delibert concedes in his June 6, 1995 Affidavit that his Motion for

Default Judgment rested solely on his self-serving arguments on papers submitted without more. Parenthetically, no hearing was ever held on the validity of the second attempted service, no process server appeared and no order determining the issue of service was ever made.[5]

Brief Summary of the Documentary Evidence

9. As evidenced by the documents from the files of the New York court not before this Court on the Herskowitzes' Motion for Summary Judgment, the instructions in that April 9, 1991 decision and May 21, 1991 order "to answer" the amended complaint had absolutely no jurisdictional consequence. In this regard, the facts show that:

(i) On June 26, 1991 Steven Delibert entered into a written stipulation in the New York case, with attorney Stephen King, counsel for the Herskowitzes, stipulating to their agreement that the Herskowitzes had the option either "to answer or move" to restate their unresolved defenses of personal jurisdiction saying as follows:[6]

---

[5] In their *Memorandum of In Opposition to Plaintiff's Motion for Default* dated March 11, 1991 the Herskowitzes have shown undisputed by Charney that New York law required an evidentiary hearing where there was a denial of service stated as follows:

> "Where there is a sworn denial of service by the defendant, the affidavit of service is rebutted, the plaintiff **must** establish jurisdiction by a prepondence of evidence **at a hearing**". (Emphasis supplied)

Frankel v. Schilling, 540 N.Y.S.2d 469 (2nd Dep't 1989) and numerous other such cases i.e.Green Point Savings v. Taylor, 460 N.Y.S. 2d 121 (2nd Dep't 1983) In Anton v. Amato 474 N.Y.S. 2d 298 (2nd Dep't 1984) the court reversed holding that where there was a denial of service, the service could not be decided on a **motion for default** but, was required to be set down for an evidentiary hearing.

[6] Under New York rules of procedure the defense of lack of personal jurisdiction can be raised by motion N.Y. CPLR 3211(a)(8).

> “This will confirm the agreement we reached on the telephone this afternoon that the time of each of the respondents [the Herskowitzes] to **answer** **or** **move** with respect to the petition [the amended complaint] in this proceeding is extended to July 3, 1991. We will speak within the next few days about the possibility of a further extension, if needed." (Emphasis supplied)

(ii) In reliance on that June 26, 1991 agreement, the Herskowitzes filed no answer but, on around July 2, 1991, filed instead a second *Motion to Dismiss* addressed to the Amended Complaint seeking dismissal among others on the ground of lack of indispensable parties and lack of in personam jurisdiction, because no proper service existed and no long arm jurisdiction could be exercised over the Herskowitzes as Florida citizens.

(iii) That June 6, 1991 agreement was reconfirmed by Charney on Page 5 of her *Attorney's Affirmation In Opposition To The Motion to Dismiss* etc., dated August 1, 1991 executed by Delibert and filed in the New York Supreme Court case, in which he acknowledged that:

> "An order was entered on May 21, 1991 (Exhibit E), and Notice of Entry directed to all parties; at the request of new counsel for defendants plaintiff extended their time "**to** **answer** **or** **to** **move**" until July 3, 1991." (Emphasis added)

10. On page 6, of that same August 1, 1991 Affirmation, Charney also conceded that the Herskowitzes' initial Motions to Dismiss for lack of personal jurisdiction directed to the Charney's initial complaint was never determined on the merits, by stating:

> “Between January 10 and January 26, 1989 each of the four defendants served a separate, substantially identical motion to dismiss the original complaint “pursuant to CPLR 3211" those motions were never determined on the merits.”

11. As evidenced by the documents from the New York court, for several months after the April 9, 1991 decision and resulting May 21, 1991 order, denying Charney's Motion for Default, Charney would engage in repeated efforts to overcome the Herskowitzes' jurisdictional objections. In fact Charney repeatedly stated that personal jurisdiction has not been decided. Cited below are a

few excerpts from some of the papers filed after the April 9 decision and May 21, 1991 order.

(i) Charney repeatedly opposed the Herskowitzes' Motion to Dismiss for lack of indispensable parties, claiming the issue was premature until personal jurisdiction over the Herskowitzes was determined, because -

> "The individual defendants [the Herskowitzes and Fried] claim the action should be dismissed for plaintiff's [Charney's] supposed inability to obtain jurisdiction over the "necessary" parties, the allegedly Florida residents individual defendants."
>
> "Moreover, the claim is premature, and cannot be decided at all, until the court has determined the issues of jurisdiction over the individual defendants [the Herskowitzes]. (Emphasis added)
>
> (Page 20 of Charney's *Plaintiff's Memorandum of Law In Opposition to Motion to Dismiss And In Support of Cross Motion* dated August 1, 1991)

(ii) Charney would delay the determination on the Herskowitzes' Motion to Dismiss for lack of personal jurisdiction and indispensable parties, with "cross motions" for discovery and for "leave to amend" her complaint, because -

> "Defendants claim lack of personal jurisdiction over the three individual defendants who are purported to reside in Florida; but one was served here; one was domiciled here when served in Florida; and the action of all clearly confer long-arm jurisdiction. To the extent there is any question on the jurisdictional issue, dismissal would be premature until discovery has been had in any case, pursuant to CPLR 3211(d), as defendants control the relevant information.
>
> "Defendants claim inability to obtain jurisdiction over necessary parties (the "Florida" defendants) requires dismissal. But as shown above, there is jurisdiction; and the motion is in any event premature until jurisdiction is decided, which in turn must await discovery under CPLR 3211(d)."............
>
> "WHEREFORE, defendants' motions [to dismiss] should be denied; or alternatively, disposition thereof should be stayed, and plaintiff's cross-motions for discovery and/or for amendment of the complaint should be granted." (Emphasis added)

(Pages 2 and 3 of Charney's *Plaintiff's Memorandum Of Law In Opposition to Motions To Dismiss etc., And In Support of Cross Motion*, dated August 1, 1991)

(iii) Charney raised irrelevant contentions related to needing more time to rebut the Herskowitzes' assertion of lack of long arm jurisdiction, despite their jurisdictional objections presenting predominant issues at law, because -

> "Accordingly, even if there is any doubt of jurisdiction, the court should not grant the motion to dismiss, until plaintiff has the opportunity to have discovery, or otherwise learn further details of defendant's actions. (Emphasis added)
>
> (Page 18 of Charney's *Plaintiff's Memorandum Of Law In Opposition to Motions To Dismiss etc., And In Support of Cross Motion,* dated August 1, 1991)

(iv) In attempts to acquire jurisdiction over the Florida citizens, Charney falsely claimed that they were citizens of New York and questioned if they were "bona fide" citizens of Florida alleging:

> "If the court does not deny outright the claim that Alexander Fried is not a domiciliary, because he is estopped from disclaiming residency after obtaining substantial benefits -- continued use of his rent controlled apartment, and the right to purchase at an insider price -- then there must be discovery as to the bona fides of the supposed change of domicile to Florida."
>
> "If defendant's incredible claim of 'enticement' is not rejected out of hand, and the Court determined to rest a decision on defendant's domicile, plaintiff is entitled to discovery on the bona fides of the claim of Judith Herskowitz to have established Florida domicile in 1974."
> (Pages 4-7 of Charney's *Reply Affirmation in Support of Cross Motion* dated August 23, 1991)

(v) Charney was unable to attack the Florida citizenship of XXX Herskowitz and wanted to eliminate him on the basis that he was not a necessary party because he was not a shareholder. Alternatively, Charney tried to assert a baseless new conspiracy theory against

XXX Herskowitz upon which to base personal jurisdiction, claiming that if he were a shareholder he conspired with the other Herskowitzes to obtain his stocks. Charney then moved for discovery and to amend her complaint with a new conspiracy claim, alleging:

> "XXX Herskowitz' carefully crafted affidavit alone shows the need for discovery. At once it claims ownership of stock, and speculates on ways that he might have obtained it, which would be inconsistent with plaintiff's claims, would be insufficient to subject him to jurisdiction, and would render him a necessary party. All of this speculation, while carefully avoiding any showing of the one necessary fact for this court to reach a decision -- how XXX Herskowitz did obtain his stock -- itself shows the need for discovery. Nor can jurisdiction be defeated by assignment to XXX some of Judith' interest, else any defendant could defeat jurisdiction by timely assignment to a conveniently distant relative. XXX is only claimed by defendants to be a (conveniently) necessary party as to the declaratory judgment claims regarding stock ownership, if he indeed did not participate in any way in management of the corporation or its affairs. Thus discovery is needed as to the means of his obtaining his claimed stock, when from whom, both to determine whether his actions subject him to jurisdiction; and if not, whether his presence is necessary at all. (Emphasis added) [7]
>
> (Pages 3 and 4 of Charney's *Plaintiff's Reply Memorandum Of Law In Support Of Cross Motion For Discovery And/Or For Amendment of Complaint* dated August 23, 1991)

12. In an order dated October 2, 1991, the Supreme Court of New York denied Charney's motions for discovery and to amend her complaint as moot, and declined to rule on the second

[7] Charney's Complaint included a claim for declaratory judgment seeking to be made a shareholder of North Jersey. New York law holds that all the shareholders in a closed corporation "who have a claim in the subject matter of action for a declaratory judgment or who may be effected by the result must be joined as necessary parties." See, Sassower v. Himwich, 236 N.Y.S.2d 491 495 (Sup.Ct. N.Y. Co. 1962) aff'd , 19 A.D.2d 946 (N.Y. 1st Dept. 1963), where because two shareholders in the closed corporation were not joined, the court ruled it "must refuse to grant such declaratory relief". Charney settled with XXX and XXXX Herskowitzes in 1999, resulting in their dismissal from this case.

Motion to Dismiss. Instead the court relied on Delibert's contentions that the predecessor judge had "permitted the withdrawal of the jurisdictional claim" as to the initial 1988 service. To emphasize again, Delibert conceded in his December 29, 1993 testimony that this finding was unsupported by the record. Consequently, Charney never conducted the discovery related to jurisdiction; pleaded no conspiracy theory upon which to base jurisdiction; cured no insufficiency of service; and furnished no other details to acquire long arm jurisdiction over the Herskowitzes as Florida citizens.

WHEREFORE, by reason of the foregoing, it is respectfully requested that this Court grant the Motion to Strike as sham Charney's pleading, Delibert's Affidavit of June 6, 1995 together with Charney's defense of waiver of personal jurisdiction.

VERIFICATION

I hereby certify under penalty of perjury that the facts stated above are true and correct to my personal knowledge.

Executed on July 18, 2003

By:_______________________
JUDITH HERSKOWITZ

Respectfully submitted,

JUDITH HERSKOWITZ J.D.
In Proper Person
P.O. Box 403543
Miami Beach, Fl. 33140
Tel:(305) 534-7600

By:_______________________
JUDITH HERSKOWITZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Strike for Sham Pleading was served on Eric Christu, 4800 N. Federal Highway, Suite 200E, BocaRaton, Fl. 33431, and XXXX and XXX Herskowitz P.O. Box 403303 Miami Beach, Fl. 33140 this th day of July, 2003.

By:______________________
JUDITH HERSKOWITZ