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,
XXXX HERSKOWITZ and XXX HERSKOWITZ,

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISQUALIFICATION OF JUDGE

Index No. 24517/88

This motion for the suggestion of disqualification of judge relies on the facts set forth in the accompanying affidavit of Judith Herskowitz. Justice Heitler has repeatedly demonstrated her inability to act impartially between the parties and so she is disqualified to preside over this matter. Most significantly Justice Heitler dispensed with the adversary system of justice to proceed ex parte. Instead of considering the facts based on the applicable law and to afford Herskowitz an evidentiary hearing on disputed issues to rule on the merits, Justice Heitler resorted to psychological tactics against Herskowitz, defaming her, impairing her credibility, and altering facts to deny her motions summarily, to disregard her responses and to exclude her entirely. The acts of bias and prejudice of Justice Heitler against Herskowitz and in favor Susan Charney her counsel Steven Delibert and the assumed receiver Paul Windels III are numerous, some of which are highlighted below:

> Justice Heitler has demonstrated her lack impartiality by her very initial act in allowing Charney, Delibert and Windels to devise an extrajudicial plan for the disbursement of the entire surplus of close to $700,000.00 as they predetermined it among themselves as to the amounts they and others were to receive, with no intent of any determination of the shareholder interest of Herskowitz for which the surplus was transferred from the bankruptcy court to Windels as “custodian”.

Justice Heitler readily issued an ex parte Order to Show Cause dated May 29, 2003 on plaintiff's motion to disburse the surplus based on that extrajudicial plan, and foreclosed any opposition by Herskowitz by contriving a default against her in an April 13, 2004 order replete with ad hominem attacks, to give the appearance that the Court could summarily grant plaintiff's motion on pretense of undisputed facts as presented by plaintiff. Thereupon, without any judicial determination, that surplus unjustly benefitted three Florida attorneys and a New York attorney who never appeared in this case, made no record in this court, held no judgment from any court, and where the fee issues were already disposed in the bankruptcy court.

Justice Heitler has now demonstrated that if Herskowitz were not held in default then she would have been eliminated by denying her standing on a misrepresentation that "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". This is now utilized in the March 23, 2006 order in advance of a hearing on Windels' Motion for Approval of Accounting of Receiver to once more foreclose any opposition by Herskowitz to that prearranged misappropriation of the corporate surplus; also to the newly created theory of creditors; to the retroactive creation of a corporate receivership for Windels; which cannot be rectified pursuant to B.C.L. §1213 as shown below. That Justice Heitler would allow Herskowitz to appear at the June 26, 2006 hearing is a mere pretense of due process where she is denied standing and is not allowed to participate.

That deprivation of standing is unsupported by the record, because that turnover order of September 18, 1992 was not entered on that $4 million judgment, and predates by almost two years that $4 Million judgment dated January 1994. It was already shown that the turnover order was entered on a **$5,000.00** money judgment for Delibert in another case; that it is void, for lack of service of notice and motion; that pursuant to CPLR §5225 personal property can be ordered for turnover only in the amount of the judgment; that the $5,000.00 and $4 Million judgments were satisfied including <u>fees</u> and for lack of proof of service of summons the $4 million judgment is void on its face under CPLR 3515(e).

In her April 13, 2004 order Justice Heitler relied on B.C.L. §626(e), providing that the court "may award...reasonable attorney`s fees" in a derivative suit. But, in her March 23, 2006 order, Justice Heitler changed her 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."

There was no prior designation of Charney and her lawyers as creditors. This appeared for the first time in Windels' Motion for Approval of Accounting of Receiver submitted on September 30, 2005 and it appeared for the first time in

that March 23, 2006 order. Charney and her attorneys never made a claim pursuant to B.C.L. §1207(a)(1)(C) to qualify as creditors. The surplus was transferred from the bankruptcy court **free and clear** of all claims of creditors. This newly created theory of payment to creditors fails to comply with B.C.L. 1207(a)(1) requiring "immediate notice of appointment" of receiver and to creditors to present their claim and with B.C.L. 1207(a)(2) requiring the receiver to call a general meeting of the creditors of the corporation within four months from the date of his appointment, where Windels attempted to do it 13 years after the May 21, 1991 appointment of receiver by publishing his notice of appointment in July 2004 and his notice calling a general meeting of creditors in November and December 2004, all of which he has done after the participants in that prearranged plan were paid.

The attempt of a retroactive creation of a corporate receivership under B.C.L. Article 12 likewise fails. Omitted is the fact that the May 21, 1991 order appointed Windels only as **temporary receiver** of North Jersey, and terminated upon entry of that $4 Million Final Judgment. In attempting to resuscitate that receivership with a November 1995 order, it has been disregarded that it was based on a CPLR §5228 postjudment receiver on behalf of North Jersey as judgment creditor for collection on that $4 Million judgment with no mention of B.C.L. §1202. Section 5228 is a statutory receivership limited to the powers of receiver provided under the statute. Board of Education v. Woolsey, 254 App. Div. 621, 3 N.Y.S.2d 93 (3rd Dept. 1938).

Further disregarded is that pursuant to B.C.L. §1203(b) a temporary receiver is continued as permanent receiver in the final judgment, which was not done. *In Re Simonds Mfg*. 39 A.D. 576, 57 N.Y.S. 776 (1st Dept. 1899) The appointment of a receiver is required to be made in a pending action, and since North Jersey is a foreign corporation it comes under B.C.L. §1202(a)(4) which provides only for appointment of receiver of the property of the corporation "to preserve the assets in this state" which action is required to be instituted by service of summons pursuant to B.C.L. §1218. No such action was commenced, nor was there North Jersey property within the state, since it was sold in 1994 in the bankruptcy court and the trustee held the proceeds. Appointment of a corporate receiver would have been in violation of the automatic stay under 11 U.S.C. §362 and is void. *Kalb v. Feuerstein,* 308 U.S. 433, 438 (1940); *Ellis v. Consolidated Diesel Elec. Corp..,* 894 F.2d 371, 372 (10th Cir. 1990); and *Matter of Olah* 31 B.R. 39 (Bkrtcy S.D. Ohio 1983).

Even if the Court could enforce that $4 Million judgment against Herskowitz it could not be by confiscation of her stock certificates, but only upon due process, allowing Herskowitz to raise all her defenses in an evidentiary hearing, which this Court has failed and refused to accord Herskowitz. The New York court has reached beyond its boundaries without the required determination of long arm

> jurisdiction over Herskowitz. Upon the Herskowitzes initial objections, a traverse hearing was set down in a May 9, 1990 order, but it was never held. As a subterfuge 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 and motion served on 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 declined 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. *In Re Willmark Service System, Inc*. 21 A.D.2d 478, 251 N.Y.S.2d 267 (1st Dept. 1964).

It is the well settled New York law that the state is bound to furnish to every litigant not only an impartial judge, but one who has not, by any act of his justified a doubt of his impartiality. Whereby, every litigant is entitled to nothing less than the cold neutrality of an impartial judge who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence. In the administration of justice it is not only requisite that a judge should be honest, unbiased, impartial, and disinterested in fact, but equally essential that all doubt or suspicion to the contrary should be jealously guarded against and eliminated. It is not only the duty of a judge to render a righteous judgment, but it is of transcendent importance to the litigants and the public generally that there should not be the slightest suspicion as to his fairness and integrity. The people should not exact less from the judiciary, the most powerful branch of our government. *See*, *People v. Kohl*, 17 Misc.2d 320, 192 N.Y.S.2d 83 (Niagara County Ct. 1959) stating as follows:

> The practice which impresses me is that a judge should disqualify himself whenever there might be the slightest impression upon the part of a litigant that his decision might be swayed by his connection with the case or his interest in the case, for it is important in the administration of justice not only that our courts be presided over by judges who are fair and impartial, but it appears to this court that

> it is equally important that litigants believe that they are being tried by a judge who is fair and impartial and not influenced by any personal interest in the case."

In *Sardino v. State Commission of Judicial Conduct*, 5 N.Y.2d 286, 461 N.Y.S.2d 229 (N.Y. 1983) the court discussed extensively judicial conduct in pending litigation. The court emphasized that "the ability to be impartial is an indispensable requirement for a judicial officer". A judge cannot assume an adversarial role or be biased or intemperate. Each judge is personally obligated to act in accordance with the law and thus cannot abuse judicial power, inter alia, by showing disregard for due process of law, ignore jurisdictional limitations of his court, deny parties their rights, or disregard mandates of the law. A judge cannot state his views in a sarcastic manner, or display animosity against litigants or to intimidate or dehumanize them.

> "Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property."

In the Matter of Diana A , 65 Misc.2d 1034, 319 N.Y.S.2d 691, 694 (Family Court , N.Y. County 1971) the court was concerned with the fairness of the procedure, whether the judge can render a fair judgment. Whether the judge had the competence and intellectual integrity to evaluate the evidence presented on the issues before him in accordance with the applicable rules. On the other hand if the judge failed to consider respondent's evidence the court was of the opinion that respondent would suffer a violation of due process and that would be a jurisdictional dereliction of duty.

People v. Bonnerwith, 69 Misc.2d 516, 330 N.Y.S.2d 248, (Town Just. Ct. Dutchess County, 1972) reiterated that bias and prejudice are the usual reasons given for asking that a judge disqualify himself. The court noted that bias has been defined in Black's Law Dictionary

(4th ed. 1961) as a 'condition of mind, which sways judgment and renders Judge unable to exercise his functions impartially in a particular case'. Whereas prejudice has been defined 'that which disqualifies Judge is condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case'. It refers to mental attitude or disposition of Judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved. A question as to when a judge should disqualify himself is a matter of conscience, fact and circumstances. Where there is the 'slightest impression' given of possible judicial bias, the judge should not sit.

In the Matter of Jennifer G and Julian G, 110 A.D.2d 801, 487 N.Y.S.2d 864, (2nd Dept. 1985) where a judge merely expressed unfavorable views toward a litigant the matter was directed to be heard by another judge. It is evident that Justice Heitler's March 23, 2006 order is not only replete with bias and prejudice but, is founded upon her bias and prejudice against Herskowitz, requiring Justice Heitler's recusal. *Solow v. Wellner,* 157 A.D.2d 459, 549 N.Y.S.2d 384 (1st Dept. 1990)

The bias of Justice Heitler is personal, arising from that extrajudicial predetermined plan of plaintiff, her attorneys and Windels for the appropriation of the entire corporate surplus, from which Herskowitz was totally excluded. The elimination of Herskowitz under pretense of defaulting her or denying her standing, to approve in one sided ex parte orders the said predetermined plan and Windel's newly created creditors and corporate receivership without an adversary proceeding, is in flagrant violation of due process, resorted to deprive Herskowitz of her vested interest in that surplus to the unjust enrichment of others.

What the above cited cases stand for is not what Herskowitz has been accorded as fully

described above. Although a court may err, the error cannot be intentional to irreparably harm, harass and abuse those who are summoned before the bench. It is well settled that Herskowitz is entitled to an impartial tribunal without the slightest suspicion as to the fairness and integrity of the judge. Moreover, that a judge is obligated to act in accordance with the law, without abuse of judicial power, and accord due process of law. As demonstrated by the above cited cases the presentation and the consideration of a party's evidence by the Court is an element of due process, in the absence of which there can be no fair hearing. The lack of fair hearing is dispositive of the issue of lack of impartiality.

The question of when a judge should disqualify herself is a matter of conscience, fact and circumstances. Where there is the slightest impression given of possible judicial bias, the judge should not sit. *People v. Bonnerwith* supra.

CONCLUSION

For all the reasons set forth herein, the Motion for Disqualification should be granted and the Court should award the moving party the costs; and such other and further relief as to the court may appear just and proper.

Dated: Miami Beach, Fl
May 31, 2006

Respectfully submitted,

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