

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
XXX HERSKOWITZ and XXX
HERSKOWITZ,

Index No. 24517/88

Defendants.

**JUDITH HERSKOWITZ'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR RELIEF PURSUANT TO NEW YORK CPLR 5015(a)
AND FOR REFERRAL ON APPLICATION TO THE ADMINISTRATIVE JUDGE**

**A. UPON A SHOWING THAT THE JUDGMENTS HEREIN OBTAINED
BY DEFAULT WERE BY FRAUD, MISREPRESENTATION,
ILLEGALITY, UNCONSCIONABILITY AND VIOLATIONS OF
LAW**

JUDITH HERSKOWITZ, submits this motion and memorandum pursuant to New York CPLR §5015(a)(3), requesting relief from the default judgments entered against her in the above entitled case, through fraud, misrepresentation and misconduct of plaintiff Susan Charney, and her attorney Steven Delibert , and for referral of this motion to the administrative judge, for review and application for relief upon showing that the default judgments entered in this case were obtained by fraud, misrepresentation, illegality, unconscionability and violations of law.

In support of this motion, Judith Herskowitz relies on her Affidavit In support of Cross Motion for Stay and/or Abate in Deference to Pre-Emptive and Primary Jurisdiction of Other Proceedings, filed contemporaneously herewith, and accompanying same. To this end reference is made to ¶¶ 6-19, 21, 23-31, 35-43, 50, 51, 53-54, 58, 58, 60, 61, 62, 64, 71-83 which ¶¶ are re-

adopted for incorporation herein.

Therefore, each act of fraud, abuse oppression and illegality described in the above paragraphs is not recited for relief on this motion. It is sufficient to say that on extreme and irrefutable departure from the requirements of due process arose from Justice Tompkins' order of October 2, 1991, whereby Judith Herskowitz, along with her sons XXX and XXX Herskowitz ("the Herskowitzes") was forever denied and precluded from being heard on their jurisdictional defenses. Afterwards, when they sought to redress the invalidity of this order by requests for rehearing and by seeking appellate relief, Plaintiff's attorney accused them of engaging in bad faith litigation tactics, upon the presumption that they had somehow waived or withdrawn their jurisdictional objections, and by this means procured several judgments for sanctions against the Herskowitzes.

By further coercive motion and enforcement measures, detailed in the above described paragraphs Plaintiff obtained a series of sanctioning orders and defaults, that included the striking of the defense to personal jurisdiction, by Justice Tompkins's order of January 19, 1993. Upon this inquest for damages, a judgment totaling \$4,300,024.42 was entered against Judith Herskowitz, by Justice Tompkins on January 21, 1994 and other judgments of sanctions.

The order of October 2, 1991 effectively enjoined defendant Fried and the Herskowitzes from attempting to "re-raise the jurisdictional issue". This virtual restraining order was based upon Justice Tompkins misinformed and invalid holding that

"defendant Fried and the Herskowitz defendants have repeatedly raised and re-raised the issue of jurisdiction in spite of Justice Silbermann's order of May 8, 1990 which permitted the withdrawal of the jurisdictional claim".

That finding by Justice Tompkins was nowhere supported by the record, and attorney Delibert's subsequent efforts to rely upon that October 2, 1991 order to obtain sanctions and defaults against

Judith Herskowitz was a fabrication of the record and a fraud on the court.

First as shown in Judith Herskowitz's accompanying Affidavit ¶¶15 and 16, Justice Silbermann's May 8, 1990 order had nothing to do with a withdrawal of jurisdictional objections, so the factual basis for Justice Tompkins denying her right to raise jurisdictional defenses was invalid. Secondly, as noted in ¶21 of the accompanying Affidavit of Judith Herskowitz, Justice Tompkins had previously found under an April 9, 1991 decision and settled May 21, 1991 order, that the Herskowitz defendants had a genuine dispute on the disputed issues of service. Third, prior to the October 2, 1991 order, and by stipulation upon letter agreement between the Herskowitzes New York attorney and Plaintiff's attorney dated June 26, 1991, a copy of which is attached as Exhibit "B", it was agreed that each would be allowed until July 3, 1991 to "answer or move with respect to the petition in this proceeding" [Charney's Amended Complaint] (See ¶23 of the Affidavit).

So, regardless of how attorney Delibert was able to mislead Justice Tompkins into believing that the Herskowitzes' jurisdictional defenses had been withdrawn he knew otherwise. In fact, as the record shows, Plaintiff had prevented the resumption of the traverse hearing that Justice Silbermann had actually directed under order of May 8, 1990 and this avoidance went so far as to have her attorney suggest that

"it would be far simplerto repeat service on the individual defendants, than to repeat the four days of hearings on the initial service" (See ¶¶ 16,18 and 19 of the accompanying Affidavit).

Then after the damage was done in this Court by Plaintiff's reliance upon the October 2, 1991 order, Plaintiff later admitted in two separate proceedings in Florida, that the reference by Justice Tompkins to a withdrawal of jurisdictional defenses, before Justice Silbermann was unsupported by the record. One such occasion was by Plaintiff's attorney Steven Delibert in his sworn testimony,

on December 29, 1993 (§ 51 of the Affidavit).¹ The second occasion was in the Florida litigation over the domestication of Charney's default judgments (§ 64 of the Affidavit).² Therefore, Plaintiff cannot deny that her default judgment against Judith Herskowitz was procured by fraudulent and unconscionable means, and by the active misconduct of her attorney Steven Delibert.

Not only was that October 2, 1991 order based upon a misinformed invalid holding that the Herskowitzes have withdrawn their objections to personal jurisdiction, but the Herskowitzes were not allowed to be heard upon nor to litigate this alleged waiver of jurisdiction. The imposition of sanctions and defaults thereafter for objecting to jurisdiction, was not erroneous, but was unauthorized and contrary to provisions of New York's procedural rules and laws. However, a waiver to jurisdictional objections going to personal jurisdiction, cannot be waived when raised in a CPLR §3211(a)(8), motion to dismiss and can be raised even in a responsive pleading pursuant to CPLR §3211(e). Here, of course, the Herskowitzes did raise their jurisdictional objections in a §3211(a)(8) motion so there could be no waiver as a matter of procedural due process.

¹ "Q.....is there any document that you have knowledge of where the defendants Judith Herskowitz, XXX Herskowitz, XXX 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."

² Charney again acknowledged in her Exceptions to the General Master's Report filed on September 5, 1995 that the New York court's determination on personal jurisdiction

“was not reached in the October 2, 1991 decision” on that “earlier permitted withdrawal of their jurisdictional objections. Rather, jurisdiction was clearly determined in the April 9, 1991 decision and resulting May 21, order.”

Justice Silberman expressly directed that the jurisdictional defenses, raised by the Herskowitzes be heard in a traverse hearing. This was in accordance with the method authorized by law for determining issues of personal jurisdiction, in an “immediate trial”, required by CPLR 32119(c). As noted in the commentaries on the

“Immediate Trial of Fact issue” C3211:47.... “a motion raising a jurisdictional objection cannot be decided until the issue is resolved”.....so it is of “utmost importance that the plaintiff have the jurisdictional issue resolved promptly”and that..... “any factual issue holding up a resolution of that question should be promptly resolved, by trial if necessary.”

as supported by the record no issues related to personal service and personal jurisdiction have ever been decided in this case. .

B. REQUIREMENTS OF NEW YORK LAW FOR SERVICE OF PROCESS TO COMMENCE AN ACTION WERE NOT SATISFIED, WHEN THAT SERVICE WAS ATTEMPTED WITH AN ORDER TO SHOW CAUSE

Plaintiff purported to serve Defendants only with an Order To Show Cause for Preliminary Injunction and Temporary Restraining Order issued ex parte on December 13, 1988. Under New York CPLR 2214(d) an Order To Show Cause is merely a form of motion which is granted by the court in a proper case on ex parte application "...in lieu of a notice of motion at a time and in a manner specified therein". Under New York CPLR 304, in effect during the relevant time periods, it was the service of a summons which commenced the action stated as follows:

"An action is commenced and jurisdiction is acquired by service of summons."

Gimbel Bros., Inc. v. Swift, 307 N.Y.S.2d 952, 954 (N.Y. County 1970) reiterated that it was the acquisition of jurisdiction over a defendant's person which commenced the action. 2 West's New York McKinneys Forms, Sec. 5:14, noted which was the applicable law at the time that -

"Service of an order to show cause that includes a summons and complaint or a

summons with notice in the supporting papers will not constitute service of process on defendant because the service of process will not be clear and unequivocal."

See also Iglesias v. Rodriguez, 143 Misc.2d 498, 491 N.Y.S.2d 701, 702 (Kings County 1989), holding that a summons and complaint stapled inside an order to show cause for preliminary injunction and not served separately,

"at the best appeared to be mere exhibits to the order to show cause, and as such were insufficient for commencement of action and acquisition of personal jurisdiction over defendant. The court is without jurisdiction to address the other issues raised by the parties since the action was not commenced pursuant to law."

The Iglesias court dismissed the action on defendant's motion. Iglesias relied on a holding of the Court of Appeals, New York's highest court, in Markoff v. South Nassau Community Hospital, 473 N.Y.S.2d 766, 767 (N.Y. 1984) ⁹ which stated,

"In New York service is effective only when it is made strictly pursuant to the appropriate method authorized by the CPLR."

For the proposition that without proper service of process no jurisdiction is acquired over a defendant sufficient to commence an action, see also Frerk v. Mercy Hospital, 470 N.Y.S.2d, 672, 674 (2nd Dept. 1984); and Barber v. John Stuart, 582 N.Y.S.2d 596, 597 (Supr. Ct. Nassau County 1991), in which the court vacated the judgment, holding that the trial court was without in personam jurisdiction over defendant where the defendant was never served with a summons and complaint. Likewise in McMullen V. Arnone, 437 N.Y.S.2d 373, 375 (2nd Dept. 1981) the court held that:

"It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void.

"Such defect is not cured by the defendant's subsequent receipt of actual notice of the suit, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court."

"The fact that notice of the action has been received is of no moment if the notice is by means other than those authorized by statute."

Additionally the judge who issued the initial December 13, 1988 Order to Show Cause on p. 4 of crossed out language providing that it was to be served "...in the manner required for the service of a summons and complaint pursuant to the Civil Practice Rule," thereby clarifying that the Order to Show Cause was not intended to be used as a substitute for initial service of process under CPLR 308. Those initial papers were at all times referred to by Charney and the New York court as an Order To Show Cause and not as a Summons and Complaint.³

CONCLUSION

Consequently, the judgments against Judith Herskowitz were obtained by means that are contrary to law. They were obtained by fraud and by violation of law. They were obtained by depriving Judith Herskowitz due process of law. Consequently the judgment are illegal. As such Judith Herskowitz is entitled to relief under CPLR 5015.

Dated: Miami Beach, Fl.
October 1, 2003

Respectfully submitted,

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By: _____
JUDITH HERSKOWITZ

³CPLR 306 requires process servers to "specify the papers served" in the Proof of Service filed with the court. In this case, the Proofs of Service of Charney's process servers referred only to an "Order To Show Cause for P.I. and T.R.O." and made no mention of any service of a summons and complaint. In M.Ayton v. Bean, 469 N.Y.S.2d 672, 679, 457 N.E.2d 778, 60 N.Y.2d 768 (N.Y. 1983) the court held that in the absence of proof of service commencing the action in the record the court lacked jurisdiction.