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
HERSKOWITZ and XXX HERSKOWITZ

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE AND TO RENEW THE JUNE 8, 2005 DECISION AND ORDER; FOR RESTITUTION; AND FOR DISQUALIFICATION OF JUDGE

Index No. 24517/88

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

JUDITH HERSKOWITZ, being duly sworn, deposes and says:

1. That I am named as a defendant in the above entitled case and make this affidavit on personal knowledge, without submitting to the jurisdiction of this Court, in support of the within motion, to vacate and to renew this Court's Decision and Order of June 8, 2005 (Exhibit 1); for restitution of the approximate sum of $700,000.00 distributed under the April 13, 2004 order; and for disqualification of Judge.

2. The Court denied all of Herskowitz's well supported motions to vacate orders and judgments, by expressly refusing to consider the substance of Herskowitz's motions and to rule on the merits. The Court disregarded the fact that the orders and judgments Herskowitz sought to vacate were null and void for having been entered without the required proof of service, and without extraterritorial jurisdiction over the nonresident Herskowitz. The Court continues to disregard the fact that said orders and judgments were based on invalid claims, were entered *ex parte* or by default and/or were procured by fraud. The Court continues to disregard the fact that

the vacatur of the said orders and judgments is mandatory and not discretionary. Therefore, the issues are raised here anew on the motions, which are as follows:

> Motion Sequence 45 - a January 19, 1993 contempt order entered by default for alleged discovery violation imposing fees of $23,500.00 for Steven Delibert, where there is no provision for contempt under discovery rules (Exhibit 12); a February 19, 1993 Order of Commitment entered on that order (Exhibit 15); a January 19, 1993 order granting declaratory judgment by default on Charney's claim for stocks of North Jersey, without the required proof (Exhibit 11); the January 21, 1994 judgment entered by default in the sum of $4,300.024.42 without the required proof of service of process, by fraud and on fraudulent claims as was shown in detail on this motion (Exhibit 19).
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> Orders under Index No. 23002/92 a January 19, 1992 order of contempt entered on a turnover order dated September 18, 1992 without the required notice and hearing requiring the Herskowitzes to hand over all their valuable North Jersey Trading Corp., stock certificates, for a $5,000.00 money judgment, upon which a February 19, 1993 commitment order was entered (Exhibits 10, 12, 14).
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> Motion Sequence 46 - Motion to vacate, renew and reargue orders of April 13, 2004 and October 12, 2004 which approved the appropriation of approx. $700,000,00 the remaining surplus funds of North Jersey.
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> Motion Sequence 47 - Motion to vacate the February 16, 2005 order denying motion for disqualification of judge motivated by personal interests, replete with acrimonious, dehumanizing personal attacks against Herskowitz.

3. It was unrebutted that Charney's case lacks the required proof of service of summons. Likewise conspicuously absent is any finding of long arm jurisdiction over the nonresident Herskowitz pursuant to requirements of CPLR §302, made essential because of the territorial limitation of this court. In the absence of long arm jurisdiction the orders of sanctions, contempt and commitment, and the $4.3 million judgment against Herskowitz are null and void.

Motion Sequence Number 45

4. The Court relies on Charney's contentions that the "jurisdictional challenge has been

repeatedly rejected by this court and by the Appellate Division". Charney relies on Charney v. North Jersey Trading Corporation, supra, 150 Misc. 2d at 849 (S. Ct. N.Y. Cty. 1991), a December 10, 1991 order of Justice Tompkins, that this Court reiterated in its June 8, 2005 order. However, Charney submitted only memorandums, without supporting affidavits, and has defaulted, by failing to appear through counsel on behalf of North Jersey Trading Corporation ("North Jersey"), as directed by this Court at the January 5, 2005 hearing. As such Charney's *pro se* appearance is in contravention of this Court's ruling that she cannot represent North Jersey and would be held in default unless she retained counsel [as required under CPLR 321(b)].

5. As recited in that December 10, 1991 order, it was entered on the motion to withdraw of counsel for the Herskowitzes, to which Herskowitzes consented, so the court routinely granted counsel's motion to withdraw. Charney then proceeded at this same hearing with a "cross motion" for sanctions, which had not been served on Herskowitz and the other individual defendants, so they were totally unaware of that motion. Knowing that the Herskowitzes were not represented by counsel, and were not at that hearing Charney proceeded *ex parte*, and evidently misrepresented the record to procure an order of sanctions that prohibited them from raising the undecided threshold jurisdictional issues.

6. The Court incorrectly states that "subsequent" to that December 10, 1991 order the Herskowitzes brought an Article 78 petition in the nature of a writ of prohibition in Herskowitz v. Tompkins, 184 A.D.2d 402 (1st Dept. 1992) appeal dismissed, 80 N.Y.2d 1023 (1992). That petition is dated December 3, 1991 (Exhibit 16.a) and so it had no relevance to that subsequent December 10, 1991 order. The Appellate Division is quoted to say "that the jurisdictional issue should have been addressed by way of an appeal from the October 16, 1991 order" to forestall

"premature appellate review of issues properly reviewable in the regular appellate process" The Court acknowledged in ft.n. 2 that an appeal was taken from the Order dated October 2, 1991 (entered on October 16, 1991) in Charney v. North Jersey Trading Corp., 184 A.D.2d 409 (1st Dept. 1992) which included the May 21, 1991 order that settled the April 9, 1991 decision. [1]

7. This Court asserts on pg. 3 that "rather than appealing the determination as to personal jurisdiction directly, however it has been Herskowitz's practice to collaterally attack the judgment against her". Without specifying what order determining personal jurisdiction Herskowitz was to appeal from, this Court under "rationale of judicial economy" has rejected Herskowitz's claim that the court lacked personal jurisdiction over Herskowitz in this action" "See CPRL §5015(4)". The order referred to in that December 10, 1991 order, that was not appealed, is the May 8, 1990 order of Justice Silbermann, upon which Justice Tompkins relied.

8. The court stated for the first time in that *ex parte* sanction order of December 10, 1991 that Justice Jacqueline Silbermann "denied" the "initial jurisdictional motions to dismiss", that she "resolved the jurisdictional issues" and "denied reargument on this issue" in her May 8, 1990 order. That December 10th order was raised by Charney for first time in opposition to

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[1] The appeal from the October 2, 1991 order was denied as unappealable, because Justice Tompkins described Herskowitz's motion to dismiss to be a reargument of Justice Silbermann's May 8, 1990 order. The Court said only "if we were to consider the merits", but on appeal from an order denying a motion to reargue the court does not address the merits. Silverstein v. Silverstein 130 A.D. 2d 369 (1st Dept. 1987) Charney previously relied on that October 2, 1991 order, in which Justice Harold Tompkins claimed that Justice Silbermann in her May 8, 1990 order had "permitted the withdrawal of the jurisdictional claim" by Herskowitz and others. As was shown to this Court in Herskowitz's unrebutted prior motion, it was more than a year later, at a hearing on December 29, 1993 in the Florida court, that Steven Delibert, attorney for Charney conceded in sworn testimony that nowhere does the record show that the Herskowitzes had ever withdrawn their jurisdictional objections. Delibert conceded that he created this pure fiction. It is clear that, if the motion to dismiss was denied by Justice Silbermann in a May 8, 1990 order, it could not have been withdrawn in that same order, or if the motion was withdrawn it could not have been denied in the same order, so neither version ever happened.

Herskowitz's current motions to vacate. This Court declined to acknowledge the simple truth that the record proves no such ruling was made by Justice Silbermann in her May 8, 1990 order.

9. It is clearly shown in the May 8th order (copy of which was attached to the prior motion) that Justice Silbermann had previously denied, a "cross-motion to dismiss" by North Jersey, whereas the Herskowitzes filed motions to dismiss, and she denied the motion to reargue of North Jersey (Exhibit 9) (See, ¶ 25(4)-(10) of this Affidavit). It was further shown by Herskowitz that Steven Delibert, counsel for Charney, conceded in his August 1, 1991 Affirmation that Herskowitz's initial motions to dismiss for lack of personal jurisdiction "were never determined on the merits" (Exhibit 13). In her May 8, 1990 order, Justice Silbermann addressed the personal jurisdictional issues raised by the Herskowitzes only to the extent of setting down for a traverse hearing their initial motions to dismiss, related to the service of Charney's Order to Show Cause. Accordingly, there was no reason for the Herskowitzes to take an appeal from that May 8, 1990 order of Justice Silbermann. That Herskowitz should have taken an appeal from a nonexistent order is yet another subterfuge by this Court, to avoid the court's lack of jurisdiction.

10. The Court refers to Herskowitz v. Tompkins, 184 A.D.2d 402 (1st Dept. 1992) the above noted Article 78 proceeding, as an additional basis for denying Herskowitz's CPLR § 5015(4) motion, on the Appellate Division's observation that it has "subject matter" jurisdiction because "Charney's contest as to her rights" in the North Jersey building was within the court's jurisdiction. However, Charney's individual "rights" in corporate property is not what is at issue here, but a judgment in excess of $4 million by Charney on behalf of North Jersey, entered personally against the nonresident Herskowitz, who was always beyond the territorial jurisdiction of this Court. It was expressly held in the decision on that petition, that the Appellate Division

did not rule on personal jurisdiction, because that had to be addressed by way of an appeal.

11. To avoid the issues of lack of proof of service and lack of extraterritorial jurisdiction, Herskowitz was barred from defending at all, with orders of sanctions, contempt and civil warrants of arrest, all in retaliation for raising the jurisdictional issues. Upon having blocked Herskowitz, Charney then procured *ex parte* that $4.3 million default judgment, dated January 21, 1994 against Herskowitz, on manufactured damages. Yet the Court would deem appropriate the imposition of sanctions on the nonresident Herskowitz and to require her to pay for the exercise of her legal right to resist the New York court's assertion of extraterritorial jurisdiction, without long arm jurisdiction, without minimum contacts and on fraudulent claims, because this Court admittedly declines to address these matters. Moreover, all the sanctions abated as they were payable to the now deceased Steven Delibert rendering them unenforceable.

12. Herskowitz moved to vacate the orders and judgments on other grounds such as, pursuant to CPLR §5015(a)(3) because they were procured by fraud; CPLR §5015(a)(4) for lack of notice, CPRL §3126 no contempt for discovery violation; CPLR 3215(e) for the fatal defect on the face of that derivative judgment for lack of proof of service, and because the damage claims were all outside the pleading. However, these were totally omitted by this Court from its June 8, 2005 order. The Court avoided theses issues by concluding as to the sanction orders, that Herskowitz failed to meet time requirements to reargue under CPLR §2221 when she made no such motion, and that she failed to show "excusable default" under CPLR § 5015(1) for delaying in filing her motion, when she did not move under 5015(1) and "excusable default" applies prior to entry of an order by default and not after.

13. No time limitations apply to Herskowitz's above noted CPLR 5015(a)(3) and (a)(4) motions. Moreover, that derivative judgment was entered in this Court in January 1994, which

Charney forthwith recorded in the Florida courts, and continued to litigate there, as well as in the Bankruptcy Court of New Jersey and the case in this Court was not reopened until May 2003, upon Charney's Motion for Disbursement. Charney was able to litigate in three jurisdictions because of a fee prearrangement, that her attorneys' would be paid the liquidated surplus of North Jersey, under a false derivative suit, depriving Herskowitz of her corporate shareholder interest.

Motion Sequence Number 46

14. In its June 8, 2005 order the Court stated that,

> "Herskowitz offers no new facts or new law, CPLR §2221, no reasonable excuse for her default or 'meritorious defense' on the motion to distribute funds, CPLR §5015; accordingly, Herskowitz's motion to vacate is denied". (Emphasis added)

However, the Court predetermined that Herskowitz has no meritorious defense, by concluding in advance, without applying the legal arguments to the facts that her defenses lack merit.[2] It was under this pretext that this Court denied Herskowitz's motions to vacate this Court's April 13, 2004 order granting Charney's motion for distribution of close to $700,000.00 to herself and her attorneys. This Court's reliance once more on Charney v. North Jersey Trading Corporation, supra, 150 Misc. 2d at 850, is proof positive that Herskowitz had raised a meritorious defense,

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[2] The court's lack of jurisdiction and other issues were raised by Herskowitz in opposition to Charney's Motion for Disbursement of the North Jersey Assets, dated May 29, 2003. The Court declined to consider Herskowitz's properly submitted papers, on the excuse that she made no personal appearance in this Court on November 22, 2003, regardless that the rules of court allow motions to be submitted on papers. In fact Charney relied solely on her papers and no hearing was held. The Court disregarded Delibert's deliberate untimely mailing to Herskowitz of this Court's orders lifting the orders of commitment, to prevent her appearance. The record reflects that on three occasions when the Court assured that Herskowitz would timely receive the suspension orders, prior to the hearing, Herskowitz had appeared before the Court on June 21, 2004, January 5, 2005 and on April 5, 2005. But, on each occasion after she traveled from Florida, the court refused to hear Herskowitz on the merits of any substantive matter set down for hearing on pretense that the merits could not be addressed unless the Court decided to open the default.

because that order shows no determination on personal jurisdiction.

15. As noted hereinbefore, that December 10, 1991 order granted the motion to withdraw by counsel for the Herskowitzes. It also granted Charney's *ex parte* cross-motion for sanctions, making reference to prior rulings, but without specifying what those rulings were, and on the mere conclusion that Justice Silbermann "denied reargument on this issue". This Court fails to explain how this had anything to do with Herskowitzes' motion to dismiss, when upon the record that denial of reargument related solely to North Jersey's motion to dismiss. [See, below ¶ 25(4)-(10)]. As noted above, Charney v. North Jersey Trading Corp., supra,184 A.D.2d at 409, related to a prior October 2, 1991 order, and was not a decision on the December 10, 1991 order.

16. Yet another meritorious defense that this Court has totally avoided, is the full satisfaction of the judgments, which included all fees. Herskowitz raised this in her June 2, 2004 motion, as a motion to renew the meritorious defense of the satisfaction of the judgments. At the June 21, 2004 oral argument, both Steven Delibert and Paul Windels III authenticated the satisfactions and this Court accepted them into evidence, still the Court totally omitted any mention of the satisfactions in its October 12, 2004 order and resorted to deny Herskowitz's motion "as one to vacate a default order, CPLR §5015(1), rather then one for reargument, CPLR §2221(a)".

17. Since the satisfactions were omitted by this Court, Herskowitz raised it again in a subsequent motion to renew pursuant to CPLR §2221, heard on April 5, 2005, but the Court once more totally omitted a ruling on this motion in its June 8, 2005 order. As the Court well knows those satisfactions discharged all the jointly liable judgment debtors including Herskowitz, thereby extinguishing any possible BCL§ 626(e) claim for fees. This is apart from the lack of extraterritorial jurisdiction over Herskowitz that rendered the derivative judgment void. The Court

disregarded other meritorious defenses, among these the undisputed showing that Charney procured her derivative judgment by fraud, misrepresentation and misconduct. Yet another defense is the jurisdictional preemption under federal bankruptcy laws that precluded the distribution to Charney and to her attorneys as fees the entire North Jersey surplus, that had been transferred to this Court under bankruptcy order solely for distribution to the shareholders.

Motion Sequence Number 47

18. On Herskowitz's Motion for Disqualification, the Court merely concludes without considering the unrebutted facts and the extensive supporting documents, that Herskowitz's arguments are without merit on the jurisdictional issues and on the $4.3 million default judgment that it was the product of fraud. The Court argues without supporting legal authorities that it was the "settlement agreement which was 'wholly satisfied' that Herskowitz's sons entered into while she did not", when the Court knows that the discharge of the judgments against the sons discharged the jointly liable Herskowitz upon the satisfactions that the judgments were "wholly paid". There is no speculation of bias and prejudice here, where the Court disregards the facts and law.

19. The distribution of close to $700,000.00 by Paul Windels pursuant to this Court's April 13, 2004 order, and prior to the October 12, 2004 order denying Herskowitz's motion to vacate, was not unknown to the Court, because the stay provision in the Order to Show Cause submitted by Herskowitz was stricken by this Court on June 2, 2004. Mr. Windels was fully aware of the satisfactions, and with the full knowledge that this was an unlawful distribution, he took undue advantage of that contrived default, by not even waiting for the expiration of the 30 day period from the service of the Notice Entry for the filing of a motion to renew and to reargue.

Motion Sequence Number 48

20. In denying Herskowitz's Motion to reargue/renew the Court's order of February 16, 2005 denying disqualification of judge, the Court acknowledges that it was not willing to alter its position holding Herskowitz in default. In Motion Sequence 46, the Court stated as grounds for vacating a default as "a reasonable excuse for her default or 'meritorious defense'". But, the Court used that default as the pretense for disregarding Herskowitz's meritorious defenses. To avoid ruling on the meritorious defense of the satisfaction of judgments, the Court resorts to a hollow excuse that it "has already considered, and rejected that argument", when it had omitted the satisfactions from its orders of October 12, 2004 and February 16, 2005.

21. The Court further omits any discussion of Herskowitz's unrebutted proof on the Dececember 10, 1991 order reported in Charney v. North Jersey Trading Corporation, supra, 150 Misc. 2d at 849 (S. Ct. N.Y. Cty. 1991), upon which this Court places so much reliance, that this was based on the misrepresentation "that the initial jurisdictional motions to dismiss were denied by Justice Silbermann on May 8, 1990" and that Justice Silbermann "denied reargument on these issues". Herskowitz supported this motion with extensive documentary evidence consisting of the May 8, 1990 order, and the motions by North Jersey to dismiss and to reargue etc., to demonstrate that it was not the Herskowitzes' motions to dismiss that were denied but those of North Jersey (See, ¶ 25(4)-(10) of this Affidavit). So again, this Court adhered to its default to deny the truth patent on the face of the record.

There is No Basis for Injunction Against Herskowitz, and the Court's Inability to be Impartial Requires Disqualification

22. To foreclose Herskowitz from raising her meritorious defenses the Court prohibited

her from bringing further motions before the Judge of this Court, without her prior permission. This Court has made clear that it will not entertain these motions not because they are not meritorious, but because of its unwillingness to vacate the void judgments and thereupon order the restitution of misappropriated funds of close to $700,000.00 by Charney and her attorneys. Not only has this Court deprived Herskowitz of her rightful claim to these funds as a majority shareholder of North Jersey, but would make her a lifetime hostage to the fraudulent $4.3 million judgment and the other illegal and unlawful orders against her.

23. Since litigation cannot be conducted against the nonresident Herskowitz across state lines, it is Herskowitz who has been, and continues to be personally and financially harmed, by the oppressive, vexatious litigation that Charney has waged for sixteen years now in three jurisdictions, in the New York courts, the New Jersey Bankruptcy court and the Florida courts.

24. This patent prejudice and bias of the Court is reinforced by the Court's unwillingness to rely on the record and to follow established precedent and law, that requires the disqualification of Justice Sherry Klein Heitler, so, that the meritorious defenses raised by Herskowitz maybe heard before an impartial and unbiased justice of this Court.

The Relevant Facts Supported with Documentary Evidence

25. The jurisdictional issues are supported with documentary evidence in a chronological sequence that clearly show that this Court is without extraterritorial jurisdiction over Herskowitz. The sequence related to this and other relevant issues are as follows:

(1) On or around December 20, 1998 Charney attempted to serve on the Herskowitzes a Motion for a Preliminary Injunction and Temporary Restraining Order, in the form an Order to

Show Cause to enjoin a tax reorganization of North Jersey. To claim jurisdiction over the Herskowitzes and Fried Charney falsely alleged that they were citizens and residents of the State of New York, when in fact Herskowitz and the others were permanent residents of the State of Florida and not of New York. Attached to the motion in support was a Verified Complaint in which Charney sought relief individually, to declare her to be a shareholder of North Jersey on an alleged gift of stocks, to receive payment for her alleged shares of North Jersey stocks pursuant to BCL §623, dissolution of the corporation, and damages in the amount of three million dollars[3]; all of which she sought personally against the Herskowitzes and Fried. (Exhibit 2).

(2). To resolve the issue of service the Herskowitz and the others filed motions to dismiss for lack of jurisdiction pursuant to CPLR §3211(a)(8) (Exhibit 3).

(3) By motion dated January 31, 1989, Charney moved the court to allow her to serve an amended complaint titled Verified Petition. Charney relabeled her individual claim under BCL §623 in a new Count VII as made derivatively on behalf of North Jersey pursuant to BCL §626. (Exhibit 4). To claim jurisdiction Charney made the same false allegations that the Herskowitzes and Fried were each a "citizen of the State of New York, resident in Florida", but, in ¶8 allegations related to CPLR §302(a) were inserted as follows:

> "Respondents Judith Herskowitz, XXX Herskowitz, and Fried, and each of them have transacted business within the State of New York, from this proceeding arises; and have committed tortious acts outside the state causing injury to property within the state, and regularly do business, engage in other persistent courses of conduct, and derive substantial revenue from services rendered in the state."

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[3] North Jersey Trading Corporation a closed New Jersey corporation, owned a 54 unit apartment building on 92nd Street and Riverside Drive N.Y.C. The property was purchased in 1958 by Alex Fried, the father of Herskowitz and Charney. Fried managed and controlled it without any help from Charney. The $3 million damages demanded by Charney exceeded the property's value at the time. Charney's demands were intended to harm Fried whose only source of income came from that property.

(4) By Notice of Cross Motion dated February 17, 1989 North Jersey by and through its counsel XXXX Moraco, (who did not represent the Herskowitzes and Fried) moved for "Dismissal of the [initial] Complaint for failure to state a cause of action, statute of limitations and defense founded upon documentary evidence" pursuant to CPLR §3211(a)(2), (5) and (7) (Excerpt of motion attached as Exhibit 5).

(5) In an order dated March 8, 1989, Justice Jacqueline Silbermann denied Charney's motion for injunctive relief. Justice Silberman expressly noted that she was ruling on "the cross-motion by defendant, North Jersey Trading Corporation to dismiss the complaint pursuant to CPLR 3211" (pg. 1), which she "denied" (pg. 4). Justice Silbermann made clear that "The motions to dismiss of the other defendants are advanced until March 21, 1989" (from the initial return date of June 17, 1989) so that clearly Herskowitz's motion to dismiss and of the other individual defendants were not denied (pg. 4). Justice Silbermann set those parts of the "motion to dismiss which relate to service of the Order to Show Cause on defendants down for a traverse hearing" before Justice Gangel Jacob, and allowed Charney to serve her Verified Petition "subject to the disposition of the traverse"(pg. 2)(Exhibit 6).

(6) By Notice of Motion dated April 11, 1989, North Jersey moved for "An order granting leave to reargue the motions resulting in the decision and order dated March 8, 1989....vacating the lis pendens, and dismissing the complaint as to the corporate defendant" in motion No. 11. (Exhibit 7).

(7) By letter dated April 9, 1990, the Herskowitz defendants and Fried moved to with-draw "their 'Motion to Renew, Reargue and to Vacate Order' returnable on May 9, 1989...motion No. 12" whereby they sought only to reschedule the March 8, 1989 order that accelerated the

return date of their motions to dismiss to March 21, 1989. Since that return date was adjourned to May 9, 1989 that was acceptable to all parties, the motion to reargue became moot (Exhibit 8).

(8) It was this motion to reargue of North Jersey (Motion No. 11) and the motion to reargue by the Herskowitzes and Fried (Motion No. 12) that came before Justice Silbermann and upon which she ruled in her May 8, 1990 order (Exhibit 9) as follows:

> "there are **two motions** before this court by the defendants for leave to reargue the decision and order dated March 8, 1989, which, inter alia, directed a traverse hearing on the jurisdictional issue, granted plaintiff leave to amend the complaint and obtain discovery (subject to the traverse), and denied the **cross motion to dismiss.** (Emphasis supplied)

(9) Thus, it was North Jersey's "cross motion to dismiss" that was denied while the Herskowitzes and Fried's "motion to dismiss" was not. Justice Silbermann further made clear that only the motion to reargue by North Jersey had been denied, as follows:

> "**North Jersey** is only a nominal party, its **motion for leave to reargue** the decision and order of this court dated March 8, 1989 **is denied**". (Emphasis supplied)

(10) Justice Silbermann permitted Herskowitz and the other individual defendants to withdraw their motion to reargue (which was not mandatory on the Herskowitzes) as follows:

> "The individual defendant, Fried and the three defendants, Herskowitz, have informed this court of their withdrawal of their 'motion to renew, reargue and to vacate order (#12), which was returnable on May 9, 1989. This court grants their written application and <u>permits</u> their motion to be withdrawn." (Empasis supplied)

Justice Silbermann reset "those parts of the motions which relate to the service of the Orders to Show Cause on all defendants for a traverse hearing" before Justice Gangel Jacob, thereby making clear that Herskowitz's motion to dismiss was not denied and was not withdrawn.

(11) Charney failed to proceed with the traverse hearing. Justice Gangel Jacob recused

herself from the case. Regardless, that the amendment of Charney's complaint remained subject to the traverse hearing, successor Justice Harold Tompkins in an April 9, 1991 decision, settled in a May 21, 1991 order, directed the Herskowitz defendants, but not Fried, to answer the amended complaint, despite the fact that Fried was an indispensable party. In that same order, Paul Windels III was appointed as temporary receiver of the property of North Jersey, but he has never qualified (Exhibit 10).

(12) In a letter agreement dated June 26, 1991 it was expressly clarified between counsel for the Herskowitzes, Stephen J. King, and counsel for Charney, Steven Delibert, that the Herskowitzes may "answer or move with respect to the petition" [the amended complaint]. (Exhibit 11).

(13) Herskowitz and the other defendants responded with a motion to dismiss dated July 2, 1991 (Exhibit 12) addressed to the amended complaint, seeking dismissal for lack of extraterritorial jurisdiction of the New York court over the Florida domiciliaries and on other grounds:

> "pursuant to CPLR 3211(a) 8 and 10 and CPLR 3013 and 3016(b), on the ground that (I) the Court lacks personal jurisdiction over respondents Judith Herskowitz, XXX Herskowitz and Alexander Fried; (ii) in the absence of personal jurisdiction over respondents Judith Herskowitz, XXX Herskowitz and Alexander Fried, petitioner's claim for a declaratory judgment must be dismissed for lack of indispensable parties; and (iii) the derivative claim which petitioner seeks to assert fails to satisfy the notice and particularity requirements of CPLR 3013 and 3016(b), and the requirements of New York case law for alleging wrongdoing which could form the basis for a derivative claim; (pages2 and 3 of Order to Show Cause).

(14) In his supporting affidavit, Stephen King, counsel for the Herskowitzes verified that Judith Herskowitz, XXX Herskowitz and Fried each of them was a Florida domiciliary, not subject to personal jurisdiction in New York (pg. 3). In her Affidavit sworn to on July 1, 1991 (pg. 3 ¶4), Judith Herskowitz (joined with XXX Herskowitz) refuted Charney's false allegations

that she was a "citizens of the State of New York" and demonstrated the lack of minimum contact, for pursuing this action against Herskowitz in New York:

> "Contrary to the false claims made in the petition (see pars.3-8), **we are not 'citizens' of New York**. Nor have we conducted any business in new York, or engaged in any conduct in or outside of New York from which petitioner's claims arise, or derived any revenue from services rendered in New York. We own no real property in New York. We have no bank accounts in New York. We transact no business in New York. We have done nothing in New York which could serve as the basis for subjecting us to 'long arm' jurisdiction.

Herskowitz further stated in conclusion on pages 4 and 5 that:

> "There is no basis for personal jurisdiction over us or respondent Fried in New York. It would be inequitable to require us to shoulder the burden and expense or proceeding further in a forum fifteen hundred miles from our homes. The hardship of defending this proceeding in New York cannot be overstated, and is especially acute in Judith's case since she is responsible for the care of her critically ill and hospitalized father, respondent Alexander Fried. Indeed Judith is suffering adverse effects on her own health as a result of the inordinate stress and strain caused by the need to both care for her father and to attend to petitioner's ceaseless harassment. Likewise, we are suffering financial hardship, because after having acted pro-se, we have now been compelled to retain counsel to represent us on this motion since we cannot come to New York to argue the motion."

(15) In response to the Motion to Dismiss Charney, acknowledged that personal jurisdiction over Herskowitz (and the others) was not yet determined. In her Attorney's Affirmation in Opposition to Motion to Dismiss etc., dated August 1, 1991, (Excerpt, Exhibit 13) Charney conceded that Herskowitz's initial motions to dismiss her complaint (and of the others, that were before Justice Silbermann in her May 8,1990 order) were never ruled on the merits:

> "Between January 10, and January 26, 1989, each of the four individual defendants served a separate, substantially identical **motion to dismiss the original complaint 'pursuant to CPLR 3211**' (notices of motion, collectively, Exhibit J hereto;); those motions **were never determined on the merits**." (Emphasis supplied) (The notices of motion are attached as Exhibit 3)

(16) Without conducting a traverse hearing on the service and without any determination

on long arm jurisdiction raised in Herskowitz's motion to dismiss, Justice Tompkins entered an Order dated October 2, 1991, in which he declined to rule on the motion to dismiss, because he deemed it to be a "reargument" and relied on the May 8, 1990 order of Justice Silbermann as was misrepresented by Charney whereby it was made to appear that the permission given to the Herskowitzes to withdraw their objection to the acceleration of the return date of their motion to dismiss, was to a withdrawal of their objections to jurisdiction (Exhibit 14)..[4] as follows:

> "North Jersey and defendant Fried and the Herskowitz defendants have repeatedly raised and re-raised the issue of jurisdiction in spite of Justice Silbermann's order of May 8, 1990 which permitted the withdrawal of the jurisdictional claim. North Jersey, defendant Fried and the Herskowitz defendants may not re-raise the jurisdictional issue".

(17) Mr. Delibert conceded at a later date in sworn testimony at a December 29, 1993 hearing that this alleged withdrawal of objections to jurisdiction in Justice Tompkins' October 2, 1991 order was unsupported by the record and was pure fiction.[5] (Excerpt Exhibit 15). Thus, the falsity of Charney's contention was not before the Appellate Division at the time the Herskowitzes pursued their appeal and petition for writ of prohibition, and therefore this issue

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[4] Herskowitzes have taken an appeal from the October 2, 1991 order in Charney v. North Jersey Trading Corp., 184 A.D.2d 409, 409 (1st Dept. 1992), but it was dismissed as nonappealable because their motion to dismiss was deemed to be a motion to reargue and so it was never reviewed on the merits. The Herskowitzes' petition for a writ of prohibition in Herskowitz v. Tompkins, 184 A.D.2d (1st Dept. 1992) was denied on the ground that their remedy was by way of appeal, and so again the issue of jurisdiction was not considered on the merits.

[5] "Q.....is there any document that you have knowledge of where the defendants Judith Herskowitz, XXX Herskowitz, XXXX Herskowitz and Alex Fried withdrew their jurisdictional objections in the New York court?
A. In so many words, I don't believe so.
Q. You do not have any such document?
A. I don't believe there is such a document in so many words.
Q. I am asking you if there is any such document wherein these parties withdrew their jurisdictional objections. The same parties as above.
A. I know of no document stating an expressed withdrawal of the objections."

could not have been appealed at the time. Additionally, since that October 2, 1991 order was addressed to the May 8, 1990 order of Justice Silbermann, that ruled only on the Herskowitzes' initial motions to dismiss addressed to Charney's initial complaint, no ruling whatsoever was made by Justice Tompkins on the CPLR §302 long arm jurisdiction, raised for the first time in Charney's amended complaint to which that second motion to dismiss was addressed, but never ruled upon.

(18) Yet, with the full knowledge of the non-existence of "the withdrawal of jurisdictional claim", and lack of long arm jurisdiction, Charney through Delibert obstructed the nonresident Herskowitzes from being heard on these issues. Charney then procured without notice to the Herskowitzes, that *ex parte* sanction order in "Charney v. North Jersey Trading Corporation supra, 150 Misc. 2d at 849, dated December 10, 1991, upon which this Court relies in its June 8, 2005 order. As stated earlier the Herskowitzes were sanctioned for their efforts to be heard on jurisdiction in the sum of $5,000.00 to be paid as attorney fees to Delibert (Exhibit 16).

(19) Charney then proceeded with her case against the nonresident Herskowitz (and the other defendants) in total disregard of the absence of extra-territorial jurisdiction of this Court. Charney procured an order to compel Herskowitz to appear from Florida for a deposition in New York and that Herskowitz produce books and records of which she was not the custodian. Unable to appear Herskowitz was defaulted by Order and Judgment dated January 19, 1993, and was held in contempt of court and was fined (jointly and severally with XXXX and XXX Herskowitz) in the sum of $23,5000.00 to be paid as fees to Charney's counsel Delibert. Disregarded was the law, that no punishment by contempt is provided under CPRL §3126 for discovery violation. (Exhibit 17).

(20) Another Order and Judgment dated January 19, 1993 was entered against Herskowitz requiring her (and the others) to turn over to the Sheriff of the City of New York all her stock certificates in North Jersey for failure to pay a $5,000.00 money judgment that was entered for having objected to the New York court's jurisdiction, and another $7,000.00 fine was imposed on the nonresident Herskowitz (and on the other defendants jointly and severally) (Exhibit 18).

(21) On February 19, 1993 an order of commitment was entered against the nonresident Herskowitz for having failed to purge herself on the alleged discovery order, and a second order of the same date was entered for not handing over her stock certificates to the Sheriff and for not paying the fine of $7,000.00. The orders directed the Sheriff of the City of New York or of any other county of the State of New York to arrest Judith Herskowitz and to deliver her to the Supreme Court of the County of New York (and the other defendants who were included in these orders) "to determine whether they shall be committed for their contempt.. (Exhibits 19 and 20).

(22) The circumstances surrounding Charney's procurement of the $4.2 million derivative judgment was fully detailed in Motion Sequence Number 45, unrebutted by Charney. The Referee's Report expressly states that the damages were presented by Plaintiff Susan Charney. It is noted that Defendants did not appear - but only because they were locked out. So Charney prevailed because "[Defendants Herskowitzes'] failure to appear resolves against defendants all doubts on that issue". Charney proceeded *ex parte* at that March 1, 1993 hearing before a Referee on fabricated damages based on an inflated rental income and underestimated expenses of North Jersey. Charney presented this for the first time, outside her amended complaint. Charney's damages included the sum of $200,000.00 a mortgage she claimed was improperly placed on the North Jersey property, but in fact was used to pay off its first mortgage. Charney

fabricated further damages of $960,000.00 by claiming a loss in market value for the North Jersey property, without any professional appraisal (Referee's Report Exhibit 21) Most significantly Charney totally excluded the salary for Alex Fried that he received from the inception of the corporation in 1958, which was his sole source of income.[6] .

(23) North Jersey was unable to operate under Charney's oppressive litigation, and in March 1993, filed for Voluntary Chapter 11 bankruptcy in the United States Bankruptcy Court for New Jersey. On Charney's motion, the Bankruptcy Court granted relief from automatic stay. Charney then moved before Justice Tompkins to adopt that fraudulent Referee's Report in the sum of $4.2 million. A default judgment was entered against XXXX and XXX Herskowitz on November 22, 1993 and the same judgment was entered against Judith Herskowitz of January 21, 1994. The damages shown individually for Charney in the Referee's Report had been recast for

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[6] In a May 13, 1996 deposition taken in the Florida case, Charney testified that Fried did get the income and profits of North Jersey, and that she received no dividends or distributions, on pages 99, 157, 212 and 213 of the May 13, 1996 transcript the following is shown:

> "Q. Did you father draw any money from the corporation?
> A. I think he did. Yeah.
> Q. Did he do this by way of salary or just taking profits?
> A. He got the profits somehow. I'm not sure how."
> "Q. Do you know who paid the monthly condo expenses, and the nurses and so forth for your dad here in Florida
> A. No I do not.
> Q. While he was alive
> A. I do not."
> "Q. Did your dad ever engage in any other type of employment than operating North Jersey Trading Corporation during the time that the corporation has been in existence?
> A. No.
> Q. So that it was his sole source of income?
> A. Right"
> Q. Did you ever receive any dividends from North Jersey?
> A. No."

Charney on behalf of North Jersey which included an additional sum of close to one million dollars of pre-judgment interest (Exhibit 22, 23).

(24) Conspicuously absent from these default judgments is the requirement of the "proof of service of the summons and complaint" pursuant to CPLR 3215(f). Instead, what is recited in the judgments is "the proof- of due service of said Motion on each of the defendants", so that the judgments are defective on their face (Exhibit 24). Charney recorded these judgments for domestication in the Eleventh Judicial Circuit Court for Miami-Dade County, Florida, where the Herskowitzes resided, and employed counsel in Florida for these purposes.

(25) All of Charney's judgments individually and on behalf of North Jersey were settled with XXXX and XXX Herskowitz, in a post judgment settlement agreement dated December 1998, for the sum of $150,000.00. They were given full and absolute satisfactions of the judgments, (Exhibit 25) stating that

> "said judgment has been wholly paid...together with all interest, <u>fees</u> <u>costs</u>, or other sums which may have accrued or may be due pursuant to such judgments"

It was undisputed at the June 21, 2004 hearing that under applicable New York law these judgments were discharged against Judith Herskowitz as well.

(26) In an August 9, 2000 order, the Bankruptcy Court allowed the transfer of the North Jersey surplus of close to $700,000.00 to this court to be distributed to the shareholders, that remained upon payment of all claims from the forced liquidation of the North Jersey real property for $3 Million. For three years no information was given to Herskowitz on these funds, until she instituted suit. Charney then moved in this Court by Order to Show dated May 29, 2003 on her Motion for Disbursement of Assets on pretext of N.Y. Business Corporation Law §626(e). Charney did not seek any distribution to the shareholders and/or to make any determination on

these issues as directed by the Bankruptcy Court, but sought the approval of a collusive agreement to distribute all the North Jersey surplus to Charney and her attorneys as follows:

Attorneys	Charges Outstanding	Amount Agreed
Susan Charney (partial reimbursement of sums already paid)	$120,000.00	$110,000.00
Steven Delibert, Esq.	$767,904.74	$401,950.94
Eric C. Christu, Esq.	$102,879.45	$105,000.00
William T. Livingston, III, Esq.	$28,185.83	$18,000.00
Clifford Hark, Esq.	$44,541.12	$25,000.00
Carlton, Fields, Ward, Emmanuel, Smith & Cutler	$28,553.56	$2,500.00
Paul Windels, III, E-q., Receiver	$19,774.95	$19,774.95
Totals	$1,111,839.65	$682,225.89

(27) This Court granted Charney's motion by order dated April 13, 2004, upon default and by rejecting the nonresident Herskowitz's opposing papers, which order was the subject matter of the motions described herein.

WHEREFORE, by reason of the foregoing, it is hereby requested that the within Motion to Vacate, to Renew, for Restitution and Disqualification of Judge be granted and that the moving party have such other relief as may to the Court appear just and proper.

JUDITH HERSKOWITZ

SWORN to before me
this 28th day of July, 2005

Notary Public - State of Florida