

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.

IAS PART 30 Heitler, J.

Index No. 24517/88

**REPLY TO CHARNEY'S
OPPOSITION TO CROSS
MOTIONS BY DEFENDANT
JUDITH HERSKOWITZ**

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 personal jurisdiction of this Court in Reply to Steven Delibert's Opposition to Cross Motions of Judith Herskowitz, replete with ad hominem attacks in an inappropriate justification for the fees he is seeking in this Court.

2. In fact the veracity of that Opposing Paper is unsubstantiated by Delibert's failure to certify it under penalty of perjury as required under CPLR 2106. Accordingly that Opposition paper has no evidentiary value whatsoever. For that very reason alone if any of that Opposition is to be considered an evidentiary hearing is mandatory and for the further reason that it is replete with false claims, it is based on disputed issues of material fact, and all factual representations are denied..

3. Delibert merely concludes that he successfully pursued a derivative suit, without being able to rebut ¶10 of the moving Affidavit that he pursued Charney's suit individually i.e. dissolution of North Jersey relying on N.Y. BCL § 1104(c) and N.J. Stat. §14A:12-7(b), declaratory judgment

for shares of North Jersey pursuant to CPLR §3001; the inspection of corporate books and records pursuant to, N.Y. BCL §624; and the appointment of a receiver for the property of North Jersey pursuant to, N.Y. BCL §1202(a)(1) and (a)(3); in only one count VII did she make a claim derivatively on behalf of North Jersey pursuant to N.Y. BCL §626, which she previously claimed individually. Yet he would seek fees for all the foregoing. In fact Charney pursued her entire suit individually and not on behalf of North Jersey Trading Corporation, and not even the judgment is in favor of North Jersey Trading Corporation as required under BCL 629(e).

4. Delibert fails to rebut that the dispute was over vacancies in the building, kept for co-op conversion to upgrade for market rent. What he claimed as loss was the loss of rents which therefore could not have been a “diversion of income” by the Herskowitzes. The sworn testimony of Charney in ¶ 67 of the Affidavit is un rebutted, that the corporate income belonged to the father Alex Fried. So, that these funds would have to go to his estate. Yet there was no provision by Delibert for Fried in His Post Inquest Memorandum, so that he would put his support on the Herskowitzes.

5. Moreover, not a penny is provided in his Post Inquest memorandum for management fees and other vital expenses of that real property. What pains him, that there is one member of the family left, who interferes in his devious scheme to empty out the corporation. Thus, trampling on thirty two years of toil, in which Charney never participated because she pursued her own career.

6. It has now come full cycle that this suit was never for any benefit of North Jersey Trading Corporation, but for Delibert personally. Those vacant apartments upon which Fried took the losses never benefitted the Herskowitzes, but upon information brought millions of dollars to the new owners, which should have been theirs and Fried’s during his lifetime. Instead by Delibert’s

mechanization they stand impoverished, while he continues with his devious schemes to appropriate whatever is left on the demise of the real property. Sadly, the family escaped from Communism in Hungary to start a new life here under promises that their property would not be taken without due process.

7. A motion is being filed in the Bankruptcy Court to reopen the case, a courtesy copy of which is also served on this Court. As to the Florida case to which Charney makes reference, that was also commenced by her. Unrebutted by Charney are the facts stated in ¶63 of the moving Affidavit that the General Master made the finding in his September 6, 1995 Report based on these undisputed facts, that on Charney's December 1988 service, the Herskowitzes were served only with a motion, which was insufficient to commence an action under New York law,

"The Herskowitzes' alleged "withdrawal" of their objections to personal jurisdiction is unsupported by the record. It seems clear that the order of Justice Tompkins reciting that the objection to jurisdiction had been "withdrawn" is unsupported by the record."

8. It was further noted in that Report that although the Herskowitzes repeatedly raised the jurisdictional issues in various courts, none of them addressed the issue on the merits. ¶64 of the Affidavit is likewise unrebutted by Charney that she acknowledged in her Exceptions to the General Master's Report filed on September 5, 1995 that the New York court's determination on personal jurisdiction

"was not reached in the October 2, 1991 decision" on that "earlier permitted withdrawal of their jurisdictional objections.

A copy of that summary final judgment is attached hereby as Exhibit 1. Likewise in his December 29, 1993 sworn testimony Delibert conceded that it was unsupported by the record that the Herskowitzes withdrew their objections to jurisdiction.

9. While Charney rehashes and attaches irrelevant papers to her Opposition paper she fails to attach any order of this Court which determined personal jurisdiction over the Herskowitzes on the merits. What Delibert is doing is huffing and puffing and heaping baseless accusations on Judith Herskowitz to coverup that no such order exists. Charney attempts to rely on a September 23, 2003 order of the Florida court claiming that it “dismissed” the Florida domestication action and would use it to bar further litigation of the jurisdictional issue in this Court.

10. However, that order was procured by outrages *ex parte* manipulations and was then prepared by Florida counsel Eric Christu, even leaving his secretary’s name on it, without motion, notice and hearing and without holding that status conference claimed in that order. That collusive *ex parte* order is void under Florida law mandating under Rule 1.420 Fla.R.Civ.P. that in an involuntary dismissal “notice of hearing on the motion shall be served” a requirement to any hearing.

11. That *ex parte* October 23, 2003 order purports to strike Judith Herskowitz’s Verified Motion to Strike as Sham the pleading and defenses of Susan Charney, disregarding that Rule 1.150 Fla.R.Civ.P. mandates that an evidentiary hearing shall be held when a party moves to strike a pleading for sham. Another motion stricken was Motion for Constitutionally Mandated Inquiry into Whether the Jurisdictional Issues were Fully and Fairly Litigated and Finally Decided in the New York court. Even though no evidentiary hearing was ever held in the Florida case and even the Administrative Judge in the Florida court directed to set that hearing it was denied by that *ex parte* October 23rd order. Thereby, preventing Judith Herskowitz from introducing into evidence over 50 documents showing that Delibert’s and Charney’s claims are false. .

12. In view of the fact that the September 23, 2003 order was entered *ex parte* and is void under Florida law, a motion for the recusal of the judge and to vacate and to set aside that September

23, 2003 order is properly pending as well as another motion to vacate a prior void order, copies of which are attached. These pending motions cannot be taken away with *ex parte* orders to avoid an evidentiary hearing to allow Judith Herskowitz to submit evidence on what is clear that there is no order that determined personal jurisdiction.

13. As to ¶ 9A of the Opposition paper it is irrelevant to the New York Final Judgment as to what is posted on a website. It is only intended by Delibert to inflame this Court against Judith Herskowitz. A case is closed upon entry of the final judgment unless there is an appeal. That website notes some other person's address and posts the Herskowitz case as it does others.

As to ¶ 9B Denied - This puts Delibert's and Charney's declaration to a lie that they came to "save North Jersey Trading Corporation" when Delibert concedes that it was to "demand appraisal and sale of her [Charney's] shares".

As to ¶ 9C Denied and it is false that Judith Herskowitz was served with process. - Judith Herskowitz never went to Delibert's office from Florida just to deliver a notice of shareholder's meeting, which he asked for as a good faith gesture. Delibert pretended to set up a meeting to try settle Charney's claim. What Delibert attempted to give to Judith Herskowitz was only an Order to Show Cause for TRO and not a summons and there was no complaint for derivative suit. It was sheer enticement and was not upheld to constitute service after a four day traverse hearing before Justice Gangel Jacob. It was after that that Justice Gangel Jacob was replaced, by Judge Harold Tompkins. Delibert refused to continue with the traverse hearing, Justice Tompkins then resorted to that fictional withdrawal of personal jurisdiction by the Herskowitzes.

As to ¶ 9D Denied - Absolutely, false self serving declarations of "that unexplained wealth that the Herskowitz lived in" when they lived in a run down house in Florida. That

reorganization was merely for tax purposes for subchapter S corporation, upon which Delibert in the above ¶ B concedes he saw his opportunity to “demand appraisal and sale of her [Charney’s] shares” from the corporation. If that real property was in such bad condition, as Delibert claims then obviously it needed money, and Charney’s demand for a payout of millions of dollars certainly cannot be said was for benefit of the corporation.

As to ¶ 9E This is an obviously desperate cover up by Delibert for replacing Justice Gangel Jacob, with Justice Harold Tompkins. It was reported in a November 11, 2003 issue of the New York Times titled “Cozying up to Judges and Reaping Opportunity” as told by attorney Ravi Batra returning favors for favors that “he tried to help acting Supreme Court judge, Harold Tompkins, win a permanent spot by calling the Manhattan Democratic leader, Assemblyman Herman D. Farrell Jr. For that in the preceding 18 months, Justice Tompkins had given Mr. Batra 10 appointments worth more than \$85,000.”

As to ¶ 9F Delibert concedes that the Herskowitzes received no motion and notice on the hearing preceding the December 10, 1991 order was *ex parte* as to the Herskowitzes.

As to ¶ 9F Denied - This is yet another false interpretation by Delibert.

As to ¶ 9 H Absolutely false. §23 of the Affidavit is undisputed that the Herskowitzes could move with a motion in lieu of an answer. Since the October 2, 1991 order was held to be unappealable it was not reviewed. The proposition that if it were appealed is mere dicta..

As to ¶ 9 I Denied - False, Upon permission of the court the papers were faxed timely. Delibert’s letter Exhibit D is *ex parte* communication with Justice Harold Tompkins, without copies to the Herskowitzes with regard to ownership of stock.

As to ¶ 9 J Denied - Court refused to accept the Herskowitzes’ evidence on the stocks.

As to ¶ 9 K Denied - No misconduct was found by referee. Judith Herskowitz was not custodian of the corporate books and records. Delibert threatened Herskowitzes with arrest if they show up personally, which would had to do to testify.

As to ¶ 9 L Clearly Delibert admits that books and records were produced. Denied, false that there were “several different versions” of the books and records.

As to ¶ 9 M The only person interested in the arrest of the Herskowitz was Delibert not even Charney. He was requested to agree not to arrest them. He refused. It is outrageous that in a civil Delibert can make honest hardworking people look like criminals because they did not hand over to him all their North Jersey stock certificates for \$5,000.00 in sanctions as he demanded..

As to ¶ 9 N See response in ¶ ¶ 8 and 9. There was a summary final judgment which correctly determined that the Herskowitzes did not withdraw their objections to personal jurisdiction, that this was unsupported by the record. These facts are undisputed by Delibert. The New York judgments were denied full, faith and credit. But it was reversed upon a June 6, 1995 affidavit of Delibert raising a fraudulent defense.

That Verified Motion to Strike as sham Charney’s pleading and defenses is addressed to that June 6, 1995 affidavit. Rule 1.150 Fla.R.Civ.P. mandates that an evidentiary hearing shall be held when a party moves to strike a pleading for sham. There are more than 23 documents to prove that the June 6, 1995 Affidavit is perjured. Yet no such evidentiary hearing was ever granted. When an evidentiary hearing was finally scheduled for August 20, 2003 then it was canceled by *ex parte* manipulations in which Charney’s Florida counsel Eric Christu actively participated preparing and submitting that void September 23, 2003 *ex parte* order to the Court, without any notice and hearing. There can be no defiance of that Florida order as claimed by Delibert because it is void.

Moreover, when a judge *ex partes* under Florida law he is required to step down from the case.

14. As to ¶10 Denied, False - Charney's objection to relief under CPLR 5015 from the judgment that it is sought ten years after it was entered is frivolous, when it is she who is seeking fees under that judgment ten years later. As to Delibert's December 29, 2003 testimony is stated verbatim in the moving Affidavit verbatim and does not why that is mischaracterized as well as Delibert's affidavit. Since, there never was an evidentiary hearing these issues were not heard.

15. As to ¶11 Denied, False- There is no confusion here as to that fictionalized withdrawal of jurisdictional objections.

16. As to ¶12 Denied, Frivolous - that Judith Herskowitz should make an offer to pay on the \$4.2 million judgment. Delibert would use the corporation after ransacking it, for extortion, while obstructing justice. The destruction of the corporation is no benefit to the corporation.

17. As to ¶13 Denied False - Unconstitutional to deny a defense. Not a misconduct to thrive to prevail on the truth, that is what courts are supposed to be for and not for sustaining a fraud to make fees as Delibert would have it.

18. As to ¶14 Denied False - The question is not the judgment but the recovery. None except for forcing under threats that \$150,000.00 out XXX and XXX Herskowitz. An argument without factual basis if the alleged services were rendered under bankruptcy then that is what is controlling. If Delibert felt that he was not going to be compensated then he should have withdrawn. Delibert considers it to be his right to hijack and ransack corporate funds under false pretenses for his fees, while he would false espouse that his litigation conferred a benefit on the corporation.

19. As to ¶15 False - Since there was a bankruptcy, the fees were prepetition or administrative expenses.

20. As to ¶16 False - The claim is derivatively, which under bankruptcy is an asset of the estate and so the fees come through the bankruptcy court. As to non-bankruptcy litigation that would be individually for Charney which can be recovered only from Charney personally.

21. As to ¶17 Denied, false - There is no competing administration of the estate it was under trustee who was awarded the fees, Bankruptcy Judge told Delibert he is litigating at his own risk and expense.

22. As to ¶18 Denied, false - No misconduct of Judith Herskowitz was ever shown. Delibert to pursued his litigation being fully aware that Charney could not pay his fees, but continued on to defraud the Herskowitzes of their interest in the corporation for his fees.

23. As to ¶19 Denied, false, only corporate debt could have been listed as such.

24. As to ¶20 Denied, false Trustee claimed estate was fully administered and all claims and administrative expenses were paid.

25. As to ¶¶ 21-24 Denied, false irrelevant. If the judgment is fully satisfied then it is discharged as to Judith Herskowitz as well and all these arguments are inapplicable.

26. WHEREFORE, for the reasons stated herein the stay of these proceedings should be granted as requested in the moving papers. This particularly by Delibert's own inability to show jurisdiction in this Court for the fees that he is seeking and since clearly the proceeding is very much a pending in the Florida court, with absolutely no determination that the New York judgments are entitled to full faith and credit, which cannot be taken away with a void *ex parte* order. Most certainly this Court should not be blinded to what amounts to personal attacks by Delibert in his attempts to appropriate the entire remaining corporate funds.