

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK

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SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.

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IAS Part 30 Heitler J.

Index No. 24517/88

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE  
DECISION AND ORDER OF APRIL 22, 2004; AND OF OCTOBER 18, 2004; TO  
RENEW AND TO REARGUE; AND TO REFER BACK TO JUSTICE SILBERMANN**

Judith Herskowitz respectfully submits her Memorandum of Law in support of her Motion to vacate pursuant to CPLR §§5015(a)(3) and 5015(a)(4) this Court's Decision and Order dated April 13, 2004 filed on April 22, 2004 and the Decision and Order dated October 12, 2004, filed on October 18, 2004; to renew and to reargue pursuant to CPLR §2221(a); and to refer back pursuant to CPLR §2217(a) the issue of the May 8, 1990 order to Justice Jacqueline Silbermann who entered that order.

**INTRODUCTION**

By decision and order of April 13, 2004 this Court granted Charney's motion for disbursement of the surplus funds held by Paul Windels III as the alleged Receiver of North Jersey Trading Corporation ("North Jersey") to Charney and her attorneys in accordance with their proposed plan, under pretense of Business Corporation Law §626(e). Herskowitz's opposing papers and motions were eliminated by a contrived default as set forth in the supporting affidavit. Then only Charney's papers were considered and Herskowitz's papers were disregarded including a motion to compel Charney and Windels to produce the satisfactions of judgment given to

XXXX and XXX Herskowitz in a post judgment settlement. Charney's and Windels' motion for protective order against producing those satisfactions of judgment were denied as "moot".

Herskowitz moved to vacate the April 13, 2004 order, by Order to Show Cause issued by this Court on June 2, 2004. Herskowitz raised numerous meritorious defenses such as the satisfaction of all Charney's judgments, in a motion to renew pursuant to CPLR §2221(a), without attaching the satisfactions, because they were not made available to her at the time, but produced them at the June 21, 2004 oral argument on her motion. Herskowitz also raised the defense of lack of personal and subject matter jurisdiction, which included the jurisdictionally void orders of contempt and commitment that had also been fully satisfied, despite Charney' use of them in her ongoing campaign of threat and intimidation to prevent Herskowitz from appearing in this Court.

The motion to vacate was denied by this Court's Decision and Order dated October 12, 2004, by characterizing the motion as being made solely pursuant to "CPLR §5015, rather than one for reargument, CPLR § 2221(a)". The Court then put the burden on Herskowitz to establish both "a reasonable excuse for the default and a meritorious defense" although these requirements apply to CPLR §5015(a)(1) they are not applicable to § 5015(a)(3) for fraud and misrepresentation or to § 5015(a)(4) for lack of jurisdiction, or under § 2221(a) for motion to renew.

Thus, the court is saying that unless it decides to exercise its discretion to set aside a contrived and unauthorized default, it will not be concerned with whether it lacked legal authority or jurisdiction to ratify the unlawful fee splitting agreement being facilitated through Charney's fraudulent BCL §626(e) motion. As such, the holding that Herskowitz had not presented meritorious defenses is attributable to the Court's predetermination not to consider her defenses, which has been the case from the outset. The Court's remarked that the November 18,

2003 hearing would be Herskowitz's "last opportunity to appear before the court on this motion" meaning Charney's motion to distribute the corporate surplus, serves to underscore this point.

It was established at the June 21, 2004 oral argument that the judgement in excess of \$4 million upon which Charney relied in her motion for disbursement, had been "wholly paid", by satisfactions of judgment that included all fees and costs and it had discharged the judgment as to Judith Herskowitz as well. There can be no question that Charney, Delibert and Windels were fully aware of that satisfaction of judgment since they signed that, and so they knew that their motion for disbursement of fees pursuant to BCL 626(e) was a fraud. In addition the distribution of the North Jersey surplus violated the orders and judgment of the Bankruptcy Court as well, which did not allow any further fees for any of Charney's attorneys. Moreover, it is now an established fact that Charney had procured her judgments by fraud and that it is facially void, as set forth in Herskowitz's motion submitted to this Court on October 28, 2004.

Herskowitz has recently discovered that of the nearly \$700,000.00 surplus that was held in the account of Windels in the Bank of New York all that remains in each of the two accounts, one savings and one checking, is less than \$20,000.00. The Court's reliance on CPLR §5015 (a)(1) is an apparent coverup for the evident disbursement of the around \$700,000.00 of the North Jersey surplus, which this Court obviously knew when it issued its order dated October 12, 2004. The Court also obviously knew this at the June 21, 2004 hearing on Herskowitz's motion to vacate the April 13, 2004 Decision and Order, when it denied the stay of the disbursement of these funds in the Order to Show Cause issued on June 2, 2004 on Herskowitz's application.

## ARGUMENT

### **I. Jurisdictional Objections Are Required to be Disposed Before Discretionary Default Vacatur is Considered Pursuant to CPLR § 5015(a)(1) And No Showing of Excusable Default and Meritorious Defense is Required on Jurisdictional Objections Pursuant to CPLR § 5015(4)**

CPLR 5015 lists five grounds upon which to move to vacate a judgement or order. The CPLR 5015(a)(1), standard of reasonable excuse is only one of these grounds. It is well settled that the jurisdictional objections pursuant to CPLR §5015(a)(4) have to be disposed, before a discretionary default vacatur is considered. Siegal Practice Commentaries C5015:9 (Lack of Jurisdiction; Paragraph 4) This covers both lack of subject matter jurisdiction and lack of personal jurisdiction pursuant to CPLR §5015(a)(4) and is without any requirement to show excusable default and meritorious defense. The obvious reason is that if jurisdiction is lacking the court has no jurisdiction to do anything, but must vacate the order or judgment. Thereby, a default entered without jurisdiction is a nullity. *Mayers v. Cadman Towers, Inc.* 89 A.D.2d 844, 453 N.Y.S.2d 25 (2<sup>nd</sup> Dept. 1982). Likewise an order entered without subject matter jurisdiction is void, which defect can be raised at any time and cannot be waived. *Editorial Photocolor Archives Inc., v. Granger Collection*, 61 N.Y. 2d 517, 474 N.Y.S. 2d 964, 463 N.E.2d 365 (1984).

The same is true when a default is procured without proper service. *Shaw v. Shaw*, 97 A.D.2d 403, 467 N.Y.S.2d 231 (1983) The jurisdictional objection does not require an affidavit on the merits. In such circumstances, the Court has no authority to impose any terms or conditions upon vacatur. *Hitchcock v. Pyramid Centers of Empire State Co.*, 151 A.D.2d 387, 542 N.Y.S.2d 813 (1989). This is because the exercise of discretion to vacate a judgment is premised upon the assumption that a valid judgment subsists, but this assumption is inoperative

whenever jurisdiction is absent, leaving the court without any discretion other than to vacate the judgment. *McMullen v. Arnone*, 79 A.D.2d 496, 437 N.Y.S.2d 373 (1981). Accordingly, this Court acted beyond the scope of its judicial authority in making the jurisdictional issues dependent upon its exercise of discretion to open the purported default.

### **1. Lack of Subject Matter Jurisdiction**

#### **In View of the Fact that the Judgments Were Satisfied, BCL 626(e) Provided No Basis for an Award of Fees and There Exists No Statutory Authority To Ratify a Plan for the Disbursement of Corporate Assets to Charney and her Attorneys**

The Court recites in the October 12, 2004 order that its April 13, 2004 order granted “plaintiff’s motion brought pursuant to New York Business Corporation Law §626(e) for an order directing the distribution” of the Chapter 11 surplus of North Jersey Trading Corporation (“North Jersey”) to Charney and her attorneys. However, that §626(e) provision was not an independent statutory right for an award of counsel fees, but arose out of the alleged November 22, 1993 and January 21, 1994 derivative judgments (Exhibits 1 and 2 to the Affidavit).

It is undisputed that these two judgments are one and the same though, the judgment against Judith Herskowitz was entered at a later date after the automatic stay was lifted in her personal bankruptcy court proceeding (ft. 2 pg.4 of Delibert Affirmation to Charney’s May 29, 2003 motion). Both of these judgments contained the identical provisions for fees as follows:

“to sever the matter of an award of expenses and counsel fees pursuant to Business Corporation Law §626; and for leave to submit an application therefor at a later date;”

Thus, Charney’s §626(e) motion for fees was predicated on these derivative judgments. Charney, Windels and Delibert, were fully aware that pursuant to a December 1998 settlement

agreement they issued satisfactions of judgments to XXXX and XXX Herskowitz which included that derivative judgment in excess of \$4 million and the judgments on the sanctions and contempt. However, they failed and refused to produce copies of the satisfactions and to file them with the Clerk's Office in violation of CPLR § 5020. It was expressly provided in these satisfactions that

“the 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.”

So, it is not only that the judgments were fully satisfied, but any future claims for fees and costs were likewise extinguished. Herskowitz submitted a substantial Memorandum of Law on the issue that a full satisfaction of judgment in a post judgment settlement discharged all the judgment debtors including Judith Herskowitz (Exhibit 6). Genuine copies of the satisfaction of judgments are attached to the Affidavit as Exhibit 10, which Herskowitz was not able to attach to her June 2, 2004 motion, because they were not made available to her at the time.

Accordingly, this Court had no jurisdiction to grant any fee distribution agreement pursuant to BCL 626(e) in its April 13, 2004 order, since the derivative judgments were extinguished by virtue of the satisfaction of these judgments. Thus, what the Court has done is to ratify a plan for distribution of the corporate surplus to Charney and her attorneys upon illusory grounds, when in truth no statutory authority existed at all. *Morrison v. Budget Rent a Car Systems, Inc.* 230 A.D.2d 253; 657 N.Y.S.2d 721 (2<sup>nd</sup> Dept. 1997) reiterated the well settled principle that

“ If the court lacks subject matter jurisdiction the parties may not confer it on the court “and that “no New York court may exercise powers beyond those granted by the New York Constitution and the implementational statutes”.

Also see, *Lynbrook Gardens, Inc., v. Ullman*, 36 N.Y.S. 2d 888, 893 (Supr. Ct. Nassau County

1942) where the Court likewise noted that,

“It has been held that ‘the court authorized by statute to entertain jurisdiction in particular case only \* \* \* acquires no jurisdiction and its judgment is a nullity, and will so be treated when it comes to question, either directly or collaterally’ where ‘it undertakes to exercise the power and jurisdiction \* \* \* to which the statute has no application’” (Emphasis supplied)

It is further well settled that

“Generally the prevailing party in a lawsuit is not entitled to an award of attorneys’ fees unless an agreement, statute or court rule authorizes the award....This New York rule is consistent with the “American Rule” which requires each side to bear its own attorneys’ fees in the absence of express statutory authorization to the contrary”.

See, *Seinfeld v. Robinson*, 172 Misc.2d 159, 656 N.Y.S. 2d 707, 710 (Supr.Ct. NY County 1997) reversed on other grounds 246 A.D.2d 291, 676 N.Y.S.2d 579.

Had Charney and her counsel and Windels not secreted these satisfactions of judgment, in order to pursue their unlawful and illegal motion to distribute the Chapter 11 surplus, then the Court could not have issued and acted on her Order to Show Cause seeking approval for the disbursement of the corporate surplus for herself and her attorneys. Accordingly, because the Court had no power to impose a “default” on an Order to Show Cause procured by Charney without jurisdiction over the subject matter and by fraud and illegality, the default on November 18, 2003 was a nullity as well as the orders of April 13, 2004 and October 12, 2004 entered thereon.

## **2. Lack of Personal Jurisdiction**

### **The Falsification of the May 8, 1990 Order of Justice Jacqueline Silbermann Cannot be Used to Establish Personal Jurisdiction**

The Court’s confidence about the establishment of personal jurisdiction is misplaced and

is no substitute for a factual determination of this question. The record of this Court does not show that personal jurisdiction has ever been established, by the required service of process. The record of the case shows only an attempted service with an Order to Show Cause for Preliminary Injunction and Temporary Restraining Order issued on December 13, 1988.

Pursuant to CPLR §2219 in preparing an order a judge is required to recite the papers used on the motion, and to give the determination or direction in a proper detail. In leu of an order determining personal jurisdiction this Court relies on a May 8, 1990 order by Justice Jacqueline Silbermann which supposedly “denied the initial motions to dismiss”. A copy of this order and the underlying Order to Show Cause are attached to the accompanying Affidavit as Exhibit 8. However, there is no such language in that order denying a motion to dismiss. To the contrary Justice Silbermann ordered a traverse hearing on Charney’s service of the December 13, 1988, Order to Show Cause for Preliminary Injunction and Temporary Restraining Order, but Charney subsequently failed and refused to proceed with that hearing.

The sad history of this case revolves around the recycled falsification of that May 8, 1990 order of Justice Silbermann, despite there being no determination on personal jurisdiction. Clearly no successor judge such as Justice Tompkins had the power to alter that order into something else. It was by the artifice of deceptively construing that order, that Justice Tompkins’ purported order transformed the May 8, 1990 order into its diametric opposite. Such practice is not authorized pursuant to CPLR §2217. Similarly this Court, has no power to rely on and perpetuate this falsity. These issues were challenged, but are yet to be resolved. Accordingly, it is required that the instant motion with regard to the May 8, 1990 order be referred back to

Justice Silberman, for her to say what her order was intended to say.

In *McMullen v. Arnone*, 79 A.D.2d 496, 437 N.Y.S.2d 373 (2<sup>nd</sup> Dept. 1981) the court held

“that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void” .....The person purportedly served may ignore the judgment, resist it or assert its invalidity at any and all times .....On a motion to vacate such a judgment for want of jurisdiction, the court, upon finding as in the instant case that service of process was not made, must vacate the judgment absolutely, and may not impose terms or conditions upon the vacatur (**CPLR 5015, subd. (a), par. 4;**)” (Emphasis supplied)

For these reasons, the unresolved question of personal jurisdiction can be raised at any time and rests squarely uniquely in the comprehension of Justice Silberman.

## **II. Vacatur for Fraud and Misrepresentation Requires no Excuse for Default Pursuant to CPLR § 5015(a)(3)**

### **1. Charney Misrepresented that the Judgment in Excess of \$4 Million Remained Outstanding Against Judith Herskowitz**

In secreting the satisfactions of judgment Charney and Windels knew that the settlement of \$150,000.00 with XXXX and XXX Herskowitz was in full satisfaction of the judgment in excess of \$4 million together with fees, costs and interest and of the other judgments for sanctions and contempt. Notwithstanding the foregoing they misrepresented in their May 29, 2003 Motion Directing Disbursement of Assets that the full amount of the \$4.3 judgment was outstanding against Judith Herskowitz and made their claim for fees on that basis. They have also misrepresented that the orders and sanctions, contempt and commitment were in full force and effect and used it to threaten Herskowitz, to contrive a default against her, when in fact they knew that these judgments were likewise fully satisfied, together with fees and costs.

On similar facts in *Birsett v. General Acc. Ins. Co. of America*, 659 N.Y.S.2d 924, 241 A.D.2d 683 (3<sup>rd</sup> Dept. 1997) where a judgment was procured by plaintiff's material and knowledgeable misrepresentation and misconduct within the meaning of CPLR(a)(3) the court vacated a judgment. In that case plaintiff fully satisfied a \$75,000 judgment against her for \$12,000 plus interest. Without revealing that settlement plaintiff sued her insurance company for the full amount of the \$75,000 plus other expenses, for which plaintiff received a judgment. Upon discovery of this misrepresentation by the insurance company the judgment was vacated by the court and was affirmed by the appellate court.

**2. It is Now Established that the Derivative Judgment in Excess of \$4 Million was Procured by Fraud and Misrepresentation; and is Facially Void; and So There Never Was A Derivative Judgment**

In the orders dated April 13, 2004 and October 12, 2004, the Court places emphasis in ratifying Charney's plan for the disbursement of the corporate surplus, on Charney's "success in the underlying shareholder's derivative action", which is a requirement for an award of counsel fees as noted in *Seinfeld v. Robinson*, supra., at pg. 710. However, it has now been demonstrated, and in view of the lack of any opposing affidavit has been established in a companion motion submitted to this Court on October 28, 2004, to vacate that derivative judgment in excess of \$4 million, that this judgment was procured by fraud, misrepresentation and misconduct of Charney.

It is well settled that where the default judgment is procured by misrepresenting the nature of the underlying facts, there is no need to show an excuse for the default to obtain an order vacating the judgment. *National Travis Inc., v. Gialousakis*, 120 Misc.2d 676, 466

N.Y.S.2d 624 (Nassau County 1983) As shown in the companion motion that judgment in excess of \$4 million was created on fraudulent claims and is facially void upon which Charney and her accomplices have perpetuated for over a decade their wholly baseless, bad faith litigation, to the destruction of North Jersey, culminating in their absconding with the entire remaining corporate surplus, of close to \$700,000.00.

### **III. The Court Considered Only One Ground on the Prior Motion To Vacate Therefore, Other Grounds Can Be Raised On This Motion**

Pursuant to this Court's orders dated April 13, 2004 and October 12, 2004 the court took into consideration only the one issue of the default pursuant to CPLR §5015(a)(1). No ruling was made on any other issues by this Court. It is well settled that a denial of a motion made on one ground does not bar plaintiff from making another motion on other grounds. *National Travis Inc., v. Gialousakis*, 120 Misc.2d 676, 466 N.Y.S.2d 624, 627 (Nassau County 1983). In that case only the issue of personal jurisdiction was determined, but the legality of the loan was not considered, and so this issue was not foreclosed on a subsequent motion. The court relied on Cf. Weinstein, Korn & Miller, New York Civil Practice, p 5011.09 holding that doctrine of "law of the case ... seeks only to prevent the relitigation of issues of law that have already been determined " and Restatement (Second) of Judgments § 27 Comment (e); and also on *Meyerson v. Lynch, Inc.*, 29 A.D.2d 761, 287 N.Y.S.2d 475 (2<sup>nd</sup> Dept. 1968)

### **IV. There was no Default by Herskowitz**

The Court in denying to vacate its April 13, 2004 order by default pursuant to CPLR § 5015(a)(1) "rather than one for reargument" relied on *Kanat v. Ochsner*, 301 A.2d 456, 457; 755

N.Y.S. 2d 371 (1<sup>st</sup> Dept. 2003). The Court overlooked that in *Kanat* default was entered against the defendants, because they failed to file opposition papers to a motion. That was not the case here, because Herskowitz had filed timely opposing papers to Charney's Motion for Disbursement of the North Jersey surplus. In *Kanat* the court treated the motion as seeking to vacate a default and not as a reargument, upon a finding that "Defendants therein had a full and fair opportunity to fully litigate the underlying merits of the action". But this Court made no such finding here, and could not because Herskowitz had no prior opportunity to litigate the issues raised in her opposing papers to Charney's motion.

Judith Herskowitz had not defaulted in failing to appear at the November 18, 2003 hearing, because she had contacted this Court on that day by telephone and asked to participate in that hearing, but that was denied. That default was contrived to prevent Herskowitz from personally appearing in this Court, with threats of arrest by Mr. Delibert. Despite promises that she would have suspension orders prepared within a day or two of the October 22, 2003 hearing that was not done until November 12, 2003, as schemed by Delibert to once more bar Herskowitz from appearing in court, so that Charney and Windels could prevail without opposition.

That her non-appearance in person was not "willful and contumacious" is evidenced by the further fact that she did timely appear on June 21, 2003 before this Court, when she did timely receive that suspension order. As stated in her accompanying affidavit, ¶14 pg.8, she did call Mr. Delibert who had not returned her calls, and spoke to this Court's deputy clerk who denied any knowledge of that suspension order. However, without any evidentiary hearing on the issue, the Court chose to discredit Herskowitz. While this Court states that Herskowitz should

have given a fax number it overlooked the fact that Herskowitz told the Court on October 22, 2003 that she does not have any. She reiterated the same at the hearing on June 21, 2004. In fact pursuant to CPLR 2103 there is no requirement that an attorney or a party appearing pro se have a fax number. Accordingly, the burden was purely on the adverse parties to get that suspension order to Judith Herskowitz timely. Furthermore, at no time prior to any hearing did the court require Herskowitz to produce “any offer of financial proof”.

Despite the fact that all the judgments of sanction and contempt have been fully satisfied, and despite the fact that it has been demonstrated that the orders of commitment are void for being jurisdictionally defective, the Court still treats these as enforceable against Judith Herskowitz. Had the Court recognized those outstanding contempt and commitment orders as the false arrest warrants they are, then the Court would have had to conclude that these false arrest warrants had been used by Charney’s counsel to illegally threaten Judith Herskowitz from appearing. Yet the Court still uses these illegal arrest warrants to justify defaulting Judith Herskowitz together with ad hominem attacks.

#### **V. Windels Not a Receiver of the Assets of North Jersey**

Mr. Windels was never the Receiver of North Jersey Corporation and could not be because the New York court is without authority to appoint him as receiver of this foreign corporation. Nor was there any such appointment. In relation to North Jersey, he was appointed merely as the receiver of the assets of North Jersey pursuant to a May 21, 1991 order. However, he has never taken an oath and never posted a bond to qualify and to assert that position. Additionally, the above entitled case was terminated by the alleged final judgments in 1993 and

1994 and so that May 21, 1991 order was extinguished.

As such, Windels was at the best never more than a non-statutory custodian of the North Jersey surplus. It was strictly in this capacity that North Jersey's post liquidation surplus was transferred from the Bankruptcy Trustee into his custody by order of the New Jersey Bankruptcy Court (Affidavit ¶ 2). Accordingly, Windels lacked statutory authority to enter into a plan of distribution to agree to the plan of distribution on behalf of North Jersey in Charney's motion, to participate in this plan of distribution, and to facilitate this plan of distribution by any means (Affidavit ¶3 ).

#### **VI. Preemption by Federal Laws**

The alleged plan of distribution of the North Jersey surplus by Charney and her attorneys is in flagrant violation of federal bankruptcy laws and the laws of the State of New York. In fact no such authority exist and no jurisdiction for its approval in this Court and certainly not under BCL § 626(e).

Any such authority had been pre-empted by the proceedings in the Bankruptcy Court for New Jersey. Pursuant to 28 U.S.C. 1334(a) and (b) under Title 11 the Bankruptcy Court has exclusive jurisdiction of the property of the debtor. It is undisputed that the surplus assets of North Jersey had been transferred into the custody of Windels, pursuant to order of the Bankruptcy Court for determining shareholder claims and the effect of the satisfactions of judgment under New York law. This was after the corporate assets were sold, and all claims were paid, settled and fully administered. Among those claims that had been settled and resolved were those for professional fees by Charney's attorneys (Affidavit ¶¶ 3 and 4 with ft. note 1) These fee

claims were made and determined pursuant to 11 U.S.C. §503(b)(3)(B) and (b)(4). In addition claims related to Charney's derivative judgment were fully settled and satisfied in the Bankruptcy case, pursuant to its pre-emptive jurisdiction under 28 U.C. §1334. As such no fee claims ever existed in this Court upon which to exercise subject matter jurisdiction pursuant to BCL 626(e). See, *Editorial Photocolor Archives, Inc., v. Granger Collection* 61 N.Y. 2d 517; 474 N.Y.S. 2d 964, 967 (1984) holding that state proceedings are the equivalent of claims cognizable under federal law are pre-empted and therefore void for lack of subject matter jurisdiction.

## **VII. Motion to Renew**

CPLR §2221 motion to renew is properly granted where new information arises which existed at time prior motion was made and is relevant to moving party's claim, but which was unavailable or unknown to that party at time of original motion". *Azzopardi v. American Blower Corporation*, 192 A.D.2d 453, 596 N.Y.S.2d 404, (1<sup>st</sup> Dept. 1993)

There can be no question that the issue of satisfaction of the judgments is a new issue that was not considered by the Court and that Herskowitz could not have attached the copies of the satisfactions to her June 2, 2004 motion because they were not available to her at the time. Likewise that the now undisputed fact that the judgment in excess of \$4 million was procured by Charney on fraudulent evidence.

Nor could Herskowitz raise the material issue that Windels obviously had illegally distributed the corporate surplus except for leaving the aggregate sum of apprx. \$40,000. In fact Windels had kept Herskowitz in the dark at the June 21, 2004 hearing by feigning that "I now have, of course an order from your Honor directing disbursement and consider that, if and when I

act on that order” (Affidavit ¶ 25 ).

### **VIII. Motion to Reargue**

This Court erred in applying an invalid standard of “excusable default” in its October 18, 2004 order, by misconstruing and limiting the basis of the prior motion to CPLR §5015(a)(1), in order to avoid and disregard the varied meritorious defenses raised by Judith Herskowitz.

The Court’s reliance on the “excusable default” standard CPLR §5015(1) presupposes that Herskowitz’s non-appearance at the November 18, 2003 hearing on Charney’s Motion for Disbursement of Assets, could constitute a default pursuant to CPLR 2214(b) and Uniform Rule of Trial Courts §202.8(c) when opposition papers had been submitted by Judith Herskowitz and in fact no oral argument was held on November 18, 2003. So, because the matters were fully contested upon the papers submitted, the court should have held an evidentiary hearing pursuant to CPLR § 2218. As such the default was artificial and contrived.

Therefore, this Court erred in relying upon a contrived and improper “default” to disregard and avoid the substantial jurisdictional and legal defenses raised by Herskowitz referenced in ¶ 28, on pages 11-12 of Herskowitz’s Affidavit in Support of Motion to Vacate Decision and Order of April 22, 2004 entered by default and for Leave to Renew and Reargue. Furthermore, this Court overlooked and/or declined to consider in its October 18, 2004 order, the factual circumstances that actually prevented Herskowitz from appearing personally before this Court on November 18, 2003 on Charney’s motion to distribute corporate assets. Finally, this Court’s discussion of the events surrounding Judith Hersowitz’s non-appearance are mistaken, misinformed and contrary to the facts of the record.

## CONCLUSION

For all the reasons set forth herein, the within motion should be granted in its entirety together with such other and further relief as to the Court may appear just and proper.

Dated: Miami Beach, Fl  
November 19, 2004

Respectfully submitted,

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