

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J

SUSAN CHARNEY,

Index No. 24517/88

Plaintiff,

-against-

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

Defendants.

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

JUDITH HERSKOWITZ submits this Memorandum of Law in support of her Motion to Renew and to Vacate and Set Aside this Court's Decision and Order of June 8, 2005 pursuant to New York CPLR § 2221(a) and §5015 for restitution of the approximate sum of \$700,000.00 distributed under the April 13, 2004 order; and for disqualification of Judge. For the facts Judith Herskowitz relies on her supporting Affidavit.

In the June 8, 2005 order the Court denied all of Herskowitz's motions to vacate and to renew enumerated in ¶2 of the accompanying affidavit. The Court did not consider any of those motions on the facts and the applicable law. Rather this Court's order consists of excuses to circumvent a ruling on the substance of Herskowitz's motions.

As to the issue of personal jurisdiction over the nonresident Herskowitz a permanent domiciliary of Florida, the Court relies on a December 10, 1991 order of sanctions procured by Charney ex parte, claiming that in a May 8, 1990 order Justice Jacqueline Silbermann "denied" Herskowitz's "initial jurisdictional motions to dismiss", "resolved the jurisdictional issues" and

“denied reargument on these issues”. The Court has not considered the record in support of Herskowitz’s prior motion returnable on April 5, 2005, showing that this May 8, 1990 order has been misrepresented because the Herskowitzes’ motion to dismiss and to reargue was not denied. To the contrary, the issue of service was set down for a traverse hearing and it was the North Jersey motion that was denied. [See, Affidavit ¶ 25(4)-(10)] Thereby, jurisdiction over Herskowitz is based on a misrepresented record, and on a nonexistent order on jurisdiction.

To deny Herskowitz’s CPLR §5015(4) motion to vacate, the Court states that the Appellate Division ruled that it has subject matter jurisdiction in Herskowitz v. Tompkins, 184 A.D.2d 402 (1st Dept. 1992) wherein the issue was “Charney’s contest as to her rights” in the North Jersey building that was within the court’s jurisdiction. However, at issue here is not Charney’s individual “rights” in corporate property, 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.

As to the orders on sanctions dated January 19, 1993 and February 19, 1993 the Court takes subterfuge under CPLR §2221 to rule that Herskowitz failed to meet the 30 day time requirements to reargue, when Herskowitz made no motion to reargue. The Court relies on CPLR §5015(1) to say that Herskowitz failed to show “excusable default” for delaying in filing her motion, when she made no motion under 5015(1) and “excusable default” applies prior to entry of an order by default. The Court has omitted from its June 8, 2004 order Herskowitz’s motions pursuant to, CPLR §5015(a)(3) for lack of jurisdiction, lack of notice; CPLR §5015(a)(3) for fraud; CPRL §3126 because there is no contempt for discovery violation; and CPLR 3215(f) for the fatal defect on the face of that derivative judgment for lack of proof of service.

Herskowitz's motion to vacate and to renew this Court's April 13, 2004, and October 12, 2004 orders granting Charney's Motion for Disbursement of the corporate funds of close to \$700,000.00 on pretext of BCL § 626(e), were denied by this Court by a subterfuge to its initial default in the April 13, 2004 order, because "Herskowitz offers no new facts or new law CPLR §2221, no reasonable excuse for her default or meritorious defense". However, the Court brushes off the meritorious defense of lack of personal jurisdiction over the nonresident Herskowitz with that misrepresented May 8, 1990 order of Justice Silberman and by disregarding the full satisfaction of all the orders and judgments including all fees, extinguishing that \$4.3 million judgment upon which this Court purported to grant that distribution of the corporate surplus.

The obvious objective of this Court is to safeguard its April 13, 2004 order, granting the disbursement of the corporate funds, depriving Herskowitz of her shareholder interest in those funds. Herskowitz's opposing papers to Charney's motion were not considered by the Court, as well as all her subsequent motions to renew/reargue and to vacate and set aside the April 13, 2004 order, on pretext of that contrived default in that order, to avoid ordering restitution of the misappropriated funds. In view of the denial of all of Herskowitz's motions, for which Herskowitz had to travel from Florida to New York on three occasions, it is clear that it would have made no difference had Herskowitz appeared in this Court on November 22, 2003.

Since there was no determination on personal jurisdiction based on the sufficiency of service and long arm jurisdiction pursuant to CPLR §§ 304 and 302 that \$4.3 million derivative judgment was void, so the Court had no authority to allow Charney and her half dozen lawyers to divide up close to \$700,000.00, for blocking Herskowitz to be heard on the merits of her defenses in every court. The Court had no subject matter jurisdiction on the further ground that the

judgments were satisfied including all fees, and also because there is a preemption under federal law, those funds having been transferred from the Bankruptcy Court. Moreover, Charney never had a derivative suit at the best only a case for payment of her shares of corporate stocks if any.

Because, of the lack of subject matter jurisdiction, and the non-judicial acts, the Judge of this Court has deprived herself of judicial immunity. Because Herskowitz cannot be barred from raising her defenses enumerated herein, no injunction can be imposed on her to deter her from the exercise of her right to resist illegitimate exercise of extraterritorial jurisdiction over her, and to enter void orders and judgments against her to her financial ruin, upon which to continue pursue her. Accordingly, this Court has conclusively established that it is incapable of being impartial, requiring the Judge's recusal

I. The Court Dispensed with Personal Jurisdiction and Acted Beyond its Territorial Jurisdiction By Resorting to Sanctions, Orders of Contempt and Commitment That Rendered this Court's Proceedings, Orders and Judgments Null and Void Ab Initio

The basic rules on the territorial limitation of State courts was laid down in *Pennoyer v. Neff* 95 U.S. 714 (1877) as follows:

“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and **be resisted as mere abuse.**” (Ibid 721)

“No State can exercise direct jurisdiction and authority over persons or property without its territory” (Ibid 723) (Emphasis supplied)

Disregarded is the fact that Judith Herskowitz is a nonresident well beyond the territorial boundaries of this Court. *Practice Commentaries*, by Vincent C. Alexander to CPLR §302 makes an extensive analysis of long arm jurisdiction and of the minimum contact requirements under

the Fourteenth Amendment to United States Constitution. There is no finding of jurisdiction over Herskowitz under requirements of CPLR §302 to subject her to the jurisdiction of this Court

In *Knapp v. Shoemaker* 82 A.D. 2d 15, 442 N.Y.S. 2d 287 (4th Dept. 1981) the court held that the action was void ab initio where minimum contacts necessary to satisfy requirements of due process were never in existence in action by New York resident. Also see, *Royal Zenith Corporation v. Continental Insurance Company*, 63 N.Y.2d 975, 483 N.Y.S.2d 993 (1984) court is without power to render judgment against a party to whom there is no jurisdiction, and a judgment rendered without jurisdiction is subject to collateral attack.

New York long arm statute CPLR §302, permits the assertion of in personam jurisdiction only if the particular claim arises from one of the listed forms of activity, stated in *Practice Commentary*, by Vincent C. Alexander to Mc.Kinneys CPLR §302, C:302:2 as follows:

“In New York, the analysis for long arm jurisdiction under CPLR 302 entails a two part inquiry: (1) Do the facts of plaintiff’s case fall within the coverage of one or more provisions of the New York statute? (2) Assuming an affirmative answer to the first question, does the particular assertion of jurisdiction comport with due process?....If the plaintiff’s assertion of jurisdiction meets the requirements of the statute, the due process inquiry, in turn, consists of a two part analysis: (1) minimum contacts must exist between the defendant and the forum (the ‘purposeful availment’ test), and (2) the assertions of jurisdiction must not offend traditional notions of fair play and substantial justice (the ‘reasonableness’ test)”.

CPLR §302 makes clear that a particular assertion of jurisdiction is to comply with due process, Plaintiff’s cause of action must “arise from” one of the listed activities in subdivision (a)(1)-(4). Charney raised her long arm jurisdictional allegations for the first time in her amended complaint. Herskowitz denied in her motion to dismiss that there existed long arm jurisdiction over her. Justice Harold Tompkins then entered that October 2, 1991 order, that misconceived

the jurisdictional issues in a May 8, 1990 order of Justice Silbermann. But, what was before Justice Silbermann at the time is Herskowitz's initial motion to dismiss addressed to Charney's initial complaint. So no ruling was made by Justice Tompkins on the CPLR §302 long arm jurisdiction, raised for the first time in Charney's amended complaint to which Herskowitz's second motion to dismiss was addressed, but never ruled upon. [See, Affidavit ¶¶25 (13)-(15)]

In that October 2, 1991 order and subsequent orders the Herskowitzes were prohibited from raising their jurisdictional defenses, and were sanctioned. For a \$5,000 sanction they were ordered to turn over all their North Jersey stock certificates; various other monetary fines were imposed on them, another \$5,000, \$23,500 and \$7,000; Herskowitzes were held in contempt and orders of commitment were issued against them to bar them from court, which are being enforced against Herskowitz to this date. Then, without her day in court a \$4.3 million dollar default judgment was entered against Herskowitz on manufactured damages.

So, no order was entered determining that the facts of Charney's case fall within the coverage of one or more provisions of CPLR §302. There is no finding that Herskowitz had engaged in any specific isolated, but purposeful business transaction in New York out of which Charney's cause of action arose. As to Charney's allegation in her amended complaint "of a tortious act committed without the state causing injury within the state.....and derive substantial revenue from services rendered in the state", there was also no such finding, and Herskowitz specifically denied in her motion to dismiss that she received any revenue from within the State of New York.

It is further well settled that if challenged the burden of proving a basis for long arm jurisdiction under CPLR §302 is upon the party asserting it. *Ziperman v. Frontier Hotel of Las*

Vegas, 50 A.D.2d 581 (2nd Dept. 1975)

“Although the plaintiff need not, in order to sustain jurisdiction, prove that the defendant is actually liable for a tort, the plaintiff must satisfy the following two part burden. First, the plaintiff must establish, factually, that the defendant’s acts occurred in New York or are sufficiently New York directed. The second part of the inquiry is whether the acts attributable to the defendant give rise to claim of tort....”

It is further well settled that there must be specific averments as to when and what wrongful acts are attributed to each defendant of wrongdoing. The complaint cannot be vague and must meet the minimum requirements of CPLR 3013 and 3016(b). See, *Di Pace v. Figueroa* 128 A.D.2d 942, 512 N.Y.S.2d 593 (3rd Dept. 1987) Complaint by which minority shareholder sought accounting and to recover for mismanagement and waste was held to be inadequate where it generally charged other shareholders with having mismanaged, wasted, and taken corporate assets, but contained no specific averments as to when and what wrongful acts were attributed to each of the other shareholders.

In her amended complaint Charney made general allegations against the defendants Judith, and XXX Herskowitz without specifying any tortious act attributable to Judith Herskowitz. She had raised in her motion to dismiss that the amended complaint failed to meet specificity requirement of CPLR §§ 3013 and 3016(b), but this was also not ruled upon in the October 2, 1991 order and Charney never amended her complaint to plead specific acts as to each defendant. So, there was no determination that Herskowitz committed any tort to subject her to long arm jurisdiction of the New York court. Even, if there were a cause of action that arose from defendant’s out-of-state tortious act, [which was not the case] further analysis would have been required to meet due process requirements to show that defendants “have sufficient contacts

with this state, so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere.” (N.Y. Jud.Conf., Twelfth Ann.Rep. 339, 343 (1967))¹

It has been held that the mere fact that respondent is a controlling shareholder in the corporation, concededly doing business in New York will not submit respondent, as an individual, to in personam jurisdiction under the long-arm statute unless the record would justify piercing the corporate veil. *Ferrante Equipment Co., v. Lasker-Goldman Corp.*, 26 N.Y.2d 280, 309 N.Y.S.2d 913 (1970) That a corporation which allegedly listed defendant as director, with no other contacts with state, under New York law there was no personal jurisdiction over defendant. *M. Prusman, LTD v. Ariel Maritime Groups, Inc.* 719 F. Supp. 214 (S.D.N.Y. 1989) Acts of nondomiciliary director of New York corporation in allegedly failing to leave Florida, and come to New York to attend directors’ meetings, and to perform in New York any of his duties as director resulting in an asserted loss to corporation were not “tortious” within long arm statute. The court held that the failure of a man to do anything at all when he is physically in one State is not an “act” done or “committed” in another State. His decision not to act and his not acting are both personal events occurring in the physical situs. That they may have consequences elsewhere

¹ In fact if any tort was committed it was by Charney by creating fraudulent, fabricated damages, for her derivative judgment in excess of \$4 million, as set forth in detail in motion sequence 45. It was unrebutted by Charney that she manufactured a loss of rental income, based on inflated rentals and underestimated expenses of North Jersey, all of which were outside of her amended complaint. That so-called loss of income, excluded many expenses including the salary for Alex Fried that he received since the inception of the corporation in 1958, which was his sole source of income. Charney’s damages included the sum of \$200,000.00 a mortgage she claimed was improperly placed on the North Jersey property, which in fact was used to pay off the first mortgage. Charney manufactured further damages of \$960,000.00 by claiming a loss in XXX et value for the North Jersey and prejudgment interest of close to one million dollars. It was upon such fraudulent claims that the corporation was ruined.

does not alter their personal localization as acts. *Platt Corporation v. Platt*, 17 N.Y.2d 234 270 N.Y.S.2d 408 (1966). Clearly, CPLR §302 was totally disregarded in the case at bar, there having been no finding of any of the requirements under this rule to subject Herskowitz to personal jurisdiction in New York, and where clearly alleged omission or inaction relating to a purported breach of fiduciary duty in Florida did not subject Herskowitz to long arm jurisdiction in New York.

II. The Court was Without Subject Matter Jurisdiction to Approve the Disbursement of the Entire Corporate Surplus to Charney and her Attorneys Where There was No Basis to Award Fees Under Pretext of BCL 626(e).

A. There is No Derivative Judgment Where the Court Acquired No Personal Jurisdiction Over the Nonresident Herskowitz

Jurisdiction of the court is a threshold issue, in absence of which the court cannot proceed. In view of the fact that no long arm jurisdiction had been acquired over the nonresident Herskowitz pursuant of CPLR §302, Herskowitz is beyond the territorial limitations of this Court, and in the absence of proof of service of process Charneys' derivative judgment in excess of \$4 million against the nonresident Herskowitz is absolutely null and void ab initio and was required to be vacated pursuant to CPLR §5015(a)(4). Accordingly, the Court was divested of jurisdiction to entertain Charney's Motion for Disbursement of the Assets of North Jersey for counsel fees to Delibert and others on pretext of BCL 626(e). What this Court has done was simply approve a motion by Charney through Steven Delibert to allow Charney and others that included Florida lawyers, to appropriate as they pleased the remaining surplus funds of North Jersey, of close to \$700,000.00 for which no statutory provision had been provided by the New York legislature.

In *People v. Hart*, 206 Misc. 490, 133 N.Y.S. 98 (Wayne Cty Ct. 1954) the court held that where judgment was entered in excess of power granted by statute, the judgment was void and a nullity, and may be set aside either directly or collaterally. This, regardless that the time to appeal had long expired, or otherwise the wronged party would have no remedy. In *Editorial Photocolor Archives, Inc., v. Granger Collection*, 61 N.Y. 2d 517, 474 N.Y.S.2d 964 (1984) it was held that where the court lacks subject matter jurisdiction, the parties may not confer it on the court and the court may not acquire it by waiver. A judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived. .

A court without jurisdiction of the subject matter of an action cannot acquire jurisdiction by erroneously deciding that it has jurisdiction. Question of jurisdiction of court over subject matter may be raised at any time. *Michel v. State*, 193 Misc. 834; 84 N.Y.S.2d 553 (N.Y. Ct. Of Claims N.Y. 1948)

B. The Full Satisfaction of the Derivative Judgment That Included the Counsel Fees Extinguished the Claim For Fees Under BCL 626(e)

The Court has totally omitted any reference to the satisfaction of judgments from its June 8, 2005 order denying Herskowitz's Motion to Vacate and Renew the April 13, 2004 order and the October 13, 2004 order. The Court referenced the satisfactions only with regard to denying Herskowitz's Motion for Disqualification of Judge. However, to avoid any ruling on the satisfactions the Court stated merely that it "has already considered, and rejected that argument", when in fact the Court had totally omitted any mention of the satisfactions from its prior orders of October 12, 2004 and February 16, 2005.

The issue of the satisfactions was extensively briefed in Herskowitz's memoranda law on each of her prior motions. The Court acknowledged Herskowitz's brief on satisfactions at the June 21, 2004 hearing.² It was shown that in her Verified Petition Charney sued Judith, and XXX Herskowitz indiscriminately, without any distinction as to the alleged acts they engaged in, without any apportionment of responsibility or liability, alleging all acts done jointly by each of them and making them jointly liable in tort (Exhibit 4). The judgments in excess of \$4million entered in November 1993, and January 1994, are based on the same injury, the damages are unapportioned between the defendants and Judith, and XXX Herskowitz, were made jointly answerable for the wrongs alleged against them (Exhibit 22). This was also the case as to the judgments individually for Ms. Charney against Judith, and XXX Herskowitz making them jointly and severally each of them liable for the whole to plaintiff.

The common law of joint and several tort liability is still the law of the New York, which is binding on this Court. Although with joint and several liability the plaintiff is free to pick and choose the tortfeasors against whom she wishes to proceed or to enforce the judgment, the well settled New York law as established by the Court of Appeals provides, that

"satisfaction of a judgment rendered against one tort-feasor discharges all joint tort-feasors from liability to the plaintiff."

² Herskowitz submitted in her Memorandum of Law in support of her Motion to Vacate and Set Aside this Court's Decision and Order by default dated April 23, 2004 with numerous authorities in support that the judgment was discharged as to Judith Herskowitz. The Court agreed with that at the June 21, 2004 hearing. On page 28, of the June 21, 2004 transcript Herskowitz stated to the Court:

"Could I please put in a surreply affidavit on what he [Delibert] brought up about the distinguishing from post judgment and prejudgment [settlement]?"

THE COURT: I don't need a surreply; I know the difference, ma'am."

Velazquez v. Water Taxi, Inc., 49 N.Y.2d 762; 403 N.E.2d 172; 426 N.Y.S.2d 467, 468 (1980) and Vincent C. Alexander, *Practice Commentary* to McKinney's CPRL C1401:1, 1996.

Velazquez, relies on Restatement of Judgments §95, further explaining the application of the above stated rule, that it does not matter if there is one judgment, two judgments, because it is “The discharge of a judgment against any one of several persons liable for a single harm or breach of duty, owed by all, discharges the others.” *Gallivan v. Pucello*, 38 A.D. 2d 876; 329 N.Y.S.2d 211 (4th Dep’t 1972) reiterated the rule that where there are two judgments based on the same injury, “Even though separate judgments are recovered against joint tortfeasors, the satisfaction of one judgment discharges the other from liability.”

It is the primary rule that though several may be sued for a single injury, and recoveries had against them, there can be only one satisfaction. *Collins v. Smith*, 8 N.Y.Supp. 794; 255 App.Div. 665 (2nd Dep’t 1939) *Makeun v. State of New York*, 98 A.D. 2d 583; 471 N.Y.S.2d 293, 297 (2nd Dep’t 1984) makes clear that full satisfaction of a judgment in a settlement is not that a money judgment is paid dollar for dollar by the judgment debtors but, that the compromise for a lesser sum on the judgment is accepted by the judgment creditor as full payment, because “an obligation is met when the parties enter into a settlement, even though that settlement is for less than the judgment.” Also see, *Rock v. Reed-Prentice Division of Package Machinery Co.*, 39 N.Y. 2d 34; 346 N.E.2d 520; 382 N.Y.S 2d.720, 723;(1976) in a compromise after judgment with one of the joint tortfeasors, with no participation by the other, even if the plaintiff accepted less than the full amount of the judgment, and the settlement amount was not in partial satisfaction of the judgment “but, was paid as a final payment in full satisfaction of the judgment...the plaintiff’s judgment has been completely discharged”. The result was the same in *Blanco v. J &*

H Associates 177 A.D. 2d 370; 576 N.Y.S. 2d 124 (1st Dep't 1991) holding that once the judgment is satisfied it is deemed to constitute the plaintiff's election of his or her remedy...and a claim inconsistent with that election may not thereafter be asserted.

As has been shown, the law does not permit such inequity and injustice that one judgment debtor would be liable for the whole \$4.2 million judgment while two other jointly liable judgment debtors would pay a relatively nominal sum. New York General Obligations Law Sec. 15-108 allows a plaintiff to settle his claim with one of several jointly liable tortfeasors without prejudicing his right to pursue the other tortfeasors, "only where there has been a settlement in which a plaintiff discharges one of several tortfeasors prior to a verdict [or judgment]." (Emph. supplied), which would be a partial satisfaction in the form of a release See, *Practice Commentary* by Vincent C. Alexander, to McKinney's CPRL C1401:6, 1996. Section 15-108 specifies that this does not apply to settlements after judgment because, "the purpose of Section 15-108 is to encourage settlement when a tortfeasor's obligations have not yet been determined. After judgment, this purpose is no longer operative."

C. Charney Sought to Enforce Individual Rights In her Initial Complaint Pursuant to BCL §623, Which She Could not Simply Relabel as a Derivative Suit under BCL §626, in her Amended Complaint

In her initial complaint Charney based her claim on BCL §623 wherein she sought payment for her alleged shares of stocks in North Jersey and an appraisal of the corporate shares for these purposes. She also sought a declaratory judgment declaring and determining the rights of the parties and the respective amounts of shareholding of the parties. In addition she sought \$3,000,000 for alleged damages "for injury suffered by her [Charney] as a result of the

oppressive conduct of the defendants”. Realizing that she could not get her damage claim individually and there were no counsel fees provided under BCL §623 she relabeled her allegations for a derivative suit in her amended complaint pursuant to BCL §626, which allows counsel fees. Charney continued to appear individually and in fact the Referee’s Report (Exhibit 21) attributed the alleged damages to Plaintiff Susan Charney and the reference to the damages by “Charney on behalf of North Jersey” was made for the first time in the November 1993, and January 1994 judgments by default. As a further fatal defect these default judgments were entered without proof of service of summons required under CPLR§ 3215(f).

Under well settled law once Charney made a claim for payment of her alleged shares her sole remedy was to seek the right of appraisal pursuant to BCL §623. In *Norte & Co. V. New York and Harlem R. Co.* 222 A.D.2d 357, 635 N.Y.S.2d 629 (1st Dept. 1995) the Court held that minority shareholder’s sole remedy was to seek right of appraisal pursuant to BCL §623 to which the exclusivity rule applied and plaintiff could not pursue a derivative suit.

In *Collins v. Telcoa International Corp.*, 283 A.D. 2d 128, 726 N.Y.S.2d 679 (2nd Dept. 2001) the court likewise held that once a dissenting shareholder who objected to corporate sale or merger brought an appraisal proceeding, could not also commence an individual or derivative action for money damages. Plaintiff’s only remedy was for monetary recovery of fair value of dissenters’ share in an appraisal proceeding. Also see, *Lazar v. Robinson Knife Mfg. Co., Inc.*, 262 A.D.2d 968, 692 N.Y.S.2d 539 (4th Dept. 1999) The court stated in no uncertain terms that “a dissenting shareholder who commences an appraisal proceeding generally is excluded from enforcing ‘any other right to which he might otherwise be entitled by virtue of share ownership.’” As to any alleged fraudulent acts the exclusivity rule provides an exception for dissenting

shareholder to bring action as individual for equitable relief to remedy unlawful or fraudulent corporate conduct pursuant to BCL §623(k).

BCL §623(h)(7) provides that each party shall bear its own costs and expenses, including the fees and expenses of its counsel. In her complaint Charney acknowledged that she was not even recognized for twenty (20) shares of North Jersey stock, and so she realized her remedies were limited. To turn this case into the counsel fees that it has become under BCL §623(e) and to take over the entire corporation, Charney's individual claims were relabeled as a derivative suit. But, Charney continued to pursue her claims for herself and not for a class of shareholders.

However, the sovereign authority of the State of New York pursuant to BCL §623(k) absolutely precluded treatment of Charney's complaint as a derivative claim and the most she could have ever recovered was limited by provisions of BCL §623(h)(7). Those provisions under the most expansive reading would not permit a judgment obtained in January 1994 personally against Herskowitz to be deemed other than an individual claim. In fact this Court itself stated in its June 8, 2005 order that the Appellate Division in Herskowitz v. Tompkins, 184 A.D.2d 402 (1st Dept. 1992) treated Charney's claim individually, that what she pursued were "her rights" in the North Jersey property, as opposed to derivatively on behalf of North Jersey. Since BCL §623(h)(7) requires each party to bear their costs and fees, this Court lacks subject matter jurisdiction under the sovereign power of the state of New York to entertain Charney's motion for fees on pretext of BCL §626(e).

**D. The Alleged Plan of Distribution of the North Jersey Surplus by Charney
And Her Attorneys Is in Flagrant Violation of Federal Bankruptcy Laws**

No jurisdiction ever existed in this Court for its approval and certainly no authority exists

under BCL § 626(e) to award fees summarily to attorneys without evidentiary hearing and proof of how they benefitted the corporation by representing Charney derivatively as opposed to individually. Any such authority had been pre-empted by the proceedings in the Bankruptcy Court for New Jersey. Pursuant to 28 U.S.C. 1334(a) and (b) under Title 11 the Bankruptcy Court has exclusive jurisdiction over property of the debtor. It is undisputed that the surplus assets of North Jersey had been transferred into the custody of Windels, pursuant to order of the Bankruptcy Court for determining shareholder claims and the effect of the satisfactions of judgment under New York law. This was after the corporate assets were sold, and all claims were paid, settled and fully administered. Among those claims that had been settled and resolved were those for professional fees by Charney's attorneys.

These fee claims were made and determined pursuant to 11 U.S.C. §503(b)(3)(B) and (b)(4). As such no fee claims ever existed in this Court upon which to exercise subject matter jurisdiction pursuant to BCL 626(e). See, *Editorial Photocolor Archives, Inc., v. Granger Collection* 61 N.Y. 2d 517; 474 N.Y.S. 2d 964, 967 (1984) holding that state proceedings which are the equivalent of claims cognizable under federal law are pre-empted and therefore void for lack of subject matter jurisdiction.

Title 28, United States Code Section 157 describes procedures related to bankruptcy cases. Under §157(b)(2) "Core proceedings" in bankruptcy include, "(A) matters concerning the administration of the estate; and (B) allowance or disallowance of claims against the estate. Bankruptcy Rule 3022 governs the effect upon the administration of claims in a Chapter 11 reorganization case, which provides that "After an estate is fully administered in chapter 11 reorganization case, the court....shall enter a final decree closing the case". Title 18, United

States Code, Section 155 addressed “Fee agreements in cases under Title 11 and receiverships” as follows”

“Whoever being a party in interest, whether a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest in any receivership or case under Title 11 in any United States court or under its supervision, knowingly, and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate, shall be fined.....or imprisoned.....or both”.

Accordingly, all attorney fee claims, relate to the corporate estate had ben determined and settled with finality by the New Jersey Bankruptcy Court, pursuant to 28 U.S.C. §157, and Bankruptcy Rule 3022. No jurisdiction existed in this Court to approve any further attorney claims against the estate, in that the application of BCL §626(e) had already been pre-empted by federal law pursuant to 28 U.S.C §1334 and 11 U.S.C. § 503. Charney’s plan of distribution of the surplus assets of corporation’s bankruptcy estate to her attorneys for fees disallowed in bankruptcy, was a patent bankruptcy offense under 18 U.S.C. §155.

IV. Where the Court Acts Outside of its Personal and Subject Matter Jurisdiction Judicial Immunity is Lost

The court held in *Rankin v. Howard* 634 F.2d 844 (9th Cir. 1980) that the absence of personal jurisdiction over a party, may be said to destroy “all jurisdiction” to adjudicate the party’s rights, whether or not the subject matter is properly before it. Moreover, because the limits of personal jurisdiction constrain judicial authority, acts taken in absence of personal jurisdiction do not fall within the scope of legitimate decision making that judicial immunity is

designed to protect. The court held that a judge who acts in clear and complete absence of personal jurisdiction loses his judicial immunity. Rankin sued his parents and the judge and alleged that there was an agreement for a favorable ruling, and ex parte guardianship papers have been issued to have him “deprogrammed” from the unification church. He alleged that they knew that the jurisdictional allegations were fraudulent, and violated jurisdictional requirements of the state guardianship statute and failed to give him proper notice.

The court held that where a judge had agreed in advance to rule favorably on the guardianship petition, such an agreement would not be a judicial act for which the judge would be cloaked with judicial immunity. Likewise a judge who acts in the clear and complete absence of personal jurisdiction and knows that he lacks jurisdiction or acts in face of clearly valid statutes or case law that expressly deprives him of jurisdiction, he loses his judicial immunity.

The court noted that the Stump court identified two specific factors to be considered in determining whether an act is “judicial”; “the nature of the act itself, i.e. whether it is a function normally performed by a judge and the expectation of the parties, i.e. whether they dealt with the judge in his judicial capacity.” Although, a party conniving with a judge to predetermine the outcome of a judicial proceeding may deal with him in his “judicial capacity” the other party’s expectation, i.e. judicial impartiality, is actively frustrated by the scheme. In any event, the agreement is not a “a function normally performed by a judge”. It is the antithesis of the “principled and fearless decision making’ that judicial immunity exists to protect”. The court concluded that a judge’s private, prior act is not a judicial act.

In Jade Square & Tower LTD. V. C.I.T. Corp. 87 A.D.2d 564, 448 N.Y.S.2d 194 (1st

Dept. 1982) the court recognized that judicial immunity of judges for acts performed within their judicial jurisdiction is necessary corollary of principle that in order to effect proper administration of justice, judge must be free to act upon his interpretation of law without fear of personal consequences to himself. But, the essential to invocation of doctrine of judicial immunity is jurisdiction, it cannot be invoked with regard to matter over which judge has no jurisdiction. Judge had no judicial competence to facilitate overall settlement involving cases which were not before him and which were pending in another court and so it was held the mantle of judicial immunity cannot cloak his actions.

In *Maestri v. Jutkofsky*, 860 F.2d 50, 53 (2nd Cir. 1988) the court held that the judge's assumption of authority outside geographical bounds of his office is the kind of clear judicial usurpation which cannot be condoned by any grant of judicial immunity. The test is two prong 1) judge will be denied judicial immunity where it appears that the judge acted in the clear absence of jurisdiction, and 2) that the judge must have known that he or she was acting in the clear absence of jurisdiction. This test, is composed both of an objective element, that jurisdiction is clearly absent i.e. that no reasonable judge would have thought jurisdiction proper, and of a subjective element that the judge whose actions are questioned actually knew or must have known of the jurisdictional defect. This protects judicial acts from hindsight examination while permitting redress in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction. The court further held that for a judge to assume authority outside the geographic bounds of his office is the kind of clear judicial usurpation which cannot be condoned by any grant of immunity and that no public policy would be served by granting immunity for such arrogant excess of authority.

When a judge acts, he is clothed with jurisdiction, and acting without such jurisdiction, he is but an individual, falsely assuming an authority he does not possess in such case he acts in a private capacity, and the responsibility is his own. *Koepp v. City of Hudson* 276 A.D. 443; 95 N.Y.S.2d 700 (3rd Dept. 1950)

V. Injunction Cannot Be Imposed on Herskowitz for Exercise of the Right to Resist Illegitimate Assumption of Jurisdiction Over Her, and this Court's Order Conclusively Establishes That It Is Incapable of Being Impartial, Requiring the Judge's Recusal.

It cannot be said that Herskowitz has engaged in abusive and vexatious litigation tactics where she is clothed with New York statutory and a due process right to resist this court's extraterritorial reach in view of Charney's failure to acquire long arm jurisdiction over the nonresident Herskowitz pursuant to requirements of CPLR §§ 302 and 304. The within proceedings were commenced by Charney. The case has a very short history in this Court as it relates to Herskowitz. She was brought into this New York litigation in 1989 with a Motion for Injunctive Relief by Charney in which she falsely asserted that Herskowitz and others were citizens and residents of New York, when in fact Herskowitz was a permanent resident of Florida since 1975. Herskowitz commenced no litigation in this Court, and acted only in defense of Charney's claims until about 1992. Thereafter, Herskowitz never appeared in this Court until Charney moved in May 2003 with her Motion for Disbursement of the corporate assets.

The court steadfastly adheres to its initial default in its April 13, 2004 order, without regard to the well settled law, that there can be no default where there was no jurisdiction. It is well settled for purposes of determining whether relief from default judgment is warranted, that defendant need not present a meritorious defense to the underlying claim if judgment being

vacated is void; jurisdictional defense is a sufficient meritorious defense. *Leab v. Streit*, 584 F. Supp. 748 (D.C. N.Y. 1984) The Court has decided not to decide any of Herskowitz's motions and the decision of this Court is to continue to adhere to that contrived default. The court resorts to that default, to avoid addressing the meritorious defenses raised by Herskowitz, with regard to personal jurisdiction, the satisfaction of the judgments, the preemption by federal law and so forth. This Court imposed this injunction on Herskowitz for personal reasons, to deter her from exposing the fabrication of the record.

In the cases relied on by this Court namely in *Sassower v. Signorelli*, 99 A.D.2d 358, 359 (2nd Dept. 1984) and in *Pignatraro v. Davis*, 8 A.D.3d 487, 489 (2nd Dept. 2004) it was the moving parties, in *Sassower* a plaintiff who was enjoined from filing further actions to prevent the filing of repetitious suits, and in *Pignatraro* a petitioner who was enjoined from filing further petitions on matters that were previously adjudicated on the merits regarding child custody and visitation without a showing of change of circumstances.

In *Walston & Co. V. Klein*, 44 Misc.2d 607, 610 (S.Ct.N.Y. Cty. 1964) plaintiff moved to enjoin the defendant from further litigating issues pertaining to a motion to vacate a default judgment on the ground of newly discovered evidence. But, regardless of how much litigation was engaged in by defendant the injunction was denied on the ground that an injunction against the defendant could be granted only in a "plenary action for injunction" in a direct action brought against the defendant for injunctive relief. In this case the Court would foreclose defendant sua sponte.

In each of the above cases the court emphasized that "public policy mandates free access

to the courts and zealous advocacy is an essential component of our legal system”. In *Sassower* where plaintiff was pressing “a frivolous claim” and “solely out of ill will or spite” the court said that equity may enjoin such as “vexatious litigation”. That is not the case here. Herskowitz has meritorious defenses fully supported with legal authorities, that cannot be enjoined.

The apparent concern of this Court is to retain the April 13, 2004 order granting disbursement of the surplus funds of close to \$700,000.00 solely on Charney’s motion with no opposition to keep that \$4.3 million judgment and sanction orders against Herskowitz, so that it would not have to order restitution. This Court has demonstrated that it has predetermined the case, avoids relying on the record while relying on non-existent orders for jurisdiction, irrespective of the territorial limitations of this Court, will not rule on the merits of the nonresident Herskowitz’s motions, and for all the other reasons stated herein, requiring the recusal of the Judge.

CONCLUSION

For all the reasons set forth herein, the within motion should be granted in its entirety together with such other and further relief as to the court may appear just and proper.

Dated: June 29, 2005
Miami Florida

Respectfully submitted,

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