SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 24517 / 1988

SUSAN CHARNEY,

Plaintiff,

- against -

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
[redacted]

Defendants.

Assigned to:
IAS PART 30:HEITLER, J.

AFFIRMATION IN OPPOSITION TO MOTION TO VACATE DECISION AND ORDER OF APRIL 22, 2004

STEVEN DELIBERT, an attorney at law duly admitted to practice before the Courts of this State, affirms under penalty of perjury:

1. I am the attorney for the plaintiff herein. I respectfully submit this Affirmation on my personal knowledge, in opposition to the defendant Judith Herskowitz's Motion by Order to Show Cause to vacate the default decision and order entered herein on April 22, 2004, and for other relief.

Improper Service of Order to Show Cause

2. At the outset, it should be noted that the Order to Show Cause was not served in accordance with the instructions of the Court, which alone would provide sufficient reason to deny the motion in its entirety.

3. The Order clearly instructs, in accordance with the customary form, that "service of a copy of this Order **and the papers on which it is granted** shall be made" [emphasis supplied] on the other parties; but Herskowitz served only the Order itself, together with a letter stating,

"Enclosed please find an Order to Show Cause on the same Motion to Vacate

Default that I have served on you previously and that you received on May 24, 2004. Accordingly, this motion is now returnable as provided in the Order to Show Cause."

4. Defendant's letter does not even contain a representation that the papers on which the Order to Show Cause was granted, are the same as the papers served with her prior motion to reopen. Given Defendant's history of misconduct throughout the course of this litigation generally, and the course of the present motions particularly, it is neither prudent nor wise to assume that Defendant served the same papers on the motion, as she presented to the Court in support of the Order to Show Cause.

"Excusable" Default

5. In seeking to excuse her patently egregious and intentional default in appearing on the prior motion, Herskowitz seeks to cast blame everywhere except at the true cause: Her own six months of blatant misconduct, dishonesty with the Court, refusal to obey the Court's instructions, pretended "misunderstandings", and all the rest of the sorry history which permeates this record.

6. A portion of that misconduct – far more than enough, in itself, to justify the entry of a default – is described in this Court's decision of April 22, 2004; should more be needed for the record:

A) Herskowitz was served with the initial Order to Show Cause on June 3, 2003, and received it on or about June 4, returnable on June 23, 2003.

B) At Ms. Herskowitz's request, the return date was adjourned to July 23, 2003.

C) Thereafter, at request of the Receiver, the return date was again adjourned to permit him to travel to China for the purposes of adopting a child; at Ms. Herskowitz' insistence that she was "not available" for the entire month of August, the adjourned date was set for September 15,

2003.

D) On August 29, 2003, Ms. Herskowitz addressed a letter to the Court, requesting a further adjournment of the September 15 date, and the Court responded by letter on September 3, 2003, setting a new return date of September 22, and expressly stating that "**There will be no further adjournments**."

E) Ms. Herskowitz claimed not to have received the Court's letter of September 3 (and not to have been put on notice of it, by her acknowledged receipt of opposing counsel's letter of September 4, 2003, which referred to the Court's letter and the new return date).

F) Instead, in a telephone call with the Court on September 12, she denied knowledge of the September 22 return date, then addressed a letter to the Court announcing her **refusal** to appear on September 22, and demanding a further adjournment.

G) On September 18, Ms. Herskowitz addressed a further letter to the Court, again demanding adjournment of the September 22 date, this time because of a "sizable hurricane", religious restrictions on travel dates, and her need to consult an attorney (the purpose for which she had ostensibly sought her first adjournment, in June; significantly, no attorney ever did appear on behalf of Herskowitz.).

H) The September 22 hearing nevertheless went forward, counsel appearing in person and Herskowitz by speakerphone telephone from Florida. After extended wrangling by Herskowitz, the Court indulged her with a further adjournment, and set the matter down for October 22, taking considerable trouble to insure that Herskowitz understood what was required (Transcript of hearing, September 22, 2003, Exhibit A hereto, at p. 10):

THE COURT: Ms. Herskowitz – Ms. Herskowitz, do you understand that

the date to be back in my courtroom has been given to you as October 22nd at 9:30 a.m. Do you understand that?

MS. HERSKOWITZ: And I can put this motion on.

THE COURT: Ma'am, that's not an answer. Do you understand that?

MS. HERSKOWITZ: Yes, ma'am.

THE COURT: Okay, and do you also understand it will not be adjourned?

And further, *id.* at pp. 13 - 14:

THE COURT: Okay, I am summing [up]. . . . We are meeting September – excuse me. October 22nd at 9:30 a.m. There will be no adjournments, and as you do not have an answering machine, we will make every effort if we need to communicate with you by phone. Short of that, ma'am, we will send letters. Letters in this jurisdiction are presumed to be received once – ma'am, don't interrupt me – once they are mailed. Do you understand that? In want to tell you that I will check with the mail, and we do not litigate by letter, so I need you to understand that also.

Thank you very much. We will see you on October 22 at 9:30.

I) Predictably, on October 21, 2003, Ms. Herskowitz yet **again** addressed a letter to the Court, to "respectfully request" (i.e., demand) that the October 22 hearing be adjourned yet again, this time on the ground of specious arguments regarding her adversaries' "late" service of papers, and of physical symptoms typical of anxiety.

J) At the October 22 hearing, Ms. Herskowitz **again** chose unilaterally not to appear, despite the Court's explicit contrary instructions, except by telephone, and **again** was granted the

courtesy of yet a further adjournment by the Court. After extended wrangling and doubletalk by Ms. Herskowitz about whether or not she had purchased a plane ticket, whether or not advance tickets were (as she had repeatedly claimed regarding her earlier adjournment demands) or were not discounted, and innumerable other side matters, the Court clearly instructed (Transcript of hearing, October 22, 2003, Exhibit B hereto, at pp. 13 - 14):

> THE COURT: I am advising you to get a lawyer. I am advising you to be in my courtroom on the 17th of November . . .
>
> MS. HERSKOWITZ: What date is that?
>
> THE COURT: It is a Monday.
>
> MS. HERSKOWITZ: Sometimes it's much more expensive to fly on a Sunday.
>
> THE COURT: Tuesday the 18th, ma'am, we'll accommodate you.

(Id., at p. 15 - 16):

> THE COURT: If you do not show up again, ma'am, and –
>
> MS. HERSKOWITZ: I have no fear now.
>
> THE COURT: . . . . Do you understand that? I will not grant you a fourth adjournment. And I am telling you ma'am, and strongly advising you to get a lawyer.

(Id., at p. 17):

> THE COURT: . . . . Miss Herskowitz[,] I am going to see you on the 18th at 9:30 am.
>
> MS. HERSKOWITZ: I'm telling the truth, I will see you on the 18th.

K) Also in the telephone conference of October 22, Ms. Herskowitz belatedly raised for the first time, her purported fear of arrest if she appeared in New York, because of long-outstanding warrants arising from her contempts of court at earlier stages of this and related cases.

L) At the request of the Court, plaintiff's counsel undertook to – and did – provide Orders for entry by the Court and delivery to Ms. Herskowitz, suspending the arrest warrants for the period necessary to appear and argue the motion on November 18. (Copies with Notice of Entry annexed to Herskowitz moving affidavit herein.)

M) On November 13, 2003, Ms. Herskowitz addressed yet **another** letter to the Court, stating that – despite the Court's repeated, clear instructions, and despite Ms. Herskowitz's repeated, clear statement of her understanding of those instructions – "I most respectfully have to appear by telephone at the November 18, 2003 hearing. At any rate this case has to be stayed first . . . "

N) On November 14, Ms. Herskowitz came up with yet another ploy, and another letter, claiming that she had not received the Orders suspending the arrest warrants against her; and that "This is yet another reason that I could not even plan a flight to New York. This is now getting close to the Thanksgiving holidays and unless reservations are made somewhat in advance it is not only the flights that are expensive, but the hotel rooms as well."

O) Once more, Ms. Herskowitz yet again failed to appear on November 18, claiming that she had not received the suspension orders in time to purchase airplane tickets at bargain rates. Once more, Ms. Herskowitz had not troubled to inquire if the suspension orders were entered and on the way to her, as in fact they were; she merely announced on the eve of the hearing that she did not intend to appear, and in fact was not present in Court on November 18. On this **third**

intentional default in appearing, the Court finally determined that it was apparent that Ms. Herskowitz had no intention of appearing, and no intention of complying with the Court's instructions; the Court accordingly entered its decision by default. (Transcript of hearing, November 18, 2003, Exhibit C hereto, at pp. 2 - 3):

> THE COURT: . . . When we were here last time, and I believe it was October 22nd of '03, Ms. Herskowitz had not appeared . . . I called her on the telephone. . . . I also made very clear during the course of that conference, in which she was on the phone, that it was my decision to grant her yet a further adjournment to appear in my courtroom for today's date, which is November the 18th. I made it very clear to her that she was to be present in my courtroom today.
>
> She is not in my courtroom today and she has been repeatedly calling my clerk and she has been repeatedly writing to this Court. . . .

(Id., at p. 4):

> THE COURT: I have extended the courtesy to Ms. Herskowitz on numerous occasions with regard to her nonappearance in this Court. It is clear to me at this point that she is not appearing today and, as such, she is deemed in default with regard to what is before the Court at this particular time.
>
> I have advised her, when I was on the phone with her, to seek counsel, and I do not see counsel in my courtroom at this particular time as a representative for her . . .

7. In determining whether the entry of that default was appropriate, not only Ms. Herskowitz's six-month history of failures and refusals to appear is relevant, but also the nature of her

conduct throughout that six-month period, permeated regularly by efforts at *ex parte* communication with the Court; failures to be available by telephone at times instructed by the Court (and agreed to by Herskowitz) for conference calls with the Court and counsel; dishonest and disingenuous misrepresentations to the Court about the history of the case, the motion, and the conduct of the parties; and simultaneous abuse of process and other misconduct in related litigation in other states.

8. Not only did the Court have its own experience with Herskowitz on which to draw, but also, as reflected in its opinion of April 22, 2004, the Court was well aware of a 15-year history of misconduct, sanctions, contempt, and arrest orders against Herskowitz, in the state and federal courts of three states, for conduct precisely akin to the conduct manifested here. As shown in the accompanying Memorandum of Law, it is appropriate and proper for a court to take such prior conduct into account, in determining the effect to be given to an instance of present misconduct before the Court.

9. In short, it is plain, on the facts of this case, no clearer instance could be imagined than this, of a litigant thumbing her nose at the Court, and daring the Court to respond. If it was an abuse of discretion to enter a default on these facts, then there is no set of facts imaginable in which a Court may default a litigant for misconduct.

"Meritorious" Defenses

10. In seeking to show that she had "meritorious" defenses to the motion, Herskowitz barely even adverts at all to the merits of the central issue presented by the motion: The propriety of the disbursement sought by Charney and the Receiver, of the corporate assets in the hands of the Receiver.

11. Instead, Herskowitz attacks at length (¶¶ 11-22) the supposedly "void" commitment orders entered by Justice Tompkins herein, in 1993. Even if there were any merit to Herskowitz's belated attacks on the orders, she is totally silent as to what they could possibly have to do with the "merits" of the present motion; and she is totally silent as to why those orders were not the subject of reargument, appeal, or other review at the time they were issued, or at any time during the more than ten years intervening. Her arguments are too little; too late; and not to any point.

12. Equally irrelevant to the present merits, is Ms. Herskowitz' effort yet again to attack this Court's findings of personal jurisdiction over her, determined by Justice Tompkins in April, 1991; adhered to on reargument in October, 1991; affirmed by the Appellate Division; and granted *res judicata* effect, as entitled to full faith and credit, by the appellate courts of Florida, in the face of innumerable collateral attacks by Herskowitz.

13. Finally, Ms. Herskowitz' claims that she would be entitled to "reargument" – if she could conceivably clear the hurdle of obtaining a reopening of her richly-deserved default – are nothing short of fatuous. Her barely coherent "Cross Motion with Notice for Stay and/or To Abate in Deference to Preemptive and Primary Jurisdiction of Other Proceedings . . . " (proceedings in a long-closed bankruptcy case and a long-closed Florida state case) is exemplary, as are her efforts to refer the case to the Administrative Judge; her efforts to transfer the case to the Commercial Part; her nonsensical claims that partial settlement with one co-defendant constitutes satisfaction of judgment against all other defendants, even those not participating in or contributing to the settlement; and her claim that because one count of the original complaint of this lengthy, difficult case contained a claim for declaratory judgment that Charney was a shareholder (quickly determined on summary judgment), all of the hundreds and hundreds of thousands of

dollars in counsel fees necessarily incurred (due almost entirely to Herskowitz's misconduct) in obtaining and protecting the derivative judgment in favor of the corporation and against Herskowitz and her co-defendants, are not reimbursable under BCL §626.

Continuing Misconduct

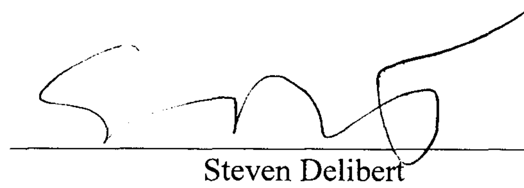
14. Even as Herskowitz asks the Court on this motion to exercise its discretion in her favor, and to excuse what is manifestly and inexcusable series of defaults, she has reverted yet again to the very form of abusive, contemptuous misconduct which earned her the default in the first place.

15. Herskowitz by letter requested that the Court again enter orders lifting the arrest warrants against her, to permit her to attend on the current return date. The Court in turn determined that a conference call with counsel would be necessary to discuss the terms thereof, and sought to establish a date for such call; upon learning of the Court's wishes, Herskowitz has proceeded to make herself unavailable by telephone for fully a week. (Copy of letter, Court Attorney to Herskowitz, June 10, 2004, Exhibit D hereto.)

14. In summary, the present motion presents no facts suggesting that the Court abused its discretion in entering a default; it presents no facts suggesting that the movant had a meritorious defense; it presents no facts suggesting any reason the Court should exercise its discretion in Herskowitz's favor and reopen the default; and it presents no facts suggesting that the movant is entitled to any other form of relief whatsoever. On the contrary, even Herskowitz's conduct on this very motion for relief from the effects of her prior misconduct, demonstrates anew that she is determined to engage in her relentless campaign of discourtesy, disregard, and contempt for the Court. The motion should be denied, and plaintiff should have such other and further relief as

may to the Court appear just and proper.

Dated: New York, N. Y.
June 15, 2004



Steven Delibert