

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

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SUSAN CHARNEY,

Plaintiff,

- against -

NORTH JERSEY TRADING CORPORATION,  
ALEXANDER FRIED, JUDITH HERSKOWITZ,  
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Defendants.  
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IAS PART 30  
HEITLER, J.

PLAINTIFF'S MEMORANDUM OF LAW  
(I) IN REPLY, IN SUPPORT OF  
MOTIONS FOR DISBURSEMENT OF FUNDS  
AND FOR PROTECTIVE ORDER  
AND  
(II) IN OPPOSITION TO CROSS-MOTIONS  
OF DEFENDANT JUDITH HERSKOWITZ

**HERSKOWITZ' CLAIM THAT THE JUDGMENT  
AGAINST HER IS SATISFIED IS MERITLESS.**

Apparently seeking to support her supposed entitlement to discovery of the satisfaction of judgment given to [REDACTED] in connection with the settlement with them, Ms. Herskowitz continues to advance her ludicrous claim that the settlement as to her former co-defendants, [REDACTED]; necessarily constituted satisfaction of judgment as to her as well. She has asserted this claim, although she did not participate in the settlement discussions in any way, did not contribute to the settlement, opposed approval of the settlement in the Bankruptcy Court; and has neither offered nor given any consideration to any

other party, and although the settlement documents were specifically drafted to run only to ██████████ and ██████████ Herskowitz.

Such an outcome would be directly at odds with the public policy favoring settlements, for it would discourage a plaintiff in any case from settling with fewer than all defendants at one time, and would permit a single defendant, no matter how unreasonable and recalcitrant, to hold veto power over settlements among more reasonable parties.

New York State law, of course, is directly to the contrary. The arguments Ms. Herskowitz has advanced in support of her claim are totally misplaced, and the cases she has offered have nothing to do with the facts of this case. Thus, in *Velazquez v. Water Taxi, Inc.*, 49 N.Y.2d 762, 403 N.E.2d 172, 426 N.Y.S.2d 467, 468 (1980), the court held "that satisfaction of a judgment rendered against one tort-feasor discharges all joint tort-feasors from liability to the plaintiff," *where plaintiff had prevailed in an arbitration brought against only one of the alleged joint tort-feasors, and had collected the full amount awarded by the arbitrator.* In the present case, by contrast, Judith Herskowitz was a defendant from the outset, and judgment entered against her as well as against the other defendants; and plaintiff has, of course, collected nothing like the "full amount" of the judgment. Likewise, in *Blanco v. J & B Associates*, 177 A.D.2d 370, 576 N.Y.S.2d 124 (1<sup>st</sup> Dept. 1991), a plaintiff was barred from pursuing a second, separate action against a second alleged joint tort-feasor, after settling and compromising a judgment obtained in an action which had been commenced against only one tort-feasor.

*Rock v. Reed-Prentice Division of Package Machinery Co.*, 39 N.Y.2d 34, 382 N.Y.S.2d 720, 346 N.E.2d 520 (1976), is likewise distinguishable, and irrelevant here, for it involved a plaintiff who settled his judgment against the primary defendant, then sought to collect further *not*

against a co-defendant, but against a *third-party defendant* who had been brought in by the primary defendant.

*Gallivan v. Pucello*, 38 A.D.2d 876, 329 N.Y.S.2d 211 (4<sup>th</sup> Dept. 1972), holding that, "Even though separate judgments are recovered against joint tortfeasors, the satisfaction of one judgment discharges the other from liability," was describing the law only where the first judgment had been "satisfied" in the sense of *full payment*, and collection anew on the second judgment would constitute unjust enrichment of the plaintiff. Here, where the judgments for over \$4,000,000 have been "satisfied" only to the extent of the \$150,000.00 paid by settling defendants ██████ and ██████ Herskowitz, there is hardly a risk of "unjust enrichment".

The correct principle is stated in the portion of General Obligations Law §15-108 which Ms. Herskowitz does *not* cite in her reference to the statute:

In accordance with the principle against double recovery, any judgment versus a non-settling tortfeasor must be reduced, at minimum, by the amount already paid to the plaintiff by the settling tortfeasor.

If Ms. Herskowitz ever offers to pay anything approaching the \$4,300,000 which she owes (excluding a nearly equal amount now accrued in interest on this 1994 judgment), plaintiff will gladly credit her with the \$150,000 heretofore paid by the other defendants.

Finally, *DeSano v. Tower*, 129 A.D.2d 976, 514 N.Y.S.2d 153, 154 (4<sup>th</sup> Dept. 1987), is wholly irrelevant, dealing with the effect of temporary stay of an action against one joint tortfeasor, while continuing to pursue the other. It does, however, observe, as we have noted above, that the anti-unjust-enrichment provision of G.O.L. §15-508 "applies only where there has been a settlement in which a plaintiff discharges one of several tort-feasors *prior* to a verdict" (emphasis supplied), and has nothing to do with the present case, where judgment entered against *all* of the

joint-tortfeasors.

But even if the judgments against Ms. Herskowitz were not outstanding, the doctrine of unclean hands bars Ms. Herskowitz from pursuing discovery in connection with the Order to Show Cause. As plaintiff has argued in support of that Order, the doctrine of unclean hands – specifically that Ms. Herskowitz has magnified the cost of recovering the assets in the Fund through her sanctioned and contumacious conduct, including sanctions that she still owes to plaintiff, imposed by this Court and the Appellate Division – bars Ms. Herskowitz from opposing the proposed distribution of the Fund. *See* Memorandum of Law dated May 28, 2003, in support of proposed distribution at 13-16. Since Ms. Herskowitz has no standing to oppose the proposed distribution, she cannot obtain discovery in connection with it either.

**CHARNEY'S SUCCESSFUL EFFORTS ON BEHALF OF THE CORPORATION ENTITLE HER TO THE FEES REQUESTED UNDER NEW YORK LAW.**

Herskowitz seeks to oppose the present application, by arguing that the fees awarded to Charney's counsel in the Bankruptcy Court are dispositive of the entire fee issue. She is, of course, totally erroneous.

First, the fee applications in the Bankruptcy Court were strictly limited to services performed *within the four corners of that proceeding* (Motion by Susan Charney for Allowance of Counsel Fees, at ¶ 10: “. . . excluded herefrom are any services or disbursements by the undersigned and other counsel, in the numerous other courts and other proceedings in which the undersigned has appeared on behalf of Charney, with respect to her successful derivative action on behalf of the Debtor . . .”; Motion by Susan Charney for Second Allowance of Counsel Fees, at ¶ 8: “. . . no compensation is sought for the continuing efforts in numerous other courts, not only as

to the collection activities in the New York and Florida courts, but also opposition to the Herskowitzes' frivolous action in the federal courts to stay further state court proceedings . . . ”)

Second, in bankruptcy proceedings, attorneys for shareholders and other interested parties are not awarded fees from the bankrupt estate for all services performed, but only for services which make a direct and “substantial contribution” to the bankruptcy case itself. 11 U.S.C. §§503(b)(3)(D) and 503(b)(4).

The fee analysis in a shareholder's derivative action, however, is entirely different from the analysis in a bankruptcy action, governed by different and far broader standards, as discussed at length in our opening brief, most recently elucidated in this State by the Appellate Division's opinion in *Seinfeld v. Robinson*, 246 A.D.2d 291, 676 N.Y.S.2d 569 (1<sup>st</sup> Dept. 1998), and is governed by the Court's determination as to whether a “substantial benefit” – *monetary or otherwise* – accrued to the corporation from the derivative plaintiff's efforts.

The trustworthiness of Herskowitz's analysis on the entire subject, may be gauged by her reliance on the lower court decision in *Seinfeld v. Robinson*, 172 Misc.2d 159, 656 N.Y.S.2d 707 (Sup. N.Y. Co. 1997) – almost the *only* authority she cites, which was *reversed* by the Appellate Division in *Seinfeld v. Robinson*, 246 A.D.2d 291, 676 N.Y.S.2d 569 (1<sup>st</sup> Dept. 1998), cited and **discussed at length in the moving papers herein**, which Herskowitz has had in her possession since early June, 2003, more than three months prior to the date of her September 19 memorandum. As discussed at length in our opening brief, the Appellate Division's opinion in reversing *Seinfeld* made abundantly clear that the lower court's constricted view of the basis for fee awards in derivative actions – on which Herskowitz places almost entire reliance – was entirely incorrect, and in no way whatever represented the law of this State.

**CONCLUSION**

Herskowitz has offered this Court no reason why she should be granted a stay in deference to her purportedly intended motions in other, inactive litigation; no reason why she should have the discovery she seeks; and no reason why the Court should not grant in full the application for fees and disbursements made by plaintiff herein.

The plaintiff's motion should be granted in its entirety, together with such other and further relief as may to the Court seem just and proper.

Dated: New York, N. Y.  
October 14, 2003



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