

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J.

SUSAN CHARNEY,

Plaintiff,

-against-

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

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

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.

2. Judith Herskowitz fears that this Court is biased and prejudiced against her in favor of Plaintiff and her attorney Steven Delibert and Paul Windels III, the named receiver of the assets of North Jersey Trading (“Windels”) Corporation and accordingly, she cannot get a fair and impartial hearing before Justice Heitler.

3. Since Justice Heitler repeatedly asserted that she hears motions by issuing an order to show cause, on September 2, 2004 Judith Herskowitz submitted for issuance by this Court an Order to Show Cause under Index No. 24517/88 and an Order to Show Cause under Index No. 23002/92. Judith Herskowitz seeks to vacate two jurisdictionally void orders of contempt, each dated January 19, 1991 entered in the above noted cases; two orders of commitment each dated February 19, 1992 entered upon these contempt orders; a January 19, 2004 order striking

pleadings by default without the required proof (Index No. 24517/88); and a \$4.2 million dollar default derivative judgment dated January 24, 1994 (Index No. 24517/88) likewise void on its face, all of which were procured by Plaintiff by fraud based upon false claims.

4. On September 13, 2004, Justice Heitler noted upon each of the Order to Show Cause that she had “Declined to Sign” it. As set forth in Judith Herskowitz’s Motion to Vacate supported with a Memorandum of Law, because these orders and judgment are void and a nullity for being jurisdictionally defective and/or were procured by fraud, the vacatur of these orders and judgment is mandatory and is not discretionary with the Court. Since Judith Herskowitz has a right to be heard on these motions, and because Justice Heitler had already taken an unfavorable position before these matters were even heard in an adversary proceeding, and it appears has predetermined the outcome, sufficient ground exists for the recusal of Justice Heitler.

5. Justice Heitler has taken over these cases upon the retirement of Justice Harold Tompkins. On May 29, 2003 Justice Heitler readily signed an ex parte Order to Show Cause for Plaintiff on her motion for approval of their plan for distribution of a \$700,000.00 surplus remaining from the liquidation of the real property of North Jersey Trading Corporation (“North Jersey”) in the New Jersey Bankruptcy Court. Pursuant to that plan the entire surplus was to be divided between Plaintiff and about a half a dozen of her attorneys and Windels, leaving North Jersey an empty shell. Judith Herskowitz a major shareholder of North Jersey was excluded from the making of that plan as well as from receiving any of that surplus upon Plaintiff’s fraudulent claims joined in by Windels that there was a \$4.2 million dollar judgment against her, when they knew it was not the case.

6. That \$4.2 million judgment is not only void on its face, but it had been satisfied,

upon which both Plaintiff and Windels had signed a *full* satisfaction of judgment, that discharged Plaintiff's judgments as to all the alleged judgment debtors. Satisfaction pieces were issued by Plaintiff and Windels on the judgments of contempt as well. However, to create the false presumption that there was a \$4.2 million judgment and other judgments against Judith Herskowitz, Plaintiff and Windels acting in furtherance of their conspiracy to misappropriate that \$700,000.00 surplus, to this date had failed and refused to file the satisfaction piece with the Clerk of this Court and to serve same on Judith Herskowitz in flagrant violation of CPLR 5020.

7. This in spite of the fact, that Plaintiff and Windels persuaded the New Jersey Bankruptcy Court that the \$700,000.00 surplus that was required to be turned over to North Jersey, be transferred to Windels as the named receiver of the North Jersey assets, on pretense that it would be distributed to the North Jersey shareholders upon adjudication of the disputes on the New York judgments. But, following the transfer of that surplus in August 2000, which was free and clear of all administrative expenses and claims, and after further fees were denied to Plaintiff's attorneys on her \$4.2 million derivative judgment for lack of benefit to North Jersey, Plaintiff and Windels secreted those funds from Judith Herskowitz. It was not until she filed suit in federal court in the Southern District of Florida that those funds surfaced by that Order to Show Cause dated May 29, 2003 filed by Plaintiff joined by Windels.

8. To eliminate Judith Herskowitz from objecting to Plaintiff's and Windels' illegal and unlawful fee splitting plan, they embarked on a scheme to prevail by default, by forcing Judith Herskowitz to personally appear in this Court on their motion for distribution, while threatening her with arrest under the orders of commitment were she to appear in this Court. As evidenced by Plaintiff and Windels in their motion papers, they relied heavily on the void orders of

contempt and false arrest warrants to foreclose Judith Herskowitz from opposing their motion.

9. In several phone conversations with Plaintiff's counsel Mr. Delibert, the last of which was on October 21, 2003, Mr. Delibert has affirmatively stated to Judith Herskowitz that those arrest warrants would be exercised against her were she to appear in this court. Plaintiff and Windels further asserted that Judith Herskowitz had no standing, because pursuant to an order dated September 18, 1992 entered on September 21, 1992 Judith and her sons XXXX and XXX Herskowitz were required to turn over all their North Jersey stocks certificates for a \$5,000.00 money judgment, which Plaintiff and Windels knew was false because that order was also void.

10. Judith Herskowitz appeared at that October 22, 2003 hearing by telephone and because of these threats of arrest, she requested that Justice Heitler enter an order suspending these warrants of arrest. Justice Heitler expressly directed Mr. Delibert "to send me an order, which I will get in the next day or two, lifting this warrant" (Excerpt, Exhibit 1). But, to prevent Judith Herskowitz from making timely airline reservations in a busy travel season, the order suspending the arrest warrants was not given to this Court as directed, and the orders were not issued until three weeks later on November 12, 2003. Consequently, it was not received by Judith Herskowitz until the week of November 17.

11. Although Judith Herskowitz had called Mr. Delibert the week of November 3, and 10, 2003 and left messages her calls were not returned. She likewise called this Court and spoke to the deputy clerk Steve but, as late as that Friday November 14, 2004 he could not give any information on the status of those orders. Because, of the untimely receipt of those orders suspending the arrest warrants Judith Herskowitz was prevented from appearing in this Court, which was in the course of Plaintiff's and Windels' fraudulent schemes to prevail yet once more

by default, which was the history of this case.

12. Although Judith Herskowitz had submitted all her papers timely for that November 18, 2003 hearings, as she learned at a later date her papers were not considered by Justice Heitler, but only Plaintiff's and Windels' and without any oral argument. Yet, upon Judith Herskowitz contacting Hon. John F. Werner Chief Clerk of this Court, by letter dated November 23, 2003, Mr. Delibert falsely represented to Hon. Werner that all the papers including that of Judith Herskowitz were marked "submitted" by Justice Heitler on November 18, 2003 and all matters were "*sub judice*" (Exhibit 2). That was the same information that this Court's Clerk Steve relayed by telephone to Judith Herskowitz on November 18, 2003.

13. It was nearly five months later on April 13, 2004 that an order was entered by Justice Heitler granting Plaintiff's motion upon the "default" of Judith Herskowitz. Disregarded were the issues raised by Herskowitz and the order was based on a personal bias and prejudice against her. That order avoided ruling on Plaintiff's and Windels' Motion for Protective Order on the crucial production of the satisfactions of judgment because they were "hereby deemed as moot".

14. The Court relied extensively on extrajudicial matters, based on litigation involving Judith Herskowitz and Plaintiff in the Southern District of New York and in the New Jersey Bankruptcy Court. Among others the Court cited "*Herskowitz v. Charney*, 1994 U.S. Dist. LEXIS 19856, *1, 5, (S.D.N.Y. 1994) ("considering plaintiff's history of resistance and failure to comply with court orders, I recommend that defendant's motion to dismiss be granted')". However, disregarded were the papers of Judith Herskowitz explaining that this dismissal was the result of Plaintiff having set a deposition in New York to compel the Herskowitzes to travel from Florida so, that by that falsely procured arrest warrant on the void September 21, 1992 turnover

order Plaintiff could force them to hand over all their North Jersey stock certificates.

15. For lack of funds Judith Herskowitz was compelled to appear pro se in the courts of Florida, New York and New Jersey at the expense of her time and finances and when represented by counsel without any reimbursement for same. In sharp contrast Charney appeared through numerous attorneys for which the corporate surplus was appropriated in total disregard of the interests of Judith Herskowitz in those funds.

16. It was clearly, demonstrated that Judith Herskowitz was willing to appear personally in this Court, when she had timely received the orders suspending those arrest warrants as she did appear at a June 21, 2004 hearing set by this Court on the motion to vacate that April 13, 2004 order. When Judith Herskowitz did appear on that day Justice Heitler announced, that she read the papers and Judith Herskowitz had ten minutes to argue her motion, after she traveled 1500 miles from Florida. Since Plaintiff and Windels failed and refused to produce those satisfactions of judgment, as a last resort, at a great deal of trouble Judith Herskowitz finally managed to procure them from other sources. It was with great reluctance that Justice Heitler accepted copies of those satisfactions of judgments even though both Mr. Delibert and Windels conceded that they signed them.

17. Judith Herskowitz has been subjected to harassment since 1988, for sixteen years now, with the objective to foreclose her from being heard on the merits in this court as well as in other jurisdictions where Plaintiff's \$4.2 million dollar judgment and other judgments were the subject matter of the litigation. It was by such schemes that Plaintiff prevailed without opposition.

18. As shown in detail in the Motion to Vacate which had been submitted to this Court in

the form of an Order to Show Cause, Plaintiff procured that September 21, 1992 order for turnover of the North Jersey stock certificates, without service of a motion to even commence a supplementary proceeding as required under CPLR 5225. Plaintiff procured that January 19, 1993 contempt order for discovery violation outside of statutory provisions of CPLR 3126. As to that \$4.2 million default judgment it is false on its face by falsely referring to a proof of due service of a Motion by Order to Show Cause on each of the defendants, when that Motion was served by first class mail. This had been a fraudulent coverup for the lack of proof of service of summons and complaint, in the absence of which no judgment by default can be entered pursuant to CPLR 3215 as well as without personal jurisdiction over the defendants as has been the case.

19. Yet, Judith Herskowitz continues to be bound by these void contempt orders and false arrest warrants, to curtail her travel to New York, to intimidate her and to bar her from the New York courts and upon which to predicate default judgments and orders in favor of Plaintiff. Judith Herskowitz been deprived of her interest in North Jersey with a void \$4.2 million judgment as noted above. That judgment is equally groundless on the merits, where it is based on false claims of diversion of mortgage proceeds; on a fictitious loss of value of the North Jersey real property; and on a fraudulently created inflated hypothetical rental income and underestimated expenses when, by Plaintiff's own admissions at all times material herein the income belonged to their late father Alex Fried.

20. Pursuant to the assurances of the Chief Clerk, Hon. John Warner stated in his November 5, 2003 letter and of the Administrative Judge Jacqueline Silbermann stated in her December 12, 2003 letter, Justice Heitler would "decide this matter appropriately according to the law and the facts" (Exhibits 3 and 4). This regretfully has not been the case. Concurrently, served on the parties

is a Motion to Vacate under Index No. 24517/88 and a Motion to Vacate under Index No. 23002/92 returnable in the motion part with a request for oral argument, which motions this Court indicated would decline to entertain.

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 29th day of September, 2004

Notary Public - State of Florida