

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK

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IAS Part 30 Heitler J.

SUSAN CHARNEY,

Plaintiff,

-against-

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

Index No. 24517/88

Defendants.

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

JUDITH HERSKOWITZ submits this Memorandum of Law in support of her Motion to Vacate and Set Aside this Court's Decision and Order entered by default on April 22, 2004 and for leave to renew and reargue the prior Motion Directing Disbursement of Assets pursuant to New York CPLR § 2221(a) and §5015 and to stay the April 22, 2004 Decision and Order during pendency of these proceedings pursuant to New York CPLR §2201. For the facts Judith Herskowitz relies on her supporting Affidavit.

**I. The Notice Requirements of Uniform Rules of Trial and Court Operations  
for Oral Argument Were Not Followed**

This Court relies on Mullane v. Central Honover Bank & Trust Co., 339 U.S.306, 314 (1950) for the requirement of notice to acquire jurisdiction before a default can be entered against "the defendant [who] has purposely declined to appear and be heard on the merits." However, what was before this Court were contested issues of fact, which to be decided on the "merits"

required an evidentiary hearing. No hearing on the “merits” was set by this Court. In fact Judith Herskowitz requested an evidentiary hearing but this Court declined to set such a hearing.

As Herskowitz has learned, the motion practice of the Civil Division of the New York County Supreme Court has been revised as of 1993, and it is the submission of papers that is required on the return date of the motion. The motion practice is governed under Uniform Rules of Trial Courts §202.8. Ms. Charney brought on her Motion Directing Disbursement of Assets by Order to Show Cause issued ex parte by this Court in May 2003. Rule §202.8(d) mandates

“that a party requesting oral argument shall set forth such request in its notice of motion or in its order to show cause” and;

“Where a motion is brought on by order to show cause the court may set forth in the order that oral argument is required on the return day of the motion”.

Charney made no “Request for Oral Argument” in her Order to Show Cause and no oral argument was set in that Order to Show Cause by this Court. So, that Order to Show Cause was merely a notice for submission of opposing papers on the return day of the motion without oral argument. Rule 202.8(d) also requires that

“a party requesting oral argument shall set forth such request in its notice of motion.....or on the first page of the answering papers”. (Emphasis supplied)

Likewise no “Request for Oral Argument” was made by Charney and Windels in any of their other motions. No “Request for Oral Argument” was made by Judith Herskowitz in her cross- motions and answer, and none was requested by Charney and Windels in any of their responses to the Herskowitz motions. The “Summary of Operations” of the New York State Supreme Court - Civil Branch reiterates the procedure for setting oral argument on an Order to Show Cause under title “Ex Parte Application” and mandates that counsel seeking oral argument

“must so indicate on the front of the proposed order” and further notes that if the Order to Show Cause is signed “the Justice decides whether argument is appropriate and, if so, will so indicate in the OSC”.

Pursuant to Rule 202.8(d) motions “are deemed to be submitted on the return day”. Under Section C “Return Date” of the Summary of Operations it is provided that motions, opposition and reply papers are submitted on the return day of the motion and

“counsel who have no office in the City; such counsel may submit the papers by mail or in person.....To the extent possible, motions will be decided “on the papers.” If argument is directed, it will take place on an announced date shortly after the day of submission. Attorneys are encouraged to use service or clerks to deliver papers. Counsel for the movant need not appear to “take a default” or for any other reason. Motions will be submitted, not marked off, in the absence of the movant”. (Emphasis supplied)

This Court states that it set a “return date for November 18<sup>th</sup> 2004”. Accordingly, oral argument on the motions of Judith Herskowitz submitted on November 18<sup>th</sup> would yet have to be directed. So, that Judith Herskowitz a resident and citizen of the State of Florida had complied by delivering all her papers to this Court prior to the November 18, 2004 return date and by having properly served it on the parties. Judith Herskowitz has “voiced her opposition” to Charney’s motion in her extensive papers. Most certainly neither Mr. Delibert nor Mr. Windels could have moved for a default, when they never requested oral argument in any of their papers as required under the rules and so were not prejudiced.

The cases upon which this Court relies for entering that default against Judith Herskowitz are not under the Uniform Rules of Trial Courts §202.8, but for the most part are pursuant to CPLR § 3216 for failure to prosecute, which is not the case here. In Heist v. Cameron, 211 A.D.2d 429, 430 (1<sup>st</sup> Dept. 1995) a sua sponte dismissal of the complaint for failure to prosecute,

was unanimously reversed, upon a showing that the case was being prosecuted. Counsel there attempted to proceed with discovery, but, that was frustrated and so his unwillingness to proceed was held not to be willful.

Likewise Cobbs v. Run Transit, 111 A.D.2d 363, 364 (2<sup>nd</sup> Dept. 1985) was a dismissal for failure to prosecute. The Plaintiff claimed personal injuries, but failed to appear for examination before trial and for a physical examination. The plaintiff neither proceeded in proper person nor did he retain counsel. Plaintiff submitted no affidavit of merit to be relieved of the default and it was a default upon a prior default. Collins v. Bertram Yacht Corp., 53 A.D.2d 527, 527 (1<sup>st</sup> Dept. 1976) was a dismissal of the complaint when the plaintiff failed to appear on the return day of the motion. However, as shown above, the rule requiring appearance on the return day was eliminated in 1993, and a party who submits papers is no longer deemed to be in default.

As to judging the issues before this Court on unrelated matters that transpired in this court ten years ago and in other courts outside of the record of this court including unpublished orders, most respectfully is unsupported by the authorities cited by this Court, because in those cases the court relies on the facts related to the immediate issues before court. <sup>1</sup>

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<sup>1</sup> Pursuant to Mr. Delibert's own recitation of the alleged history of the case, the Herskowitzes engaged only in a defense to Ms. Charney's litigation. It was Ms. Charney who commenced the litigation in this Court, which forced the corporation into bankruptcy and who in 1994 instituted proceedings in the Florida courts. Judith Herskowitz was never sanctioned in the Florida case and never defaulted in appearing. As to the Bankruptcy Court case in Florida, it was dismissed without prejudice. The order In re: Judith Herskowitz, 166 B.R. 764, 765 (Bankr. S.D. Fla. 1994) on Ms. Charney's Motion for Sanctions was entered in jest by Bankruptcy Judge Crystol. The sanction consisted of that "Ms. Herskowitz shall obtain and mail Ms. Charney, at least five days before Susan's next birthday, a birthday card which contains the words "Happy Birthday Sister"". In that same order Judge Crystal attributed bad faith to Ms. Charney as well, saying "it usually takes 'two to tango'". Continued on next page....

As to the opinions of New Jersey Bankruptcy Judge Stephen Stripp in the case of North

## **II. The Contempt and Commitment Orders Upon Which This Court Relied Are Illegal, Void and Constitutionally Invalid**

Two orders were entered on Charney's motions each titled "Order of Commitment" and each of them dated February 19, 1993. One of these orders was entered in the above entitled cause. That "Order of Commitment" is predicated on an order dated January 19, 1993, purporting to hold in contempt of court the defendants North Jersey Trading Corporation, Judith Herskowitz, XXXXHerskowitz and XXX Herskowitz, for failure to produce books and records of the corporation, and 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. This alleged prejudgment discovery violation is enforceable only under N.Y. CPLR § 3126. No remedy by contempt is provided under § 3126. Siegel Practice Commentaries C:3126:4 emphasizes that the remedy of contempt is "unavailable against a party for a failure to disclose, because the remedy of contempt is not included in CPLR 3126", and adequate remedy by sanctions is provided under Rule 3126. It is well settled that where the court is unauthorized to conduct contempt proceedings, the ensuing mandate of commitment is void. In Re: Buthy 34 A.D.2d 119; 312 N.Y.S. 2d 119 (4<sup>th</sup> Dep't 1970)

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Jersey, Case No. 93-31620 it is again respectfully called to the attention of this Court, that Judge Stripp was removed from the bench in September 2001, and the U.S. Court of Appeals, Third Circuit refused to reappoint him, because of the numerous complaints against him.

In the case in the Southern District of New York, Ms. Charney was a party only individually. It was commenced in the Southern District of Florida. Upon Charney's insistence it was transferred to the Southern District of New York. The Herskowitzes have taken a voluntary dismissal, which Mr. Delibert had the Southern District vacate. His objective was, to force the Herskowitzes to travel from Florida to New York for a deposition which he deviously scheduled in his New York office so that they could be brought before Justice Tompkins of this Court to arrest them to force them to surrender their North Jersey stock certificates. When the Herskowitzes did not appear because no protective order would issue, on Charney's motion the case was dismissed.

As to the February 19, 1993 “Order of Commitment” entered under Index No. 23002/92 it arises out of a judgment entered on August 19, 1992 for the sum of \$5,000 as payment of fees for Ms. Charney’s counsel Mr. Delibert and \$650 for costs. The order expressly provided that “Additional Respondent [Charney] have execution thereof.” The law is clearly stated in §753 Judiciary Law that where a money judgment is enforceable by execution, the remedy by contempt is unavailable. Also see, *Calvert v. Le Tam Realty Corp.*, 118 A.D.2d 426; 499 N.Y.S. 2d 89 (1<sup>st</sup> Dep’t 1986) A money judgment which pursuant to CPLR 5201 is enforceable by execution, cannot be enforced by contempt.

In total disregard of the applicable law Ms. Charney deceptively converted that money judgment into a contempt proceeding, by way of a post-judgment turnover proceeding for personal property. Charney has not even met the basic prerequisites to commence a turnover proceedings. Charney failed to serve a restraining notice pursuant to CPLR §5222 an information subpoena pursuant to § 5223 and the petition for turnover pursuant to §5225 each of which strictly requires that it“ shall be served personally in the same manner as a summons or by registered or certified mail return receipt requested”. No proof of such service was ever made by Charney.

In *Bergdorf Goodman, Inc., v. Marine Midland Bank*, 97 Misc.2d 311; 411 N.Y.S. 2d 490 (N.Y. County 1978) where service of a motion for turnover proceeding was made by regular mail without proof of a signed return receipt on the certified mail or service in the manner of a summons, the court held the service insufficient, requiring the dismissal of the petition for turnover. Also see, *Carl v. Moyer*, 63 Misc.2d 1052; 313 N.Y.S.2d 936 (Supr. Ct. Onondaga County 1970) The court ruled that where on the service of an information subpoena the certified

mail was returned to plaintiff's attorney with the notation by the Post Office that it was "unclaimed" service had to be made "in the same manner as a summons" and in the absence of proper service no fine could be levied and there could be no punishment by contempt. In accord *Metropolitan Life Insurance Co., v. Young*, 157 Misc. 2d 452 (Civ. Ct. N.Y. County 1993) No presumption of receipt attaches on service by ordinary mail, since signed return receipt is required. Thereupon, the court denied the motion to punish for contempt.

That "Commitment Order" entered under Index No. 23002/92 is not only void for lack of proper service, but also for lack of extra-territorial jurisdiction to enter that September 21, 1992 turnover order. Ms. Charney attempted to bring that turnover proceeding against Judith Herskowitz a nonresident of the state, for the turnover of all her stock certificates in North Jersey Trading Corporation, not kept within the state. The stock certificates that Ms. Charney demanded to be turned over, are deemed to be personal property of the individual stockholders. *Matter of Calamity Jane's Inc.*, 22 B.R. 5 (D.NJ 1982) The situs of intangible property for these enforcement purposes is the location of the person, on whom performance is required, which in this case is the State of Florida and not New York. *Abkco Industries, Inc. V. Apple Films LTD.*, 39 N.Y.2d 670; 350 N.E.2d 899; 385 N.Y.S.2d 511 (1976). See, *Brown v. Arabian American Oil Co.*, 53 Misc. 2d 182; 278 N.Y.S. 2d 256 (Supr. Ct Suffolk County 1967) wherein the court determined that special proceeding provisions of Article 52 do not authorize garnishment against a nonresident judgment debtor whose funds are outside of the state.

New York law does not provide long arm jurisdiction for purposes of reaching property out of state to enforce a New York judgment. CPLR §314(c)(3) provides only quasi in rem jurisdiction where the non-resident owns property that can be located in the State of New York.

In fact this limitation is consistent with the constitutionally permissible limit of extra-territorial jurisdiction established in *Pennoyer v. Neff*, 95 U.S. 714 (1878)

Additionally that September 21, 1992 turnover order is facially invalid inasmuch as it makes no reference to a restraining notice as required under CPLR §5225 nor to any disclosure under §5222. Omitted from the order is any provision for the payment of the \$5.650 judgment or any determination of an equivalent value of property to satisfy that judgment. The order merely compels the turnover of all the stock certificates of all the Herskowitzes with a value far in excess of the \$5,650 judgment.

Furthermore, even if that turnover proceeding could be enforced by contempt, (which is not the case) it can be only civil in nature. That is not the case here. The contempt is not coercive or remedial but, is a punitive sanction, consisting of an unconditional forfeiture of all the corporate stock certificates plus the payment of \$7,000 as an alleged fine for counsel fees for Mr. Delibert. What occurred here, is the unlawful exercise of punitive measures in an attempt to enforce an ineffective enforcement remedy in violation of CPLR §5210. United States Supreme Court declared such judicial acts constitutionally invalid in *United Mine Workers v. Bagwell*, 51 U.S. 821 (1994).

**III. It is Ms. Charney, Mr. Delibert and Mr. Windels Who Violated the Rules by Their Failure and Refusal to File the Satisfaction of the Judgments Which Would Have Prevented Them from Bringing on Their Motion Directing Disbursement of Assets**

This Court erroneously assumes that “there is a judgment in excess of \$4 million in favor of North Jersey Trading Corporation” against Judith Herskowitz. At the same time the Court acknowledges that the “Co-defendants XXX and XXXX Herskowitz have settled with plaintiff”.

However, any reference or determination of the effect of that settlement on the jointly liable co-defendant Judith Herskowitz is omitted by this Court.

On page 4, ¶12(D) in his May 28, 2003, Affirmation in Support of Motion for Directing Disbursement of Assets, Mr. Delibert acknowledges that the “final judgment for over \$4,000,000.00 in favor of Susan Charney on behalf of North Jersey Trading Corp.,” entered against XXXX and XXX Herskowitz on November 22, 1993 and against Judith Herskowitz on January 21, 1994 were one and the same judgment. In footnote 2, Mr. Delibert explains that a separate judgment was entered against Judith Herskowitz because of a Chapter 11, proceeding, she commenced in the Southern District of Florida Case No. 93-14360-BKC-AJC. That

“Charney thereupon obtained an order from this Court, temporarily severing Judith Herskowitz, without prejudice, and directing entry of judgment against XXX and Robert, when Judith’s bankruptcy proceeding was dismissed judgment entered herein against her, as well”.

Mr. Delibert stated that these judgments were based on the Referee’s Report. Both the November 1993 and January 1994 judgments relied on the same alleged damages for breach of duty noted in that Report which were as follows: \$2,104, 963,33 for an alleged diversion of rents by defendants from January 1985 to February 1993; “\$200,000 for a mortgage allegedly improperly placed on the rental property” \$960,000 for alleged diminution of value of the real property, plus a 9% pre-judgment interest. (The above calculations and underlying data were supplied solely by Ms. Charney).

Attached as Exhibit H to Delibert’s Affirmation of May 28, 2003, is the 1998 settlement agreement with XXXX and XXX Herskowitz. Stated on page 6, ¶ 4(a) of that agreement is that Ms. Charney, will provide “Full and absolute satisfactions of Judgments 1,3,4,5, and 6 ” which

judgments were as follows: Judgment No. 1 - entered on November. 22, 1993 against XXXXand XXX Herskowitz in favor of Susan Charney on behalf of North Jersey Trading Corp. for 4,251, 947.87 and in favor of Susan Charney individually for \$935.00.

Judgments 3, 4, 5 and 6 jointly against Judith Herskowitz, XXXXHerskowitz and XXX Herskowitz, in favor of Susan Charney individually as sanctions for fees for Mr. Delibert namely: Judgment No. 3 - entered on August 24, 1992, for \$5,000; Judgment No. 4 - entered on February 10, 1993, for \$23,500.00; Judgement No. 5 entered on August 18, 1992 for \$5,650.00 and; Judgment No. 6 - dated January 19, 1993 for \$7,000.00. The two Orders of Commitment dated February 19, 1993 were issued on Judgment Nos. 4, 5, and 6, in effect creating an unconstitutional debtor's jail. On page 5 ¶ 5(D) of his Affirmation in support of the Motion for Directing Disbursement etc., Delibert acknowledges that Judgments 1,3,4,5,and 6 "have been satisfied pursuant to the settlement between Ms. Charney, the corporation, and XXXXand XXX Herskowitz".

The satisfactions of judgment were not filed by Ms. Charney, Mr. Delibert or Mr. Windels nor were they served on the judgment debtor Judith Herskowitz in flagrant violation of New York CPLR §5020 mandating that

"When a person entitled to enforce a judgment receives a satisfaction or partial satisfaction of the judgment, he shall execute and file with the proper clerk ....a satisfaction- piece or partial satisfaction-piece acknowledged in the form required to entitle a deed to be recorded, which shall set forth the book and page where the judgment is docketed. A copy of the satisfaction-piece or partial satisfaction-piece filed with the clerk shall be mailed to the judgment debtor by the person entitled to enforce the judgment. (Emphasis supplied)

It is further noted under Practice Commentaries by David D. Siegel, Subdivision 9(a) that

“Upon receiving any satisfaction of the judgment, the judgment creditor or other person entitled to enforce a judgment...must file a satisfaction piece with the appropriate clerk and must mail a copy of it to the judgment debtor within 10 days.”

Judith Herskowitz as the named judgment debtor and shareholder of North Jersey Trading Corporation made requests to Ms. Charney and Windels for production of the satisfaction of judgments, but they failed and refused to produce these documents.

In her Verified Petition Ms. Charney sued Judith, XXXXand XXX Herskowitz indiscriminately without any distinction in their corporate capacity as officers and directors, without any apportionment of responsibility or liability, alleging all acts done jointly by each of them and making them jointly liable in tort. As shown above that November 1993, \$4.2 million judgment and the January 1994 \$4.2 million judgment are based on the same injury, the damages are unapportioned between the defendants and Judith, XXXXand XXX Herskowitz, were made jointly answerable for the wrongs alleged against them. This was also the case as to the judgments individually for Ms. Charney against Judith, XXXXand XXX Herskowitz jointly and severally each of them liable for the whole to plaintiff.

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, the well settled 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.*, 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, which goes further on the above stated rule

explaining that it applies to

“where one judgment has been obtained in an action against one of the persons liable for a breach of duty; where two judgments have been obtained in separate actions against such persons; and where two judgments have been obtained in one action, whether such judgments are joint or several”

“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 except for costs in actions began against the others. Likewise a payment in full by or on behalf of one of the judgment debtors which is accepted by the judgment creditor discharges the others except for costs. This is true where no judgment has been obtained against the other obligors either for the same amount or for larger amounts in separate actions, and where judgments have been obtained against the others in the same action. It is immaterial whether the one paying was, with reference to one who has not paid, primarily or secondarily liable.”

*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 (2<sup>nd</sup> Dep't 1939) Plaintiff sued landlord and tenant in the same action for damages for injuries suffered when he fell through a sidewalk opening into the cellar. The court held that when the tenant paid the money into the court and the time to appeal expired the judgment was satisfied and the landlord was discharged.

The same rule was applied in *Bundt v. Embro* 21 N.Y.2d 1032; 291 N.Y.S.2d 12 (1968) the Court of Appeals affirmed the Appellate Division (27 A.D.2d 931; 278 N.Y.S. 2d 776 (2<sup>nd</sup> Dep't 1967) which modified the order of the lower court, by granting the three defendants's motion for summary judgment upon a showing of satisfaction of the damages by the State of

New York in the Court of Claims.

In *Goswami v. H & D* 355 N.Y.S.2d 922, 925 ; (Supr. Ct. Steuben County 1974) the property owner sued the city and its contractor in separate actions for trespass and nuisance.<sup>2</sup> Owner sought money damages against the defendants claiming that they entered upon his land without consent, stored equipment, removed portions of his land and injured his land, his personal property and trees. The court held that

“where a joint trespass is alleged, plaintiff may like to sue all trespassers jointly, or each of them separately, and each is answerable for act of all. However, where separate actions are brought for joint trespass, there may be separate recoveries but there may be but one satisfaction.”

In *Amodeo v. State*, 257 A.D.2d 748; 683 N.Y.S.2d 337, 338 (3<sup>rd</sup> Dep’t 1999) owners claimed their real property was damaged when alterations made to a highway drainage system caused surface water to erode their land. They sought money damages in actions instituted, one against the County, and another against the State. A judgment for the sum of \$17,000.00 was entered against the County and State moved for summary judgment for dismissal of case against State. The court held that the suits were virtually identical were fully litigated resulting in a judgment in landowner’s favor which were satisfied, thereby releasing all potential tortfeasors, including the State.

In *Flannery v. Marley*, 280 A.D.2d 580; 720 N.Y.S.2d 807 (2<sup>nd</sup> Dep’t 2001) plaintiff sued for injury in an altercation in a Nevada hotel. Judgment was recovered against the hotel owner, who then satisfied the judgment. In a subsequent action against the hotel owner and the

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<sup>2</sup> The court pointed out that with the advent of the Dow Chemical decision, if the plaintiff has not joined all the tortfeasors as parties defendant, any of those sued may implead those not sued by plaintiff so that all the joint or concurrent tort feasons will be before the court for a proper determination as to their degree of fault.

New York Post , the defendants asserted that plaintiffs were barred from recovery against joint tortfeasors upon obtaining satisfaction of the Nevada judgment against another tortfeasor. The court granted the dismissal of the action holding that

“[O]nce the judgment is satisfied it is deemed to constitute the plaintiff’s election of his or her remedy” (*Blanco v. J & B Asosocs.*, *supra*, at 371, 576 N.Y.S./2d 124). Since the appellants admitted that the hotel owner satisfied the Nevada judgment, they failed to raise a triable issue of fact to defeat the New York Post *prima facie* showing that they had elected their remedy”.

In *Socialistic Co-Operative Publishing Association v. Henry Kuhn* 164 N.Y. 473 (1900) the court made clear that where a fine is imposed upon several defendants for a civil contempt one payment is a satisfaction as to all.

*Makeun v. State of New York*, 98 A.D. 2d 583; 471 N.Y.S.2d 293, 297 (2<sup>nd</sup> 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, stated as follows:

“The existence of a money judgment, founded on a determination by the fact finder, establishes an obligation which is met when the parties enter into a settlement, **even though that settlement is for less than the judgment.**”  
(Emphasis supplied)

That principle was reiterated in *Williams v. Weiser*, 175 Misc.2d 289; 667 N.Y.S. 2d 236 (Supr. Ct. Bronx County, 1997) The plaintiff suffered serious injury when the vehicle in which he was a passenger collided with another car. Plaintiff sued the owner and driver of the other car. The defendants then brought a third party action against the plaintiff’s employer and owner of the vehicle and driver of the vehicle. The jury verdict was for close to \$2.4 million for plaintiff, which plaintiff and defendant agreed to reduce to a judgment of close to \$1.7 million, which

they settled for \$1.4 million without any participation by the third party defendants. After the defendants paid the \$1.4 million to plaintiff, there was no question that plaintiff had no right to collect the difference of the \$1.0 million from the nonsettling third party defendants. Since the judgment was apportioned 50% to defendants and 50% to the third party defendants, the only question was the right to contribution by the settling defendants from the nonsettling defendants.

It was made clear by the Court of Appeals in *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) 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, 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”. (Emph. supplied)<sup>3</sup>

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) in that case two infant plaintiffs represented by their mother each obtained a judgment in the sum of \$1.0 million against their landlord as compensation for the injuries suffered from the ingestion of lead. Thereafter the judgment was comprised as provided in the

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<sup>3</sup> 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. Therefore, the judgment between plaintiff and Westbury was also discharged. There remained only a claim for contribution 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.

parties' settlement agreement for \$475,000 per child. The plaintiff then attempted to sue the successor landlord for the same injuries. The denial of the motion to dismiss by the lower court was reversed by the appellate term, holding that

“Although an unsatisfied judgment will not constitute a bar to a plaintiff’s assertion of claims against a joint tortfeasor, 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. Accordingly, ‘[I]t is well settled that the satisfaction of a judgment rendered against one tort-feasor discharges all joint tort-feasors from liability to the plaintiff.’”

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 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*, 129 A.D.2d 976; 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 pre-judgment 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."

**IV. Attorney Fees and Expenses Are Payable Only from Proceeds of the Judgment or From the Settlement, More Specifically Recovered Assets As Opposed to Liquidated Corporate Assets Resulting from a Judgment**

This Court relies solely on Ms. Charney's papers to note that she correctly asserts that it is appropriate to reimburse her for attorney fees in pursuing her "successful shareholder's derivative suit". In support this Court cites *Glen v. Hoteltron Systems Inc.*, 74 N.Y.2d 386, 393 547 N.Y.S.2d 816 (1989) however, this Court overlooks that *Glen* expressly provides that the legal expenses and attorney fees may be recouped only

"from the proceeds of a judgment compromise or settlement in favor of the corporation" (Emphasis supplied)

*Seinfeld v. Robinson*, 246 A.D.2d 291, 295; 656 N.Y.S.2d 707, 710 (1<sup>st</sup> Dep't 1998) another case cited by this Court, reiterates that same principle, noted above in *Glen*. So, that clearly regardless of the amount of legal expenses and attorneys' fees claimed it is not to be paid out of the corpus of the corporation. Accordingly, it is not that a \$4.2 million judgment was recovered by Ms. Charney or that the property was liquidated as a result of that judgment.

The court overlooks the fact that this entire sum that is subject of Ms. Charney's motion for disbursement came into the jurisdiction of this Court, by virtue of a transfer order entered by the U.S. Bankruptcy Court for New Jersey. The Court overlooks the fact that all claims related to the corporate debtor including professional fees sought by Mr. Delibert and Ms. Charney's other attorneys were fully administered and resolved in the bankruptcy proceeding. The Court overlooks the fact that the Mr. Windels was designated in this case as a Receiver to

be a mere custodian for the purposes of receiving the liquidated assets of the fully administered corporate debtor. The Court further overlooks the fact that neither the Receiver nor any of Ms. Charney's attorneys recovered a single asset or proceeds prior to or subsequent to the transfer of the liquidated corporate asset from the bankruptcy Trustee to the state receiver.

Pursuant to this Court's own recitation for the appointment of Receiver is that "it appeared that the corporation was 'not being properly maintained and that the income of the corporation may be subject to improper diversion'". With due regard that it appeared is a mere unproven suspicion and that it "may be subject" also fails to establish a fact. Furthermore, as to what additional monetary assets the corporation retained has not been shown by Ms. Charney, when the funds of close to \$3 million dollars resulted from the sale of the real property of the corporation. It should be further noted that when Charney commenced her litigation in 1988 the corporation was indebted for a mere \$200,000 first mortgage, based on that \$3 million sales price, leaving a net equity of \$2.8 million, as to the \$700,000 that remained on that liquidation which includes the \$150,000 on the settlement, with XXXXand XXX Herskowitz.

**V. No Judgment by Default Can Be Entered Without Jurisdiction Over the Person of Defendant**

There is an additional reason that there can be no default against Judith Herskowitz is that under the well settled law,

"Default judgment could not entered if there is no jurisdiction over person of the defendant."

As has been shown in Judith Herskowitz's prior papers no personal jurisdiction had been

acquired over the Herskowitzesr by this Court rendering that underlying \$4.2 million judgment void. That Mr. Delibert, makes infinite references to other judges, and courts, the fact remains that the only order in this Court is that October 2, 1991 purporting to find that the Herskowitzes have withdrawn their jurisdictional defenses. However, this was conceded by Delibert and Ms. Charney to be without support in the record.

#### **VI. It Is The Strong Policy of the State to Decide Cases on the Merits**

This Court relying on Fischbach v. Moore, Inc. v. Skyline Constr. Mgmt., 293 A.D.2d 390, 392 (1<sup>st</sup> Dept. 2002) states that it is “the strong policy of this State that cases be decided on the merits”. Fischbach was a dismissal for failure to prosecute. But, upon a showing that this was not the case, because papers were filed the case was reversed and was reinstated on appeal. As demonstrated by this motion and upon the previously submitted motions and responses Judith Herskowitz has shown sufficient grounds for vacating the April 22, 2004 Decision and Order entered by default and to grant her motion for leave to re-argue and to renew.

Dated: May 20, 2004  
Miami Florida

Respectfully submitted,

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By: \_\_\_\_\_  
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