

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

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

Index No. 24517/88

Defendants.

**THE DERIVATIVE JUDGMENT HAS BEEN FULLY SATISFIED WITH THE
SETTLEMENT APPROVED AND ADMINISTERED BY THE BANKRUPTCY
COURT THAT OPERATED TO SATISFY THE JUDGMENT AS TO ALL PARTIES**

As noted in ¶69 of the Affidavit of Judith Herskowitz Charney executed upon a family owned subscription agreement to purchase a rent controlled apartment, that resulted in a settlement payment of \$150,000.00 to withdraw the execution and a satisfaction of judgment to XXX and XXXX Herskowitz. Joining in this settlement and satisfaction of the derivative judgment was the Trustee, Windels, Delibert and Charney acting for herself and on behalf of North Jersey. It was approved by order of the Bankruptcy Court, and the settlement proceeds were administered as an asset of North Jersey's Chapter 11 estate. (See ¶70 of Affidavit)

Judith Herskowitz argued at the hearing on approval of the settlement in the Bankruptcy Court that the settlement covered her as well, by operation of law. (¶71 of Affidavit). However, the Bankruptcy Court ruled that the effect of the settlement was not a matter properly before it. (See ¶73 of Affidavit) In fact, Charney through her attorney, used this issue of the settlement and satisfaction as to its effect under New York law, to justify Charney's request for the transfer of the corporate proceeds to Windels. (See ¶74 of Affidavit) This also enabled her attorney to mislead the

Bankruptcy Court regarding the termination of litigation over the domestication of Charney's judgments in Florida, which caused the Bankruptcy Court to order the corporate funds transferred to her New York receiver "for adjudication there of the shareholder's rights therein between Judith Herskowitz and Susan Charney". (See ¶75 of Affidavit)

Consequently, the Bankruptcy Court dismissed the case, and caused the proceeds that are subject to Charney's motion to be delivered into the custody of Windels. (See ¶76 of Affidavit). Yet it should be self-evident that the Bankruptcy Court never contemplated that Charney would bring the motion now before the court, and certainly never authorized the dissipation of corporate assets that Charney would have this Court approve for herself and for her attorneys. To be sure, the transfer was made so that the respective shareholder rights between Judith Herskowitz and Susan Charney could go forward in this Court. Crucial to this adjudication is the satisfaction of judgment that Charney and Windels have refused to file in the Clerk's office of the Supreme Court of New York County, though mandated by N.Y. CPLR ¶5020 to do so. (See ¶72 of Affidavit).

The simple explanation for this failure to comply with the procedural requirements of CPLR ¶5020 to file the satisfaction with the Clerk's office, and to produce same upon request, is to prevent the proper review and consideration as to its effect, in fully satisfying the derivative claim against Judith Herskowitz. As stated, the settlement with XXX and XXXX Herskowitz was in full satisfaction of the derivative judgments.

It was likewise undisputed by Karen Bezner in the District Court that, the provision in the Settlement Agreement for a "full and absolute satisfaction of judgments" "solely as to XXXX and XXX" is also in violation of the laws and public policy of New York. It was fully argued that under New York law, the "full satisfaction" of the judgments in a post judgment settlement cannot be

restricted to some of the jointly and severally liable judgment debtors.

Joint and several tort liability is still the law of the New York. 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, New York law provides,

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

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

In *Rock v. Reed-Prentice Division of Package Machinery Co.*, 382 N.Y.S. 720, 723; 346 N.E.2d 520 (1976) the Court of Appeals made clear that, in a compromise after judgment with one of the joint tortfeasors, even if the plaintiff accepted less than the full amount of the judgment, but the settlement amount was paid as full satisfaction of the judgment

"the plaintiff's judgment has been completely discharged". (Emph. supplied)¹

It is the further well settled New York law, that when 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."

Gallivan v. Pucello, 329 N.Y.S.2d 211 (4th Dep't 1972) The same was held in *Blanco v. J & B*

¹ In *Rock* supra, the plaintiff recovered a judgment in the sum of \$400,000 of which \$350,000 (87.5%) was against Reed Prentice and \$50,000 (12.5%) against Westbury. Westbury declined to join in the settlement. Plaintiff then settled and compromised the judgment with Reed Prentice for the sum of \$250,000, in full satisfaction of the \$400,000 judgment. Consequently, the judgment between plaintiff and Westbury was also discharged. Only a claim for contribution remained between Reed Prentice and Westbury. This was for Westbury's proportionate share of liability on the settlement sum of \$250,000 of which \$31,250 (12.5%) was determined to be the amount Westbury was required to pay Reed Prentice.

Associates, 576 N.Y.S. 2d 124 (1st Dep't 1991) After plaintiff and defendant compromised a judgment for a lesser sum, plaintiff could not pursue a joint tortfeasor based on the same injuries because,

"once the judgment is satisfied it is deemed to constitute the plaintiff's election of his or her remedies."

Even though there are two separate derivative judgments one against XXXX and XXX Herskowitz and another against Judith Herskowitz, still the parties were all jointly and severally liable, since the two judgments were based on the same claim and injury.

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 tort-feasors prior to a verdict [or judgment]." (Emph. supplied)

So this is inapplicable to settlements made after judgment. *Rock v. Reed-Prentice*, supra., and *DeSano v. Tower*, 514 N.Y.S.2d 153, 154 (4th Dep't 1987). However, such settlement prior to verdict would be a partial settlement or in the form of a release. See, Vincent C. Alexander, *Practice Commentary* to McKinney's CPRL C1401:6, 1996. Likewise a settling tortfeasor "may be dropped from the case pursuant to a discontinuance" in a prejudgment settlement. However, 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."

CONCLUSION

Accordingly, sufficient reasons have been set forth herein that the judgments against Judith Herskowitz have been satisfied as well based on the full satisfaction of the judgment to the jointly liable judgment debtors XXXX and XXX Herskowitz.

Dated: Miami Beach, Fl.
October 1, 2003

Respectfully submitted,

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