

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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: No. 24517 / 1988  
SUSAN CHARNEY, :  
:   
Plaintiff, :  
:   
against - :  
: NOTICE OF MOTION  
NORTH JERSEY TRADING CORPORATION, FOR PROTECTIVE ORDER  
ALEXANDER FRIED, JUDITH HERSKOWITZ, :  
~~ROBERT HERSKOWITZ, JUDITH HERSKOWITZ, JUDITH HERSKOWITZ,~~ :  
Assigned to:  
Defendants. : IAS PART 30  
: HEITLER, J.  
:   
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PLEASE TAKE NOTICE THAT, upon the annexed Affirmation of Steven Delibert, Esq., dated August 4, 2003, and the accompanying Memorandum of Law, the undersigned will move this Court at the courthouse thereof, at the Motion Submission Part, 60 Centre Street, Room 130, New York, New York, on September 15, 2003, at 9:30 o'clock in the forenoon or as soon thereafter as counsel may be heard, for an Order, pursuant to Articles 31 and 52 of the New York Civil Practice Law and Rules, protecting plaintiff against the Document Production Demand of Judith Herskowitz, dated July 14, 2003, together with such other and further relief as may to the Court seem just and proper.

PLEASE TAKE FURTHER NOTICE THAT, pursuant to CPLR Rule 2214, all answering papers must be served so as to be received at least seven days before the return date of this motion.

Dated: New York, New York  
August 5, 2003

Yours, etc.

STEVEN DELIBERT  
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New York, New York 10007

Attorney for Plaintiff  
(212)267-7183

TO: JUDITH HERSKOWITZ  
P.O. Box 403543  
Miami Beach, Florida 33140

Defendant *pro se*

~~XXXXXXXXXXXXXXXXXXXX~~  
~~XXXXXXXXXXXXXXXXXXXX~~  
New York, New York 10024

Defendant *pro se*

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~~XXXXXXXXXXXXXXXXXXXX~~  
Miami Beach, Florida 33140-2939

Defendant *pro se*

KAREN E. BEZNER, ESQ.  
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Former Trustee in Bankruptcy

PERRY & WINDELS  
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Attorneys for Paul Windels III, Receiver

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No. 24517 / 1988

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SUSAN CHARNEY,

Plaintiff,

- against -

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

Defendants.  
----- x

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

:  
AFFIRMATION IN  
SUPPORT OF MOTION  
FOR PROTECTIVE ORDER

STEVEN DELIBERT, an attorney duly admitted to practice before the Courts of this State, affirms, pursuant to CPLR Rule 2106:

1. I am attorney for the plaintiff, Susan Charney. I submit this Affirmation in support of the within motion for a protective order, pursuant to Articles 31 and 52 of the New York Civil Practice Law and Rules, against the purported Document Production Demand of Judith Herskowitz, dated July 14, 2003, a copy of which is annexed hereto as Exhibit A.

2. I have served a Notice of Rejection, and Objections to Ms. Herskowitz's Document Production Demand, copies of which are annexed hereto as Exhibit B.

3. I seek a Protective Order from this Court because the demand for documents was improperly served and is void; because Ms. Herskowitz's past history herein demonstrates conclusively her penchant for misconduct, and for using any and every opportunity for harassment and abuse of opposing parties and the Court; because the demand constitutes a burdensome and oppressive "fishing expedition", seeking immense numbers of wholly irrelevant documents; and because Ms. Herskowitz has no standing to seek the documents which she demands.

4. In her present Document Production Demand, Ms. Herskowitz seeks disclosure of:

- a) “the full and absolute satisfactions of the judgments” which Ms. Herskowitz thinks should have been filed in connection with plaintiff’s settlement with Ms. Herskowitz’s former co-defendants, her sons ██████ and ██████ Herskowitz;
- b) “Any other relevant papers received on the settlement . . . .”; and
- c) “Time sheet on the fees requested by Steven Delibert in Motion in Support on Motion Directing Disbursement of Assets.”

**Improper Service by “Fax”**

5. The sole “service” of the document demand by Ms. Herskowitz on the undersigned, was by “fax” on or about July 14, 2003. The undersigned, however, has not consented to service by fax, either by including a fax number in the address block of papers served herein, nor by any other means.

6. That “service” by unpermitted fax, was only the latest in a long series of improper actions by Ms. Herskowitz, in which she has abused methods of service of papers, rendered herself impervious to various forms of service while not hesitating to use those same forms of service on other parties in the action.

7. The Court’s own personnel are familiar with the most recent series of such episodes, in which she barraged the Court and other parties with a series of faxes, while insisting that she herself had no fax by which she could receive responsive papers.

8. Despite her denials, Court personnel were present on the telephone during attempts to arrange a conference call directed by the Court, wherein Ms. Herskowitz’s telephone

rang unanswered for a long period of time, then was answered by a machine that sounded indisputably like a fax machine. Clearly, Ms. Herskowitz has sought to abuse the privilege conferred by the CPLR allowing service by fax in certain circumstances, and should not be permitted to engage in such deceitful conduct.

**Prior Improper Conduct of Defendant.**

9. That the document demand – even if not void for improper service – is indubitably made for improper purposes is shown by Ms. Herskowitz’s past history of misconduct herein, which is inescapably demonstrated in the record. Since this Court entered a default judgment<sup>1/</sup> against her in this action in the amount of \$4,300,024.42 on January 21, 1994 (*See* Affirmation of Steven Delibert dated May 28, 2003, and submitted in support of the pending Order to Show Cause (“Delibert O.S.C. Aff.”) ¶ 12, Ex. A), Ms. Herskowitz has launched a fusillade of collateral attacks on that judgment, all of which have ultimately proved unsuccessful, but which have imposed significant cost and hardship on plaintiff, on myself and the other attorneys who have appeared for plaintiff, and on the courts. It is plain that this Document Production Demand, like most of Ms. Herskowitz’s ploys for the past ten years, is no more than another attempt to forestall justice in these proceedings.

10. Moreover, as described in detail in the Delibert O.S.C. Affirmation, Ms. Herskowitz has defied Courts up and down the East coast of the United States, both State and Federal.

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<sup>1/</sup> Not a “default” based on “sewer service”, or any mere inadvertency by defendant Herskowitz. As she has never denied, she was personally handed process in the office of plaintiff’s attorney in New York City. After litigating – and losing, at Special Term and in the Appellate Division – jurisdictional challenges to service based on such technical claims as “enticement” and on whether the summons was on top of the pile of papers she was handed, Herskowitz simply refused to accept the result, refused to comply with any of this Court’s orders for production of documents, etc., and refused to appear at inquest.

This Court has repeatedly sanctioned her conduct, Charney v. North Jersey Trading Corp., 150 Misc.2d 849, 578 N.Y.S.2d 100 (Sup. N.Y. 1991) (\$5,000 sanction), twice held her in contempt of Court, Charney v. North Jersey Trading Corp., Index No. 24517/88 (Sup. N.Y.), Order entered Jan. 19, 1993 (\$23,500 fine for contempt), and Herskowitz v. Tompkins, Index No. 23002/92 (Sup. N.Y.), Order entered Jan. 19, 1993 (\$7,000 fine for contempt), and ordered her arrest for contempt of Court, Charney v. North Jersey Trading Corp., Index No. 24517/88 (Sup. N.Y.), Order entered Feb, 19, 1993 (Order of Commitment), and Herskowitz v. Tompkins, Index No. 23002/92 (Sup. N.Y.), Order entered Feb, 19, 1993 (Order of Commitment).

11. This Court is not alone in sanctioning Ms. Herskowitz and/or holding her in contempt. *See* Delibert O.S.C. Aff. ¶ 18, nn.7-10, for citations to sanctions and orders holding Ms. Herskowitz in contempt issued by the Appellate Division, First Department, the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit, and the United States Bankruptcy Court for the District of New Jersey.

12. That Ms. Herskowitz has unsuccessfully sought to thwart the judgment of this Court through collateral litigation, including litigation brought against judges sitting in these proceedings (*see* Herskowitz v. Hon. Harold J. Tompkins, 184 A.D.2d 402, 585 N.Y.S.2d 386 (1<sup>st</sup> Dept 1992), *appeal dismissed*, 80 N.Y.2d 1023, 607 N.E.2d 818, 592 N.Y.S.2d 671 (1992)) and motions for recusal of nine separate judges (*see* Delibert O.S.C. Aff. ¶¶ 17-24, n.11), therefore raises a serious concern that the demand here is made only for the further improper purpose of delay and harassment.

**Overbroad Fishing Expedition.**

13. That Ms. Herskowitz is engaged in an overbroad fishing expedition, in search of

documents which have no relevance at all to any conceivable issue herein, is demonstrated by her demand for copies of satisfactions of judgments which she thinks should have been filed – in which case, of course, they would be public record – and for “all other papers received in connection with the settlement”.

14. The documents relating to the settlement and disposition of the judgment against the former co-defendants and Herskowitz simply have absolutely nothing whatsoever to do with the sole issue before the Court, of the proper distribution of the remaining assets of the corporation.

15. Ms. Herskowitz apparently seeks the documents relating to the settlement with her former co-defendants, in support of a totally misperceived claim which she has heretofore sought unsuccessfully to advance in the Bankruptcy Court and other forums where actions related to this one have been litigated. She purports to believe that compromise, settlement and satisfaction of judgment against one defendant, necessarily and inescapably results in release of all other defendants, even those not contributing to or participating in the settlement in any way. (See, e.g., Excerpt from Brief of Appellant Judith Herskowitz, In re North Jersey Trading Corp., No. CIV-99-5208 (GEB) (D.C., D.N.J.), annexed hereto as Exhibit C). As shown by the accompanying Memorandum of Law, Ms. Herskowitz’s arguments are entirely incorrect. The settlement with other defendants has absolutely no bearing on the judgment against Ms. Herskowitz.

**Lack of Standing.**

16. In addition, whatever might otherwise be the propriety of the document demands asserted by Ms. Herskowitz, she simply has no standing to assert those demands.

17. To the extent Ms. Herskowitz might otherwise have standing to participate herein

as a shareholder, she is clearly estopped from any such purported standing, by the fact of the \$4.2 million derivative action judgment outstanding against her in favor of the corporation.

18. The only reason that Ms. Herskowitz remains a “shareholder” at all, is her refusal to comply with prior orders of this Court, directing her surrender of stock in the corporation – one of the bases on which she has heretofore been held in contempt. See, Exhibit D hereto (Decision and Order, Tompkins, J., 9/18/1992, in both No. 23002/1992, Herskowitz v. Tompkins, and No. 24517/1988, Charney v. North Jersey Trading Corp., *inter alia*, granting turnover order for shares of stock in North Jersey Trading Corp.; granting contempt unless defendants appear for deposition before referee commencing 10/29/1992, directing production of books and records at least 10 days before); and see Exhibit E hereto (Order and Judgment, Tompkins, J., Jan. 19, 1993, in Herskowitz v. Tompkins, Index No. 23002/1992, holding Petitioners-Judgment Debtors in contempt for failure to turn over shares, directing fine of \$7,000.00 for contempt.)

19. Plainly, where Ms. Herskowitz remains a “shareholder”, only because of her failure and refusal to comply with the Orders of this Court, and where she has indeed been held in contempt of this Court for failure to turn her shares over to the Sheriff, it would be anomalous indeed to permit her nevertheless to assert that she is a “shareholder” for purposes of further delay and obfuscation in this proceeding.

20. In addition, even if Ms. Herskowitz might otherwise still be a shareholder in the corporation, she is a shareholder who has been found guilty by this Court of participation in a scheme to strip the corporation of its assets and divert them to her own uses; who has sought to mulct her own sister, plaintiff Susan Charney, of Charney’s shares in the corporation; who has pillaged and laid waste to the corporation in her reckless, scorched-earth defense against bearing

the consequences of her actions, and has generally placed herself at odds with the corporation's interests for a continuous period of more than fifteen years.

21. Such a "shareholder" is hardly an appropriate representative of the corporation in any litigation, particularly where – as here – she seeks to place herself at odds with the position of the very Receiver appointed by this Court to protect the corporation's assets from the depredations of Ms. Herskowitz and her former co-defendants.

22. I have made this motion in addition to serving objections to the Document Production Demand in order to avert another commonly-used ploy of the defendant Herskowitz, who could otherwise be expected to respond to the objections by serving a Motion to Compel Discovery returnable many months from now, in the hope of delaying the final disposition of this case still further.

23. I have tried to resolve this matter in good faith. Prior to serving her Document Production Demand, Ms. Herskowitz telephoned me and made an oral demand for the documents here sought; I informed her that she was not entitled to them, and they would not be forthcoming. The faxed demand then ensued, and Ms. Herskowitz has refused to retract it.

24. I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
August 4, 2003

A handwritten signature in black ink, appearing to read "SMD", written over a horizontal line.

Steven Delibert