

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SUSAN CHARNEY,

Plaintiff,

- against -

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
[REDACTED], [REDACTED]

Defendants.
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IAS PART 30
HEITLER, J.

Index No. 24517/88

MEMORANDUM OF LAW IN OPPOSITION TO
MOTION FOR DISQUALIFICATION

Paul Windels III, a Receiver pursuant to Order of this Court dated May 21, 1991, and Susan Charney *pro se*,¹ respectfully submits this Memorandum of Law in opposition to the motion of defendant Judith Herskowitz to disqualify Hon. Sherry Klein Heitler, the Justice of the Supreme Court currently assigned to this case, from this case.

This motion appears to be the tenth such motion that Herskowitz has made for recusal of judges in this and related litigation pending in this Court as well as in the state and federal courts of Florida, and the United States Bankruptcy Court for the District of New Jersey.² The mere

¹ Steven Delibert, Charney's counsel, died in July 2004.

² See the accompanying Affidavit of Eric Christu sworn to October 13, 2004, itemizing seven separate recusal motions. In addition, Herskowitz has made recusal motions in these proceedings, and in the United States District Court for the Southern District of New York. See Affirmation of Steven Delibert dated May 28, 2003, and submitted in support of the Order to Show Cause dated May 29, 2003, ¶ 23 n.11. A federal court action brought by Herskowitz against Charney, Mr. Delibert, and three Florida state court judges has been recommended

volume of these motions demonstrates that they have been filed for tactical reasons and that Herskowitz cannot distinguish with the extreme and clear sort of judicial bias that warrants disqualification and a judicial determination different from what she desires. Here, the sole ground Herskowitz alleges in favor of her motion is that Justice Heitler declined to sign certain orders to show cause Herskowitz had submitted, notwithstanding that Justice Heitler has signed at least one order to show cause submitted by Herskowitz. Yet the orders Justice Heitler declined to sign appeared frivolous on their face in that they sought to relitigate matters that had been determined over ten years ago by this Court and the Appellate Division. Consequently, and in light of the great efforts Justice Heitler has made to accommodate Herskowitz and provide her with every opportunity to litigate in this matter, the record demonstrates no bias whatsoever. Accordingly, the Court in its discretion should decline this motion.

STATEMENT OF FACTS

This action was commenced as a derivative action by Susan Charney, a 40% shareholder of North Jersey Trading Corp. ("North Jersey"). Charney claimed that Ms. Herskowitz and defendants ~~Christu Aff. Ex. B.~~ Herskowitz had misappropriated income from North Jersey that rightfully belonged to her. This Court entered a default judgment against Ms. Herskowitz in this action in the amount of \$4,300,024.42 on January 21, 1994 (*see* Affirmation of Steven Delibert dated May 28, 2003, and submitted in support of the Order to Show Cause entered May 29 2003

for dismissal by the United States Magistrate Judge assigned to the case. Christu Aff. Ex. B. In Florida action, the Court has prohibited Herskowitz from filing papers without leave of court based on her repeated history of relitigating matters that had already been decided. Christu Aff. Ex. A. Nevertheless, Herskowitz persists not only with this motion but, in the Florida federal action, she has even objected to the suggestion of Mr. Delibert's death. Christu Aff. Ex. C.

("Delibert Aff.") ¶ 12, Ex. A).³

Ms. Herskowitz sought to impede this judgment by commencing various collateral actions in this and various other Courts. She brought these actions against plaintiff and her counsel, and in one instance Justice Harold Tompkins (who was originally assigned to this case). In addition, she commenced a bankruptcy proceeding concerning North Jersey in the United States Bankruptcy Court for the District of New Jersey. *See generally* Delibert Aff. ¶¶ 14-25. These collateral actions and her conduct generally have greatly increased the cost to plaintiff and her counsel in prosecuting this action. *See generally* Delibert Aff. ¶¶ 14-25.⁴

Following the appointment of a bankruptcy trustee, the assets of North Jersey were liquidated at a surplus over outstanding liabilities. North Jersey's bankruptcy estate also received \$150,000 as a result of the attachment by plaintiff and her counsel of conversion rights for a cooperative apartment belonging to ██████████ ██████████ Herskowitz and the ensuing settlement with ██████████ ██████████. Delibert Aff. ¶¶ 26-33. The bankruptcy estate of North Jersey ultimately turned over a surplus of \$663,759.68 (the "Fund") to the Receiver and the Receiver and counsel for plaintiff sought and obtained an Order to Show Cause in order to distribute that surplus. Delibert Aff. ¶¶ 33-34. On April 13, 2004, this Court approved the proposed distribution on default, after Herskowitz, who had filed papers in opposition to that Order to

³ Charney and the Receiver have settled with ██████████ and ██████████ Herskowitz after judgment was entered against them. *See* Delibert Aff. ¶ 12, 26-29.

⁴ During the course of this and other actions, Ms. Herskowitz has been sanctioned and held in contempt of Court by this Court, the Appellate Division, First Department, the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit, and the United States Bankruptcy Court for the District of New Jersey. Ms. Herskowitz has never paid any of these sanctions, including \$35,500 imposed by this Court and \$5,000 by the Appellate Division, First Department. *See* Delibert Aff. ¶¶ 15, 19, nn 4-5, 7.

Show Cause, failed to appear at oral argument for the third time at a date set by the Court. See Affirmation of Paul Windels III, dated October 13, 2004, Ex. A, E. On two prior occasions when Herskowitz failed to appear, the Court granted her an adjournment directed her to do appear at a rescheduled hearing date. *Id.* Ex. C, D. Moreover, the Court even temporarily suspended two outstanding arrest warrants against Herskowitz based on her contempts of Court in these proceedings in order to enable her to appear for oral argument. Windels Aff. Ex. A, D.

Herskowitz sought and obtained an Order to Show Cause from Justice Heitler dated June 2, 2004, seeking to vacate her default. Windels Aff. Ex. B. In connection with that argument, the Court again temporarily suspended those two arrest warrants in order to enable Herskowitz to appear.⁵ That Order was argued on June 21, 2004, and is pending.

In support of this motion, Herskowitz alleges that, in early September 2004, she submitted orders to show cause to Justice Heitler to vacate the judgment and the two contempt orders against her. Justice Heitler apparently noted on each of Herskowitz's proposed orders that she "declined to sign" it. Based on Justice Heitler's decision not to sign those proposed orders, Herskowitz now contends that Justice Heitler has exhibited such bias against her as to warrant disqualification from this case.⁶

ARGUMENT

⁵ Herskowitz makes no mention that Justice Heitler signed the June 2, 2004, Order to Show Cause, a fact that undermines her attempt to fashion an argument that Justice Heitler displayed bias by declining to sign her September proposed orders to show cause.

⁶ Herskowitz has contemporaneously filed motions to vacate the judgment and contempt orders. Those motions are returnable October 28, 2004. It is assumed that those motions seek the same relief and are predicated upon the same grounds as the proposed orders to show cause that Justice Heitler declined to sign.

The lack of any indicia of bias on the part of Justice Heitler amply justifies denial of Herskowitz's motion as well within the Court's discretion. As a matter of well settled law, a motion for recusal or disqualification that is not based on a financial relationship between a judge and a party or counsel pursuant to Judicial Law Section 14 is addressed to the discretion of the Court. *Burdick v. Shearson American Express, Inc.*, 160 A.D.2d 642, 559 N.Y.S.2d 908 (1st Dept.), *leave to app. denied*, 76 N.Y.2d 706, 560 N.Y.S.2d 988 (1990) (affirming denial of recusal motion based on out of court statements by judge to attorneys under discretion standard); *Conti v. Citrin*, 239 A.D.2d 251, 657 N.Y.S.2d 678 (1st Dept. 1997) (affirming denial of recusal motion as within trial court's discretion where judge witnessed alleged assault that was subject of separate action between parties); *People v. Grier*, 273 A.D.2d 403, 709 N.Y.S.2d 607 (2d Dept. 2000) (affirming denial of recusal motion as within discretion of trial court).

A movant for recusal carries the burden of demonstrating bias sufficient to warrant recusal. As the Third Department explained in *Robert Marini Bulder, Inc. v. Rao*, 263 A.D.2d 846, 848, 694 N.Y.S.2d 208, 210 (3d Dept. 1999):

The mere allegation of bias is insufficient to require recusal. . . . "A judge has an obligation *not* to recuse himself or herself until he or she is satisfied that he or she is unable to serve with complete impartiality, in fact or appearance."

263 A.D.2d at 848, 694 N.Y.S.2d at 210 (emphasis added & citations omitted). *Accord, People v. Bonnerwirth*, 69 Misc.2d 516, 522, 330 N.Y.S.2d 248, 255 (Rhinebeck Town Ct., Dutchess Cty., 1972), (cited by Herskowitz) (recusal requires "more than a slight showing of judicial bias. A proponent should be required to show that . . . there are circumstances which would place in serious doubt the advisability of that judge to hear the case before him. The proponent should be required to show clear circumstances . . ."). The Second Department in *Matter of Billings*, 120

A.D.2d 663, 502 N.Y.S.2d 500 (2d Dept. 1986), likewise affirmed the Suffolk County Surrogate's denial of a recusal motion as within his discretion, notwithstanding that the Court found that the Surrogate had made "intemperate" and "unwarranted" remarks. 120 A.D.2d at 663, 502 N.Y.S.2d at 501. The Court found that those remarks were not "so biased that his failure to disqualify himself was an abuse of discretion." *Id. People v. Grier*, 273 A.D.2d at 405-06, 709 N.Y.S.2d at 610 (statement by judge that prosecution appeared to have strong case did not warrant recusal absent evidence of any biased ruling by judge); *Sivigny v. Sivigny*, 213 A.D.2d 243, 245, 624 N.Y.S.2d 120, 121-22 (1st Dept. 1995) (court's admonishment of counsel was proper and comments allegedly evidencing bias actually served to clarify issues); *Solow v. Wellner*, 157 A.D.2d 459, 549 N.Y.S.2d 384 (1st Dept. 1990) (movant must point to an "actual ruling which demonstrates bias"). Indeed, in this very litigation, the First Department rejected Herskowitz's motion for recusal of Justice Tompkins on the ground that Herskowitz had failed to offer any evidence to support her bare allegations of bias. *Matter of Herskowitz v. Tompkins*, 184 A.D.2d 402, 585 N.Y.S.2d 386 (1st Dept.), *appeal dismissed*, 80 N.Y.2d 1023, 607 N.E.2d 818, 592 N.Y.S.2d 671 (1992). The Court held, "Petitioners have failed to set forth any grounds pursuant to Judiciary Law § 14 for recusal of respondent Justice Tompkins . . . and their allegations of bias or prejudice are unsupported." 184 A.D.2d at 404, 585 N.Y.S.2d at 388.

Here, the only fact that Herskowitz alleges – that Justice Heitler declined to sign order to show cause papers – does not approach the sort of showing of bias requiring or even justifying recusal. She points to no statement on the part of Justice Heitler evidencing any sort of bias. That Justice Heitler has signed the June 2, 2004, order to show cause from Herskowitz demonstrates that Justice Heitler is perfectly willing to sign order to show cause papers from

Herskowitz or any other party that seek proper relief. Indeed, Justice Heitler's refusal to sign Herskowitz's order to show cause papers may well reflect that those papers were frivolous on their face.⁷ Directly on point is *Ficalora v. Town Board Government of East Hampton*, 276 A.D.2d 666, 714 N.Y.S.2d 353 (2d Dept. 2000), *appeal dismissed*, 96 N.Y.2d 813, 751 N.E.2d 940, 727 N.Y.S.2d 692, *reconsideration denied*, 96N.Y.2d 897, 730 N.Y.S.2d 794 (2001) (no bias shown where trial judge denied two applications for temporary restraining orders).

Far from demonstrating bias, the record demonstrates that Justice Heitler has taken extraordinary steps to afford Herskowitz the opportunity to be heard and litigate her side of the case. After plaintiff and the Receiver applied for distribution of the funds held by the Receiver, the Court adjourned two oral arguments when Herskowitz failed to appear, notwithstanding that she had been directed to appear for oral argument. Windels Aff. Ex. C-D. Prior to the third adjourned date, November 18, 2003, the Court vacated the arrest orders outstanding against Herskowitz in order to enable her to attend the hearing. The Court further pointed out to Herskowitz that she had the ability to retain counsel to appear for her. Although she acknowledged that Justice Heitler was "the first honorable judge that has" permitted her to appear in court notwithstanding her unpurged contempt citations and promised to appear on

⁷ Herskowitz seeks to vacate orders that are ten years old. The underlying judgment in this case, which she seeks to vacate, was based on an order requiring her to answer the complaint, which order was affirmed by the Appellate Division, *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1st Dept. 1992). The contempt sanction she seeks to vacate in *Herskowitz v. Tompkins* appears to have been entered subsequent to the order of the First Department in that case awarding sanctions against her and expressly authorizing this Court to impose further sanctions as necessary. *Matter of Herskowitz v. Tompkins*, 184 A.D.2d at 404, 585 N.Y.S.2d at 388. Herskowitz's papers make no attempt to explain why she failed to appeal or move to vacate those orders in a timely fashion. Moreover, the outstanding contempt sanctions cannot serve as an excuse for Herskowitz's failure to act. Herskowitz could either have appeared through counsel or purged herself of the contempt.

November 18, (Windels Aff. Ex. D at 16-17), Herskowitz did not appear on that date and the Court accordingly and appropriately granted the application for distribution on default. Windels Aff. Ex. A, E.

That Herskowitz seems to move to recuse nearly every judge that decides a matter contrary to her liking further militates against recusal here. The regularity with which she moves to recuse judges more than suggests that she has made this motion simply for tactical purposes. Such an attempt at judge-shopping is plainly improper. *Solow v. Wellner, supra*, 157 A.D.2d at 459, 549 N.Y.S.2d at 385.

None of the cases cited by Herskowitz compels a contrary conclusion. *Sardino v. State Commission on Judicial Conduct*, 5 N.Y.2d 286, 448 N.E.2d 83, 461 N.Y.S.2d 229 (1983), involved the removal of a judge from the bench as opposed to a disqualification motion. The judicial conduct at issue there -- the repeated failure to inform criminal defendants of their constitutional rights at arraignments and the setting of bail without regard to the relevant statutes, finds no parallel in the case at bar.⁸ *Frischling v. Schrank*, 24 A.D.2d 462, 260 N.Y.S.2d 537 (2d Dept. 1965), involved a judge who who stated that he believed one trial witness while the trial was still proceeding and that documentary evidence presented by the opposing party "meant nothing to him". That the judge had apparently made up his mind before the close of the trial is of course the essence of prejudice, the exact opposite of a judge deciding whether or not to act after due consideration, as is the case here. *People v. Bonnerwirth*, 69 Misc.2d 516, 330

⁸ Indeed, with respect to these proceedings, the Appellate Division found no cause for recusal of Justice Tompkins who imposed the contempt sanctions and entered the default that Herskowitz is seeking to vacate. *Matter of Herskowitz v. Tompkins*, 184 A.D.2d at 404, 585 N.Y.S.2d at 388-89.

N.Y.S.2d 248, actually denied a motion for recusal where the movant failed to carry his burden of proof that the town justice could not render impartial justice even though the judge personally knew some of the witnesses in the case. *In the Matter of Diane A*, 65 Misc.2d 1034, 319 N.Y.S.2d 691 (Family Ct. N.Y. Cty., 1971) likewise denied a recusal motion based on Family Court Judge's familiarity with some of the parties in the case based on an earlier proceeding. *In the Matter of Jennifer G and Julian G*, 110 A.D.2d 801, 487 N.Y.S.2d 864 (2d Dept. 1985), the Second Department directed the recusal of a Family Court Judge who had declared himself "barely persuaded" by a prior Appellate Division ruling in that case and had awarded custody of minor children to a parent who admittedly beat them. Here, no such disregard for Appellate Division precedent exists – in fact this Court and the Appellate Division have agreed in these proceedings on every significant issue that was raised before the Appellate Division. *Schrager v. New York University*, 227 A.D.2d 189, 642 N.Y.S.2d 243 (1st Dept. 1996) (judge's son worked at same hospital as one defendant and judge's daughter was receiving medical treatment from other defendants), and *People v. Kohl*, 17 Misc.2d 320, 192 N.Y.S.2d 83 (Niagara Cty. Ct. 1959) (justice of the peace also served on town board that was party to related litigation against defendant), both involved a personal connection between the judge and one or more parties to the case, an issue that is not present here. Both *Schrager* and *Kohl* are therefore subject to the stricter standard imposed under Judiciary Law Section 14, as distinct from the discretion standard applicable here. *Burdick v. Shearson American Express, Inc.*, *supra*, 160 A.D.2d 642, 559 N.Y.S.2d 908; *Conti v. Citrin*, *supra*, 239 A.D.2d 251, 657 N.Y.S.2d 678.

CONCLUSION

For the reasons set forth above, the motion for a disqualification should be denied, together with such other and further relief as the Court may deem just and proper.

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Respectfully Submitted,

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