

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK

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IAS Part 30 Heitler J.

SUSAN CHARNEY,

Plaintiff,

-against-

**MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR  
DISQUALIFICATION OF JUDGE**

NORTH JERSEY TRADING CORPORATION,  
ALEXANDER FRIED, JUDITH HERSKOWITZ,  
XXXX HERSKOWITZ and XXX HERSKOWITZ,

Index No. 24517/88

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This motion for the suggestion of disqualification of judge is based on the facts set forth in the accompanying affidavit of Judith Herskowitz.

It is the well settled law in New York 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". It is further held that courts should scrupulously maintain unsullied their dignity and integrity. That 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. That 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. The court further emphasized that 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. As such, the people should not exact less from the judiciary, the most powerful branch of our government. *People v. Kohl*, 17 Misc.2d 320, 192

N.Y.S.2d 83 (Niagara County Ct. 1959) further stating as follows:

“The question of when a judge should disqualify himself is generally one of conscience. Some judges disqualify themselves only when in their own mind their connection with the case is such that they feel they cannot be fair and unbiased. 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”. Accordingly, a judge cannot assume an adversarial role or be biased or intemperate. The court further reinforced the rule, that 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. Furthermore, that 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 *Schrager v. New York University*, 227 A.D. 189, 642 N.Y.S.2d 243 (1<sup>st</sup> Dept. 1996) where the trial transcript revealed that plaintiffs were denied a fair and unprejudiced consideration of the evidence against defendants through the cumulative effect of the trial judge's improper interference with plaintiffs' presentation of their case, and open bias toward the defense the

appellate court ruled that

“Although the trial judge properly concluded that there was no mandatory statutory basis for his disqualification (see, Judiciary Law § 14), and that in the absence of statutory grounds the decision upon recusal motion is a matter normally [227 A.D.2d 191] entrusted to the trial judge's personal conscience (People v. Smith, 63 N.Y.2d 41, 68, 479 N.Y.S.2d 706, 468 N.E.2d 879), bias or prejudice unconnected with a statutory "interest" in the controversy can constitute grounds for concluding that a trial judge abused his discretion by failing to disqualify himself where the record reveals that his bias affected the result of the trial (see, Johnson v. Hornblass, 93 A.D.2d 732, 461 N.Y.S.2d 277)”

*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.

In *Frischling v. Schrank*, 24 A.D. 2d 462, 260 N.Y.S.2d 37 (2<sup>nd</sup> Dept. 1965) the court did not consider it a fair trial where before the presentation of the plaintiff's evidence has been completed, the trial judge's bias against the defendants' became overpowering and court held it required a new trial. In that case the trial judge was convinced that the witness was telling the truth and challenged the defendants to show that the witness had not told the truth. The appellate court was of the opinion, that at that point the court had become so biased that it could not properly evaluate the written evidence and other testimony that followed it.

*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 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, (2<sup>nd</sup> Dept. 1985) where a judge merely expressed unfavorable views toward a litigant the matter was directed to be heard by another judge.

Although a court may err, however pursuant to the above cited cases the error cannot be intentional to irreparably harm, harass and abuse those who are summoned before the bench. Accordingly, it is well settled that Judith Herskowitz is entitled to an impartial tribunal without the slightest suspicion as to the fairness and integrity of the judge. Furthermore, that a judge is obligated to act in accordance with the law, without abuse of judicial power, and accord due process of law. Accordingly, this Court, cannot render orders in favor of one party, under disguise of a default, without allowing participation by the adversely effected party. Nor can the outcome of motions be predetermined as has been the case here in favor of Plaintiff and Windels.

Although a litigant is entitled to fair and unprejudiced consideration of the evidence, none of Judith Herskowitzes' papers and evidence were considered by this Court and her Motion to

Vacate was rejected even before it could be scheduled for a hearing. 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.

As cited above a 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

September 29, 2004

Respectfully submitted,

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