

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

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

Defendants.

**AFFIDAVIT IN SUPPORT
OF CROSS-MOTION TO
VACATE AND IN RESPONSE
TO WINDELS' MOTION FOR
APPROVAL OF ACCOUNTING**

Index No. 24517/88

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

JUDITH HERSKOWITZ, being duly sworn, deposes and says:

1. That I am named as a defendant in the above entitled case and make this affidavit on personal knowledge, without submitting to the personal jurisdiction of this Court in opposition to Paul Windels' III ("Windels") Motion for Approval of Accounting and in Support of my Cross-Motion to Vacate and Set Aside the April 13, 2004 order and the October 12, 2004 order for lack of subject matter and lack of personal jurisdiction, for fraud on the court and to renew on Windels new claims of receivership and on issues previously not considered by this Court.

2. Windels concludes incorrectly that the April 13, 2004 order entered by default granting his and plaintiff's application for the distribution of the corporate surplus on Herskowitz's default is a final order (Exhibit 1), when Windels possessed no authority as a corporate receiver under a May 21, 1991 prejudgment order to stipulate to that distribution, where for the first time he attempts to cover this up with a November 21, 1995 postjudgment order of receivership to which he adopts inapplicable notice requirements to create a false receivership retroactively,

where Herskowitz's meritorious defenses were disregarded because of a contrived default, that is reiterated in the October 12, 2004 order (Exhibit 2) and where there is no finality until Windels' account is approved, all of which are to be resolved in the trial court in an evidentiary hearing, and not in the appellate court.

3. The surplus funds of North Jersey Trading Corporation ("North Jersey") of close to \$700,000.00, the subject of Windels' motion for approval of his account was transferred from the United States Bankruptcy Court for the District of New Jersey by trustee Karen Bezner to Windels sometime in August 2000. This was on dismissal of the a chapter 11 bankruptcy case upon the payment of all claims and administrative expenses and fees. Windels acknowledged that all liabilities of North Jersey were paid (par. 4). The surplus was not recovered in plaintiff's derivative suit, but was from the sale of a 54 unit apartment building, located at 200 Riverside Drive New York City, that was owned by the corporation for over thirty years, since 1959. The transfer of the corporate surplus to Windels was made upon insistence of plaintiff's counsel Steven Delibert's, in a motion dated December 10, 1999, that the New York court was better suited to determine shareholders' right to those funds (Exhibit 3). These funds were secreted for three years, with no information given to Herskowitz.

Windels Relies on a Newly Fabricated Receivership for the Distribution of the Corporate Assets

4. Instead of seeking a determination as to the shareholder rights to those funds, plaintiff through Delibert joined with Windels moved by Order to Show Cause issued by this Court on May 29, 2003 seeking approval for the distribution of the entire corporate surplus of close to \$700,000.00 to plaintiff and five lawyers as prearranged among themselves. (par. 7) This Court

relied on Windels' authority as claimed in his Affirmation in Support of Proposed Distribution of Funds, dated May 28, 2003 "[I] am receiver of the assets of North Jersey Trading Corporation ("North Jersey"), pursuant to this Court's order of May 21, 1991" (par. 1) (Exhibit 4). Windels asked for fees pursuant to Section 1217(a) of the Business Corporation Law.

5. By order dated April 13, 2004 this Court granted by default the proposed distribution of funds by Windels as "the appointed Receiver of the property of North Jersey Trading Corporation" (Exhibit 1). By order dated October 12, 2004 the Court declined to reopen the default and once more designated Windels as the "appointed Receiver of the property of North Jersey Trading Corporation" (Exhibit 2).

6. That this temporary receivership under the May 21, 1991 pre-judgment order has never commenced and was never in existence is conceded by Windels because of "the prior appointment of a receiver acting on behalf of the mortgage lender in a foreclosure proceeding". Windels concedes that he has never taken an oath, has never posted a bond and has never served as receiver of the property of North Jersey under that May 21, 1991 pre-judgment order (pg. 4 par. 4) (Exhibit 6). The May 21, order was entered on plaintiff's motion dated February 7, 1991 pursuant to BCL §1202 (Exhibit 5). That application itself was invalid for failure to serve it on the Attorney General of the State of New York.

7. Windels acknowledges that in March 1993 North Jersey filed a voluntary petition for relief under Chapter 11 in the New Jersey bankruptcy court, and that in the same year on plaintiff's motion a trustee was appointed, who took control and possession over North Jersey and its property the apartment building at 200 Riverside Drive N.Y.C. par. 4-6). Plaintiff also filed a Motion for Relief from Automatic Stay, so that this Court could issue the derivative judgments.

8. On November 22, 1993 Justice Harold Tompkins entered a derivative judgment by default against defendants XXXX and XXX Herskowitz (Exhibit 7) and on January 21, 1994 entered the same judgment against Judith Herskowitz (Exhibit 8). These judgments made no provision to continue Windels as permanent receiver, nor could it, since the North Jersey property was under control and in possession of the bankruptcy trustee.

9. Windels acknowledges that the North Jersey real property was liquidated (par. 4). On August 31, 1994 an order was entered in the Bankruptcy Court authorizing the Trustee “to sell the real property known as 200 Riverside Drive, New York, New York to Sam Domb & Ulo Barad for the purchase price of \$2,925,000.000 “. Following that sale on September 8, 1994 a deed was executed by Trustee Karen E. Bezner transferring all right and title of North Jersey Trading Corporation in 200 Riverside Drive, New York, New York to Tomer Realty the assignee of Domb and Barad for the above noted sum (Composite Order and Deed, Exhibit 9). Upon receipt of the sales price the said funds were solely under the administration of trustee.

10. To avoid the effect of the Florida proceedings which at the time reversed the New York judgments, and so that this should not interfere with plaintiff’s collection attempts in New York, through her attorney Delibert rushed into this Court, to procure appointment of receiver. By Order to Show Cause dated September 28, 1995 Windels was appointed a post-judgment receiver pursuant to CPLR §5228¹ for plaintiff as the judgment creditor on behalf of North Jersey for enforcement of the derivative judgment against property of judgment debtor, and “to provide a neutral fiduciary to receive the surplus which might” be transferred from the New Jersey

¹ Although the motion was made under CPLR 5106 as well, that was inapplicable since at issue was only a money judgment and CPLR 6401 applied only to pending cases.

bankruptcy court (Exhibit 10 and 11 and Delibert's Affirmation May 28, 2003 pg. 5) In addition the November 21, 1995 order was made subordinate to the orders of the bankruptcy court.

11. Because of the repeated objections made by Herskowitz to Windels' false representations that he is the Receiver of the assets of North Jersey under that May 21, 1991 order, Windels would now change his position in his instant motion, to claim that he is the receiver under the November 21, 1995 order (Exhibit 11) (see, par. 1 of Windels' Affirmation). Windels is fraudulently attempting to create a corporate receivership for North Jersey under BCL Article 12, out of his CPLR §5228 appointment as post judgment receiver for the judgment creditor, to cover up his illegal distribution of the entire corporate assets to plaintiff and her five lawyers. Windels fraudulently designates plaintiff and these lawyers as creditors of North Jersey, and compounds the illegality by attempting to do it retroactively.

Windels Created His Fraudulent Receivership with False, Retroactive Publications and With Creditors to Whom North Jersey Was Never Indebted

12. In his oath of January 1996 related to the November 21, 1995 appointment as a CPLR §5228 of receiver Windels falsely represented that he is the duly appointed receiver for the benefit of plaintiff Susan Charney, on the North Jersey real property, which she never owned, and which was already sold in the Bankruptcy Court in August 1994 (Exhibit 12).

13. The falsity of Windels' attempt to rely upon the procedures of Article 12, is evidenced by the fact that he now attempts to implement more than eight later the statutory requirement of immediate notice of his appointment as receiver to the November 21, 1975 order, that was pursuant to CPLR §5228 by publishing his "Notice to Present Claims" on July 23, 2004 and July 30, 2004, which he attached as Exhibits H and I to his Affirmation (par. 10) ,(Exhibit

13). Windels falsely claimed in his notice

“Paul Windels III, receiver of defendant North Jersey Trading Corporation that he has been duly appointed receiver of said North Jersey Trading Corporation and that he has duly qualified as such and entered upon the performance of his duties”.

No order ever appointed Windels “Receiver of North Jersey”. As shown above Mr. Windels’ appointment under that November 21, 1995 order was only as receiver for plaintiff as judgment creditor, on behalf of New Jersey for enforcement of the derivative judgment against property of the judgment debtor - upon which he never collected any money.

14. Furthermore, Windels’ pretended “Notice to Present Claims” was published more than a year after the deal was made for the distribution of the entire corporate surplus in the sum of \$665,226.98 leaving about \$20,000.00 as fees for Windels, as set forth in the May 29, 2003 motion seeking approval of the distribution (Exhibit 3), and seven months after the November 18, 2003 approval of that distribution by the Court, and three month after the April 13, 2004 order that granted that distribution (Exhibit 1) without any claim having been presented, without any proof of claim, and without designating any of the participants in that distribution as a “creditor” of North Jersey.

15. Windels further states that he called a meeting of the creditors of North Jersey by publication on November 29, 2004 and December 6, 2004 (Exhibit 14). In that “Notice by Receiver of Meeting of Creditors” Windels claimed,

“Paul Windels III receiver of defendant North Jersey Trading Corporation appointed by Order dated May 21, 1991.....meeting of North Jersey Trading to be held on the 6th day of January 2005...”

16. As shown above Windels never served as receiver under the May 21st order. Moreover, this so-called meeting of the creditors was called more than a year and half after the

May 29, 2003 Motion for Disbursement was filed, a year after the arrangement for distribution was approved by the Court on November 18, 2003 and more than a half year after the April 13, 2004 order granting the distribution of the entire corporate surplus.

17. Additionally, all these publications were made after Windels already distributed the surplus as noted below. Windels lists his distribution in Schedules 2 and 3 attached to his Affirmation titled as the “Amounts Disbursed by Receiver” which he also designates as the “Creditors of North Jersey Trading Corporation” as follows:

<u>Amount Paid</u> <u>Amount of Obligation</u>	<u>Date Paid</u>	<u>Payee (also referred to as)</u> <u>Creditor</u>
\$404,727.98	July 22, 2004	Steven Delibert, Esq.
\$105,000.00	July 22, 2004	Eric Christu, Esq.
\$ 2,500.00	August 25, 2004	Hywel Leonard, Esq.
\$ 18,000.00	August 25, 2004	William Livingston, Esq.
\$ 25,000.00	July 29, 2004	Clifford Hark, Esq.
<u>\$110,000.00</u>	July 30, 2004	Susan Charney
Total \$665,226.98		

18. In none of Windels prior papers were any of the above noted persons named as creditors and this has been raised for the first time on this motion. Windels contentions that no other creditors of North Jersey showed up, the reason is self-evident, because all claims were made and paid in the bankruptcy case.

Windels’ Authority as Receiver Was Only for Enforcement of the Derivative Judgment, Which Was Extinguished Upon the Full Satisfaction of the Judgment Prior to that May 29, 2003 Motion for Distribution

19. To force a settlement of the derivative judgment in excess of \$4 million plaintiff pursued a turnover proceeding against XXXXHerskowitz on a subscription agreement to a rent controlled apartment that was the former residence of the late Alex Fried. Upon Fried’s death the

right to purchase the apartment as a co-op went to the Herskowitzes. Pursuant to plaintiff's admission on page 15, par. 27 in the May 28, 2003 Affirmation of her counsel Steven Delibert that subscription agreement was the only substantial asset that she could find. Plaintiff was anxious to settle

“rather than face the extended uncertainties of continued litigation with Herskowitzes, which would have raised such novel and difficult issues as the effect on an ostensibly rent-controlled tenancy (of XXXXHerskowitz), of attachment of his co-op conversion rights by a judgment creditor.”

20. Pursuant to a Settlement Agreement dated December 1988, the bankruptcy trustee received the sum of \$150,000.00 from XXXXand XXX Herskowitz, for which they were given full satisfaction of the derivative judgment in excess of \$4 million (Exhibit 15). In violation of requirements of CPLR §5020 Charney, Delibert and Windels failed and refused to file the satisfactions with the Clerk of Court to pursue their conspiratorial fee claims in state court, on claims for fees that were denied in the bankruptcy court.

21. It was established at the June 21, 2004 oral argument in this Court, that the judgment in excess of \$4 million upon which Charney relied in her motion for disbursement, had been “wholly paid”, by satisfaction of judgment that included all fees and costs and it had discharged the judgment as to Judith Herskowitz as well. The Court made no ruling and made no mention of the satisfaction of judgment in its October 12, 2004 order and so this issue is raised anew.

22. It is the undisputed fact that the judgment entered by default on November 22, 1993 by Justice Harold Tompkins against defendants XXXXand XXX Herskowitz in the principal sum of \$3,264,963.33 with prejudgment interest of \$986,984.52 for the total sum \$4,251,947.87 (Exhibit 7) was the same as the default judgment entered on January 21, 1994 against Judith

Herskowitz in the same principal sum of \$3,264.963.33 with prejudgment interest of \$1,035.061,12 in the total sum of \$4,300.024.42 (Exhibit 8). (See, May 29, 2003 Motion for Disbursement, Delibert Affidavit pg. 4, ft 2.). So, that these judgments arise out of the same alleged injury, but were entered at different times because of a bankruptcy stay for Judith Herskowitz.

23. 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.

The North Jersey Stock Certificates Had a Value Far in Excess of the Five Thousand Dollar Money Judgment And So Furnishes No Basis for Depriving Herskowitz of her Interest in North Jersey

24. Windels' inference that he could disregard Herskowitz's interest in North Jersey, because she was under order of the court to turn over to the Sheriff of New York her North Jersey stock certificates is without merit. That turnover order arose from a money judgment entered on August 19, 1992 by the clerk of the Supreme Court, for the sum of \$5,000.00 as fees payable to Delibert and \$650.00 for costs, with the provision "to have execution thereof" under Index No. 23002/92, wherein Charney appeared individually and not on behalf of North Jersey (Exhibit 16) .

25. Without the required service of a notice and motion on the judgment debtors the Herskowitzes and without consolidation of the two cases, in a combined order dated September 18, 1992 entered on September 21, 1992 under Index No. 23002/92 the Herskowitzes were directed, pursuant to CPLR 5525(a), (which should have been 5225) to turnover all their stock certificates in North Jersey to the Sheriff of New York County (attached as Exhibit L to Windels' Affirmation).

26. That September 21, 1992 turnover order was intended to enable plaintiff and Delibert to seize the Herskowitzes' interest in North Jersey consisting of the multi million dollar apartment building on Riverside Drive New York City. However CPLR 5225 limits the collection on a property to only so much as sufficient value to satisfy the judgment. So at the most plaintiff could have deducted was \$5,000 from the close to \$700,000.00 of the corporate funds and no more.

The Court Is Acting Beyond its Territorial Jurisdiction and Herskowitz Could Not Be Defaulted Where There Was No Personal Jurisdiction over Her

27. It is un rebutted that plaintiff's case lacks the required proof of service of summons. Likewise conspicuously absent is any finding of long arm jurisdiction over the nonresident Herskowitz pursuant to requirements of CPLR §302, made essential because of the territorial limitation of this court. Since no personal jurisdiction was acquired over Herskowitz by this Court there is no derivative judgment against her in excess of \$4 million, to deprive her of her interest in North Jersey and upon which to base that distribution. Reference is made to the prior paper and incorporated herein, the Motion to vacate and renew the June 8, 2005 order in which the issue of the lack of personal jurisdiction and long arm jurisdiction has been fully briefed, is supported with documentary evidence and a Memorandum of Law.

Herskowitz Has Not Defaulted Where the Objective is to Foreclose Her from Defending Against Plaintiff's and Windels' Motions So that They Can Prevail Without Opposition

28. As to Windels references to that contrived an artificial default against Herskowitz on November 18, 2003 he now has made clear that the intent was to eliminate Herskowitz from opposing the appropriation of the corporate surplus. Had Windels made that distribution to

plaintiff and her attorneys as creditors, then all these individuals were required to be present in court on November 18, 2003 to present their claim and to prove their claim, and/or their claim for attorney fees and only then could Herskowitz have been defaulted for nonappearance. Yet neither plaintiff nor her attorneys with the exception of Delibert appeared, three of whom were from Florida outside of the jurisdiction of this Court. Herskowitz did plan to be present but, the suspension orders were received by her untimely, which was unknown to these absent lawyers. The burden of proof rested on plaintiff and her lawyers, and not even Delibert proceeded to present his case. The court accepted their paper as submitted, but not Herskowitz's.

29. Herskowitz moved thereafter to vacate that default. She submitted an Order to Show Cause to the Court with Stay. Herskowitz requested that pending the hearing and determination of the within motion plaintiff and her counsel Delibert and Windels be enjoined from disbursing any of the funds of close to \$700,000.00. That provision was crossed out by the Court and the funds were distributed as shown above prior to a determination on the motion, in that October 12, 2004 order, which simply reaffirmed that default (Exhibit 17).

30. Now, that Herskowitz has appeared three times for oral argument in this Court, an injunction was entered against her without notice and hearing to prevent her from even filing papers, on what initially was plaintiff's "cross-motion" for injunctive relief that could not be accepted by this Court because it was filed untimely. Herskowitz called Windels on September 23, 2005 at 5:15 P.M. to ask him to agree to give her additional time to respond to his Motion for Approval of Accounting. Windels responded that Herskowitz cannot file a response without the permission of Justice Heitler, and which she may not give.

Windels Shows no Entitlement to Fees

31. Since as shown above Windels concededly never qualified and never served under BCL Article 12 as a corporate receiver there is no basis for him to seek fees pursuant to BCL §1217, for services that he could not have rendered nor did he. Windels had no authority to stipulate to fees of Florida attorneys for collection efforts on judgments that were never domesticated in Florida, upon which they never collected any funds, received no judgment for fees to make them judgment creditors, or any creditors and were denied fees in the bankruptcy court.

32. Windels' alleged efforts to find purchasers for the North Jersey property, inter meddling with the appointment of trustee, with the liquidation of the North Jersey property and other such activities in relation to the North Jersey property prior and after bankruptcy have all taken place when he was not qualified as receiver, and so could not serve as receiver. The trustee retained her own professionals. Trustee used a real agent to find a purchaser and retained attorneys and accountants. There is no mention in trustee's time sheets of any contacts with Windels.

33. Windels' efforts of collection on the derivative judgment related to a different case under Index No. 113775/95, for which application should have been made in that case. Windels instant motion is in the case under Index No. 24517/88. Moreover, Windels alludes that he assisted plaintiff's counsel Delibert. Windels did not retain Delibert as counsel. By Windels' own admission the turnover proceeding was commenced by Charney and her lawyer Delibert.

34. The November 21, 1995 order itself does not allow double dipping by plaintiff's counsel and Windels as receiver, nor do the statutory provisions of CPLR 5228. The receiver either undertakes the enforcement of the money judgment against the property of the judgment debtor, for which he can retain counsel, but there is no provision to act as an assistant receiver to

to the judgment creditor and her attorneys.

35. The receiver is entitled to fees pursuant to CPLR §5228 on the sums received and disbursed by him limited to five percent. With regard to the Florida proceedings plaintiff was represented by counsel, and no moneys were recovered to entitle Florida counsel nor Windels to fees. Windels did not collect any moneys on the derivative judgment. That settlement for the \$150,000.00 was made in the bankruptcy court, which was paid to trustee and for which trustee has taken credit. It is because there was no recovery on that derivative judgment that the bankruptcy judge denied the fee application for Delibert and Florida counsel.

36. Windels had no authority to disburse the surplus funds under CPLR 5228. In addition the derivative judgment was satisfied including fees. Windels had no authority to disburse the corporate funds under a false corporate receivership that he created. The surplus funds were transferred to Windels from a trustee's bank account for which he is likewise not entitled to fees. Those funds remained from the sale of the corporate property on which the trustee received the statutory fees, in effect Windels seeks a double dipping.

JUDITH HERSKOWITZ

SWORN to before me
this 26th day of September, 2005

Notary Public - State of Florida