

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J.

SUSAN CHARNEY,

Plaintiff,

Index No. 24517/88

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE
THE JANUARY 19, 1993 CONTEMPT ORDER, THE FEBRUARY 19,
1993 ORDER OF COMMITMENT, THE JANUARY 19, 1993 ORDER
ENTERING DEFAULT AND THE JANUARY 21, 1994 JUDGMENT**

JUDITH HERSKOWITZ submits this Memorandum of Law in support of her Motion to Vacate and Set Aside pursuant to CPLR §2221 and §5015(a) the January 19, 1993 order entering default judgment without the required proof; the January 19, 1993 contempt order for discovery violation, which relief is not provided under the rules; the February 19, 1993 Order of Commitment issued in relation to that order; and the January 21, 1994 judgment entered by default in favor of Charney on behalf of North Jersey Trading Corporation (“North Jersey”) and against Judith Herskowitz based upon fraud and absence of proof of service of summons and complaint, rendering it a nullity (Exhibits 11,13 and 15).

Under Index No. 23002/92 in a concurrently filed Motion to Vacate and supported with a Memorandum of Law Judith Herskowitz also seeks to vacate orders as follows; the September 21, 1992 order directing the turnover of all the North Jersey stock certificates owned by Judith Herskowitz and her sons Xxx and Xxx Herskowitz (“the Herskowitzes”) in that it was entered without service of a notice and motion; the January 19, 1993 contempt order and the February 19,

1993 Order of Commitment, issued in relation to the void September 21, 1992 order, (Exhibits 10,12 and14).

SUMMARY OF FACTS

The above noted orders and judgments are not only void for lack of personal jurisdiction over the Herskowitzes and Alex Fried, (“Fried”) but, are equally void for illegality, fraud, extrinsic fraud, lack of subject matter jurisdiction and absence of procedural prerequisites. Plaintiff through her attorneys pursued an impermissible **strike suit** in the guise of a false derivative suit for their personal benefit so, that they could empty out North Jersey to the last penny to leave it an empty shell. The Herskowitzes and Fried Florida residents were denied their day in court even on the threshold personal jurisdictional issues raised in their motions to dismiss, that were never determined on the merits. Instead Justice Tompkins stated in his October 2, 1991 order that the Herskowitzes had withdrawn their jurisdictional defenses before a predecessor judge, which was unsupported by the record, as was conceded by Plaintiff ’s attorney Steven Delibert in his sworn testimony and was mere fiction.

To foreclose the Herskowitzes from raising the jurisdictional issues and to defend on the merits so that Plaintiff could prevail ex parte and/or by default, she procured sanction orders that imposed fines on the Herskowitzes payable directly to her attorney Mr. Delibert as fees. One of these was in the sum of \$5,000.00, which was reduced to an August 19, 1992 money judgment. Through that \$5,000.00 judgment Plaintiff set out to confiscate all of the Herskowitzes stock interest in North Jersey which owned a 54 unit apartment building at 200 Riverside Drive NYC. Without the required notice and motion Plaintiff procured a September 21, 1992 order ex parte directing the Herskowitzes to turn over to the New York Sheriff all their North Jersey stocks.

Because, Plaintiff could not reach the stock certificates in Florida, the turnover order was exploited to contrive in that same September 21, 1992 order an order compelling the Herskowitzes to appear for their deposition in New York in the courtroom of Justice Tompkins. There was no showing of a meritorious purpose, as required for discovery in a derivative action. The contrived nature of this order was evidenced by the fact, that the deposition was scheduled just a few days after the Herskowitzes were required to turnover their stock certificates to the New York Sheriff. Because of the prospect of inescapable confiscation of all their North Jersey stocks, the Herskowitzes were prevented from appearing at a deposition where their liberty and property rights were being threatened for non-compliance with a jurisdictionally invalid turnover order.

Thereupon, the Herskowitzes' pleadings were stricken, in a January 19, 1993 order. because of that non-appearance for deposition. They were thus, barred from defending on the issue of liability on Plaintiff's false derivative suit. In addition Plaintiff was declared a 40 per cent shareholder of North Jersey, without the required proof pursuant to CPLR 3001. In yet another order dated January 19, 1993 the Herskowitzes were held in contempt for discovery violation, when no such punishment of a party is provided under CPLR 3126. In yet a third order dated January 19, 1993 the Herskowitzes were held in contempt for their failure to turnover all their North Jersey stock certificates based on the void September 21, 1993 order.

As a direct consequence of these void contempt orders, Plaintiff procured yet two more orders each titled Order of Commitment, both dated February 19, 1993 directing to arrest the Herskowitzes if apprehended in the State of New York, unless, they purged themselves by paying substantial fines and turning over all their North Jersey stock certificates. The intended effect of these false arrest warrants was either to force the Herskowitzes to surrender all their North Jersey stock certificates, or to foreclose their participation in Plaintiff's false derivative suit. An

inquest to assess damages was scheduled for March 1, 1993, before a referee.

Although the Herskowitzes had an absolute right to defend on the damages, they were denied that right, through the false arrest warrants so that Plaintiff could present her fraudulent submissions on damages ex parte, without challenge, to prevail by default. In her amended complaint as for her derivative claim, Plaintiff merely sought damages for diversion of corporate income by the Herskowitzes for their personal benefit. Plaintiff stated the nature of the damages for the first time in her March 15, 1993 Post Inquest Memorandum, which were outside of her amended complaint. It was by these fraudulent and coercive measures amounting to extrinsic fraud that Plaintiff procured a totally false \$4.2 million default judgment against Xxx and Xxx Herskowitz on November 23, 1993 and the same judgment jointly against Judith Herskowitz on January 21, 1994 purportedly on behalf of North Jersey, as yet another means to appropriate the Herskowitzes interest in the corporation.

That \$4.2 million judgment was not procured on proof, but was based on false suppositions and conjectures in a sham Inquest, to which Plaintiff was the only party after having barred the Herskowitzes from that hearing. To fabricate that diverted income, Plaintiff did not and could not rely on the actual corporate rental income kept artificially low by rent control and rent stabilization laws. She created a false presumption that the monthly rental income in 1982 was \$24,000.00 and so for the period from 1985 to 1993 the rental income should have been from \$28,000.00 to \$40,000.00 a month. Plaintiff deceptively omitted a 1982 federal tax return which showed that the average monthly rent was less than \$20,000.00 and that North Jersey generally operated at a loss. For the referee's hearing Plaintiff prepared a fictionalized summary of overstated rents for the period from January 1985 through February, 1993 in the sum of

\$3,486,840.59 from this she deducted false, understated monthly expenses of \$15,000.00 in the total sum of \$1,470,000.00. The difference of \$2,104,963.33 a totally hypothetical sum she claimed was unaccounted for and was the damage for diverted income. Plaintiff noted the hypothetical monthly rents as if they were paid 100 percent for each and everyone of the apartments for over eight years, a period of 98 months, when she knew this was not the case. Plaintiff excluded many expenses including the income of Fried that she knew he was entitled to and received from the inception of the corporation. She included these false damages till 1993, which included the time period that the building was taken over by a receiver since 1991.

To falsely inflate the rents, Plaintiff noted vacant apartments at market rents, illegal because market rents could be charged under DHCR rules only upon capital improvement, that required a substantial investment by conventional financing that was foreclosed by Plaintiff's litigation. Plaintiff overstated rents regardless that they were rolled back by DHCR and disregarded close to \$100,000,00 that had been awarded to tenants as compensation for overcharges on prior leases made by Alex Fried before 1984 but, was not made a party to the derivative suit.

Plaintiff further claimed damages for a \$200,000.00 mortgage "improperly placed on the property" which was also false. As a matter of public record those proceeds were used to pay off a prior North Jersey mortgage. Her last item of damages was an alleged diminution of value of the building for \$960,000,00 that was unsupported by any official appraisal, nor could it be, because the value of the building was increased by the vacant apartments. These apartments were intended for a co-op conversion to be sold at market price which Plaintiff foreclosed with her litigation. Plaintiff added on close to a million dollars in prejudgment interest, resulting in that fraudulent \$4.2 million judgment. So, there was no proof of diversion of income and none by Judith Herskowitz for Plaintiff and her associates to steal her corporate interest.

ARGUMENT

I. Authority to Grant Relief for Lack of Jurisdiction and for Fraud and Fraud on the Court Is Provided under CPLR 2221 and 5015

The courts possess broad statutory authority to set aside judgments and orders pursuant to CPLR 5015(a)(4) and this is especially true whenever the defect is jurisdictional. It is well established that an objection that goes to the fundamental power of the competency of court to adjudicate the cause, will survive even a final judgment or order without time limitation. See, 5 Weinstein-Korn-Miller, N.Y.Civ.Prac. § 5015.10. This is the same where fraud on the court or on the parties is alleged, pursuant to CPLR 5015(3). *Shaw v. Shaw* 97 A.D.2d 403, 467 N.Y.S.2d 231 (2nd Dept. 1983) Furthermore, the courts possess inherent power to set aside judgments in the interest of justice. David D. Siegel Practice Commentary C5015:11.

A. Orders and Judgments Entered on Default Are Not Appealable

It is further well settled that a party may not appeal directly from an order entered upon his default, the proper remedy being an application to open the default made to the rendering court (see CPLR 5511, 5015) *Furci v. Furci*, 358 N.Y.S.2d 195, 45 A.D.2d 1003 (2nd Dept., 1974). *Morse v. Morse*, A.D.2d 750, 412 N.Y.S.2d 220 (3rd Dept. 1979) As shown in the accompanying affidavit and in this Memorandum, the \$4.2 million derivative judgment as well as other orders sought to be vacated herein were entered upon default without allowing the Herskowitzes to contest any of the issues and accordingly, relief by motion to vacate is appropriate.

B. Authority of Successor Judge To Vacate Orders and Judgments

Although motions to set aside the court's determination are usually made before the judge

who made such determination, there are circumstances where the judge who entered the order or judgment is unavailable or is no longer on the bench to determine a motion to vacate. That power then passes on to the successor judge who has the power to review the predecessor judge's decisions on any ground that he could have reviewed such orders and judgment had he been available *Arden Associates, V. Vasquez* 168 Misc.2d 475, 638 N.Y.S.2d 535 (Civ. Ct. N.Y. County).

In *Hess v. Wessendorf*, 102 A.D.2d 926, 477 N.Y.S.2d 515, 516 (3d Dept., 1984) the court recognized that the motion to vacate the preclusion order should have been made to the judge who had issued that order. However, that judge was unavailable because he retired from the bench and so the court held it was appropriate to consider the subsequent order granting plaintiffs' motion for relief from the preclusion order, notwithstanding that a successor judge made the subsequent order.

In *Aurora G. v. Harold Aaron G.*, 98 Misc.2d 695, 414 N.Y.S.2d 632, (N. Y. Fam. Ct., 1979) the issue was whether child support payments can be enforced by the sequestration of the fathers' benefits under his annuity contracts with the College Retirement and Equities Fund (CREF) and the Teachers Insurance and Annuity Association of America (TIAA). These Corporations moved the court to vacate and modify an order of sequestration in a support proceeding. Since Judge Thurston was no longer on the bench, successor Judge Turret was held to have authority to review Judge Thurston's order to vacate or modify the order.

Thereby, this Court as the successor judge to Justice Harold Tompkins who had retired does have the authority to vacate and set aside the orders and judgments named herein, each of which was entered in this court, ex parte and/or by default, without a determination on the merits.

II. Orders Were Entered Without Jurisdiction and Statutory Authority Upon Which Orders of Commitment Were Issued, Foreclosing the Herskowitzes from Participation so that Plaintiff Could Prevail Without Opposition or by Default

A. The September 21, 1992 Turnover Order, the January 19, 1993 Contempt Order and the February 19, 1993 Commitment Order Are Void

(1) Money Judgment Cannot be Enforced by Contempt

On August 19, 1992 a money judgments was entered in the clerk's office under Index No. 23002/92 in the sum of \$5,000.00 as payment of fees for Mr. Delibert, counsel for Plaintiff and \$650.00 for costs. The order expressly provided that "Additional Respondent [Charney] have execution thereof." (Exhibit 9) 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 (1st Dep't 1986) for the proposition that a money judgment which pursuant to CPLR 5201 is enforceable solely by execution, cannot be enforced by contempt.

(2) The September 21, 1992 Ex-parte Turnover Order Is Jurisdictionally Defective, Is Facially Invalid, and So Is Not Enforceable by Contempt

Plaintiff deceptively converted that \$5,650.00 money judgment into a contempt order, by way of an ex parte turnover order inserted into an order under Index No. 24517/88 that also bore Index No. 23002/92 and was dated September 18, 1992 and entered on September 21, 1992 (Exhibit 10). Plaintiff failed to meet the basic prerequisites for commencement of a turnover proceeding. Plaintiff failed to serve a restraining notice pursuant to CPLR §5222, an information subpoena pursuant to CPLR § 5224, which are prerequisite to a turnover order. Plaintiff also failed to serve her motion for stock turnover in accordance with CPLR §5225, a supplementary

proceeding which rule strictly requires that it “shall be served personally in the same manner as a summons or by registered or certified mail return receipt requested”. The same rule applies in supplementary proceedings to the service of the restraining notice and information subpoena.

It is well settled that service of a motion to commence a turnover proceeding cannot be made by regular mail, and service without proof of a signed return receipt by certified mail or service in the manner of a summons, is insufficient, and invalidates a turnover proceeding. This is because “A legal proceeding to divest rights cannot be instituted without safeguarding the right to due process of law. Due process requires proper notice of the proceedings”. *Bergdorf Goodman, Inc., v. Marine Midland Bank*, 97 Misc.2d 311; 411 N.Y.S. 2d 490 (N.Y. County 1978). In yet in another CPLR 5225 proceeding to enforce a judgment against landlord who was directed to turn over an amount sufficient to satisfy a judgment, where the service of the Order to Show Cause was not made as required under the rule, the proceeding was held to be jurisdictionally defective. *Oil City Petroleum Co., Inc., v. Fabac Realty Corp.*, 70 A.D.2d 859 418 N.Y.S/2d 81 (1st Dept. 1979). Accordingly, the September 21, 1992 turnover order is void.

Additionally, the September 21, 1992 turnover order is facially invalid for failure to make reference to a restraining notice or to any disclosure under §5222 as required under CPLR §5225. Likewise omitted from the order is any provision for the payment of the \$5,650.00 judgment or any determination of an equivalent value of property to satisfy that judgment. The order merely compels the turnover by the Herskowitzes of all their stock certificates in North Jersey, which owned real property valued in excess of a million dollars. So, the value of those stocks far exceeds that \$5,650 judgment. Clearly the objective was to deprive the Herskowitzes’ of their entire interest in North Jersey. This was contrary to provision of CPLR 5225 pursuant to

which the court may order the judgment debtor to pay the money, or so much of it as is sufficient to satisfy the judgment, and if the amount is insufficient, then to deliver so much of any other personal property, as is sufficient value to satisfy the judgment.

It has been further held that no sanction can be levied and there can be no punishment by contempt where there was no service of the motion, because the certified mail was returned by the Post Office to plaintiff's attorney with the notation that it was "unclaimed". The court adhered to the rule that in a supplementary proceeding to lay the foundation for an order of contempt the service requirements must be strictly adhered to. *Carl v. Moyer*, 63 Misc.2d 1052; 313 N.Y.S.2d 936 (Supr. Ct. Onondaga County 1970). In accord *Metropolitan Life Insurance Co., v. Young*, 157 Misc. 2d 452 (Civ. Ct. N.Y. County 1993) holding that no presumption of receipt attaches to service by ordinary mail, since a signed return receipt is required. This case also held that the presumption of receipt which attaches to first class mail was inapplicable, because the mailing cannot be received until the addressee signs. Thereupon, judgment creditor's motion for order punishing defendant for contempt by default was denied.

It is well settled, that violation of an order void for lack of jurisdiction is not punishable by contempt. Where the court had no authority to make an order restraining appellant from terminating utility services to the subject premises, there was no power to punish appellant for disobedience of that order. *Ford v. Tower West Associates* 120 Misc. 2d 240, 467 N.Y.S.2d 476 (1st Dept. 1983) Because no contempt order can be issued upon that jurisdictionally defective September 21, 1992 turnover order that January 19, 1993 contempt order was likewise void (Exhibit 12) and so that February 19, 1993 Order of Commitment issued upon it would constitute a false arrest warrant (Exhibit 13) that is equally void and unenforceable.

(3) The Court Lacks Extraterritorial Jurisdiction Over Nonresident's Property Not Within the State

Plaintiff attempted to bring that turnover proceeding against Judith Herskowitz a non-resident of the state, for the turnover of all her North Jersey stock certificates, not kept within the state. The stock certificates that Plaintiff 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. *Abkco Industries, Inc. V. Apple Films LTD.*, 39 N.Y.2d 670; 350 N.E.2d 899; 385 N.Y.S.2d 511 (1976). Also 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 the special proceeding provisions of Article 52 do not authorize garnishment against a nonresident judgment debtor whose funds are outside of the state.

Because the residence of Judith Herskowitz was always in Florida, the turnover, contempt and commitment orders entered under Index No. 23002/92 were not only void for lack of proper service, but were also void for lack of extra-territorial jurisdiction to enter that September 21, 1992 turnover order.

(4) The Contempt Order Is Not Civil in Nature, but Is an Unauthorized Criminal Contempt

Moreover, even if that turnover proceeding could be enforced by contempt, (which is not the case) it can be only civil in nature. But in the case at bar 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 to Mr. Delibert. This

constituted an unlawful exercise of punitive measures in an attempt to coerce compliance with an ineffective enforcement remedy in violation of CPLR §5210. The United States Supreme Court declared such judicial act unconstitutional in *United Mine Workers v. Bagwell*, 51 U.S. 821 (1994).

B. The January 19, 1992 Contempt Order for Discovery Violation Is Void for Lack of Subject Matter Jurisdiction, Upon Which No Commitment Order Can Be Issued

The order dated January 19, 1993, entered under Index No. 24517/88 purports to hold in contempt of court the defendants North Jersey Trading Corporation, Judith Herskowitz, Xxx Herskowitz and Xxx Herskowitz, pursuant to §753 Judiciary Law 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 \$23,500.00 consisting of counsel fees for Mr. Delibert (Exhibit 12).

However, there is no statutory provision for punishment by contempt of a party for discovery violation. 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. Also see, *Wolf v. Rand*, 216 A.D.2d 99, 628 N.Y.S.D.2d 101 (1st Dept. 1995) the court did not consider contempt to be the appropriate remedy for defendants’ discovery violation and instead authorized the imposition of appropriate sanctions pursuant to CPLR 3126. It is well settled, that where the court is unauthorized to hold contempt proceedings, the ensuing mandate of commitment is void. *In Re Buthy*, 34 A.D.2d 119; 312 N.Y.S. 2d 119 (4th Dep’t 1970)

The court’s power to punish for discovery violation is statutory under CPLR §3126. As

shown above no statutory authority is provided under §3126 to punish a party by contempt for discovery violation. It is well settled that where the court is without jurisdiction to act, its judgment is considered a nullity and must be vacated. *Marazita, V. Nelbach*, 91 A.D.2d 604, 456 N.Y.S.2d 423 (2nd Dept. 1982) Thereby, the January 19, 1993 order punishing by contempt a discovery violation, and its enforcement by the February 19, 1993 Commitment Order are both null and void, and subjected Judith Herskowitz to another false arrest warrant (Exhibits 12 &15)

III. The January 19, 1993 Order and Judgment Declaring Plaintiff a 40 Percent Shareholder of North Jersey, Is Void for Having Been Entered by Default Without the Required Formal Proof, and Without the Indispensable Party Alex Fried the Purported Donor of the Stocks, Foreclosing Plaintiff to Pursue a Derivative Suit

Plaintiff sought a declaratory judgment in her amended complaint pursuant to CPLR 3001 (Exhibit 4 pgs. 5 & 12). As noted above Plaintiff was declared a 40 percent shareholder of North Jersey without the required proof, by judicial fiat. However, declaratory relief cannot be granted simply on default of a party. It is expressly stated under Siegel Practice Commentaries C3001:23 relying on *Wilson v. Wilson*, 181 Misc. 941, 43 N.Y.S.2d 526 (1943) that a declaratory judgment solely by default cannot be taken. To enter a declaratory judgment by default against the defendant the “plaintiff must nonetheless take the stand to attest to all parts of the claim” because, unlike the ordinary default cases, proof upon a default application for declaratory judgment cannot be made solely on paper. The right to a judgment was stated to depend on the proof adduced by a party at trial and not on the mere fact that a party is in default, nor upon ex parte affidavits. Siegel in his Commentary also relied on *National Surety Corporation, v. Peccichio*, 48 Misc.2d 77 264 N.Y.S.2d 177 (Supr. Ct. Albany County 1965) which stated:

“A declaratory judgment may be issued even if a defendant defaults in appearing or defending the action, but a default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary that plaintiff establish a right to a declaration against such a defendant”.

Also in accord *Gristi v. Mortgage Commission*, 291 N.Y.S. 257 (2nd Dept. 1936) holding that plaintiff was not entitled to declaratory judgment because of default of one party, since the right to such judgment depended on proof adduced at trial. Also see, *Crantson v. Walton-164th Street Corp.*, 115 N.Y.S. 2d 331 (Supr. Ct. Bronx County 1952) holding that the declaratory relief prayed for depends on the nature and quality of proof.

Yet, another defect that needs to be noted is that Alex Fried died on March 25, 1992, in Miami, Dade County, Florida, and no administrator ad litem was substituted, and qualified in his place and stead as required under CPLR 1015 despite the fact that Plaintiff claimed Fried to be the donor of the alleged North Jersey stock certificates. He was an indispensable party, and was so named in her complaint and under the declaratory clause - Count II of the amended complaint as a party necessary to obtain complete relief. Thus, Fried’s disposition of his stocks and opposition to Plaintiff’s claims were effectively eliminated, by the simple expedient of failure to substitute. It is well settled as was stated in *Silvagnoli v. Consolidated Edison Employees Mutual Aid Society*, 112 A.D.2d 819, 429 N.Y.S.2d 619 (1st Dept. 1985) that:

“The death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a).....As the court stated in *Matter of Einstoss*, supra: "If a party dies before a verdict or decision is rendered in an action, it abates as to him.... unless it is revived by substituting his personal representative." Any order made between the death of a party and the substitution of a legal representative is void.” (Emphasis supplied)

Moreover under Business Corporation Law §626 a shareholders` derivative action in the right

of the corporation can be brought only by a holder of shares of the corporation. So, a determination as to whether Plaintiff was a shareholder was a prerequisite to pursuing her derivative suit. In *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 488 N.E.2d 828, 497 N.Y.S.2d 898 (1985) where the ownership of the corporate stocks were in dispute the court ruled that:

“Inasmuch as plaintiff’s right to maintain a shareholder’s derivative action depends upon his success on his individual causes of action, the derivative claims should be severed and held pending disposition of plaintiff’s individual claims. “

Plaintiff procured that declaratory judgment by her misconduct in scheming to strike the Herskowitzes’ pleadings for their alleged failure to appear for their deposition scheduled in the courtroom of Justice Tompkins for purposes other than their deposition, to compel them to turnover all their North Jersey stock certificates. However, without specific factual allegations a defendant is not permitted to be examined before trial in a shareholder derivative action because of the well known potential for abuse in derivative actions, which have been recognized by the courts are often brought by plaintiffs for reasons of their own and contrary to the best interests of the corporation they purport to represent. *Condren v. Slater*, 85 A.D. 2d 507, 444 N.Y.S.2d 454 (1st Dept. 1981).

At no time has Plaintiff stated any specific factual allegations with evidentiary value to establish the charges of that diversion of income to entitle her to conduct discovery in a shareholder derivative suit. Plaintiff’s amended complaint was based purely on conclusions of diversion of income, assets, and property of the corporation based on information and belief. Judith Herskowitz was not the custodian of the corporate books and records nor was she active in the management of North Jersey to be subjected to such harassment under disguise of discovery. Also see, *Van Aalten v. Mack*, 7 A.D. 289, 182 N.Y.S.2d 648 (1st Dept. 1959) *Stull v. Studebaker Corporation*, 30 A.D. 2d 574, 290 N.Y.S.2d 574 (1st Dept. 1968)

IV. Authority for Relief from the Derivative Default Judgment, for Noncompliance with Essential Prerequisites; for Fraud, Misrepresentation and Misconduct; and Where Based on Matters Outside of the Pleading

(1) Lack of Subject Matter Jurisdiction to Enter Default Judgment For Noncompliance with Essential Prerequisites of CPLR 3215(f) Rendering the Derivative Judgments a Nullity and Void on its Face

Pursuant to CPLR §3215(f) as part of the “proof “required for entry of a judgment by default, the applicant “shall file proof of service of summons and the complaint”. The proof of service is governed by CPLR 306, by personal or substituted service. See, Siegel Commentary C3215:16. The Order and Judgment entered by Justice Tompkins, on November 22, 1993 under Index No. 24517/88 for \$4.2 million against Xxx and Xxx Herskowitz merely recites on page 2, “the proof of due service of said Motion on each of the defendants” referring to the service of an “Order to Show Cause dated March 25, 1993; the affirmation of Steven Delibert executed on March 23, 1993 with exhibits in support of said Motion” (Exhibit 18). The same Order and Judgment was entered by Justice Tompkins on January 21, 1994 against Judith Herskowitz that also recites on page 3 “the proof of due service of said Motion on each of the defendants” referring to the service of an “Order to Show Cause dated January 6, 1994; the affirmation of Steven Delibert executed on January 4, 1994 with exhibits in support of said Motion” (Exhibit 19). These motions were served by first class mail.¹

So, that Plaintiff falsely obfuscated the fact that there was no “proof of service of summons and complaint” as required by CPLR 3215(f) for entry of a judgment by default,

¹ Proof of service of the summons and complaint is required to be stated in the judgment is made clear in West’s McKinney’s Forms for CPRL Volume 2 §§ 5:248, 5:249, 5.250 etc.,

rendering those judgments false on its face. Since the derivative judgments were jointly against the Herskowitzes and they were all indispensable parties, Plaintiff was required to file proof of service as to each of them. Plaintiff purported to serve on the Herskowitzes and Fried merely an Order to Show Cause for Preliminary Injunction and Temporary Restraining Order on or around December 20, 1988. At this and all material times former CPLR ¶ 304 was in effect, which specified the “Method of commencing action or special proceeding”, providing in pertinent part:

“An action is commenced and jurisdiction is acquired by service of a summons”
(Emphasis added)

This makes Plaintiff’s non-compliance with the proof prerequisite under CPLR 3215(f) by failing to “file proof of service of the summons and the complaint” a fundamental defect that by virtue of former CPLR 304 it deprived the court of jurisdiction to enter any judgment in this case. It is well settled that the failure to comply with the requirements of CPLR 3215 for entry of a default judgment renders a judgment a nullity and must be vacated. In *Marazita v. Nelbach*, 91 A.D. 2d 604, 456 N.Y.S.2d 423,(2nd Dept. 1982) upon the failure to properly file proof of service the court held that:

“Where a default judgment is entered without compliance with the necessary requirements therefor that judgment is a nullity and must be vacated”.

In accord *Pack v. Saldana* 178 A.D.2d 123, 577 N.Y.S.2d 12 (1st Dept. 1991) and *Mc. Dermott v. Hoenig* 32 A.D.2d 838, 302 N.Y.S.2d 280 (2nd Dept. 1969)

Since Plaintiff served only a motion in the form of an Order to Show Cause she did not establish procedural prerequisite for her default judgment and the judgments are fatally defective. The judgments are a nullity and are void ab initio pursuant to CPLR 3215(f) for the court’s lack

of jurisdiction to enter it. It is to be noted that Judith Herskowitz's prior §5015(a) motion raised jurisdictional challenges based on the lack of personal jurisdiction and service on the default judgment entered by Justice Tompkins on January 21, 1994.

(2) The Default Derivative Judgment Was Procured By Fraud

CPLR §5015(a)(3) provides for vacating judgments and orders on the ground of fraud, misrepresentation or other misconduct of an adverse party that deprives a party of a full trial, or has the effect of preventing a party from fully presenting his case. In *Tamimi v. Tamimi*, 38 A.D.2d 197 328 N.Y.S.2d 477, 479, 483 (2 Dept., 1972) the court allowed an attack on a judgment

“where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in this case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court,.....which show that there has never been a real contest in [38 A.D.2d 200] the trial or hearing of the case.....In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court”.

Tamini also relied on Pomeroy's Equity Jurisprudence (vol.3, 5th ed. §919a) which states that

‘Fraud, whether committed on the court or on the opposite party or on both, may be extrinsic within the meaning of the rule when its effect is to prevent the unsuccessful party from having a trial or from presenting his case fully, as, for instance, keeping him away from court by false promise of compromise, or purposely keeping him in ignorance of the pendency of the action’.

In *Shaw v. Shaw*, 97 A.D.2d 403, 467 N.Y.S.2d 231, 234 (2nd Dept., 1983) the court held that where the movant seeks a judgment to be vacated upon the ground of "fraud, misrepresentation, or other misconduct" pursuant CPLR 5015(a)(3) for extrinsic fraud, the movant need not show that he has a meritorious defense or cause because:

“a default judgment obtained through extrinsic fraud should be vacated without any requirement that the movant show a meritorious defense. Such a judgment is a nullity, irrespective of the question of merit.” (Emphasis supplied)

In *Cohoes Realty Associates v. Lexington Insurance Co.* 292 A.D.2d 51, 745 N.Y.S. 2d (1st Dept. 2002) the court reversed an order dismissing a complaint based upon the misconduct of a party. According to the facts of the case Lexington denied knowledge that a vacant factory did not have a functioning sprinkler system and so refused coverage to plaintiff after the factory burned down. Plaintiff contended that Lexington was on notice. Later plaintiff discovered a detailed inspection report finding that the premises did not have a sprinkler system. This contradicted prior sworn testimony by Lexington’s witness that there was a sprinkler system.

On the basis of this newly discovered evidence plaintiff moved pursuant to CPLR 5015(a)(2) to renew a motion for summary judgment against Lexington. The lower court granted the motion, but the appellate court reversed finding a lack of due diligence in pursuing discovery. On remand, plaintiff moved pursuant to CPLR 5015(a)(3) to vacate the dismissal order on the ground that it had been obtained by Lexington by fraud, misrepresentation and other misconduct. The lower court denied relief on the basis of the appellate court’s prior affirmance of the order granting summary judgment to Lexington. The appellate court held that it was not precluded from reconsidering its prior determination for reasons as follows:

“As an initial matter, neither Lexington nor any other party to a litigation holds a vested right to have a court perpetuate its mistakes.....Moreover, an appellate court has inherent and plenary authority to exercise its discretion to review a previous order obtained by means of misconduct by a party toward the courtThis authority is rooted in the notion that a party successful in obtaining an order by means of misconduct does not render a court powerless to undo that order when the truth is brought to light. Neither "law of the case" nor stare decisis is applicable in such instances. These principles generally provide courts with the power to prevent unnecessary relitigation of claims decided on the merits. They are not intended to shelter parties who have engaged in acts of misconduct or misrepresentation to the courts.”

In Lanc, v. Donnelly, 184 A.D.2d 840 584 N.Y.S.2d 214, 215 (3rd Dept. 1992), the court held that by virtue of its inherent power to exercise control over its own judgments, a court may open a judgment for sufficient reasons and in the interest of justice. Furthermore, because the power of a court to open its own judgments is not limited by statute, the fact that plaintiff's motion was made more than one year after entry of Supreme Court's order (see, CPLR 5015[a][1] is of no consequence. As such the Supreme Court has the inherent authority to vacate a judgment in the interest of justice, even where the statutory one-year period under CPLR 5015(a)(1) has expired. Also see, *Aieyra v. Briggs & Stratton Corp.*, 585 N.Y.S.2d 468, 469, 184 A.D.2d 766 (2nd Dept., 1992) holding that the Supreme Court has the power to set aside, correct, or modify its own orders on a motion of any party upon appropriate grounds.

It is well settled that every court retains a continuing jurisdiction to reconsider any prior intermediate determination it has made. Also see, *Aridas v. Caserta*, 41 N.Y.2d 1059, 364 N.E.2d 835, 396 N.Y.S.2d 170, (N.Y. 1977) and *State v. Kama*, 699 N.Y.S.2d 472 (2nd Dept. 1999).

Plaintiff with her attorney Delibert misused the proceedings, to fraudulently procure two sanction orders each of which awarded a \$5,000.00 fee to Delibert and costs to Plaintiff to penalize the Herskowitzes and to foreclose them from contesting her claims. On one of the \$5,000.00 judgments Plaintiff procured that invalid September 21, 1992 order requiring the Herskowitzes to turn over to the New York Sheriff all of their stock certificates in North Jersey, with property worth in excess of a million dollars. In that same September 21st order a deposition of the Herskowitzes was set up in the courtroom of Justice Tompkins. The threat of the use of coercive

and punitive measures should they fail to turn over their stock certificates pursuant to that invalid September 21st order prevented the Herskowitzes from appearing at that deposition.

For this non-appearance two contempt orders both dated January 19, 1993 were entered against them, one for non-compliance with the stock turnover order and the other for their failure to appear at the deposition. A third order of the same date was entered that struck their pleadings and entered default against the Herskowitzes to foreclose them from opposing Plaintiff's claims and to present their case on the issue of liability. This was followed by the commitment orders of February 19, 1993, which contained purge requirements for the payment of money plus the turnover of all their North Jersey stocks.

Although the Herskowitzes were entitled to appear at the Inquest to challenge the damages on Plaintiff's purported derivative suit, Plaintiff resorted to duress to deny the Herskowitzes access to those proceedings by means of threats through the invalid stock turnover order procured ex parte without the required notice and motion, the invalid contempt orders and false arrest warrants. Thus, there is no question that the threat faced by Judith Herskowitz of being arrested fifteen hundred miles from her home, had she attended that Inquest, was very real. Delibert constantly used as a weapon against Judith Herskowitz the threat of arrest were she apprehended in the State of New York. In fact he did make an attempt to have her arrested when he believed that she was visiting in New York in a family member's apartment. So, that what transpired here is a classic extrinsic fraud resulting in a judgment entered without a contested adversary proceeding.

(2) The Default Judgment is a Nullity for Having Been Entered Outside of the Pleadings

Plaintiff created an illusion of damages through her invented and false ex parte submis-

sions, to which the Herskowitzes were foreclosed to object. For her damage claim Plaintiff contrived a missing inflated rental income; a fraudulent claim of missing mortgage proceeds and a fictionalized claim of devaluation of the North Jersey property. As supported by the accompanying Affidavit, Plaintiff's ex parte submissions are shown to have been nothing more than hypothetical assertions about what the monthly rentals and expenses should have been over a 98 month period. Although the documentation in the form of tax returns and other reliable sources were available to Plaintiff that showed that there were no missing rentals, and that the corporation had actually been just breaking even or operating at a loss, Plaintiff ignored these facts, in order to create an illusion of rental income, to justify her false allegation of diversion corporate income.

However, these were not the damage claims Plaintiff made in her amended complaint and were raised for the first time in her Post Inquest Memorandum dated March 15, 1993 as a summary of what was allegedly raised at the March 1, 1993 Inquest (Exhibit 16). Plaintiff sought the derivative damages in Count VII of her amended complaint in which she merely concluded upon "information and belief" that

"the Respondents Judith Herskowitz, Xxx Herskowitz and Xxx Herskowitzes, have enriched themselves at the expense of the corporation, have diverted to their own use and benefit the assets, income and property of the corporation, and have otherwise improperly profited at the expense of the Corporation", and so Plaintiff was "entitled to judgment in the name and on behalf of the corporation, in such amount as may be shown upon the trial hereof to have been wrongfully looted and diverted from the corporation by the said individual Respondents".

Thus, the derivative judgment for \$4.2 million entered against Xxx and Xxx Herskowitz on November 22, 1993 (Exhibit 18) and against Judith Herskowitz on January 21, 1994 (Exhibit 19), relied on the damages that Plaintiff created for purposes of the Inquest, and had no

relationship to the allegations of her amended complaint. Nor could it have where for the most part Plaintiff's claims of damages occurred subsequent to the January 1989 amended complaint, in the period from 1989-1993. Plaintiff's claim of improper use of mortgage proceeds was in October 1990 and her claim of diminution of value of the real property was in 1993. Therefore, Plaintiff was required to amend her complaint pursuant to CPLR §3025(b) and (c), which she failed to do.

It is well settled that a judgment by default may not "differ in type from that demanded in the complaint nor can a default judgment exceed the amount demanded in the complaint see, CPLR §3215(b). As similarly stated in Siegel's Commentary C3215:10 the defaulting party is bound only to the extent of the original complaint. In *Mazie v. Mazie*, 77 A.D.2d 878, 430 N.Y.S.2d 672,(2nd Dept., 1980) the former wife had petitioned the Family Court to enforce the separation agreement relating to the automatic increase in the amount of alimony and child support, and sought arrears in the sum of \$421.20 plus for additional expenses. The petition was not amended nor was the husband apprised of the exact nature and extent of the said "additional expenses". A hearing was held at which the husband did not appear, and an order was entered for the sum of \$3,286.20, consisting of the \$421.20 in arrears and of the additional expenses for medical and education of the parties two children. In reversing the order, the appellate court denied about \$2,700.00 for the additional expenses because the husband was not informed of the exact nature of these expenses.

In *Stanford v. Van Skiver*, 64 A.D.2d 868, 407 N.Y.S.2d 601, (4th Dept., 1978) the trial court granted a judgment by default against third party defendant Paterson that included \$1,959.00 for counsel fees. Paterson appealed. The appellate court deleted the fees, because even

though Patterson had defaulted he had not received notice of the inclusion of the \$1,959.00 in the original complaint nor by amendment served on him. So, the lower court was held to be without jurisdiction to grant judgment by default that included the fees for the sum \$1,959.00.

Likewise in *Lape v. Lape*, 255 N.Y.S.2d 953, 23 A.D.2d 539 (1st Dept. 1965) the trial court order was reversed on the ground that while the court could enter a judgment for the sum of money demanded on the second cause of action, it could not enter a judgment directing the return of the property which was not sought in the complaint.

In view of the fact that the damage claims made by Plaintiff in her derivative claim were outside of her amended complaint, this court was without subject matter jurisdiction to enter that derivative judgment thereon.

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
September 1, 2004

Respectfully submitted,

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