

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,
XXXXHERSKOWITZ and XXX
HERSKOWITZ,

Defendants.

**AFFIDAVIT IN SUPPORT OF
MOTION TO VACATE
DECISION AND ORDER
OF APRIL 22, 2004 ENTERED
BY DEFAULT AND FOR LEAVE
TO RENEW AND TO REARGUE**

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, in support of my motion to vacate this Court's Decision and Order entered on April 22, 2004 by default and for leave to renew and reargue plaintiff Susan Charney's Motion Directing Disbursement of Assets (Exhibit A).

2. By Decision and Order entered on April 22, 2004 in the above entitled case, this Court granted plaintiff Susan Charney's motion for disbursement of funds, upon defaulting defendant Judith Herskowitz, for not appearing in this Court on November 18, 2004. The motion was brought on by plaintiff Susan Charney through her attorney Steven Delibert seeking an order directing the disbursement of close to \$700,000 held by the named receiver Paul Windels III. The \$700,000 constitutes the remaining funds of North Jersey Trading Corporation, transferred from the New Jersey Bankruptcy Court, which Charney sought to be divided between herself and her

six attorneys as agreed upon among themselves as to the respective sums to be received by each.

3. Although it is acknowledged by this Court that I have timely served Ms. Charney and Mr. Windels with my papers including a cross motion, and properly submitted those papers to this Court, the April 22, 2004 Decision and Order rests solely on Ms. Charney's papers.

I. Excusable Non Appearance

Delibert has Willfully Failed to Abide by Instructions of This Court and Submitted the Order to Suspend the Orders Of Commitment Untimely

4. The Court refers to an October 22, 2003 "telephone conference" in which "Ms. Herskowitz informed the Court that she was threatened by Mr. Delibert that she would be arrested if she comes to the New York court "on outstanding warrants of arrest" fines and sanctions against her. Mr. Delibert acknowledged this. This Court then agreed

"that the arrest warrants would be lifted, and a copy of the order lifting the warrant would be sent to her home so that she could travel to New York for this court appearance without fear of arrest."

Judith Herskowitz expressed her gratitude to the Court, for having made that decision and was happy to know that she could appear in court without fear of arrest.

5. The Court then directed Mr. Delibert to prepare and deliver an order, which was to be received by the Court "in a day or two", to which he agreed.. Thus, my appearance in this Court on November 18, 2003 was contingent on the expeditious receipt of that order, so that I could make travel arrangements from Florida to New York, especially when this was going into the busy Thanksgiving holiday season. To get a reasonable round trip air-fare from Miami to Florida required the purchase of airline tickets one to two weeks in advance which were non-refundable. I am of advanced years, with very limited funds and this was an expensive trip for

me. As to retaining counsel that was likewise not within my means.

6. Mr. Delibert in willful violation of the explicit directions of this Court requiring him to submit that proposed order in a day or two, submitted it three (3) weeks later, so that what are two orders - one in the above entitled case and the other in Index No. 23002/92 - were not signed until Wednesday, November 12, 2004 (copies of the orders attached as Exhibit B). Therefore, I received the orders untimely the week of November 17th. (Pursuant to CPLR 2103, five days are added for mailing.) putting me into a quandary as to whether I was going to receive the orders.

7. Mr. Delibert willfully, in bad faith, deprived me of the opportunity to complete my travel arrangement from Florida to New York so, that I could be in this Court on November 18th, 2003 as I planned. It was obviously intentionally and knowingly calculated by Mr. Delibert that the orders would not reach me timely, so that he could prevail once more without opposition, by default, which has been his modus operandi. Needless to say this has made me very upset.

8. On November 14, I contacted this Court copied to Mr. Delibert and Mr. Windels as to the non-receipt of the order lifting the "warrants of arrest" as well as their reply papers. On that same day I also contacted the court by telephone to inquire about the order but this Court's assistant Steve had no information and there was no call back by Mr. Delibert. I called again on Monday November 17, 2003 and spoke to Steve who told me that under these circumstances I would not be expected to be able to jump on a plane for that court appearance and so I would be called when the case comes on November 18, 2003 and could appear by telephone.

9. On November 18th, I have called this Court, and spoke to Steve, but I was not allowed to participate by telephone. However, Steve told me that there was no oral argument and no hearing and that all the papers including my papers were marked submitted. In a letter dated

November 25, 2003 to Hon. John F. Werner, Chief Clerk and Executive Officer of this Court, to whom Chief Administrative Judge Hon. Jonathan Lippman referred this matter, Mr. Delibert assured Hon. Werner,

“that substantially all the matters raised in Ms. Herskowitz’s letter [the issues raised in her papers] were raised by her to Justice Heitler, before whom this action is now pending; that the motions respecting these issues were marked ‘submitted’ by Justice Heitler on November 18, 2003...and that all these matters are now *sub judice*.”

10. As to any delay prior to the November 18th return day of the motion most respectfully that is attributable to Mr. Delibert and Mr. Windels as well.¹

II. Meritorious Defense

A. Delibert Has Continuously Threatened Judith Herskowitz with Null and Void Contempt and Commitment Orders to Deny Her Access to Court, in Order to Prevail by Default

11. That fear of arrest was real when Mr. Delibert persistently raised in his Affirmations and Memoranda of Law the threat of arrest and commitment, should I appear in the New York court. For years Mr. Delibert terrorized me and my sons XXXXand XXX Herskowitz threatening us that if we appear in the New York court, we would be immediately imprisoned until we paid the fines of about forty thousand dollars and gave up all our corporate stocks. That

¹ Mr. Windels set on that \$700,000 for three years from August 2000 to May 28, 2003 without any reason and any explanation for that delay. Mr. Delibert and Mr. Windels consented to an adjournment to July 21, 2003. Then by letter dated July 8, 2003 Mr. Windels requested an adjournment because of his trip to China (Exhibit C). For everyone’s convenience there was an adjournment to September 22, 2003. I served and submitted a cross motion, and the matter was adjourned to October 22, 2003 to give Mr. Delibert and Mr. Windels an opportunity to respond. As directed by this Court, I reserved those papers and were timely received by Mr. Delibert and Mr. Windels on October 3, 2003. While they have taken three weeks to respond to my papers, they served their papers untimely depriving me of the required seven days to respond, which was jurisdictional under CPLR2214 (b) necessitating an adjournment.

Mr. Delibert holds these orders very much in effect is further made clear in this Court's November 12, 2003 order each of them titled "Order Suspending Order of Commitment as to Judith Herskowitz". As stated in those orders they were entered on the consent of both Mr. Delibert and Mr. Windels to suspend the effect of two orders each titled "Order of Commitment" each dated February 19, 1993, from November 16, 2003, to terminate on November 23, 2003.

12. That I was subject to be arrested in New York is recognized by this Court in its April 22, 2004 Decision and Order as well in stating that there are "arrest warrants outstanding" against Judith Herskowitz. In his current papers Mr. Delibert accuses me of being a "fugitive" from the arrest orders of the New York court, regardless that at all times material herein I was and I am a citizen and permanent resident of the State of Florida.

13. The modus operandi of Mr. Delibert has been as on this motion to fill his papers with contempts and sanctions to incite and to prejudice the Court against me as he did in other courts that included my sons XXXX and XXX Herskowitz. To demean, disparage and to malign us Mr. Delibert falsely claims to this date, that we "looted" the corporation and engaged in tortious conduct by diverting and converting corporate funds for personal benefit, none of which has Charney or Delibert ever proven. Because they have thrown up that smoke screen, we were obstructed from being heard on the merits based on the facts and evidence as was the case now. It was upon such maneuvers that Charney through Delibert procured that \$4.2 million dollar derivative judgment on behalf of North Jersey Trading Corp., against me and my sons.²

² Omitted is the fact that the North Jersey property at 200 Riverside Drive N.Y.C. was purchased by Hedy and Alex Fried in 1958, they managed it and derived its income during their lifetime, and as conceded by Ms. Charney she never received any income or dividends from North Jersey, but pursued her own career from which she derived her income. Ms. Charney through Mr. Delibert began her litigation in 1988 in this Court with - Continued next page.....

14. This Court was erroneously influenced in entering its Decision and Order in favor of Charney on the fifteen year history recited solely by Mr. Delibert. First of all I appeared before this Court, only from 1989 to about 1993 and have not been before this Court for ten years until Charney filed her instant motion in 2003. Since the contempts, sanctions and fines as recited by Mr. Delibert were an integral part of this Court's April 22, 2004 Decision and Order, on that issue alone it would be warranted to set aside that default entered against me.

15. As shown in the accompanying Memorandum of Law each of the orders and judgments titled "Order of Commitment" entered on February 19, 1993 is unsupported by applicable New York law, are void and contravene constitutional provisions.

16. As to the February 19, 1993 "Order of Commitment" (Exhibit D) entered in the hereinintituled action it is based on a January 19, 1993 order (Exhibit E) "adjudging the defendants North Jersey Trading Corporation, Judith Herskowitz, XXXXHerskowitz and XXX Herskowitz to be in contempt of court" for failure to produce books and records of the corporation, for failure to appear for their deposition in New York City, and to pay a "fine" of \$23,500 consisting of counsel fees for Mr. Delibert. However, no remedy by contempt is available for

a motion to enjoin North Jersey to change to a Subchapter S corporation, ,which she pursued not out of concern for North Jersey, but as a shakedown for the payment for millions of dollars from her father Alex Fried.

What Ms. Charney relied on to procure that 4.2 million dollar derivative judgment was a falsely presented damages for alleged loss of rental income on a number of apartments covering the period of 1984 to 1992. This was when Alex Fried who died in 1992 was very much alive. Omitted was that the apartments were kept vacant as a management decision by Fried for co-op conversion or to upgrade the formerly rent controlled apartments to increase the low rents. So there was no income to divert and the meager income was received by Fried. Ms. Charney relied on falsely hyped up rents including on the vacant apartments, minimized the corporate expenses and excluded any income for Fried, then added on close to a million dollars in prejudgment interest and another million dollars for a fictitious loss of value of the real property.

discovery violations. The only remedy is provided by sanctions under N.Y. CPLR 3126.

17. As to the February 19, 1993 “Order of Commitment” under Index No. 23002/92 (Exhibit F) based on a January 19, 1993 order (Exhibit G). The orders arise out of a judgment entered on August 19, 1992 for the sum of \$5,000 as payment of fees for Charney’s counsel Mr. Delibert and \$650 for costs (Exhibit H). The order expressly provided that “Additional Respondent [Charney] have execution thereof.” Inasmuch as this is a money judgment enforceable through execution, remedy by contempt is unavailable under §753 Judiciary Law.

18. In total disregard of the applicable law Charney deceptively converted that money judgment into a contempt proceeding, through a turnover proceeding for personal property. Immediately following the entry of that August 19, 1992 order, without any service of a motion on the judgment debtors Judith, XXXXand XXX Herskowitz, Charney procured an order entered on September 21, 1992 directing them to turnover all of their stock certificates in North Jersey Trading Corporation, to the Sheriff of New York County, pursuant to CPLR 5225(a) within twenty (20) days of the service of a copy of that order with notice of entry (Exhibit I). There was no provision in that September 21st order requiring the payment of the \$5,650 money judgment. The proceedings became not for the payment of that judgment, but to compel the Herskowitzes to surrender all their stock certificates in North Jersey Trading Corporation and to punish them by incarceration for failure to do so. This without regard that those stocks are not within the State of New York, and I am a citizen and permanent resident of the State of Florida.

19. Then by that January 19, 1993 order (Exhibit G) the Petitioners Judith Herskowitz, XXXXHerskowitz and XXX Herskowitz were held in contempt of court for the “disobedience of the order entered on September 21, 1992 for failure to deliver to the Sheriff of the County of

New York the certificates for their shares of stock in North Jersey Trading Corporation;” and imposing a fine \$7,000 as attorney fees for Mr. Delibert, jointly and severally against Judith, XXXXand XXX Herskowitz. The purge consisted of the payment of that \$7,000 to Mr. Delibert and the delivery of all their stock certificates to the Sheriff of the City of New York.

20. That order further provided that should the Herskowitzes fail to deliver their stock certificates to the New York County Sheriff on the ex parte application of Ms. Charney an order of commitment would issue, which was that February 19, 1993 Order of Commitment. There is likewise no mention in these orders of that \$5,650 money judgment, but only compelling the Herskowitzes to surrender all their corporate shares and to pay a \$7,000 fine.

21. At that time that corporate interest was worth in excess of a million dollars, and even now upon the liquidation of the corporate real property there remains \$700,000. These orders were entered into prior to that \$4.2 million judgment and before entry of any order or judgment on Charney’s claim for 40% of the corporate stocks. Mr. Delibert has obviously resorted to that devious scheme to procure those orders of commitment with the design to confiscate all the corporate shares from the Herskowitzes to take over the corporation. Alternatively, he would prevail by default by preventing the Herskowitzes from appearing in court with his threats of arrest based on those orders which he knew or must have known were unlawful and false.

22. Had Charney and Delibert, not procured these void orders and judgments culminating in “warrants of arrest” to prevent the Herskowitzes from appearing in court to oppose their deceitful activities, had Charney, Delibert and Windels not violated statutory provisions requiring

them to file the full satisfactions of judgment on the settlement with XXXXand XXX Herskowitz, which establish that all the judgments were discharged as to me as well, there would have been no need for the orders lifting the “warrants of arrest” and there would have been no ground upon which to keep me out of this Court on November 18, 2003. On this ground alone the April 22, 2004 Decision and Order entered by default must be vacated aside.

B. Issues Overlooked or Which the Court Failed to Consider and/or Address

23. There is yet another issue with regard to Ms. Charney’s New York proceedings. As submitted in my affidavit in opposition to Ms. Charney’s motion, (but, not considered because of the default) that October 2, 1991 order which purported to rely on an alleged withdrawal of objections to personal jurisdiction by Judith, XXXXand XXX Herskowitz (Exhibit J). Ms. Charney relied on that order in this Court as well as in the other courts as having determined personal jurisdictional over the Herskowitzes. Sanctions were imposed on the Herskowitzes in the New York courts for contesting the jurisdiction of the New York.

24. However, in a December 29, 1993 sworn testimony Mr. Delibert conceded that this was unsupported by the record and thus was pure fiction.³ The October 1st order and Excerpts of that testimony attached hereto as (Exhibit K). Yet in face of these undisputed admissions by Ms.

³ “Q.....is there any document that you have knowledge of where the defendants Judith Herskowitz, XXX Herskowitz, XXXXHerskowitz 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.”

Charney and her attorney Mr. Delibert, the Herskowitzes have been prevented from being heard on these issues in this Court as well as in all the other courts, which is yet another item that Ms. Charney's attorneys have included as their fees.

25. The Court erred in its April 22, 2004 Order and Decision in granting Ms. Charney's motion for disbursement of the corporate funds of close to \$700,000 as counsel fees in a derivative action pursuant to New York Business Corporation Law § 626(e). Even if these counsel fees were appropriate, the Court erred in failing to distinguish between the alleged services rendered for Ms. Charney individually- for which no fees are allowed - and for Charney on behalf of North Jersey Trading Corporation.

26. Charney made no claim for a derivative suit in her initial December 1998 Verified Complaint. Charney's claims were all individually as follows: for a declaratory judgment to be declared a shareholder of North Jersey Trading Corporation; damages for herself for three million dollars; the inspection of the corporate books and records pursuant to N.Y. BCL § 624 and; "to receive payment for her shares under provisions of Section 623 of the Business Corporation Law". Consequently for three years there was no litigation on behalf of North Jersey Trading Corporation.

27. It was not until sometime in December 1991, that the Herskowitzes were required to respond to Charney's Verified Petition. In that she asserted individually a claim for the dissolution of North Jersey relying on N.Y. BCL § 1104(c) and N.J. Stat. §14A:12-7(b) a 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 only one count VII was derivatively on behalf of North Jersey pursuant to N.Y. BCL §626.

28. Further issues are set forth in the papers noted below which were previously submitted but, were not considered. I have fully voiced my opposition to Charney's motion for distribution of the corporate assets, having put in a great deal of time and research into those papers. Accordingly, there was no abandonment of defense to that motion which papers are as follows:

Cross Motion with Notice For Stay and/or To Abate in Deference to Preemptive and Primary Jurisdiction of Other Proceedings; Motion for Relief Under CPLR 5015 and Motion to Compel Production of Documents, supported with an Affidavit. (Attached hereto and incorporated by reference.)

Memoranda of law numbered as follows:

(1) Memorandum of Law in Support of Cross Motion For Stay And/or to Abate in Deference to Pre-emptive and Primary Jurisdiction of Other Proceedings;

(2) Memorandum of Law in Support of Motion for Relief Pursuant to New York CPLR 5015(a) and for Referral on Application to the Administrative Judge A) Upon a Showing That the Judgments Herein Obtained by Default Were by Fraud, Misrepresentation, Illegality, Unconscionability and Violations of Law;

(3) Memorandum in Support of Motion by Judith Herskowitz to Compel Production of Documents;

(4) That No Jurisdiction Exists to Award Fees under BCL 626 (e) since This Was Not a Genuine Derivative Action and Neither Plaintiff Nor Her Attorney Conferred a Benefit upon the Corporation and;

(5) 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;

(6) Motion for Relief from the November 24, 1995 Order Appointing Receiver also accompanied with an Affidavit and Notice of Motion (All the above attached to the Memorandum of Law in the support of the instant Motion to Vacate etc., and incorporated by reference). and;

Reply papers to Charney's Response to her Cross Motions; and to Paul Windels Opposition to Cross Motion and to Plaintiff's Memorandum of Law to Cross Motion.

29. All the issues noted above, which this Court overlooked in granting Charney's motion for disbursement of funds, constitutes ground for leave to reargue Charney's Motion for Directing Disbursement of Assets. The Court erred in granting fees of close to \$700,000 to the attorneys for the activities noted above. The Court further erred where no basis for jurisdiction is shown for a New York court to award fees to lawyers representing Charney in the Florida courts.

30. The issues noted above also constitute grounds for a motion for leave renew, Motion for Directing Disbursement of Assets in that I had no opportunity to raise these issues and are raised for the first time.

WHEREFORE, by reason of the foregoing, it is hereby requested that the within Motion to Vacate Decision and Order of April 22, 2004, Entered by Default and for Leave to Renew and Reargue be granted and that the moving party have such other relief as may to the Court appear just and proper.

SWORN to before me
this 20th day of May, 2004

JUDITH HERSKOWITZ

Notary Public - State of Florida

