

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.

---

**NO JURISDICTION EXISTS TO AWARD FEES UNDER BCL 626 (e) SINCE  
THIS WAS NOT A GENUINE DERIVATIVE ACTION AND NEITHER PLAINTIFF  
NOR HER ATTORNEY CONFERRED A BENEFIT UPON THE CORPORATION**

In his Statement of Facts in support of Plaintiff's motion for distribution under New York Business Corporation Law §626(e), "of the sum of approximately \$682,225.89, at the "conclusion of this long and ultimately successful derivative action", attorney Delibert admits that not more than \$150,000.00 was obtained through a post-judgment settlement with XXX and XXX Herskowitz. What attorney Delibert fails to discuss, is that this so-called recovery of \$150,000.00 was administered through the Bankruptcy Court and Delibert has already been compensated for his efforts by an allowance of close to \$50,000.00 from the Bankruptcy Court. He further admits being paid another \$68,500.00 from Charney, so that he received a total of \$118,500.00.

Attorney Delibert attempts to take credit that in pursuing enforcement in New York on that 4.2 million dollar judgment he "discovered a co-operative conversion interest of XXX Herskowitz in New York, which he attached by means of a successful turnover action". In fact, this "co-operative conversion interest" was well known to Charney and Delibert, because this was where

Charney's father Fried resided until he moved to Florida on or around 1986 and that is how it came to XXX Herskowitz his grandson. Delibert goes on to acknowledge, as noted before that a settlement was negotiated with XXX and XXX Herskowitz with the approval of the Bankruptcy Court, for the full satisfaction of that 4.2 million dollar judgment, for which at the most he could extract \$150,000.00 by threatening to sell the cooperative rights to that New York apartment and to oust its occupants XXX Herskowitz and his family. Consequently, that 4.2 million dollar judgment was extinguished in the Bankruptcy Court especially as aforesaid because the full satisfaction of that judgment discharged that derivative judgment as to all the jointly liable judgment debtors including Judith Herskowitz.

There can be no question about the fact that emptying out North Jersey Trading Corporation to leave it an empty shell for fees of Charney's attorneys confers no benefit on North Jersey. Nor do Charney's activities as described fully in the accompanying Affidavit causing the loss of its sole property at 200 Riverside Drive New York City. Additionally the evidence here is that Charney pursued her claims individually and has not shown any damages derivatively to North

To begin with the initial complaint, in five counts, was brought by Charney in her own name and right, to obtain access to books and records; for appointment of a receiver; for dissolution of the corporation and to award Charney damages of three million dollars (\$3,000,000.00). That three million dollar damage claim was then turned into derivative claim by Delibert as an afterthought, in an amended complaint, predicated upon phony allegations as a pretense for Delibert to generate fees for himself from the corporation in reliance on BCL 626(e), by litigating against the Herskowitzes ad infinitum, while putting the blame on them for having the temerity to oppose his tactics that have so far precluded and obstructed their right to be heard.

That second complaint dated January 26, 1989 and verified by Charney on January 28, 1989 was prepared by Delibert. It was nearly identical to her first complaint, except that the so-called derivative claim was added under count 7 alleging that Judith Herskowitz, XXX Herskowitz and XXX Herskowitz had diverted and looted the assets income and property of the corporation. Leave to amend was granted retroactively under order of March 8, 1989, subject to determination on the service in a traverse hearing. The Herskowitzes were not required to respond to that second complaint until sometime in November 1991. The Verified Petition consisting of seven counts had only one claim derivatively on behalf of North Jersey. However, the derivative allegations were still overshadowed by the remaining counts of the new complaint that remained individualized for Charney's sole benefit; and even more significantly, the relief Charney sought was almost entirely for her individual benefit, including damages on her personal behalf.

Although the new complaint modifies the caption to read "Susan Charney, individually and as shareholder of an on behalf of North Jersey Trading Corporation" the most telling detail is that in the body of the complaint Susan Charney continues to refer to herself as the petitioner, solely for herself, without mention of North Jersey Trading Corporation. Under §626(e) a true derivative action can be brought only "in the right of a domestic or foreign corporation to procure a judgment in its favor". Furthermore, under §626(c), it is provided that "the complaint shall set forth with particularity the efforts of the plaintiff the initiation of the action of the reasons for not making such effort". No such effort was even attempted by Charney.

As supported by the record Charney did pursue each and everyone of her individual claims commencing with her action for declaratory judgment to declare herself to be a shareholder of North Jersey, to inspect the books and records of North Jersey, for dissolution of North Jersey, for the

appointment of Windels as receiver and so forth. Yet Delibert would claim fees indiscriminately on an hourly basis under BCL §626(e) for pursuing these claims individually for Charney.

Only in ¶39 of Count 7 of the Verified Petition does Charney make any attempt to comply with statutory pre-requisite for a derivative suit by making sham allegations of waste and diversion of corporate income, to which income at any rate Charney conceded at a later date that only Alex Fried was entitled to (¶67 of the Affidavit). The more significant point is that Charney and Delibert were never able to support their allegations of looting, waste and diversion of corporate assets, even in the context of their one sided and ex parte presentation at the inquest for damages in her derivative suit. An examination of Delibert's Post-Inquest Memorandum makes this perfectly clear. Rather than damages caused by "looting" and "diversion" the Plaintiff's theory of damages was predicated on claims of mismanagement.<sup>1</sup>

In addition, when Charney commenced her litigation in December 1988 she also filed a lis pendens on the property, which prevented North Jersey from securing conventional refinancing of its mortgage that ballooned and for refurbishing the vacant apartments. So once again, Delibert exploited the financial distress Plaintiff's action caused the corporation by manufacturing damages from lost rentals which at any rate were minimal because of controlled rents under New York law.

---

<sup>1</sup> One of which was a fictional \$960,000.00 loss of value due to vacant apartments has which in fact was the value added when the bankruptcy trustee sold that building. The other item of damage involved the loss of rental income in excess of reasonable expenses from January 1, 1985 until February 28, 1993, totaling \$2,016,840.59. Yet, on page 15 of Delibert's memorandum, at paragraph (4) Delibert refers to monthly rent reports from June 1, 1991 through January 1993, by the management corporation "retained to manage the property by the Receiver appointed pursuant to mortgage foreclosure". Delibert nowhere differentiates between any reduced rentals that appear prior to the foreclosure and those that arose afterwards in 1991, when the Receiver for the mortgage holder was placed in charge, despite the fact that Plaintiff contends the loss of rentals runs through the period until February 28, 1993.

Thus, the allegations of looting and diversion alleged in the second complaint were manufactured to state a sham derivative cause of action.

Yet another item of damages described on page 25 of Delibert's Post Inquest Memorandum is a \$200,000.00 mortgage. It is not explained when the "two new mortgages" were placed. Although Delibert asserts that these mortgages were "improper" he never suggests in the slightest way that any of the Herskowitz defendants benefitted personally from these mortgages. Without proof of any personal benefit or diversion Delibert says that because it is the "defendants' obligation to account", their liability must be presumed by default. Delibert arrives at this conclusion by relying upon "the allowance for regular expenses already made in plaintiff's proposed accounting". Of course the Herskowitzes had no opportunity to account, or to dispute anything to account for because as Delibert states on page 2 of memorandum their misconduct "has been established for all purposes".

So, the Herskowitzes' liability arises in the absence of "any showing that the proceeds were used for lawful corporate purposes", as he further states on page 25. Hence, once again damages are interposed without proof. Moreover on parties, such as Judith Herskowitz who at all times material to Charney's litigation resided in Florida and has not been shown to be actively involved in the management of the North Jersey property and where it was conceded by Charney that all the North Jersey income was Fried's (§67 of the Affidavit).

In his Report dated March 22, 1990, the Referee approved these damages by crediting "all of the uncontradicted evidence as to Plaintiff's losses". It is noteworthy that this Report names Charney, individually as Plaintiff without reference to North Jersey Trading Corporation. So, too, did Delibert's Post Inquest Memorandum. So, too does Delibert's Statement of Facts in support of

the motion for distribution. So, too, does Delibert's Statement of Facts in support of the motion of distribution. So, too does Delibert's Affirmation in support of motion for distribution. So, too does Charney's Affirmation in support of motion for distribution. So, too does Windels Affirmation in support of motion for distribution. And, so too, for does this Court's Show Cause Order of June 20, 2003.

However, such individualized denominations of the party plaintiff are contrary to the required form under McKinney's §8:02 for a complaint in a Shareholders' Derivative Action. Such actions must be captioned and brought "in the right of [the corporation] to procure a judgment in its favor and suing on behalf of all the shareholders thereof similarly situated". Here, by contrast, Charney dispenses with even the pretense of a derivative claim, since the relief being sought upon her motion is exclusively for her benefit and for the benefit representing her individual interests. As such, fees cannot be awarded pursuant to BCL §626(e)

In fact, because the items of damages presented ex parte at the inquest at best never rise above losses arguably attributable to managerial inattention, rather than due to the theft or diversion, Charney's failure to "set forth with particularity the efforts of plaintiff to secure the initiative of such action by the board of trustees" cannot be excused by claiming it was "futile to demand that said persons cause the corporation take any action to recover its wasted and stolen assets from themselves". Consequently, a statutory pre-requisite to any derivative claims alleged in Charney's Verified Petition is lacking.

In fact, as noted in ¶67 of Judith Herskowitz's accompanying Affidavit, to emphasize again Charney knew that her derivative allegations against the Herskowitzes for theft, diversion, waste and looting were false. For as referenced in the deposition of Charney therein described, she

acknowledged that the corporate income and property was being used to provide support for her father while he was alive. In fact, as the accompanying Affidavit at ¶46 fn. 17 shows, all her items of damages were manufactured. So, Charney perjured herself with the derivative allegations of her second complaint, in order to keep her failed individual action alive, by engrafting upon it the false derivative allegations. Or more accurately put, Steven Delibert invented the derivative allegations of the new complaint, that Charney was induced to falsely verify, so they could pursue this confiscatory litigation for both Charney's and Delibert's exclusive benefit.

Still, regardless of whoever or whatever may have been the cause of the damages contained in the Referee's Report of March 22, 1993, not even Delibert indicates that Judith Herskowitz had anything to do with causing them. On page 5 and 6 of his Post Inquest Memorandum, Delibert states that XXX and XXX Herskowitz were responsible for collecting rents, prepared rent rolls and paid expenses. On page 7, Delibert states that XXX Herskowitz was the "active management". On page 25, Delibert states that the "improper" mortgages totaling \$200,000.00 were obtained through the efforts of XXX and XXX Herskowitz.

Nowhere is it claimed that Judith Herskowitz had anything to do with the management of the apartment building, or played an active role in the affairs of the corporation. As such, she was just as passive as Charney, and as indicated earlier, was brought into this case in order to be made liable under Charney's sham derivative claims, and upon Delibert's manufactured damages, so that Delibert and Charney could use her fraudulently procured derivative judgment as the means to confiscate Judith Herskowitz's stock interest. And they now seek to rely upon BCL 626(e), however wrongfully, to achieve these corrupt ends.

To be sure, when Delibert's Post Inquiry Memorandum is examined with an eye to Charney's

actual pre-suit concerns, as stated on page 4, as opposed to her false derivative allegations, it is evident that the dispute arose over “the creation of vacancies in the property” and the removal of fixtures “rendering apartments uninhabitable”. This reinforces the fact, noted at the outset of this discussion, that the vacancies were being created to take advantage of the relief provisions of the 1986 Tax Reform Act, which Delibert alluded to in his letter of December 1, 1988 to Judith Herskowitz (Exhibit D-). So, the unrented apartments that were being left vacant for the purpose of transacting a co-op conversion or to bring the low rents up to market were the source of the controversy, instigated by Charney, and then exploited by Delibert by his manufactured damage claims arising from those vacancies.

Yet even assuming Charney was not acting out of a desire to shake down her family through exploitive derivative allegations, at the bottom of her dispute with her family over the operation of the apartment building was a difference of opinion over the corporate management. Charney wanted the building sold and to be cashed out. The other family members wanted to convert to co-op through refinancing. The problem that Charney faced in bringing this litigation is that the business judgment rule would have raised a barrier to her action if all she could show was a dispute over the managerial direction at the corporate business. *Lewis v. S.L. & E. Inc., etc.*, 629 F.2d 764, 708-09 (2<sup>nd</sup> Cir. 1980) In fact as noted earlier, her initial action was discarded. That is why she engrafted the sham derivative allegations of theft and diversion, to raise a false appearance of mismanagement and conflict of interest upon the face of the complaint, so as to escape the business judgment rule. *Lewis*, supra. at pgs. 709-712.

Thus, although BCL §626(e) permits a recoupment of legal fees from the proceeds of a judgment or settlement, a fee request may be denied where the corporate defendants acted for a

bonafide business purpose. *Seinfeld v. Robinson*, 656 N.Y.S. 2d 707, 719 (Supr. Ct. 1997) Moreover for an award of attorney's fees to be justified "the benefit to the corporation and the general body of shareholders must be "substantial" to prevent derivative action from becoming - purely strike suites of great nuisance and no affirmative good...." *Seinfeld v. Robinson*, supra, at pgs 711-712. Lastly, when an alleged derivative action is brought to recover damages resulting in harm to the individual shareholder, the suit remains personal, not derivative. *Glenn v. Hoteltron Systems, Inc.*, 547 N.Y.S.2d 816, 819 (N.Y. 1989) On the other hand, for the suit to be derivative, then even a wrongdoing shareholder should ultimately be entitled to share in the proceeds of the damage award (Ibid). Finally, BCL §626(e) only allows for an award of fees from the proceeds of the judgment or settlement, but "it does not authorize the imposition of such expenses on the losing party. *Glenn v. Hoteltron*, supra., at p. 819. Therefore, upon these precedents and principals, no fee award pursuant to BCL §626(e) is permissible with respect to proceeds from the sale of corporation's real estate through the Bankruptcy Court, and for which Delibert has already been paid.

One other point needs to be emphasized. Charney's standing to pursue this derivative action required that establish her individual claim to shareholder status first, as a pre-requisite to pursuit of the derivative claim. *Center v. Hampton Affiliates, Inc.*, 66 N.Y. 2d 782, 786 (1985) To be sure the decision *Bernstein v. Polo Fashions*, 55 A.D. 2d 530 (1<sup>st</sup> Dept. 1976) cited by the Court of Appeals, held:

"Plaintiff individually, on behalf of himself and all of the stockholders of defendant....and also in the right of defendant charges....that defendant...wasted and mismanaged the corporate assets. Though this cause of action cannot be advanced by Plaintiff in his individual capacity...he has standing to assert it derivatively provided he was a stockholder at the time the alleged wrongs were committed at the time of trial and a the time of entry of judgment....Whether he has the right to maintain a stockholder's derivative action depends, therefore upon the outcome of

the third cause of action for there it is alleged [defendant] perpetrated a fraud on him in the preparation of a stock purchase agreement.....”

As noted in the Affidavit of Judith Herskowitz, at ¶31, Charney’s shareholder status was not recognized until Justice Tompkins granted her motion for partial summary judgment on March 5, 1992, for being “unrebutted”, after overlooking the Herskowitzes’ opposition papers filed on March 3, 1992. Charney was awarded a 20% interest under that March 5, 1992 order, essentially by compelled default. Another 20% interest was awarded to Charney, by judicial fiat, under Justice Tompkins’ order of January 19, 1993. (See, ¶40of the accompanying Affidavit.)

Consequently, Charney’s shareholder status was not established, prior to her awards of shareholder percentages, by triable evidence, or by proof subjected to standard tests of relevancy and admissibility. So, once again, this raises a problem of standing in relation to the period during which the derivative damages arose, along with the individual as opposed to derivative nature of Charney’s claims, with respect to fees permitted to be awarded under §626(e). In this regard, it will be recalled that the derivative damages supposedly caused by the Herskowitzes was from January 1, 1985 through February 28, 1993. However, Charney was not recognized as a shareholder until March 5, 1992 while the apartment building was under management by a court appointed receiver for the mortgage holder.

It was virtually impossible to separate the damages resulting from any alleged fiduciary breach by the Herskowitzes for the period prior to March 5, 1992, when Charney had no standing at all, and for the period of March 5, 1992 to February 28, 1993, when Charney had colorable standing. It was likewise impossible to separate post March 5, 1992 damages, related to the effect of any alleged fiduciary breach prior to Charney’s award of shareholder status, from the effects of

the foreclosure and management by the receiver fro the mortgage holder. For this reason attorney Delibert cannot distinguish between his representation of Charney in her individual right, and his representation of her in a derivative capacity, and he makes no attempt to do so.

**CONCLUSION**

Wherefore, by reason of the foregoing Charney has failed to show any entitlement for fees and expenses of her attorneys as sought in her Motion for Disbursement pursuant to BCL § 626(e) and therefore her motion it is respectfully requested be denied in all respects.

Dated: Miami Beach, Fl.  
October 1, 2003

Respectfully submitted,

JUDITH HERSKOWITZ  
Defendant Pro se  
P.O. Box 403543  
Miami Beach, Fl. 33140  
Tel:(305) 534-7600

By: \_\_\_\_\_  
JUDITH HERSKOWITZ