



SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK

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Index No. 24517 / 1988

SUSAN CHARNEY,

Plaintiff,

- against -

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

Defendants.

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:  
Assigned to:  
IAS PART 30:HEITLER, J.

:  
MEMORANDUM OF  
PLAINTIFF AND  
RECEIVER IN  
OPPOSITION TO  
MOTION TO VACATE  
DECISION AND ORDER  
OF APRIL 22, 2004  
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**Statement of Facts**

In June, 2003, plaintiff herein moved for an Order, directing the disbursement of funds held by the Receiver of the assets of North Jersey Trading Corporation.

The sole party seeking to oppose the motion was defendant Judith Herskowitz.

After a long and sorry six-month history by Herskowitz of delay, obfuscation, misconduct, dishonesty with the Court, refusal to abide the Court's instructions, and general impropriety – all of a piece with fifteen years of such conduct throughout this litigation, all of which was known to the Court – the Court declared Herskowitz in default, and granted the motion on default.

Herskowitz now purports to move for relief from her default, but as shown herein, she does not even mention, much less show how she could satisfy, the narrow standard for such reopening; she does not even mention, much less show how she could satisfy, the requirement of a meritorious defense; and she does not even mention, much less show any reason for, the Court to exercise its abundant discretion in her favor, and excuse her manifestly intentional default.

**POINT I.**

**A DEFAULT MAY BE REOPENED ONLY  
UPON SHOWING OF AN EXCUSABLE DEFAULT.**

**A. No Excusable Default**

The law of New York is and long has been abundantly clear: Where a decision or judgment is based upon a default by the opposing party, relief may be obtained only upon a showing of “excusable default”. CPLR 5015(a)(1).

But in the present case, so far from an “excusable” default, the record is abundantly clear just how outrageous and **inexcusable** Herskowitz’s multiple defaults were. The accompanying affirmation of Steven Delibert, Esq., recites at length the refusals to comply with Court directions, the sorry and implausible excuses, the dishonesty and purported “failure” to receive communications from the Court, that added up to a clear basis for finding that Herskowitz’ final default in appearing was knowing, intentional, purposeful, and a dare to the Court to do something about it.

While the courts of course recognize a strong policy in favor of deciding cases on their merits, that policy has its limits, and where – as here – the default is plainly intentional, while the “merits” of the defaulter’s position are difficult indeed to divine, no reopening is necessary or proper.

In particular, and most obviously, where a default was apparently deliberate, the default is not excusable and will not be reopened. Back v. Stern, 23 AD2d 837, 259 NYS2d 538 (1<sup>st</sup> Dept. 1965).

Moreover, where – as was in substantial part true here – a default was brought about by a party’s own refusal to receive communications regarding the litigation, the default was not

excusable. Allied Bldg. Products Corp. v. Clarke, 187 A.D.2d 1036, 590 N.Y.S.2d 335 (4<sup>th</sup> Dept. 1992).

And even if Herskowitz could show – as she most certainly has not – that the individual failure to appear on which the Court acted might have been reasonable, the Court’s decision to enter a default and subsequent refusal to reopen would be entirely proper where – as was certainly true here – the defendants’ overall pattern of behavior raised a clear inference of willful and contumacious conduct. Collins v. Bertram Yacht Corp., 53 A.D.2d 527, 384 N.Y.S.2d 186 (1<sup>st</sup> Dept. 1976) aff’d 42 N.Y.2d 1033, 369 N.E.2d 758, 399 N.Y.S.2d 202 (1977); Robinson Saw Mill Works, Inc. v. Speilman, 265 A.D.2d 604, 696 N.Y.S.2d 277 (3d Dept 1999); Henderson v. Stilwell, 116 A.D.2d 861, 863; 498 N.Y.S.2d 183, 185 (3<sup>rd</sup> Dept. 1986).

#### **B. The Court May Control its Own Calendar**

Herskowitz’s primary reliance in showing that her default was “excusable”, is her lengthy disquisition on the manner in which the Court supposedly violated the calendar rules of the Uniform Rules of the Trial Courts (Memorandum, pp. 1-3), but she forgets the primary rule governing motion practice, in this or any Court: It is the Court, and not the litigants, which controls the calendar. Heist v. Cameron, 211 A.D.2d 429, 620 N.Y.S.2d 385 (1<sup>st</sup> Dept. 1995). It is the Court, and not the litigants, which may determine in its discretion if it will hear oral argument, or not; require appearance, or not; grant adjournments, or not; and it is the Court which determines if a litigant has taken excessive liberties with its patience.

Herskowitz claims that by merely setting a “return date”, the Court was not giving her notice that appearance and oral argument were required, but her claim flies **directly in the face of the facts, as shown by Ms. Herskowitz’ own statements** in the transcripts of the Court’s con-

ference telephone calls with Ms. Herskowitz on at least two occasions:

(Transcript of hearing, September 22, 2003, Exhibit A to Delibert affirmation, 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 22<sup>nd</sup> 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.

(Transcript of hearing, October 22, 2003, Exhibit B to Delibert affirmation, 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 17<sup>th</sup> 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 18<sup>th</sup>, 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 18<sup>th</sup> at 9:30 am.

MS. HERSKOWITZ: I'm telling the truth, I will see you on the 18<sup>th</sup>.

**C. Any "Error" in the Prior Commitment Orders Is Irrelevant**

For reasons which are not at all clear, but which apparently are thought to make her default excusable, Herskowitz goes to great lengths to prove that the prior commitment orders "upon which this Court relied" are "illegal, void and constitutionally invalid".

She proves at once too little, and too much: First, she does not even tell us for what purpose the court supposedly relied on the prior orders, and it would appear in fact that it is not the Court, but Herskowitz herself who has relied upon those prior orders, as furnishing an excuse for failure to appear. If reliance upon them was error, the error was that of Herskowitz; it may not be laid at the feet of the Court, and it may not provide Herskowitz with an excuse for her default.

Moreover, if the prior orders of Supreme Court were indeed so blatantly erroneous that the court here should not have relied on them, then that would have been open to review; but Herskowitz nowhere explains why review of those prior orders was not sought at any time in the more than ten years since their entry.

Finally, a litigant's reliance on her own prior contumacious conduct as providing an excuse for more of the same is a bold argument indeed. In what must be one of the few prior cases where a contumacious litigant had such audacity, it was squarely held that fear of reincarceration for contempt was not an excuse for failure to appear, since the "duress", if any, was caused solely

by defendant's own deliberate flouting of the mandates of the court and plaintiff did not commit or threaten to commit any unlawful act which may have induced the defendant to act. Helwig v. Wilkens, 51 A.D.2d 694, 39 N.Y.S.2d 413 (1<sup>st</sup> Dept.), app. dismiss. 39 N.Y.2d 798, 385 N.Y.S.2d 757, 351 N.E.2d 424 (1976).

## POINT II

### NO VALID DEFENSE ON THE MERITS IS SHOWN

Besides showing that her default was "excusable", which she has not done, Herskowitz would be required to show that she had a valid defense on the merits, in order to obtain the relief she here seeks. She fails equally in this regard.

Indeed, it is difficult to determine the point of most of the arguments (Memorandum, pp. 8- 19) that seem to be intended to demonstrate that there was a valid defense.

Most notably, a full ten pages (Point III) is devoted to an effort to show that settlement for less than the full amount of the judgment by Charney as derivative-action plaintiff, with some of Ms. Herskowitz's former co-defendants, somehow should also enable Ms. Herskowitz herself to obtain full satisfaction of the judgment, although she was not party to the settlement negotiations, contributed nothing to the settlement, and in fact bitterly opposed its approval in the Bankruptcy Court.

Merely to state the argument, of course, is to refute it, and to demonstrate its utter absurdity; it would be an ill-advised public policy indeed, that discouraged settlements by mandating that no post-judgment settlement could be reached with any defendant, without offering full satisfaction to every other defendant, whether participating or not. The law, of course, is exactly to the contrary; little purpose would be served in describing precisely the misdescription offered

by Ms. Herskowitz of each of the innumerable cases she mis-cites in this portion of her memorandum, but the argument is of a piece with the remainder of her offerings.

Still further afield is her claim that attorney fees in a shareholder's derivative action are payable only from the collected proceeds of a judgment or settlement. Indeed, the very case cited by Herskowitz herself is the leading case in this state – cited by plaintiff **in support** of the original motion herein – for the proposition that benefits other than money may and should be recognized as benefits to the corporation, for which derivative action fees should be awarded. Seinfeld v. Robinson, 246 A.D.2d 291, 295, 656 N.Y.S.2d 707, 710 (1<sup>st</sup> Dept. 1998). Were it even worth the effort after all that has gone before, Herskowitz's blatantly false description of the Seinfeld holding would itself be sufficient to call for a sanction motion against any ordinary defendant; but Herskowitz has transcended the ordinary contemnor, and has reached that state of grace where sanction motions punish only the attorney wasting the effort to make them, for her assets are where they cannot be found, and her person is where the Sheriff of New York County cannot reach her.

And yet again, at last, Herskowitz re-asserts the claim that after two decade-old holdings in this Court, and one in the Appellate Division, and a dozen or more in the state courts of Florida in the course of various collateral attacks by Herskowitz on this Court's initial jurisdiction, she may yet again dispute the personal jurisdiction of this Court over her.

Even in the incredible event that the argument were open to make, it would avail Herskowitz nothing, for the relief granted by the motion herein was not relief against her at all; it was relief granted with respect to the assets of the corporation, most surely subject to the jurisdiction of this Court. If Ms. Herskowitz appeared by submitting papers in opposition to plaintiff's mo-

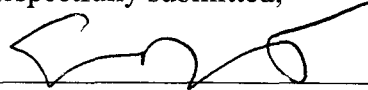
tion, she indeed did subject herself to jurisdiction; but even if she did not, it would avail her nothing, for the Court most surely had and has jurisdiction over the corporation (a New Jersey corporation operating real estate in New York City at the commencement of the action); over its own appointed New York receiver of corporation's the New York assets; and over those assets themselves, primarily the proceeds of sale of the corporation's New York real estate, remitted to the New York receiver by order of the New Jersey Bankruptcy Court at the conclusion of the bankruptcy case.

### CONCLUSION

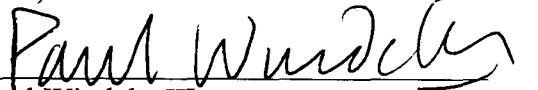
Movant's arguments for reopening her default surpass the frivolous. The motion should be denied, and plaintiff should have such other and further relief as may to the Court appear just and proper.

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

Respectfully submitted,



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