

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J.

SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,

**AFFIDAVIT IN SUPPORT OF
MOTION FOR
DISQUALIFICATION OF JUDGE**

Index No. 24517/88

STATE OF FLORIDA)
) S.:
MIAMI-DADE COUNTY)

JUDITH HERSKOWITZ, being duly sworn, deposes and says:

1. I make this affidavit on personal knowledge, without submitting to the personal jurisdiction of this Court, in support of this motion for an order of disqualification of Justice Sherry Klein Heitler. Justice Heitler has caused her impartiality to be reasonably questioned and is thereby disqualified to act in this case.

2. This matter has been before Justice Heitler for three years since May 29, 2003. During this time period, the primary objective was to eliminate Herskowitz a majority shareholder, to the extent of not allowing her to file any papers, so that Justice Heitler would rule without opposition only in favor of Susan Charney, her counsel the late Steven Delibert and the named receiver Paul Windels III. By virtue of the power of her office, Justice Heitler resorted to psychological tactics to intimidate, defame and discredit Herskowitz.

3. In her March 23, 2006 order (Exhibit 1) Justice Heitler deprived Herskowitz of standing, in advance of the hearing on Windels' Motion for Approval of Accounting of Receiver, in which he attempts to create a backdated nonexistent receivership for North Jersey, relies on

untimely, retroactive publications, designates creditors after they were paid emptying out the surplus, except for the receiver's commission that Windels seeks without legal basis. It would be an exercise in futility for Herskowitz to travel from Florida to New York, for that hearing where she is denied the right to be heard. The matters upon which the Court relies for depriving Herskowitz standing to exclude her, are unsupported and are contrary to the record, furnishes no basis for the Court to approve Windels' motion ex parte, and requires the recusal of Justice Heitler.

4. On pages 2-3 of this Court's March 23, 2006 order, the Court states its reason for the depriving Herskowitz of standing as follows:

"Herskowitz alone, objects to Windels' submission of his final accounting as Receiver for North Jersey, and his request for commission pursuant to B.C.L. §1217. Herskowitz however, has **no standing** to lodge an objection to his accounting" because "Herskowitz is neither a creditor or shareholder. To the contrary, Herskowitz owes in excess of \$4 million to North Jersey, as there has been a judicial determination that Herskowitz must turn over her shares in North Jersey to the Sheriff of New York County. See Matter of Herskowitz v. Tompkins, Index No. 12002/92 (S.Ct. N.Y.Cty.Sept. 18, 1992)(Tompkins, J.) To date, Herskowitz has not complied with this order, and there are, at present, arrest warrants outstanding, based upon her failure to comply". (Emphasis supplied)

However, by this Court's own description the assertion of lack of standing is unsupported and is contrary to the record. Justice Heitler notes the date of that turnover order as September 18, 1992, (Exhibit 2) whereas that \$4 million judgment is dated January 21, 1994. Since that turnover order predates that 1994 judgment by almost two years (Exhibit 3) that 1992 turnover order was clearly not issued on that \$4 million judgment. As previously submitted to Justice Heitler that turnover order was on a \$5,000.00 money judgment in another case under Index No. 23002/92 (Exhibit 4). It was undisputed that the turnover order was without notice and motion served on Judith Herskowitz and so it is void. This was yet another matter that Justice Heitler

failed and refused to act upon to continue the illusion of a turnover order and arrest warrant against Herskowitz, upon which to defame and tarnish her image. Moreover, that \$5,000.00 money judgment was for counsel fees for Delibert, who is now deceased and so it would be a surrogate matter, and not within the jurisdiction of Justice Heitler.

5. As shown below Justice Heitler has persistently disregarded that the \$4 million judgment had been fully satisfied as well as that \$5,000.00 money judgment which by operation of law discharged all the jointly liable judgment debtors (Exhibit 5). Accordingly, Justice Heitler has laid no foundation to strip Herskowitz of her North Jersey shares, upon which to deny her standing for the unjust enrichment of the above named lawyers. Nor has Justice Heitler shown any legal basis to deprive Herskowitz's deceased parents to give shares of their corporation to Herskowitz.

6. In his Motion for Approval of Accounting of Receiver, Windels seeks approval for what is a misappropriation of the surplus funds. In her March 23, 2006 order Justice Heitler relates that in her April 13, 2004 order she approved plaintiff's proposed plan for disbursement of the surplus funds of North Jersey Trading Corporation ("North Jersey") of close to \$700,000.00. This was upon the Motion for Disbursement etc., of Charney, through Delibert joined with Windels upon which Justice Heitler issued ex parte an Order to Show Cause, dated May 29, 2003. Charney, Delibert and Windels predetermined in their motion, the respective shares in that surplus and the specific amounts they and their attorneys were to receive as follows: Susan Charney \$110,000.00 as an alleged reimbursement for fees that she paid; Steven Delibert, Esq. \$401,950.94; Eric C. Christu, Esq. \$105,000.0; William T. Livingston III Esq., \$18,000.00; Clifford Hark, Esq. \$25,000.00; Carlton, Fields, Ward, Emmanuel, Smith & Cutler \$2,500.00; Paul Windels, III, E`q., Receiver \$19,774.95 in the total sum of \$682,225.89. Thereupon

cleaning out North Jersey to the last penny with nothing going to Herskowitz a majority shareholder, which Justice Heitler readily adopted in her April 13, 2004 order.

7. This despite the fact that the surplus funds were transferred from the New Jersey Bankruptcy court to Paul Windels III as a stakeholder “custodian”, upon Delibert having convinced the Bankruptcy Judge not to distribute the surplus to the shareholders, because he claimed there remained a dispute as to the respective shares of the shareholders in that surplus, which should be determined in the New York court. However, Windels has taken possession of those funds by deception, in an interstate fraud, because no attempt to resolve any shareholder dispute was raised in plaintiff’s motion for approval of that prearranged plan for distribution.

8. As Herskowitz is now prevented from objecting to Windels’ accounting by that deprivation of standing, she was not allowed to challenge that pre-arranged sharing in the surplus as well, because as stated by Justice Heitler, Herskowitz was held in default. It is clear that had Herskowitz not been held in default, she would have been denied standing sooner. That default was contrived as well, because Herskowitz had submitted papers in opposition, and so she had not defaulted. The objective was the same for Justice Heitler to enter her April 13, 2004 order of approval ex parte. Not mentioning that since that \$4 million derivative judgment was satisfied, including fees there was no basis to file that motion for disbursement in the first place.

9. In her April 13, 2004 order (Exhibit 6) Justice Heitler purported to rely for her approval of that pre-arranged out of court fee agreement on N.Y. Business Corporation Law 626(e) which provides that in a derivative suit the court “may award plaintiff..... reasonable expenses including reasonable attorney’s fees” and without making any distinction as to what Charney pursued individually and what if any on behalf of North Jersey. Furthermore, of the

attorneys listed above only Delibert participated in that alleged New York derivative suit, for which he was compensated in the bankruptcy court. Christu, Hark and Carlton Fields are Florida attorneys, who never appeared in the New York case, they pursued no derivative suit and held no judgment for fees as well as Livingston a New York attorney who likewise made no appearance in that derivative suit. Obviously, Justice Heitler decided that she could not summarily approve a prearranged plan of fee division, where Section 626(e) requires a judicial determination of an award of fees, has now dispensed with that Section 626(e) provision.

10. Justice Heitler would now change course in her March 23, 2006 order to make a retroactive approval of "plaintiff's proposed plan for the disbursement of the funds held by Receiver Paul Windels III ("Windels") **to creditors** of North Jersey Trading Corporation....the various counsel who prosecuted this shareholder derivative suit on behalf of North Jersey". The groundwork for this change was laid by Windels in his Motion for Approval of Account of Receiver he submitted on September 30, 2006, in which he designated the recipients of that surplus for the first time as "creditors", in attempts to coverup his illegal prearranged distribution of the surplus and to suppress the truth.

11. This despite the fact that the surplus funds were transferred from the bankruptcy court free and clear of all claims of creditors, including Charney and her attorneys. In none of her prior orders had Justice Heitler named and treated the recipients of that surplus as creditors of North Jersey pursuant to Article 12 of New York Business Corporation Law. In fact none of the recipients of that surplus made a claim as creditors pursuant to B.C.L. §1207(a)(1)(C) to contrive this status of creditors after the fact. As noted in his Motion for Approval of Accounting Windels paid the surplus to Charney and her lawyers in July 2004 and engaged in a charade of retroactive

publication of his notice of appointment and notice to creditors, afterwards in the same month of July 2004 and published his notice calling a general meeting of creditors in November and December 2004 (Excerpt, Exhibit 7). This was meaningless, since B.C.L. 1207(a)(1) requires “immediate notice of his appointment” and to creditors to present their claim, and B.C.L. 1207(a)(2) requires the receiver to call a general meeting of the creditors of the corporation within four months from the date of his appointment, which Windels attempted to do 13 years later.

12. Windels expressly conceded that he never qualified and never served under that May 21, 1991 order, and has never taken his oath and never posted his bond under that order, which Justice Heitler likewise acknowledged in her March 23, 2006 order. To resuscitate Windels’ May 21, 1991 appointment of receiver for North Jersey, Justice Heitler contends that in the November 1995 order “the court renewed Windels’ appointment as Receiver”.

13. Justice Heitler omits that Windels was appointed in that May 21, 1991 order only as “**temporary receiver of the property** of North Jersey Trading Corporation” (Exhibit 8). Justice Heitler further omits that the derivative Final Judgment by default entered against ----- Herskowitz in November 1993 and against Judith Herskowitz in January 1994 had not reappointed Windels as permanent Receiver under B.C.L. §1203(b) and so any and all temporary receivership terminated.

14. Justice Heitler likewise omits that the November 1995 order was based on CPLR §5228 as post-judgment receiver for collection on that purported \$4.3 million judgment on behalf of plaintiff Charney against the judgment debtors. This was not followed by any publication. The CPLR §5228 postjudgment motion for appointment of receiver made no request for appointment of Windels as permanent receiver pursuant to B.C.L. §1202, and could

not because that required a pending action (Exhibit 9). The action was terminated by judgment as noted above and no new action was commenced pursuant to B.C.L. §1202(a)(4) which applies to a foreign corporation that North Jersey is. Since the North Jersey real property was sold in 1994 and all proceeds were held by the bankruptcy trustee, there was no property within the state for appointment of receiver of the property of North Jersey. Therefore, the only manner to have continued Windels was as permanent receiver in the judgment, which was not made.

15. But, even that CPLR §5228 post judgment receivership was no longer in effect at the time of the approval of plaintiff's plan of disbursement by Justice Heitler in her April 13, 2004 order, because satisfaction of judgment was issued on that judgment in excess of \$4 million as "wholly paid" including fees, which discharged the judgments on behalf of North Jersey against all the jointly liable judgment debtors that included Judith Herskowitz. For that same reason that the judgments had been satisfied there are no outstanding arrest warrants against Herskowitz

16. The satisfaction of judgments were signed by Windels, Charney and Delibert, which they failed and refused to file, as required pursuant to CPLR 5020 and refused to produce it as required under discovery rules, which Justice Heitler declined to enforce. It was not until June 2004 that I was able to procure a copy of that full satisfaction from other sources and presented it to Justice Heitler. Although Justice Heitler accepted that full satisfaction and other satisfactions as being a true and correct copy of the original she has wholly omitted the effect of the **satisfaction of judgments** from all her orders and declined to take judicial notice of the law of the State of New York, including the Court of Appeals, governing this issue.

17. There is yet another ground upon which no \$4 million judgment exists against Judith Herskowitz, which Justice Heitler likewise disregards. The burden of this litigation was placed

on Herskowitz a nonresident, without long arm jurisdiction, which prevented this Court to reach beyond its territorial boundaries. Upon the Herskowitzes initial objections to jurisdiction a traverse hearing was set down in an order of May 9, 1990, but it was never held (Exhibit 10). Justice Heitler refuses to recognize that the \$4 million judgment entered by default is void on its face for having been entered without the required proof of service of summons pursuant to CPLR 3515(e).

18. Justice Heitler relied on a December 10, 1991 order of Justice Tompkins cited as *Charney v. North Jersey Trading Corp.*, 150 Misc.2d 849, 850, 578 N.Y.S.2d 100 (Sup.Ct. N.Y. Cty. 1991) an ex parte order entered without notice to Herskowitz which relied on Delibert's false representation that Justice Silbermann in her May 8, 1990 order denied the Herskowitzes' "**initial motions to dismiss**" that she "resolved the jurisdictional issues" and "denied reargument on this issue". Justice Heitler failed and refused to hold an evidentiary hearing to enable Herskowitz to introduce into evidence that it was not her motion but that of North Jersey that was denied and not on jurisdictional grounds. Since that was an ex parte order no appeal lies from that order.

19. The issue was presented to Justice Heitler with supporting documents demonstrating that the \$4 million default judgment was fabricated by Delibert on a speculative loss of rental income, based on an inflated false rent roll and underestimated expenses that excluded many expenses and most of all any income for Herskowitz's father Alex Fried for the last ten years of his life, who died in 1992, a holocaust survivor who escaped from Communism. In face of the true documentary evidence Charney was unable to rebut the fact that the \$4 million judgment was procured by fraud. By that litigation the burden of support of my father was placed on me, in addition to the substantial attorney fees and expenses of this litigation, depleting my finances

for none of which was I ever reimbursed. I was compelled to appear pro se at the expense of my time and energies. Upon having received nothing from North Jersey Justice Heitler would leave me with that void \$4 million default judgment, to continue to ruin my credit.

20. That confiscation of property was accomplished on pretense of that fabricated judgment, which in addition to the fraudulent damages was stacked with a million dollars for prejudgment interest and around a million dollars for depreciated value, without any appraisal that would have shown the increased value of the real property, to which no defense was allowed. The corporation was driven into bankruptcy and its property was sold in August 1994 for around \$3 million, which was less than the \$4.2 million judgment that continued to run at a usurious rate of interest.

21. Contrary to Justice Heitler's contentions I have raised new issues, but none of the new issues had been ruled on the merits by Justice Heitler, nor could it be where I had not been afforded an evidentiary hearing on disputed issues.

WHEREFORE, by reason of the foregoing Judith Herskowitz does make the suggestion that the Judge of this Court disqualify herself from the herein titled action.

JUDITH HERSKOWITZ

SWORN to before me
this 31st day of May, 2006

Notary Public - State of Florida