

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.

**AFFIDAVIT IN SUPPORT OF
MOTION TO VACATE
DECISION AND ORDER
OF APRIL 22, 2004; AND OF
OCTOBER 18, 2004; TO
RENEW AND TO REARGUE;
AND/OR TO REFER MATTER
TO JUSTICE SILBERMANN**

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 pursuant CPLR §§ 2221(a) and 5015(a)(3) and (a)(4), on personal knowledge, without submitting to the jurisdiction of this Court in support of my motion to vacate this Court's Decision and Order dated April 13, 2004, filed on April 22, 2004; the Decision and Order dated October 12, 2004, filed on October 18, 2004; to renew and to reargue; to refer back the issue of the May 8, 1990 order to Justice Jacqueline Silbermann who entered that order, pursuant to CPLR §2217(a).

The May 29, 2003 Motion for Approval of Disbursement of Surplus

2. On May 29, 2003 this Court issued a Rule to Show Cause on Charney's Motion Directing Disbursement of Assets, supported with Affirmations of her counsel Steven Delibert and of Paul Windels III ("Windels"), the alleged receiver of the assets of North Jersey Trading

Corporation (“North Jersey”), pursuant to a May 21, 1991 order. Charney and Windels were seeking approval to disburse nearly \$700,000.00 held by Windels, which constituted the Chapter 11 surplus of North Jersey, transferred from the New Jersey Bankruptcy Court in August 2000. These funds were secreted and surfaced three years later through Charney’s May 29, 2003 motion, only after Herskowitz commenced an action in the federal court in Florida.

3. That May 29th motion was made under pretext of New York Business Corporation Law, §626(e) which provides that a court may award reasonable counsel fees in a derivative suit. However, what Charney and her attorneys were seeking from this Court, was an order ratifying their plan to disburse that entire surplus to themselves as shown below:

Attorneys	Charges Outstanding	Amount Agreed
Susan Charney (partial reimbursement of sums already paid)	\$120,000.00	\$110,000.00
Steven Delibert, Esq.	\$767,904.74	\$401,950.94
Eric C. Christu, Esq.	\$102,879.45	\$105,000.00
William T. Livingston, III, Esq.	\$28,185.83	\$18,000.00
Clifford Hark, Esq.	\$44,541.12	\$25,000.00
Carlton, Fields, Ward, Emmanuel, Smith & Cutler	\$28,553.56	\$2,500.00
Paul Windels, III, Esq., Receiver	<u>\$19,774.95</u>	<u>\$19,774.95</u>
Totals	\$1,111,839.65	\$682,225.89

4. The foregoing despite the fact that the fee arrangement among Charney’s attorneys was made after professional fees had been settled in the bankruptcy court case.¹ Although it was

¹ At an August 3, 1994 hearing, regarding additional relief from the automatic stay, to allow Charney to domesticate her New York judgments in the Florida court, she was informed that she would be proceeding at her own risk and expense and that her attorneys could not be compensated for their efforts to domesticate her New York judgments unless they “succeeded in receiving something there for the benefit of the estate” and it was pointed out that (cont.)

acknowledged that Judith Herskowitz is a majority shareholder of North Jersey, she was not consulted, but the plan was agreed to between “Charney and her various counsel and the **corporation** itself through the said Receiver heretofore appointed by this Court”.

“Mr. Delibert hasn’t sought to be retained by Ms. Bezner. And therefore, it appears to me that if, and **only if, he and his client succeed in recovering something there, for the benefit of the estate**, and if and only if they make an application under code section 503B(3) and B(4), for rendering a substantial contribution to the case. Would they arguably have a basis for being compensated by the estate, for their services. **So essentially, they’re proceeding at their own cost and their own risk**” (Emphasis supplied)

In the North Jersey bankruptcy case Charney’s attorney Steven Delibert made several applications for fees and expenses, pursuant to 11 U.S.C. §503(b)(4) as an administrative expense for professional services rendered. In these applications Charney acknowledged that attorney’s fees could be awarded only if Charney, “realized any actual recovery on behalf of debtor with respect to the derivative action judgments”. Delibert made three applications the first of which was dated March 20, 1995, that awarded Delibert administrative claims of \$19,692.20 for counsel fees and \$3,096.95 for expenses. A second application was granted by order dated September 11, 1995, for \$24,310.00 in fees and \$2,862.72 for expenses.

A third application, however, was denied by the Bankruptcy Court stating in a letter opinion of May 2, 1997, that no additional allowances were justified upon the standard determining “substantial contribution”. In this same letter opinion, the Bankruptcy Court noted that the litigation in Florida over the validity of Charney’s New York judgments “appear to be primarily for [Charney’s] benefit rather than for the benefit of the estate”. Saying as follows:

“This is the Court’s response to your motion for allowance of fees and expenses under Code section 503(b)(3)(D), authorizes the court to allow compensation and reimbursement of expenses to an attorney for a creditor or equity security holder in a chapter 11 case where such professional makes a “substantial contribution” to the case. You haven’t submitted a memo on the standards for determining “substantial contribution” in this Court, which you should have. The mere fact that such allowances have been made by this Court before does not mean that they will continue to be made indefinitely.

Moreover, you note that one of the motions for which you seek such compensation was denied by this Court. It is difficult to understand how that could constitute a substantial contribution within the meaning of the subject standard. In addition, your client’s challenges to the actions taken by the Herskowitzes in Florida to invalidate the New York judgments **appear to be primarily for your client’s benefit rather than for the benefit of the estate.**” (Emphasis supplied)

All the Judgments Had had Been Satisfied

5. Charney stated there was a judgment in excess of \$4 million against Herskowitz with interest since January 1994 in favor of of North Jersey and that she had recovered the same judgment against Robert and XXX Herskowitz on behalf of North Jersey in November 22, 1993 (Exhibit 1). But, because of a personal bankruptcy proceeding by Judith Herskowitz, the judgment against her was entered at later date on January 21, 1994 (Exhibit 2) after the automatic stay was lifted (ft. note 2, page 4 of Delibert's Affirmation).

6. Charney acknowledged "that the judgment against Robert and XXX Herskowitz as well as all other incidental judgments and orders entered against them in connection with the enforcement of sanctions, etc., in this action and the related actions,² have been satisfied, pursuant to a [December 1988] settlement agreement (ft note 5).³ Pursuant to that agreement

² Delibert noted these sanctions in ft. notes 4 and 5 on page 6, of his Affirmation as a \$5,000.00 sanction in a 1991 order, a \$23,500.00 contempt fine in a January 19, 1993 order, both under Index No. 24517/88 and a further contempt fine of \$7,000.00 in yet another January 19, 1993 order, under Index No. 23002/92 and two February 19, 1993 orders of commitment issued in relation to these orders.

³ As to that settlement with XXXX and XXX Herskowitz Charney acknowledged (Delibert's Affirmation ¶ 25, page 14) that it was accomplished by coercion, by instituting a turnover proceeding under Index No. 113775/95, against the landlord of 490 West End Avenue, NYC for the co-op conversion rights to a rent controlled apartment. While Charney claimed that millions of dollars were "looted" by the Herskowitzes from North Jersey, she conceded that this "constituted the Herskowitzes' only known substantial asset in New York. Charney boasted that this settlement was "concluded only by a threat to re-open the turnover proceeding regarding XXXX Herskowitz's co-op conversion rights on the ground of his bad faith settlement negotiations". Charney also relied on proceedings she instituted in the Florida courts for the enforcement of that \$4 million judgment against the Herskowitzes, but without any recovery of assets, yet agreeing to disburse \$150,000.00 of the North Jersey surplus to her Florida attorneys. Admittedly, it was because Charney could find no assets that she entered into that settlement for the sum of \$150,000.00 to be paid by XXXX and XXX Herskowitz to the Bankruptcy Trustee in the North Jersey's Chapter 11 bankruptcy proceedings (¶ 27, page 15).

full satisfactions of judgment were given to XXXX and XXX Herskowitz by bankruptcy Trustee Karen Bezner, Charney, Delibert and Windels.⁴ The effect of these satisfactions was to discharge the aforementioned orders and judgments as to Judith Herskowitz as well.

7. In violation of requirements of CPLR § 5020 Charney, Delibert and Windels failed and refused to file the satisfactions with the Clerk of Court, to pursue their conspiratorial fee claims in their perjured affirmations. Charney and Windels falsely asserted in their May 29, 2003 motion, that all the contempt and commitment orders and the judgment in excess of \$4 million remained outstanding against Judith Herskowitz so as to deny her standing and her interest in the corporate surplus.

8. Moreover, that May 29, 2003 motion was replete with references to actions and proceedings pursued by Charney individually and not derivatively in the name and on behalf of North Jersey, thereby providing no basis for a §626(e) fee award on that additional ground. In fact Charney instituted the above entitled case in 1988, individually to be declared a 40% shareholder of North Jersey, for inspection of the corporate books and records, dissolution of North Jersey a foreign corporation, and for appointment of a temporary receiver of the North Jersey real property at 200 Riverside Drive New York City.

⁴ The Settlement was approved in the Bankruptcy Court in 1999 and a copy of the Settlement Agreement was attached to the Charney's May 29, 2003 motion as Exhibit H. An order dated August 9, 2000 was entered by the Bankruptcy Court concluding the administration of the estate whereby the Trustee was directed to deliver "all estate funds in her possession" to Windels "that was free and clear of all liens and of upon all administrative expenses having been paid". Although, pursuant to 18 U.S.C. §349 upon dismissal of the bankruptcy case the property reverts to the corporation, as reflected in Delibert's December 10, 1999 response for Charney, she convinced the Court to transfer those funds to the New York court, to resolve issues on New York law, such as the effect of the satisfactions of judgment and other issues on the judgment.

Document Production Demand

9. On July 14, 2003 Judith Herskowitz served a Document Production Demand on Charney individually and on behalf of North Jersey. Charney and her attorney Steven Delibert were requested to produce the full and satisfactions of the judgments given to XXXX and XXX Herskowitz under Index No. 24517/88 on the November 22, 1993 judgment in the sum of 4,251,947.87; the August 24, 1992 judgment in the sum of \$5,000.00; and on the January 19, 1993 judgment in the sum of \$23,500.00 and; under Index number 23002/1992, on the August 19, 1992 judgment in the sum of \$5,650.00 and; on the January 19, 1993 judgment in the sum of \$7,000.00. The same request for production of documents was made on Windels.

10. Both Charney and Windels failed and refused to produce the requested documents. Instead they filed Motions for Protective Order, returnable in the Motion Submission Part on September 15, 2003, without request for oral argument. Charney's and Windels' motions were replete with the identical, persistent ad hominem attacks against Judith Herskowitz, for making "collateral attacks" on the \$4.3 derivative judgment, which were defenses provided under the law and have never been heard on the merits.

11. Charney and her associates once again resorted to the jurisdictionally void unlawful contempt and commitment orders procured ex parte to oppress and prejudice the rights of Judith Herskowitz to the North Jersey surplus. They have mischaracterized the production of those satisfactions of judgment as an "Overbroad Fishing Expedition" which they knowingly failed to file with the Clerk of this Court. Charney even had the audacity to claim that Judith Herskowitz lacks "Standing", relying on venomous lies as it appears on pages 5-7 of her Motion for Protective Order claiming that Herskowitz remained a shareholder only because she failed to

hand over all of her North Jersey stock certificates to the New York Sheriff, based on what is now uncontested to be jurisdictionally void, ex parte September 18, 1992 turnover order.

12. The return date of the motions for protective order were adjourned to October 22, 2003.⁵ Judith Herskowitz responded with a Motion to Compel Production of Documents. She also filed substantial opposing papers to Charney's Motion for Disbursement among others on the ground of lack of subject matter and lack of personal jurisdiction, since the derivative judgments had been satisfied, and for lack of jurisdiction under BCL § 626(e) to ratify the plan to disburse the North Jersey surplus.

Suspension Orders Received Untimely

13. While on the one hand Judith Herskowitz was being pressured by this Court to appear personally, on the other hand she was constantly threatened by Mr. Delibert that she would be arrested "on the outstanding warrants of arrest" should she appear in person in this Court. The last of these conversations with Mr. Delibert took place on October 21, 2003. Because of the terror tactics resorted to by Mr. Delibert to prevent Judith Herskowitz from appearing in the New York court, she brought this matter up before this Court on October 22, 2003 appearing by telephone. This Court then agreed that an order would be entered lifting the arrest warrants. Attached to Steven Delibert's Affidavit dated June 15, 2004 were the transcript

⁵ By letter dated July 8, 2003 Mr. Windels requested an adjournment because of his trip to China. For everyone's convenience there was an adjournment to September 22, 2003. Herskowitz 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, Herskowitz reserved those papers and were timely received by Mr. Delibert and Mr. Windels on October 3, 2003. While they had taken three weeks to respond to her papers, they served their papers untimely depriving her of the required seven days to respond, which is jurisdictional under CPLR2214 (b) necessitating an adjournment.

of the October 22, 2003 and of the November 18, 2003 hearings. On page 11 line 24 of the October 22nd hearing this Court stated that:

THE COURT: I will ask them [Delibert and Windels] to submit it [the suspension order] to me. What is your fax number, ma'am?

MRS. HERSKOWITZ: I don't have a fax number, your Honor.

THE COURT: Then **we will send to your address** an order in which I lift the warrant."

And continued on page 15, line 19, is as follows:

THE COURT: Now Miss Herskowitz, I have asked counsel to send me an order, which I will get in **the next day or two**, lifting this warrant."(Emphasis supplied)

14. Thus, the appearance of Herskowitz at the upcoming November 18, 2003 hearing was conditioned upon the expeditious receipt of that suspension order, which the Court agreed to send to her, and acknowledged that she had no fax number. Time was of essence, so that she would have sufficient time to make travel arrangement from Florida to New York, especially when this was going into the busy Thanksgiving holiday season, requiring advance reservations.

15. After a while, when Herskowitz had not received the suspension orders, she called Mr. Delibert the week of November 3, and the week of November 10, 2003 and left messages, but her calls were not returned. She likewise called this Court and spoke to deputy clerk Steven Welovnick, but as late as Friday November 14, 2004 he could not give any information on the status of those orders. On that same day Herskowitz also faxed a letter 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. She called again on Monday morning, November 17, 2003 and spoke to deputy clerk Steve who told her that under these circumstances she would not be expected to be able to

jump on a plane for that court appearance and so she would be called when the case comes on Tuesday, November 18, 2003 and could appear by telephone.

Herskowitz Was Defaulted, Her Papers Were Eliminated, And Only Charney's Papers were Considered

16. On November 18, Herskowitz called this Court, and spoke to deputy clerk Steve, but she was not allowed to participate by telephone. However, deputy clerk Steve told her that there was no oral argument and no hearing and that all the papers including her papers were marked submitted. As shown by the suspension orders, without any explanation for the delay they were signed by this Court three weeks later on November 12, 2003 and were received by Herskowitz the week of the 17th, leaving her no time to finalize flight and travel arrangements.

17. Although Herskowitz had called and requested to be allowed to participate in the hearing of November 18, 2003 she was denied that opportunity. Pursuant to page 4, line 13, of the transcript of the November 18, 2003 proceeding, although Justice Heitler acknowledged that she had Herskowitz's papers before her, she made clear that she was going to consider only Charney's and Windels' papers stating:

“As such, at this particular time, gentlemen, I have a large group of papers before me. I need to make sure that the papers that you wish to have considered are before me, and then the Court will hear whatever argument you wish to make, if you feel it is necessary beyond what is in your papers, and then the Court will deem this as submitted motion.”

18. The Court then further emphasized (page 6 line 11) that she was defaulting Judith Herskowitz for failure to appear in person on November 18th because:

“Further, I want to be very clear that in this particular Court, **we do not take papers through the mail**, and in this particular courtroom, we do require appearances on both motions and order to show cause.” (Emphasis supplied)

Thereupon, Justice Heitler directed Delibert and Windels to separate their papers from Herskowitz's papers,

“All right. Gentlemen, please look through these papers as I previously directed you to do so. Thank you. I'm handing, at this particular time, a set of papers and three folders that refer to motion 040, 039 and 041 (handing). Thank you. (Whereupon, an off the record discussion was held.)”

THE COURT: All right. I have three motions in front of me, 039, 040 and 041. I note that there are papers here by Ms. Herskowitz she is not here. I indicated she is in default.....As such, I will note that 039, the movant is Ms. Charney. I will consider that motion submitted as well as the movant in 040, which is Mr. Windels, as being submitted. And also 041, which is Ms. Charney, which is also deemed submitted.

Thus, only Charney's and Windels' papers were considered, (Page 7, line 12) however, without anything more presented in support of Charney's motion and without a hearing as follows:

“As Ms. Herskowitz is not here and as she is in default, her papers will not be considered. They will be part of the files, gentlemen, but as I explained before, the rule of this Court is appearance on motions and order to show causes. Is there anything you feel that you need to advise me of that is not in your papers? If so, the Court will deem these three motions as being submitted.”

19. Yet, upon Judith Herskowitz having contacted Hon. John F. Werner Chief Clerk of this Court, by letter dated November 23, 2003, (Exhibit 3), Mr. Delibert falsely represented to Hon. Werner that all the papers including that of Judith Herskowitz were marked “submitted” by Justice Heitler on November 18, 2003 and all matters were “*sub judice*”, as follows:

“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*.”

That was the same information that this Court's Deputy Clerk Steven Welovnick relayed by telephone to Judith Herskowitz on November 18, 2003.

The April 22, 2004 Decision and Order Denying Motion to Vacate

20. It was nearly five months later on April 13, 2004 that Justice Heitler issued a Decision and Order entered on April 18, 2004, approving Charney's "motion for disbursement of funds held by the Receiver" while totally disregarding Herskowitz's papers (Exhibit 4). The so-called Receiver was given the green light "to distribute funds to plaintiff and [her] attorneys in accordance with plaintiffs proposed plan" (Page 8 of that order). Although Justice Heitler stated on page 1 of her Decision and Order that Charney's motion directing distribution of the surplus held by the receiver was pursuant to BCL § 626(e), Justice Heitler in approving Charney's motion failed and refused to make any determination as to what if any litigation conducted by Charney was derivatively on behalf North Jersey. As such, this was not a determination of compensable fees pursuant to § 626(e) but was a free give away of the North Jersey surplus deceptively planned by Charney and her attorneys.

21. To justify the default, Justice Heitler engaged in ad hominem attacks against Herskowitz. Most of this was based on extrajudicial litigation, not conducted before this Court and so it could have no relevance to the default in this case, based upon the very authorities relied on by this Court. The Court avoided ruling on Charney's and Windels' Motion for Protective Order on the crucial production of the satisfactions of judgment because they were "hereby deemed as moot". Except for disregarding those satisfactions of judgment, no basis existed for Charney to bring on her motion for disbursement of the surplus, and to continue to threaten Herskowitz with the arrest warrants that were extinguished by reason of those satisfactions of judgment.

22. Herskowitz applied to this Court for issuance of an Order to Show Cause With Stay

to Vacate the April 13, 2003 Decision and Order entered by “default”. On June 2, 2003 the Court issued an Order to Show Cause, but crossed out the provision seeking to stay the distribution of funds. Herskowitz moved to vacate the April 13, 2003 order pursuant to CPLR §§ 5015 and 2221(a). Herskowitz stated that by reason of the untimely receipt of the November 12, 2003 suspension order she was prevented from appearing personally in this Court on November 18, 2003; the orders of contempt and commitment used to threaten her with arrest were null and void for being jurisdictionally defective; the judgments had been satisfied; and that she had raised numerous other issues in response to Charney’s Motion for Directing Disbursement of Assets, the North Jersey surplus, which the Court similarly disregarded as noted in the footnote below.⁶

⁶ 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.

The June 21, 2004 Hearing

23. To avoid delay, Herskowitz prepared and submitted to the Court proposed orders to suspend the arrest warrants. Thereupon, a telephone conference was held and the Court, issued its own suspension orders. At great expense Herskowitz traveled from Florida to New York and personally appeared in this Court on June 21, 2003, at the scheduled time of 11:30 A.M. thereby demonstrating her willingness to appear in this Court. But, as shown on page 4 beginning with line 25 of the transcript of the June 21, 2003 hearing (Exhibit 5) the Court announced:

“This is your motion, ma’am. I will hear what you have to say. I will give you ten minutes.”

MS. HERSKOWITZ: “I can’t say it in ten minutes. I came all the way from Florida.”

The COURT: “I have read these papers, I am familiar with this case. Tell me what you would like to tell me with regard to this, Ms. Herskowitz.”

MS. HERSKOWITZ: Okay. Well, do I have to argue the whole thing from the beginning?

THE COURT: No, you don’t. That’s why I’m just indicating to you to highlight for me what you feel you need to highlight. I have read the papers.

24. Thereupon, Herskowitz explained that this was a ligation built on Charney’s false claims that the Herskowitzes “looted” the corporation’s income when in fact the income at all times belonged to Alex Fried, the father of Charney and Herskowitz. She stated that she could not come up on a last minute notice from Florida, because the planes are full and in fact even with reservations they were bumped off the flight and had to take another flight.

25. Herskowitz emphasized that she was prevented from appearing at the November 18, 2002 hearing because of false arrest warrants, and furthermore that the judgment in excess of \$4

million is void and that all the judgments had been satisfied. Herskowitz offered genuine copies of the full satisfactions of judgment to the Court, executed in a postjudgment settlement with XXXX and XXX Herskowitz. The satisfactions were authenticated by Delibert and Windels. Herskowitz cited authorities she relied on in her Memorandum of Law relating to the full satisfaction of judgments in a postjudgment settlement, establishing that these discharged the judgments to Judith Herskowitz as well. (Excerpt of Memo relating to satisfaction attached as Exhibit 6) Judith Herskowitz offered copies of case law, and the McKinneys' forms, to CPLR 5020 clearly showing the distinction between a pre-judgment settlement and a post-judgment settlement. When Herskowitz offered to furnish a surreply on these issues (page 29, line 3) this Court responded:

“I don't need a surreply; I know the difference, ma'am.”

26. Mr. Windels then attempted to exonerate himself from what he said were spurious accusations that he was perpetuating a fraud on the bankruptcy court stating in part (on pgs. 24, 25) as follows:

“In other words, what I represented to the Bankruptcy Court was that I would not make any disbursements until ordered by the Supreme Court, that is in this case, your Honor. I now have, of course an order from your Honor directing disbursement and consider that, if and when I act on that order, I will be acting exactly the way I would have presented to the Bankruptcy Court.”

To which this Court responded “ I understand your position”.

However, to avoid the merits of Herskowitz's June 2, 2004 motions the Court noted (pg. 29, line 22-26) that

“First I have to get past whether, I'm going to open the default.....If I get past the default, then I consider the renew and reargue”

The October 12, 2004 Order Denying to Vacate Default Under CPLR 5015

27. Some four months later this Court issued a Decision and Order dated October 12, 2004 filed on October 18, 2004, (Exhibit 7) denying the motion to vacate the April 13, 2004 order, regarding it “as one to vacate a default order, CPLR §5015, rather than one for reargument, CPLR §2221(a)”. Therein the Court placed the burden on Herskowitz to establish “both a reasonable excuse for the default and a meritorious defense to the action”, and concluded that Herskowitz has not met that burden.

28. Under pretext of review of prior litigation this Court reiterates the same ad hominem attacks against Herskowitz as in its prior April 13, 2004 Decision and Order, to demean, disparage and disgrace Herskowitz, accusing her of engaging in obstructive frivolous litigation tactics. All of those cases referenced by this Court, were actively pursued by Charney before other judges in other courts, and there is no showing of their relevance to the issues raised by Herskowitz before this Court. In fact none of those referenced orders go to the merits of the case, but are merely procedural devices to prevent Herskowitz from being heard on the merits, including upon orders of sanctions, contempt and arrest warrants.

29. The Court also reiterates that Herskowitz was defaulted for “failure to appear for a court-ordered conference in this matter” on November 18, 2003, although no such order was ever served on Herskowitz. The Court continues to maintain that there are arrest warrants outstanding against Judith Herskowitz, thus reaffirming the threat to her personal safety should she appear in this Court, without an order lifting those arrest warrants.

30. On page 3 of that order, this Court acknowledges that it did receive a volume of telephone calls and mail from Judith Herskowitz, and so

“Herskowitz had only to contact this court to verify that the order had in fact, been signed and sent, and to obtain faxed copies of those orders, should she have so desired.”

This a diversion from the fact that Judith Herskowitz did call this Court prior to that November 18th hearing and received no information from this Court’s deputy clerk Steven Welovnick, with regard to the orders suspending the arrest warrants. Moreover, to avoid the fact that those suspension orders were sent to Herskowitz untimely, thereby preventing her from making travel arrangement from Florida to the Novemer 18th hearing, the Court would fault Herskowitz for failing to show, that “s[h]e was unable to afford a later purchased plane ticket” with an “offer of financial proof”(without any prior request for such proof).

31. The Court also attempts to dismiss Herskowitz’s unresolved claim of lack of personal jurisdiction by referring to a May 8, 1990 order of Justice Silbermann contending that it denied the initial jurisdictional motion. This contention is unsupported by that very May 8th order. There is absolutely no reference in that order to any denial of the initial motion to dismiss. To the contrary that order expressly

“sets those parts of the motions [to dismiss] which relate to service of the Order to Show Cause on all defendants down for a traverse hearing”

(Copy of May 8, 1990 order and relevant portion of Order to Show Cause attached as Exhibit 8)

32. Thus, that May 8th order not only did not deny the initial motions to dismiss, but directed to hold an evidentiary hearing on the service. Additionally, Charney through her Attorney’s Affirmation in Opposition to Motion to Dismiss etc., page 6 ¶ 9(B) under penalty of perjury, acknowledged that the initial motions to dismiss had never been decided the merits:

“Between January 10, and January 26, 1989, each of the four individual defendants served a separate, substantially identical motion to dismiss the original complaint ‘pursuant to CPLR 3211’ (notice of motion, collectively, Exhibit J hereto): those motion were never determined on the merits.”

(Excerpts attached as Exhibit 9) In fact this statement was made on a second motion to dismiss, because that first motion to dismiss had never been ruled on the merits. Furthermore, if this Court wishes to engage in fictionalization of the Justice Silbermann's order then the matter must be referred back to her, to address this falsification of the record.

33. Another misstatement by this Court is that no legal argument was presented

“to suggest that there is any merit to her opposition to plaintiff's motion for the disbursement of funds held by the Receiver for North Jersey Trading Corporation.”

In addition to the issues raised by Herskowitz in her June 2, 2004 Motions she attached her opposing papers and cross-motions to Charney's Motion for Directing Disbursement of Assets, the North Jersey surplus, that were not considered by this Court, which are noted in footnote 6 of this Affidavit. Among these were issues on the full satisfaction of the judgments which are now hereby attached pursuant to CPLR § 4539 (Exhibit 10). It is to be noted that the satisfaction of judgment follows strictly McKinneys' forms, to CPLR 5020 § 8:202, which provides that,

“whereas said judgment has been wholly paid”

34. In addition to the above all the satisfactions of judgment given to XXXX and XXX Herskowitz provide that “the said judgment has been wholly paid “,

“together with all interest, fees costs, or other sums which may have accrued or may be due pursuant to such judgments” (Emphasis supplied).

Since these satisfactions of judgments were not made available to Judith Herskowitz at the time of the June 2, 2004 motion they had not been attached to that motion and so are now attached to the instant motion.

35. The denial of the motion to stay and to vacate the April 13, 2004 order entered upon

default is self explanatory. As noted above, at the time Charney brought the motion for distribution, served under the Court's Order To Show Cause of May 29, 2003, the North Jersey surplus consisted of nearly \$700,000.00. I made a recent discovery that this \$700,000.00 that was held in the name of Paul Windels, as alleged Receiver of North Jersey Trading Corporation in Savings Account No. 637- 0233738 at the Bank of New York is no longer there. This account presently holds a balance of \$19,884.00. Another North Jersey Trading Corporation Checking Account No. 630-2242648 also holds a balance below \$20,000.00.

36. This makes clear that the order of April 13, 2004 and the current order dated October 12, 2004 are works of subterfuge by which this Court used unauthorized procedures, improper and oppressive impositions, satisfied and void contempt and commitment orders, a contrived and artificial default and nothing other than impertinent and irrelevant ad hominem attacks to justify the wrongful, summary distribution of that surplus; and to thereby avoid having to consider the merits of the numerous legal and jurisdictional defenses that Herskowitz had raised in her many submissions to this Court.

WHEREFORE, for all the foregoing reasons it is respectfully requested that the within motion to vacate the orders and judgments noted herein should be granted, and that the moving party have such other relief as the Court may deem just and proper.

JUDITH HERSKOWITZ

SWORN to before me
this 19th day of November, 2004

Notary Public - State of Florida