SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

IAS Part 30 Heitler J

SUSAN CHARNEY,

Index No. 24517/88

Plaintiff,

-against-

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

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF CROSS MOTION TO VACATE AND IN RESPONSE TO WINDELS' MOTION FOR APPROVAL OF ACCOUNT

JUDITH HERSKOWITZ submits this Memorandum of Law in support of her Motion to Renew and to Vacate and Set Aside this Court's Decision and Order of April 13, 2005 and October 12, 2005 pursuant to New York CPLR § 2221(a) and §5015 and to renew and in response to Windels' Motion for Approval of Account of Receiver. For the facts Judith Herskowitz relies on her supporting Affidavit.

This Court Can Appoint Only a Receiver of the Property for a Foreign Corporation

Windels is falsely attempting to show compliance with BCL Article 12, in order to give an appearance of retroactive legitimacy to an illegal distribution, notwithstanding that he never qualified and never served as an article 12 receiver and at a time when the illegal distribution had already occurred prior to this attempt at implementing the sham procedures under Article 12. Windels would fraudulently apply procedures under BCL Article 12 to a post-judgment receivership under CPLR §5228 as a coverup for his illegal disbursement of the North Jersey surplus of close to $700,000.00.

First of all North Jersey Trading Corporation ("North Jersey") is a foreign corporation incorporated in the State of New Jersey. The courts of the state of New York do not have jurisdiction to appoint a general receiver of a foreign corporation. However, the court may appoint a receiver of the property of the foreign corporation to preserve its assets in this state. Accordingly, an order of appointment for receiver for a foreign corporation is limited to the property within the state. *Acken v. Coughlin*, 103 App. Div. 1, 92 N.Y.S. 700 (1st Dept. 1905)

Plaintiff moved for appointment of a temporary receiver of the North Jersey real property pursuant to BCL §1202 by Order to Show Cause issued on February 7, 1991 (Exhibit 5). Thereupon, an order dated May 21, 1991 was entered appointing Windels as "temporary receiver of the property of the defendant North Jersey Trading Corporation" (pg. 7 of the May 21, order) which described the property as "a multiple dwelling owned by said defendant North Jersey Trading Corporation located and known as No. 200 Riverside Drive, in the City and County of New York, State of New York".

The April 13, and October 12, Orders Were Entered Without Subject Matter Jurisdiction Since Windels Was Never a Receiver of the Corporate Property

Windels acknowledges that he has never served under that temporary receivership in the May 21, 1991 pre-judgment order because of "the prior appointment of a receiver acting on behalf of the mortgage lender in a foreclosure proceeding" (pg. 4 par. 4). BCL §1218 (a)(10) provides that the appointment of a receiver or the pendency of an action for the appointment of such receiver, shall until such receiver shall be discharged or until such action shall have terminated, be a bar to any subsequent application or action for the appointment of a receiver of

the assets of the same corporation. Based upon this statute in *Hershbaum v. Compania Petrolera Trans-Cuba* 215 N.Y.S.2d 898 (Supr. Ct. Kings Cnty, 1961) the court held that stockholder's action for appointment of a receiver for New York assets of a Cuban corporation could not be maintained in view of pendency of another action previously brought by another stockholder of the corporation wherein a receiver was appointed and continued to function. Accordingly, Windels Article 12 receivership under the May 21, 1991 order never came into existence.

Pursuant BCL §1203 a temporary receiver is appointed before final judgment, and a permanent receiver is one appointed by a final judgment or is a temporary receiver who has been continued by the final judgment. A corporate receiver can be appointed only in a pending action in four type of cases, specified under the BCL §1202 .

Windels further 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). On Charneys' motion the Bankruptcy Court lifted the automatic stay for the New York court to enter the derivative judgments. There is no provision in the default derivative judgment entered on November 22, 1993 against defendants XXXX and XXX Herskowitz (Exhibit 7) and in the same judgment entered on January 21, 1994 (Exhibit 8) to continue Windels as permanent receiver, clearly because the corporate property the sole asset of North Jersey, was under absolute control and preemtive jurisdiction of the bankruptcy trustee.

Windels further acknowledges that the building the "principal asset of North Jersey" was sold (par.4). Attached to Herskowitz's affidavit in support of the within motion is a copy of the

August 31, 1994 order of the Bankruptcy Court authorizing the Trustee "to sell the real property known as 200 Riverside Drive, New York, New York. Following that sale on September 8, 1994 a deed was executed by Trustee Karen E. Bezner transferring all right and title of North Jersey in that property to the buyers (Exhibit 9). Upon receipt of the sales price the said funds were solely under the administration of trustee.

It is well settled that upon termination of the receivership by virtue of the final judgment and subsequent judicial sale of the premises, no authority is vested in the receiver to act with respect to the property. See, *Dulbert v. Ebenhard*, 68 A.D.2d 323, 417 N.Y.S.2d 71 (1st Dept. 1979) where at issue was a final judgment of foreclosure and sale of the premises with a conveyance made thereunder, which the court held, barred and foreclosed the right and interest of defendant owner in the real property. Thereupon, the receiver ceased to be a representative of the owners' estate entitled to possession. Consequently, the receiver could not presume to act after the final judgment of foreclosure and sale and the court directed that the proceedings pursued by the receiver be dismissed for **lack of subject matter jurisdiction**.

So, that this Court in entering its April 13, 2004 order allowing Windels to distribute the entire corporate surplus as the "Receiver of the assets of North Jersey Trading Corporation ("North Jersey"), pursuant to this Court's order of May 21, 1991" was entered wholly without subject matter jurisdiction, since Windels had no such statutory authority and to designate the plaintiff and the participating attorneys as creditors by stipulation.

Windels Assertion of Powers as Receiver of the Corporate Property Is a Sham

Windels asserts for the first time in his instant motion for approval of his account, that his

appointment under the May 21, 1991 order was continued by order of November 21, 1995. However the motion for appointment by Order to Show Cause dated September 28, 1995 shows that Windels was appointed a post-judgment receiver in a supplementary proceeding, pursuant to CPLR §5228[1] for plaintiff as the judgment creditor on behalf of North Jersey for enforcement of the derivative money judgment against property of judgment debtor, and "to provide a neutral fiduciary to receive the surplus which might" be transferred from the New Jersey bankruptcy court (Exhibit 10 and 11 and as stated in Delibert's Affirmation May 28, 2003 pg. 5). Pursuant to CPLR §5228

> "the court may appoint a receiver on motion of judgment creditor based on the powers provided under subsection (a) to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment. A receiver is entitled to necessary expenses and to commissions, not exceeding five percent of the sums received and disbursed by him as the court which appointed him allows".

Supplementary proceedings authorizing the appointment of a "receiver of the property of the judgment debtor are creatures of statute and the powers and title of the receiver are no broader than the statute authorizes. *Maurice v. Traverlers Ins. Co.*, 121 Misc. Rep. 427, 201 N.Y.S. 369 (Supr. Ct. N.Y.Cnty 1923) The power to appoint statutory receiver, in a supplementary proceeding by judgment creditor, is derived from statute and is not derived from court's equity powers. An equity receiver is merely a custodian of the property consigned to his custody, to which he has no title, wherein a statutory receiver has such power and authority as the statute under which he is created gives him. A receiver in a supplementary proceedings takes legal title to all of the personal property of the **judgment debtor** existing at the time of his

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[1] Although the motion was made under CPLR 5106 as well, that applies only where the judgment is for property, and CPLR 6401 applies only to pending cases.

appointment, but clearly not to the corporate property as Windels would have it. *Frank v. Lutton*, 267 A.D. 703, 48 N.Y.S.2d 136 (3rd Dept. 1944) Furthermore, the court can confer the powers of permanent receiver on a temporary receiver only under BCL §1203(b), and since Windels was not a BCL Article 12 receiver he had no authority to assume those powers, to stipulate to give away the corporate property.

A CPLR 5228 receivership is only for the benefit of judgment creditor who makes application therefor and does not inure to benefit of anyone else until extended to that other party. *Ferh v. First Americana Corp.*, 31 A.D.2d 967, 299 N.Y.S.2d 214 (2nd Dept. 1969) The only judgment creditor named in that November 21, 1195 order was plaintiff on behalf of North Jersey and so Windels could not act on behalf of the five lawyers named in his motion. Furthermore, since none of these other attorneys collected any sums on the derivative judgment, they were not entitled to any commissions under CPLR §5228, which was the position of the Bankruptcy judge.

The corporate surplus of close to $700,000.00 was on deposit in the bankruptcy trustee's account and was transferred to Windels. It was held *In Re: Kraemer* 40 A.D.2d 1053, 338 N.Y.S.2d 913, (3rd Dept. 1972) that the receiver was not entitled to commissions on the amount which was on deposit in the corporate bank account, when he assumed his duties, nor on the interest generated thereon, since such sums were not received and disbursed by him.

. CPLR §6404 applies to an accounting by a CPLR 5228 receiver and is limited to the funds collected on the judgment. A receiver is an officer of the appointing court, subject to its regulation and control, and he must administer and account for the property **of the judgment debtor** coming into his possession. *Thellusson v. State*, 176 Mis. 301, 26 N.Y.S.2d 765 (Ct. Claims N.Y. 1941)

Windels' Attempts to Turn His CPLR 5228 Receivership into an Article 12 Corporate Receivership Which he Cannot Do

Windels resorts to a charade with the notice requirements of BCL Article 12 corporate receivership in attempting to apply it to a CPLR §5228 receivership, which has no such requirement. Mr. 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 (Exhibit 6). The May 21, order was entered on plaintiff's motion 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 as required under BCL 1203(a)(4). In *Leonard v. Soufoul* 172 N.Y.S.2d 11 (Supr. Ct. Kings Cty 1957) a proceeding for appointment of a temporary receiver for the defendant corporation was held to be ineffective where it did not appear that the Attorney General had been given notice of the application required by statute.

Even if this were a BCL Article 12, receivership - which it is not - the failure to meet with notice requirements alone would void that receivership. BCL 1207(a)(1) requires a receiver upon his appointment and qualification (oath and bond) to give immediate notice of his appointment by publication. Windels certainly could not do that more than eight years after taking his oath on January 1996, 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). BCL 1207(a)(1)(c) requires that all creditors and claimants, present their claim to the receiver in writing and in detail at a specified place and by a specified day which shall not be less than six months after the first publication of such notice. No such claims were ever presented. Moreover BCL 1207(a)(2) requires receiver to call a general meeting of the creditors of the corporation

within four months from the date of his appointment by notice to be published which Windels published nine years after his November 21, 1995 appointment on November 29, 2004 and December 6, 2004 (Exhibit 14). No claims were ever presented, and no claims were ever proven, and there were no creditors of North Jersey, entitled to that distribution. None of the parties who received the funds disbursed to them ever collected on that derivative judgment and so this is pure theft.

Clearly judicial estoppel applies to these abuses by Windels as was held in *Woodson v. Mendon Leasing Corp*. 259 A.D.2d 304, 686 N.Y.S. 2d 411 (1st Dept. 1999) Where parties previously prevailed on their argument that Mandon was not a party to the default judgment plaintiffs were judicially estopped by their previous position from arguing that default judgment against other party had res judicata or collateral estoppel effect on defendant.

The Full Satisfaction of the Derivative Judgment That Included the Counsel Fees Extinguished the Claim For Fees

The Court has totally omitted any reference to the satisfaction of judgments from its June 8, 2005 order denying Herskowitz's Motion to Vacate and Renew the April 13, 2004 order and the October 13, 2004 order. The Court referenced the satisfactions only with regard to denying Herskowitz's Motion for Disqualification of Judge. However, to avoid any ruling on the satisfactions the Court stated merely that it "has already considered, and rejected that argument", when in fact the Court had totally omitted any mention of the satisfactions from its prior orders of October 12, 2004 and February 16, 2005.

The issue of the satisfactions was extensively briefed in Herskowitz's memoranda law on each of her prior motions. The Court acknowledged Herskowitz's brief on satisfactions at the

June 21, 2004 hearing.[2] It was shown that in her Verified Petition Charney sued Judith, XXXX and XXXHerskowitz indiscriminately, without any distinction as to the alleged acts they engaged in, without any apportionment of responsibility or liability, alleging all acts done jointly by each of them and making them jointly liable in tort (Exhibit 4). The judgments in excess of $4million entered in November 1993, and January 1994, are based on the same injury, the damages are unapportioned between the defendants and Judith, XXXX and XXXHerskowitz, were made jointly answerable for the wrongs alleged against them (Exhibit 22). This was also the case as to the judgments individually for Ms. Charney against Judith, XXXX and XXXHerskowitz making them jointly and severally each of them liable for the whole to plaintiff.

The common law of joint and several tort liability is still the law of the New York, which is binding on this Court. Although with joint and several liability the plaintiff is free to pick and choose the tortfeasors against whom she wishes to proceed or to enforce the judgment, the well settled New York law as established by the Court of Appeals provides, that

> "satisfaction of a judgment rendered against one tort-feasor discharges all joint tort-feasors from liability to the plaintiff."

Velazquez v. Water Taxi, Inc., 49 N.Y.2d 762; 403 N.E.2d 172; 426 N.Y.S.2d 467, 468 (1980) and Vincent C. Alexander, *Practice Commentary* to McKinney's CPRL C1401:1, 1996. *Velazquez*, relies on Restatement of Judgments §95, further explaining the application of the

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[2] Herskowitz submitted in her Memorandum of Law in support of her Motion to Vacate and Set Aside this Court's Decision and Order by default dated April 23, 2004 with numerous authorities in support that the judgment was discharged as to Judith Herskowitz. The Court agreed with that at the June 21, 2004 hearing. On page 28, of the June 21, 2004 transcript Herskowitz stated to the Court:

> "Could I please put in a surreply affidavit on what he [Delibert] brought up about the distinguishing from post judgment and prejudgment [settlement]?
> THE COURT: I don't need a surreply; I know the difference, ma'am."

above stated rule, that it does not matter if there is one judgment, two judgments, because it is "The discharge of a judgment against any one of several persons liable for a single harm or breach of duty, owed by all, discharges the others." *Galllivan v. Pucello,* 38 A.D. 2d 876; 329 N.Y.S.2d 211 (4th Dep't 1972) reiterated the rule that where there are two judgments based on the same injury, "Even though separate judgments are recovered against joint tortfeasors, the satisfaction of one judgment discharges the other from liability."

It is the primary rule that though several may be sued for a single injury, and recoveries had against them, there can be only one satisfaction. *Collins v. Smith,* 8 N.Y.Supp. 794; 255 App.Div. 665 (2nd Dep't 1939) *Makeun v. State of New York,* 98 A.D. 2d 583; 471 N.Y.S.2d 293, 297 (2nd Dep't 1984) makes clear that full satisfaction of a judgment in a settlement is not that a money judgment is paid dollar for dollar by the judgment debtors but, that the compromise for a lesser sum on the judgment is accepted by the judgment creditor as full payment, because "an obligation is met when the parties enter into a settlement, even though that settlement is for less than the judgment." Also see, *Rock v. Reed-Prentice Division of Package Machinery Co.,* 39 N.Y. 2d 34; 346 N.E.2d 520; 382 N.Y.S 2d.720, 723;(1976) in a compromise after judgment with one of the joint tortfeasors, with no participation by the other, even if the plaintiff accepted <u>less</u> than the full amount of the judgment, and the settlement amount was not in partial satisfaction of the judgment "but, was paid as a final payment in full satisfaction of the judgment...the plaintiff's judgment has been completely discharged". The result was the same in *Blanco v. J & H Associates* 177 A.D. 2d 370; 576 N,Y,S, 2d 124 (1st Dep't 1991) holding that once the judgment is satisfied it is deemed to constitute the plaintiff's election of his or he remedy...and a claim inconsistent with that election may not thereafter be asserted.

As has been shown, the law does not permit such inequity and injustice that one judgment debtor would be liable for the whole $4.2 million judgment while two other jointly liable judgment debtors would pay a relatively nominal sum. New York General Obligations Law Sec. 15-108 allows a plaintiff to settle his claim with one of several jointly liable tortfeasors without prejudicing his right to pursue the other tortfeasors, “only where there has been a settlement in which a plaintiff discharges one of several tortfeasors prior to a verdict [or judgment]." (Emph. supplied), which would be a partial satisfaction in the form of a release See, *Practice Commentary* by Vincent C. Alexander, to McKinney's CPRL C1401:6, 1996. Section 15-108 specifies that this does not apply to settlements after judgment because, "the purpose of Section 15-108 is to encourage settlement when a tortfeasor's obligations have not yet been determined. After judgment, this purpose is no longer operative."

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: September 26, 2005
Miami Beach, Florida

Respectfully submitted,

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