

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J

SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.

**AFFIDAVIT IN SUPPORT OF
MOTION TO RENEW AND TO
VACATE ORDER TO SETTLE
RECEIVER'S ACCOUNT AND
TO DISCHARGE RECEIVER**

STATE OF FLORIDA)
) S.:
MIAMI-DADE COUNTY)

JUDITH HERSKOWITZ, being duly sworn, deposes and says:

1. That I make this affidavit on personal knowledge, a permanent resident of Florida, without submitting to the personal jurisdiction of this Court in Support of my motion to vacate and set aside the October 23, 2006 order and to renew.

2. This Court signed an order dated October 23, 2006, presented to the Court by Mr. Paul Windels III purportedly pursuant to Rule 202.48 of the Uniform Rules for the Trial Courts of New York State (Exhibit 1). Herskowitz was taken by surprise, because Rule 202.48 allows submission for settlement of an order only "after the signing and filing of the decision directing that the order be settled and submitted". An example of this is shown in Exhibit 2 in which the court made the decision and then directed "settle order", whereupon a "Notice of Settlement" was served Exhibit 3. No decision was issued by this Court, to create a basis for Mr. Windels' self serving order.

2. Nor was the required evidentiary hearing held to furnish a basis for a decision. In

paragraph 6 of Mr. Windels' proposed order dated September 22, 2006, the objections served by Judith Herskowitz are rejected "on the basis that she failed to appear at **oral argument** on September 11, 2006" copy attached as Exhibit 4. So, that Mr. Windels knows and acknowledged that no evidentiary hearing was set on his motion for September 11, 2006, but only for oral argument, and was noted on the court's calendar only as an appearance for a "status conference". This is further supported by the fact that none of the purported half a dozen creditors appeared on September 11, 2006, who never made a claim and never proved their claim in this case.

4. In view of the fact that no evidentiary hearing was set as required under the rule, and Herskowitz was barred from appearing to voice her objections, it is not a basis to reject her objections that she "failed to appear before the Court on September 11, 2006 in support of her objections as required under rules of this Court". B.C.L. §1216(c) required the Court to hear Judith Herskowitz's objections, but it was prearranged prior to that September 11, 2006 date, that her objections would not be heard, so that Mr. Windels' requests and purported accounting disposing of close to \$700,000.00 upon a private out of court agreement, with no order ever appointing him "Receiver of North Jersey Trading Corporation" and without recognizing the full satisfaction of the judgments would be approved ex parte.

5. Omitted from that October 23, 2006 order is the fact that Judith Herskowitz had appeared on her objections, to Mr. Windels' Motion for Approval of Final Accounting of Receiver that was returnable on September 30, 2006, to which on the same day Judith Herskowitz had filed timely objections. Mr. Windels' motion was set for hearing for January 23, 2006. Judith Herskowitz had traveled at great expense from Florida, to appear in this Court. However, none of the alleged half a dozen creditors appeared and no evidentiary hearing was

held, although duly requested. This was the case on prior occasions that Herskowitz had to appear in this Court on June 21, 2005, January 5, 2005, April 5, 2005. It was the usual unproven unsupported arguments of Mr. Windels which was the same on January 23, 2006, with no evidence allowed to be introduced and no testimony taken. The Court reserved decision. Then to avoid that required evidentiary hearing, the Court entered an order dated March 23, 2006, in which Judith Herskowitz was prohibited from objecting to Mr. Windels' accounting and was barred from participating in his motion stated on page 2 of that order as follows:

“Herskowitz, alone objects to Windels' submission of this final accounting as Receiver for North Jersey, and his request for commissions pursuant to B.C.L. §1217. Herskowitz, however has no standing to lodge an objection to this accounting. B.C.L. §1216(c) provides that, upon submission of a final accounting by a receiver, the court ‘shall hear the allegations, objections and proofs of **all parties interested** and allow or disallow such account, in whole or in part, and make a final order.’ While Herskowitz, no doubt, would assert an ‘interest’ in the resolution of this final accounting, the court is of the opinion that the meaning of ‘interested’ in this context, is defined by subdivision (a) of B.C.L. §1216, which imbues ‘the attorney general or any creditor or shareholder’ the standing to ‘apply for an order that the receiver show cause why an accounting and distribution should no be had ‘where the receiver has not done so within one year of qualifying as receiver. Plainly Herskowitz is neither a creditor or shareholder. To the contrary, Herskowitz owes in excess of \$4 million to North Jersey, as there has been a judicial determination that Herskowitz must turn over her shares in North Jersey to the Sheriff of New York County. See Matter of Herskowitz v. Tompkins, Index No. 12002/92 (S.Ct. N.Y.Cty.Sept. 18, 1992)(Tompkins, J.)”

6. On page 4 of that very same March 23, 2006 order the Court denied Herskowitz's objections to Mr. Windels accounting. On page 5, the Court directed Mr. Windels to publish in newspapers

“setting 9:30 a.m. on June 26, 2006, at Room 438, 60 Centre Street, New York, New York 1007 as the date and location at which the Receiver and all **interested parties** are expected to appear, and the Receiver shall present this final accounting and the court shall hear any objections and concerns of such interested persons”.
(Emphasis supplied)

7. Herskowitz was not only artificially excluded as not an “interested party”, but was threatened with contempt should she appear in this Court to attempt to be heard on her objections. Herskowitz attempted to move for Clarification and to Renew and To Vacate the March 23, 2006 order in a motion returnable on August 15, 2006 demonstrating to the Court that she did not owe \$4 million on that September 18, 1992 turnover order, because first of all that order was only on a \$5,000.00 money judgment, which although was procured by fraud, was fully satisfied. Moreover, by the Court’s own description Herskowitz could not have and did not owe any \$4 million dollars to North Jersey on that 1992 turnover order of Justice Tompkins, because it predated by 2 years the January 1994 \$4 million judgment, and was fully satisfied (Exhibit 5).

9. Additionally, that the turnover order was not for North Jersey, but personally for Charney, on a \$5,000.00 money judgment, which was also fully satisfied; and was entered in another case cited by this Court as Index No. 12002/92, that was never consolidated with this case and to which Mr. Windels was not a party in any capacity. To adhere to this denial of standing to object to Mr. Windels’ accounting, by order dated August 8, 2006 this Court denied even a “permission to allow a motion to be made to vacate this court’s decision and order dated March 23, 2006”, on the mere conclusion that “the issues presented therein have been dealt within several previous decisions”, when these issues were not previously raised and heard.

10. As noted in the October 23, 2006 order Mr. Windels’ motion was reset for September 11, 2006, adjourned on Mr. Windels’ request. It is incorrectly stated in that order that Judith Herskowitz filed additional objections to Mr. Windels’ accounting. Herskowitz filed papers protesting the ex parte proceedings, which was clearly noted in the title of her paper as follows: “Herskowitz Has Been Barred from this Court by Disallowing Her Motions and Response; by

Depriving Her of Standing to Foreclose Her from the Right to Object to Windels' Accounting; So That it Be Conducted *ex Parte*; Which Binds No One”.

11. The April 13, 2004 order noted in the October 23, 2006 order, has no relevance. Section 1216 B.C.L. upon which the Court relies makes no provision to apply it to a prearranged private out of court agreement for the appropriation of the entire corporate assets of close to \$700,000.00, entered into without any publication to creditors; without any creditors presenting their claim to the receiver as required pursuant to §1207(a)(1)C); without proof of claim and where the designation of creditors was made after payment, which appeared for the first time in Mr.. Windels' final account that he filed on September 30, 2005, to none of which was Herskowitz permitted to object.

12. As to that October 12, 2004 order, that was on Herskowitz's motion upon which this Court issued an Order to Show Cause setting the motion down for June 21, 2004. This was a motion to renew and to vacate the prior April 13, 2004 order based upon the full satisfaction of the judgments that Windels failed and refused to produce, which Herskowitz was finally able to procure from other sources. However, Justice Heitler crossed out the provision requesting to enjoin the disbursement of the funds held by Mr. Windels. Herskowitz appeared in this Court on June 21, 2004, presented the full satisfaction of judgment on the \$4 million judgment by default as well as on the other judgments, but the Court declined to mark the fully authenticated satisfactions into evidence, which extinguished the judgments including the fees, leaving no basis to appropriate any part of that corporate surplus. This was before any funds were distributed by Mr. Windels between July and August 2004, which was shown to be the case for the first time in his instant September 12, 2006, motion for approval of his accounting. This unmask

retrospectively, the futility of any objections by Herskowitz to what was a prearranged deal on the close to \$700,000.00, surplus of North Jersey.

13. Furthermore, as previously noted no May 21, 1991 order exists that appointed Mr. Windels “Receiver of defendant North Jersey Trading Corporation”. Mr. Windels has never qualified and never served as receiver of North Jersey under that May 21, 1991st order. Mr. Windels’ retroactive publication of notice of a May 21, 1991 appointment 13 years later in 2004 is a sham and without any effect where Mr. Windels was not appointed as permanent receiver of the assets of North Jersey in the November 1993 and January 1994 final judgment. So, that Mr. Windels impersonated himself as receiver of North Jersey to empty out the corporation to the last penny. Neil Mann Assistant Attorney General of the State of New York, made clear in his “Response of the State of New York to Notice by Receiver of Presentation of Account” dated August 16, 2006, that his office “takes no position regarding any and all of the relief requested by the Receiver.” which Mr. Windels acknowledged in his September 6, 2006 Affirmation.

14. Mr. Windels not only masterminded with the late Mr. Steven Delibert to misappropriate the entire surplus funds of close to \$700,000.00 of North Jersey in a private out of court deal, but made up his own self serving order to be issued ex parte approving his accounting of those funds replete with his misrepresentations, and to relieve himself of liability that order is “decreed to be final and conclusive upon all of the creditors of North Jersey Trading Corporation, and upon all persons who have or had claims against it, upon any open or subsisting engagement, and upon all the shareholders of North Jersey Trading Corporation” and bestowed upon himself commissions of around \$20,000.00. As shown above this was done without the required evidentiary hearing, without considering any of Herskowitz’s timely submitted papers and was done exclusively on papers of Mr. Windels.

15. None of the issues raised in the accompanying Memorandum of Law, which is a summary of the objections raised to Mr. Windels' Motion for Approval of Accounting of Receiver were considered all of which are valid objections. As such the order dated October 23, 2006 was entered ex parte.

SWORN to before me
this 11st day of December, 2006

JUDITH HERSKOWITZ

Notary Public - State of Florida