

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,
XXXX HERSKOWITZ and XXX
HERSKOWITZ, ,

Defendants.

**REPLY AFFIDAVIT OF JUDITH
HERSKOWITZ TO AFFIRMATION
IN OPPOSITION TO MOTION
TO VACATE DECISION AND
ORDER OF APRIL 22, 2004**

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 Reply to Plaintiff's attorney Steven Delibert's Affirmation in Opposition to Motion to Vacate Decision and order of April 22, 2004.

Objection to Service of Papers Has Been Waived

2. Mr. Delibert makes the libelous suggestion that the papers served on my Motion to Vacate are not the same as the papers upon which this Order to Show Cause relies. The papers on the Order to Show Cause are the same papers that were at first served with a Notice of Motion to meet the 30 day deadline for filing a motion to renew and reargue. When this Court issued an Order to Show Cause on June 2, 2004, which was available to be picked up on June 3rd and was required to be served on that same day, because of that limited time, I was informed by the Court's Clerk Steve Welovnick that it was sufficient to serve the Order to Show Cause. Pursuant

to Rule 2214(d) an Order to Show Cause is merely a substitute for a Notice of Motion.

Accordingly, Mr. Delibert and Mr. Windels were properly served with all the papers that are before the Court on the Order to Show Cause. Mr. Delibert was also served with all the prior papers in response to his Motion for Disbursement etc.

3. Furthermore, Mr. Delibert has waived any objection to the service of the Order to Show Cause, by responding to the motion without making a prior objection and by his failure to return those papers to me as required under CPLR 2101(f).¹ So, it is I who would be prejudiced, since if Mr. Delibert had returned that Order to Show Cause timely, I could have relied on the Notice of Motion that was returnable for June 16, 2004.

Since Mr. Delibert Fails to Offer an Explanation For The Untimely Suspension Order He Is In No Position To Object to Herskowitz's "Excusable Default"

4. Being unable to offer an explanation for not submitting to this Court a timely Suspension Order as directed by this Court within a day or two from that October 22, 2003 conference, Mr. Delibert engages in vitriolic tirades and in an endless string of ad hominem attacks. It is clear from each of the papers filed by Mr. Delibert on these current motions that his modus operandi was always to rely on threats by using those alleged arrest warrants. Mr. Delibert engaged in unrelenting terror tactics, to have me excluded from this Court, with the objective of enabling him to prevail by yet another default.

5. When that failed, and he was required to prepare and submit an order suspending those arrest warrants, he then delayed submitting it for three weeks. Mr. Delibert put me into a state of

¹ Rule 2101(f) provides that the party upon whom service of the papers is made shall be deemed to have waived objection to any defect in the paper unless within two days after receipt thereof, he returns the paper to the party serving it with a statement of particular objections.

anxiety as to whether I would receive those orders in time to enable me to appear at the hearing. The only copies of that November 12, 2003 Suspension Order that was delivered to me was by an untimely ordinary mail, the week of November 17, 2003. There is no affirmation here by Mr. Delibert of any Express Mail. As such, Mr. Delibert made material misrepresentations at the November 18, 2003 hearing, as indicated by that transcript of that proceeding, claiming my timely receipt of that Order, so that he could prevail by yet another default.

6. Although Mr. Delibert engages in yet another tirade because the hearing on his motion was continued a number of times, however, by his own admission, it was not only on my request but others as well. Mr. Delibert still needs to explain why the funds of nearly \$700,000 were held for three years by Mr. Windels, before informing this Court by any means..

A Meritorious Defense Has Been Shown

7. Mr. Delibert's is so proficient in his lies that not only does he rely on his lies as if it were the truth, but urges each and every court as he does this Court to rely on his defamation of my character with his history of "misconduct, sanctions, contempt and arrest orders" to justify the default. However, when he was presented on the instant motion that the arrest warrants he procured from this Court are void for lack of authority to issue them, he has no other explanation except to put the burden on me that I should have moved to reargue or appeal those orders. However, contrary to Mr. Delibert's contention, relief from those orders can never be too late because void orders can be vacated at any time pursuant to CPLR 5015.

8. Although Mr. Delibert has conceded in a December 29, 1993 sworn testimony that the October 1991 order relying on an alleged withdrawal of objections to personal jurisdiction was unsupported by the record, he would still obstruct me from being heard on those issues. In

addition, his statement that this order was affirmed by the Appellate Division is untrue because the appeal was dismissed on the ground that this was a non-appealable order.

9. To avoid the effect of that satisfaction of judgment with XXXX and XXX Herskowitz that it operated as a discharge to me as well, Mr. Delibert wrongly represents that I have argued “nonsensical claims that partial settlement with one co-defendant constitutes satisfaction of judgment against all other defendants”. At issue is not “partial settlement” but a “full satisfaction of the judgments”. Furthermore, Mr. Delibert would admit that one count of Charney’s claim was individually for Charney, which was a major part of his litigation, yet he would seek fees for that as well from the corporation. That alleged determination on the shares was made four years after in 1992, and that derivative judgment followed in 1993.

10. The Seinfeld standard of substantial benefit was applied in the Bankruptcy Court and all derivative and related BCL §626(e) claims were extinguished. This is indisputable by Delibert’s own motion wherein he acknowledged that all professional fees and expenses were paid in the Bankruptcy Court for services to the corporation. Attached here is a Memorandum of Law dated December 10, 1999 signed by Mr. Delibert conceding that the surplus ordinarily goes back to the corporation, but because of the contested issues “between Susan Charney and Judith Herskowitz” over entitlement to the surplus, he requested the funds be transferred to the receiver to resolve the issue in state court. As the events now show, the Bankruptcy Court was misled by Mr. Delibert into abstaining to decide that shareholder contest and into transferring the funds so that he could use this Court to perpetuate his fraud on the Bankruptcy Court, by entering into this illegal fee arrangement in violation of the bankruptcy laws. The corporation’s assets were sold, liquidated and fully administered by the Bankruptcy Trustee. Mr. Delibert did nothing. So, this Court lacks jurisdiction to decide any matter other than as authorized by the Bankruptcy Court.

WHEREFORE, the motion to vacate, for reargument and to renew should be granted in all respects and Judith Herskowitz should have such other relief as may to the Court appear just and proper.

SWORN to before me

this 18th day of June, 2004

JUDITH HERSKOWITZ

Notary Public - State of Florida